

Accountability beyond Institutional Rules: How the Corporative Interests Affect the National Councils of Justice and of the Public Prosecutor's Service in Brazil

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Abstract

The article analyzes the design, composition, and normative activity of the National Council of Justice (CNJ) and of the National Council of the Public Prosecutor's Service (CNMP) in Brazil, as explanatory elements of the type of control they exercise over their members. We conducted an inquiry into council member appointment criteria member profiles, and into how these aspects affect the Councils' decisions. For that, we conducted a collective biography of the 203 members of these judicial Councils over the 2005-2019 period and an analysis of the content of the resolutions issued over that same period. We identified the formal rules and informal practices that guide the composition and functioning of these Councils and contend that the combination of these elements leads to a process in which corporatist accountability prevails over democratic accountability. The Brazilian Councils are, therefore, the expression of a symbiosis between accountability institutions and those accountable.

Keywords

Democratic Theory, Corporative Control, Independence, Judiciary, Prosecution Service

1. Introduction

The problem of control over judicial institutions is classic, articulated with the

elitist and corporatist bias of these institutions in different countries (Shapiro, 1981; Magalhães, 1999; Zald & Lounsbury, 2010; Garoupa, 2016; Solomon, 2018; Garoupa & Magalhães, 2020). In this study, we understand that the judicial independence is not just about protecting judges and prosecutors, ultimately, it aims at protecting society from possible abuse of power by rulers. Behind this discussion there is a normative theory of democracy, in addition to elected politicians, the members of the judicial bureaucracy must be subject to ongoing democratic control mechanisms to guarantee that they do not deviate from your public functions and do not act in defense of corporative interests to the point that they override the Constitution approved by the legitimate representatives of the sovereign people (Gruber, 1986; Olsen, 2015), in short, so that they are more accountables.

Concerning the Justice Councils and similar bodies, they have been proposed all over the world to protect judicial administration and discipline against pressure from the economic and political system (Garoupa, 2016). Present in more than 120 countries, these collegiate bodies arose as an attempt to ensure both the independence and the democratic accountability of members of judicial institutions (Garoupa & Ginsburg, 2008; Garoupa, 2016, Solomon, 2018). What has been found, however, is that the mere existence of a national Council does not ensure the effective performance of judicial institutions, with consideration of their composition and roles being necessary to explain their control (Garoupa, 2016). Specifically, Garoupa and Ginsburg (2008) state that calibration between independence and accountability stems from these bodies nomination mechanisms and performance of their roles.

It is based on this approach that this study intends to analyze the National Council of Justice (CNJ) and the National Council of the Public Prosecutor's Service (CNMP) in Brazil to explain how they tend to exercise their control, emphasizing not only their composition and formal duties, but the informal criteria that define appointments and, thus, the performance of their duties. It must be mentioned that the Brazilian Public Prosecutor's Service (in Portuguese: "Ministério Público", MP) is almost independent from the Judiciary Branch, almost constituting a fourth branch in the State's constitutional structure (Viegas et al., 2022a).

With the aim of understanding if the Councils created in Brazil tend to exercise their control, two distinct and opposite categories guide our analysis in relation to how control tends to be exercised: a) democratic control, comprising effective transparency, oversight, and discipline of political actors with decision-making power in the judicial sphere, ultimately designed to prevent them from abusing their power; b) corporatist control, which lacks clear and effective transparency, accountability, and discipline mechanisms, aiming at protecting individual members of the judicial system and, therefore, ensuring the corporatist interests of their institutions.

The argument developed here is that, even though National Judicial Councils

in Brazil were created to conduct external accountability (guided by democratic accountability principles) of the members of the justice system, these Councils fail to carry out that duty because they are submitted to internal and external corporative pressure that likens them to internal control bodies, as those formerly existing in Brazil. The greatest strength of this kind of control ultimately results in a symbiosis between those who control and the controlled. This tendency to symbiosis has the potential to explain, for example, why the Councils did not create limits for operation Car Wash (in Portuguese: “operação Lava Jato”) and the many abuses practiced during it, initially aimed at combating corruption, but which has been shown to be oriented towards corporate and political ends.

This article is organized in five parts. In the first one, the concepts and theoretical issues underlying the analysis are presented. In the second part, the methodology used is outlined. In the third, in addition to a brief background to the two Councils created in Brazil, including their design, composition, and roles, first-ever analytical data on the profile of those appointed to the CNJ and the CNMP between 2005 and 2019 is provided, highlighting the criteria that guided appointee selection. Also included in part three are survey findings on every resolution issued by both Councils over the same period, pointing out the prevalent content of such normative standards. In the fourth, the survey findings are discussed, and then this part is followed by final considerations.

2. Analytical Theoretical Framework

The theoretical framework of the article is based on the understanding that institutions operate beyond the scope of formal rules alone. It is crucial to grasp the factors influencing actors’ decisions to adopt or dismiss specific institutional designs, as well as their ongoing actions in sustaining the rationale behind those initial choices. To examine the dominance of corporatist control in this process, the article draws upon concepts derived from sociological institutionalism and historical institutionalism (Hall & Taylor, 1996). Both perspectives emphasize the significance of rules while acknowledging their incomplete depiction of organizational dynamics.

Thus, this study is centered around the concept of democratic accountability, which is understood as the implementation of the democratic principle of controlling government officials (both elected and unelected) to prevent the misuse of power. To ensure accountability, various mechanisms are employed, including transparency, continuous institutional accountability measures, and ongoing oversight of elected representatives and the higher levels of the public decision-making bureaucracy (Mainwaring & Welma, 2003; Philp, 2009; Gallhofer, Haslam, & Walt, 2011; Pelizzo & Stapenhurst, 2014).

In this context, the foundation of this study rests on the influential work of DiMaggio and Powell (1983). They argue that the most suitable concept to capture organizational homogenization is isomorphism, defined as a constraining

process that compels a unit (such as state departments, regulatory agencies, or organizations offering similar services and products) to resemble other units facing similar conditions. Despite numerous empirical studies demonstrating the homogenization of public institutions (Meyer & Rowan, 1977; Perry, Engbers, & Jun, 2009; Christensen, Dong, Painter, & Walker, 2012; Gong & Xiao, 2016; George, Baekgaard, Decramer, Audenaert, & Goeminne, 2018; Coroado, 2020), this concept has not been applied in studies analyzing the national Councils established to exercise democratic control over judicial institutions, which is the primary focus of this research in the context of Brazil.

In the specific empirical case examined in this study, the predominant form of organizational isomorphism is identified as mimetic, as defined by DiMaggio and Powell (1983). This kind of isomorphism arises from uncertainty surrounding issues that lack clear solutions, leading organizations to emulate those deemed legitimate and successful as their role models, while potentially retaining their existing practices. In the Brazilian context, this isomorphic process heavily relies on informal practices that influence formal rules, taking advantage of gaps within them and allowing for discretionary actions to emerge.

While isomorphism serves as a heuristic tool to comprehend reality, akin to Weberian ideal types, it is important to acknowledge that, under diverse conditions, the same pressures that drive isomorphic processes can result in institutional differences (Beckert, 2010). Therefore, in addition to seeking empirical evidence of homogenization, it is crucial to identify observable trends and their underlying causal mechanisms. It is necessary to exercise caution because, despite surveys revealing homogenization processes, mainstream historical institutionalism continues to ponder why institutional differences persist (Beckert, 2010).

To understand the origins of the national Councils in Brazil, the concept of critical juncture is also utilized to assess institutional change triggered by exogenous shocks, which act as pivotal points in preceding institutional trajectories (Pierson, 2004). Empirically, it was observed that proposals for establishing external accountability bodies to oversee the Brazilian judiciary materialized only in the context of specific political crises, after many years of discussion. However, the subsequent transformations of these bodies predominantly followed the mimetic isomorphism model, as mentioned earlier. Consequently, amidst the interplay of institutional change and continuity, this article aims to demonstrate the prevalence of a new institutional format that failed to introduce effective accountability to the judicial system, perpetuating corporatist control.

The explanation for this institutional outcome can largely be attributed to factors highlighted in the international literature on national judicial Councils, which emphasize design, composition, and roles as three crucial variables for analyzing institutions. Garoupa and Ginsburg (2008) argue that these variables reflect the inherent tension between formal arrangements and actual social control. By synthesizing data from over 120 countries and considering variations in

composition and duties across judicial Councils, the authors classify them into three types: Councils consisting solely of judges, Councils comprising members from other governmental bodies or their appointees, and Councils composed of lawyers. In terms of functional roles, Councils are categorized as follows: house-keeping, which involves overseeing administrative matters such as judicial career structures and financial aspects, including budgets; Councils responsible for appointing judges from other judicial spheres; and Councils designed to assess judges' performance, encompassing functions such as promotion, discipline, and salaries.

The composition of these Councils is regarded as a key variable influencing the outcomes of control (Ferejohn, 1999; Hammergren, 2002; Larsson & Naurin, 2016). According to the literature, it is assumed that a majority of members from the institutions targeted by the control will strengthen judicial independence. However, even when the composition does not consist of a majority from the focus of control, the role of Council members coming from the controlled careers tends to prevail. In practice, the Council relies on information provided by the controlled members, often requiring their technical expertise in various matters. Additionally, members from accountable careers may have other motivations for achieving exceptional performance, such as representing strong corporatist interests. Summarizing this discussion, Garoupa and Ginsburg (2008) argue that the interaction between composition and roles shapes the distinct configurations of these Councils, thereby influencing the intensity of control that they exert.

We underscore that comparative studies on judicial Councils are basically anchored in existing formal rules in the various countries analyzed. Though relevant, they are, from our point of view, insufficient to explain how these organizations operate. In the case of Brazil, for instance, the legal statutes do not clarify the appointment criteria that must be complied with in establishing their composition, exhibiting considerable discretion in this regard and, in general, as regards what can and cannot be the object of regulation by resolutions. It is precisely into this open space of action that this study delves in to establish the standards of conduct therein configured stemming from the combination of formal rules and informal practices, that is, the type of accountability held, whether democratic or corporatist, as per our classification.

But before we move into the analysis of the data, the methodological procedures used in conducting the survey are outlined.

3. Methods and Data

The methodology employed in this study is qualitative in nature. To investigate the criteria for selecting Council members and their variation over time, we utilized the collective biography approach, a valuable tool introduced by Stone (1971). This approach facilitated the creation of a comprehensive database encompassing 203 council members appointed to the CNJ and the CNMP from

2005 to 2019. The database provided extensive information, enabling the identification of the specific criteria employed for each individual's appointment. A biographical form was utilized to organize data such as their educational background, professional experience, and involvement in professional associations.

Furthermore, an analysis of the resolutions issued by Council members between 2005 and 2019 was conducted (Patton, 2015). During this period, a total of 303 resolutions were issued by the CNJ, and 206 resolutions were issued by the CNMP. To aid in this analysis, we employed the Iramuteq software, which facilitated the processing and analysis of a significant amount of textual data by calculating word frequencies (Ratinaud, 2014; Ruzza et al. 2020).

Data regarding the constitutional arrangement and Council members were gathered from the Federal Executive portal and the records of the Federal Senate of Brazil. These sources provided the resumes submitted for the screening of nominees and are readily accessible on the internet. Additionally, information on the resolutions can be found online at the official electronic addresses of the CNJ and CNMP.

4. National Councils in Brazil

4.1. A Brief Historical Recapitulation

The Brazilian judicial system is characterized by a complex and hierarchical structure. At the top is the Federal Supreme Court (Supremo Tribunal Federal, STF), which is responsible for constitutional matters and has the final say on legal disputes. Below it is the Superior Courts, which handle specific areas of law such as standardization of federal law enforcement, labor, electoral, and military cases (Brasil, 2004). The lower courts are divided into federal and state jurisdictions. The federal courts deal with cases involving the Union interests, while the state courts handle matters pertaining to state laws and local issues. In recent years, the Brazilian judicial system has faced challenges such as case backlogs, delays in the resolution of disputes, and allegations of corruption within the system (Bonelli, 2010). Efforts have been made to address these issues, including the establishment of the CNJ and the CNMP, which aim to enhance transparency, accountability, and efficiency within the judiciary.

However, despite these initiatives, the Brazilian judicial system still faces significant obstacles. Limited resources, understaffing, and a lack of infrastructure contribute to delays in delivering justice. Additionally, there are concerns about the influence of political and economic interests on judicial decisions, as well as the need for further improvements in access to justice, especially for marginalized and vulnerable populations.

The idea of creating bodies to conduct external accountability of the Judiciary Branch and the Public Prosecutor's Service (MP) has been present in Brazil since the 1988 Constitution drafting process, which aimed to lay down the post-authoritarian regime, democratic legal framework. The proposal, however, was not accepted due to strong opposition from members of justice system in-

stitutions who expressly rejected external accountability and, by means of a powerful lobby during the constituent process, managed to keep the subject from being included in the constitutional text (Fragale Filho, 2013; Ribeiro & Arguelhes, 2015). They also managed to exclude the theme from public debate in Brazil for nearly two decades, which only returned to the governmental agenda when a new political context arose of corruption charges against judges and calls by international bodies for modernizing and increasing the efficacy of judicial processes in the country (Bonelli, 2010).

Faced by this new context, the forces contrary to external accountability eventually gave in and agreed to reformulate the Judiciary. Yet Constitutional Amendment nr. 45 of 2004, which created the CNJ and the CNMP, made countless concessions to the Judiciary and the MP. Notwithstanding the establishment of accountability functions, the amendment set forth that most of its members should come from the very same institutions to be controlled. What's more, it left the appointment criteria in the hands of the controlled themselves. Well, as the literature indicated, composition is a determinant variable in explaining the control judicial Councils may or may not exercise over members of judicial institutions (Garoupa & Ginsburg, 2008; Garoupa, 2016).

4.2. The Design of CNJ and CNMP

Despite initial expectations that the national judicial Councils would serve as effective external accountability bodies for the Judiciary Branch and the MP (Nunes, 2010; Ribeiro & Paula, 2016), the institutional design establishing the CNJ and the CNMP ultimately adopted a hybrid model. This model mandated that these Councils simultaneously function as accountability bodies and maintain links with the institutions they oversee. In terms of composition and roles, both judicial Councils share a similar design. Notably, external members comprise only a quarter of the total membership in both Councils. As indicated in **Table 1**, members from the Judiciary and MP collectively make up 73% of each council's composition, highlighting a prioritization of independence over control, as observed in the literature.

Regarding their roles, CNJ and CNMP have no jurisdictional and legislative functions. The control they exert is administrative, obviously not entitling them to change the legal framework. Nor can they decide on the removal of judges

Table 1. Rules governing the composition of the CNJ and CNMP¹.

| Council | Judiciary | MP | OAB | SF | CD | Total |
|---------|-----------|----|-----|----|----|-------|
| CNJ | 9 | 2 | 2 | 1 | 1 | 15 |
| CNMP | 2 | 8 | 2 | 1 | 1 | 14 |

Data organized by the authors. Source: 1988 Constitution.

¹Abbreviations: MP, Public Prosecutor's Service; OAB, Brazil's Bar Association; SF, Federal Senate; CD, Chamber of Deputies.

and of members of the MP who may have committed serious wrongdoing, which would be crucial for effective accountability². Both Councils competences include drafting administrative rules such as resolutions and recommendations to guide the conduct of members of the careers controlled. They can file and claim to themselves disciplinary cases, establish the removal of a case to another judicial body, or even temporarily suspend those being investigated. That is, the control these judicial Councils exert is like the internal corporatist practices of disciplining and investigating the conducts of their respective members.

In Brazil, the *corregedorias* are internal bodies of the Courts and of the MP upon which is incumbent oversight of their members' conducts; they are not, however, autonomous to discipline wrongdoers. They just investigate any wrongdoing and submit a report to each unit's internal boards to administer discipline or not. Both *corregedoria* members and internal board members are chosen by their own peers, who might even be the target of a given accountability procedure. That is why the way these structures operate has always been the subject of much criticism for the poor, almost non-existent control of the conduct of members of the Judiciary Branch and the MP, making them unaccountable.

It is worth reaffirming that resistance against the creation of an effective external accountability body did not cease even after judicial Councils CNJ and CNMP were created. The professional associations advocating for the corporatist interests of judges and prosecutors reacted to the creation of those bodies first by filing a petition with the Supreme Federal Court (STF) as to the constitutionality of these judicial Councils (Fragale Filho, 2013). After their claim was dismissed, they started to question decisions made by the two Councils. This ongoing questioning by the professional associations has served, in practice, to redefine the limits of the CNJ and the CNMP and of their duties by the controlled themselves (Ribeiro & Paula, 2016; Arantes & Moreira, 2019). And thus, it might be understood as “a prolonging of the debates on institutional design (judicial independence vs. accountability; judicial autonomy vs. centralization) that have not come to an end with the formal creation of the Council” (Ribeiro & Arguelles, 2015: p. 479).

5. Results

5.1. CNJ and CNMP Composition and Profile between 2005 and 2019³

The constitutional amendment that established the CNJ and the CNMP did not provide specific criteria for the appointment of national Council members. The amendment only outlined the appointee's career and institution of origin, along with a two-year term that could be renewed once. From the year of their incep-

²In Brazil, members of the Judiciary and of the MP, after a two-year probation period, remain for-life in their offices and can only lose them by judicial sentence, that is, by a judiciary system procedure with no external accountability.

³For more details on the composition of CNJ and CNMP, see: Viegas, Abrucio & Mongelós (2022b).

tion in 2005 until 2019, a total of 203 individuals served on the two Councils. Upon analyzing the career profiles of these Council members, we observed a significant presence of individuals with prior and direct engagement in professional associations that advocated for corporatist interests (**Table 2**).

Among those chosen from judicial careers, the national associations of magistrates of the Union are the ones with the greatest impact on this selection process. At the CNJ, members involved in Brazil's Federal Judges Association (AJUFE), which represents Federal Justice members, and the members of associations related to Labor Justice are the ones who have most often been members of the Council. These judges' associations are organized nationwide and are headquartered in the Federal Capital (Brasília, DF). Both associations lobby Congress (*Fragale Filho, 2013*).

For a better understanding of other key features of CNJ council members originally from the Judiciary, some particularities of the functioning of the Brazilian Judiciary must be mentioned. Brazilian courts, except for the STF, are composed of career judges (approved in an entrance examination), but 1/5 of the seats must be occupied by members of the MP and another fifth by members of Brazil's Bar Association (Constitutional Fifth). Appointment of these members to the Judiciary, in keeping with the so-called Constitutional Fifth, follows a procedure which requires the participation of the Executive Branch, as it chooses from among the most voted on a list submitted by the MP and Brazil's Bar Association, to fill the seats allotted to each one of these institutions alternately (*Mongelós, 2013*).

CNJ members who are appointed in compliance with the Constitutional Fifth rule have as a distinctive feature their political experience, because their nomination is arguably based on extensive networking with members of the Executive Branch and of the Judiciary Branch itself. Thus, 20% of CNJ members coming from the Judiciary owe their nomination to the Constitutional Fifth rule. Furthermore, as the STF and the CNJ themselves often call judges to help them with their regular duties, this establishes an internal top-bottom network of relationships in the Judiciary (*Fragale Filho, 2013*), which also explains the presence on the CNJ of judges (6%) who had previously worked as ancillary judges at Brazilian higher courts, more noticeably the STF.

As for the CNMP, involvement in professional associations is a much more important requirement, as even judges nominated to the CNMP council engage in such activities throughout their careers (**Table 2**). In this regard, it is worth pointing out the constant presence of members of the National Association of Prosecutors of the Republic (ANPR), representing the corporatist interests of the Federal MP. This association's strength and the success it has with its nominees can be verified by the fact that it has managed to have at least two representatives on each of the seven CNMP Councils set up between 2005 and 2019.

It is worth noting, still as regards the CNMP, the presence of members of the National Council of Prosecutors General (CNPG), composed of states' prosecutors

Table 2. Frequency of engagement in professional association activities⁴.

| Council | Judiciary (%) | MP (%) |
|---------|---------------|----------|
| CNJ | 12 (19%) | 5 (35%) |
| CNMP | 5 (35%) | 42 (75%) |

Prepared by the authors.

general of each of the Brazilian states' MP. As they head their institutions of origin, which supposes leadership and coordination skills, they have already been submitted to a previous selection procedure as set forth in the 1988 Constitution (Article 128, § 3°)⁵. That is, members of the CNMP who have held seats on the CNPG exhibit as their profile's distinctive feature previous political experience, just like those members selected based on the Constitutional Fifth holding a seat on the CNJ, an important factor for the Executive Branch to consider when appointing them.

Political proximity also appears in appointments by the Supreme Federal Court (STF). Between 2005 and 2019 of the 14 judges appointed by Brazil's highest judicial institution to one of the seats the Judiciary Branch is entitled to on the CNMP, 50% of them had been advisors to justices of the Brazilian Supreme Court. This further strengthens the argument made here concerning the power of co-optation of ancillary judges by members of the STF (forces endogenous to the Judiciary). In the case of the MP, as it is autonomous in relation to the Judiciary Branch, appointments by the STF to the CNMP must be seen as exogenous forces of control over members of the Prosecutor's Service.

By the same token, members active on professional association ANPR accounted for 30% of the Prosecutor's Service appointments to the CNJ over the period analyzed, which is also indicative of the presence of a force endogenous to the Judiciary on that judicial council. Lastly, it should be noted that, between 2005 and 2019, the CNMP was chaired by Prosecutors General of the Republic who had been directly involved in their corporation's association (ANPR) (Viegas, 2022), that is, a profile attached to advocacy of the corporatist interests of the Federal MP.

The presence of forces exogenous to these Councils might prompt increased external accountability, yet when we analyze the normative activity of both Councils, as we shall see ahead, we verify the predominance of coordinated action between Brazil's justice system institutions, quite often including trading favors. Thus, in addition to a strong symbiosis between controllers and con-

⁴Aggregate (%), a percentage that is based on the number of members of Judiciary and MP careers on both Councils who are engaged in their professional associations in relation to the total number of members in these careers – CNJ = 77 members; CNMP = 70 members. Abbreviation: MP, Public Prosecutor's Service.

⁵This procedure establishes that all the members of every state MP shall, every two years, participate in the selection of the attorney general. By the vote of all the members of a given unit, a triple list with the names of those most voted is prepared and submitted to the governor of each respective state for one of them to be chosen as attorney general (Viegas, 2022).

trolled on account of institutional design and appointments privileging a majority coming from the very same accountable institutions, actions are also coordinated between the MP and the Judiciary to help each other in defense of their interests.

This two-level game, symbiosis and coordination, poses major obstacles to the two national judicial Councils, the CNJ and the CNMP, to conduct effective external control over the Brazilian justice system, making it somewhat impervious to democratic accountability.

5.2. CNJ and CNMP Normative Activity over the 2005-2019 Period⁶

Analysis of the CNJ's and CNMP's normative activity reveals actions that enabled the judicial corporations' self-defense, besides measures suggesting informal coordination between council members especially when addressing a normative standard of interest both for the MP and the Judiciary. Between 2005 and 2009, the CNJ and the CNMP issued a total of 303 and 206 resolutions, respectively. Analyzing their content, what is striking is the fact that the CNJ released 97 resolutions amending previous norms (32%) and the CNMP issued 88 resolutions for the same purpose (46%). Overall, the more recent resolutions seek to moderate the more rigorous tone of those originally issued. That is, when the CNJ and the CNMP set out to issue more accountability rules, political pressure makes them back off, as can be seen in subsequent resolutions amending and/or revoking more stringent rules and reducing restrictions on the conduct of judges and prosecutors.⁷

Another salient issue when it comes to the content of resolutions is the watering down of recruitment rules for Judiciary and MP careers. In this regard, Constitutional Amendment nr. 45 of 2004 established a minimum of three years of previous legal activity as eligibility requirement for candidates willing to enter a career in the Judiciary Branch and the MP (Brasil, 2004), expressing the lawmakers' concern over the young age and lack of experience of judges and prosecutors. But, countering the intention of the Legislative Branch, the Councils regulated the legal activity to comprise practical and nonpractical situations, some of them diametrically opposed to professional experience.⁸ They established, for instance, the possibility of meeting the three-year eligibility criterion by attending graduate programs at official schools directly related to the Judiciary and the MP.

On different themes regulated by both Councils by means of resolutions, situ-

⁶For more details on the normative activity of CNJ and CNMP, see: Viegas, Loureiro & Abrucio (2022c).

⁷For example, and by no means an exhaustive list: CNJ Resolutions nr. 15/2006, 31/2007, 53/2008, 68/2009, 76/2009, 112/2010, 207/2015, 241/2016, and 244/2016; CNMP Resolutions nr. 19/2007, 22/2007, 68/2011, 77/2011, 111/2014, 151/2016, 184/2018, 190/2018, and 193/2018.

⁸For example, and by no means an exhaustive list: CNJ Resolutions CNJ nr. 11/2006, 75/2009, 118/2010, 203/2015; CNMP Resolutions nr. 4/2006, 11/2006, 14/2006, 24/2007, 29/2008, 40/2009, 57/2010, 87/2012, 141/2016, 170/2017, 188/2018, 203/2019, and 206/2019.

ations arose in which they acted in coordination, including in clear confrontation with the federal legislation, even coming to override such legislation. It is worth highlighting some examples of new spaces of action these resolutions opened.

The first one concerns a regulation by the CNJ and the CNMP for a housing allowance to members of the Judiciary and the MP, an issue that has been much debated in the Brazilian media, as an expression of exorbitant privileges granted to these segments of the country's public bureaucracy. Regulated by CNJ Resolution nr. 199/2014 and CNMP Resolution nr. 117/2014, the housing allowance would be paid as compensation; and once it was added to the salary, authorized to exceed constitutional limits on the pay of the country's high-ranking bureaucracy. Given the negative repercussions, CNJ and CNMP modified some of the criteria in more recent resolutions (CNMP Resolution nr. 194/2018 and CNJ Resolution nr. 276/2018, albeit upholding the housing allowance as a benefit on top of the salary). At any rate, clearly both Councils organized the issuance of the resolutions in coordinated fashion, both in 2014 and in 2018, as they were published on the same date and with almost identical contents.

A second example refers to the definition of a black person. In 2010, the Statute of Racial Equality came into effect in Brazil (Federal Law nr. 12, 288), considering black population "the set of people who declare themselves black or brown" (Article 1, IV), but the CNMP only regulated the matter, through Resolution nr. 170, in 2017. In addition to tardily issuing this regulation, seven years after it came into effect, which in itself signals resistance to abide by the law, the CNMP established that approved judicial career candidates who had self-declared to be black should be submitted to an evaluation before an organizing committee for the purpose of determining their phenotype. As such requirement was not set forth in the federal law, as regards this matter the CNMP acted counter to the federal law.⁹

Two other CNMP resolutions draw one's attention. With Resolution nr. 179/2017, the CNMP authorized members of the MP to enter into agreements regarding administrative improbity, i.e., corruption, an attribution that CNMP members already had. What should be underscored in this case is that the Administrative Improbity Law (Federal Law nr. 8, 429/1992) expressly prohibited plea bargaining at the time the resolution was issued. Therefore, this is a situation in which the CNMP clearly contradicted the law in force. Resolution nr. 181/2017, in turn, exceeded the CNMP's regulatory power, by introducing a dangerous innovation in the legal order and thus threatening the rule of law. The CNMP created the so-called "non-persecution agreement", modelled on the U.S. "plea bargaining", clearly affronting the 1988 Constitution, for it is incumbent solely on National Congress to legislate on legal matters. The "agreement" would

⁹There are other examples for the CNJ case, as Resolution nr. 7/2005, which addresses the prohibition of nepotism, and Resolution nr. 175/2013, which authorizes same-sex civil union. Both had their constitutionality questioned before the STF, which underscored the possibility of the CNJ, which is a body of the Judiciary Branch and subordinated to the STF, issuing primary normative acts, or in other words, setting normative standards.

not even be sanctioned by the Judiciary Branch, thus entailing that the MP would not be externally accountable for the investigations and agreements entered, regardless of the gravity of the wrongdoing.

6. Discussion and Final Remarks¹⁰

The judicial Councils created in Brazil with the aim of exerting democratic control over judicial institutions have not emulated international experiences. Rather, they took the form of quasi-internal affairs departments like the *corregedorias*, which had already been operating in the country before Constitutional Amendment nr. 45 of 2004, as set forth in judgeship and prosecutorial organic laws.¹¹

Assimilation by CNJ and CNMP Councils of practices in effect in the internal affairs *corregedorias* resulted from the relentless resistance of their members to the creation of the two Councils, seen as an actual threat of accountability, a guidance that is steadily being incorporated into their organizational structures. In truth, studies of these judicial Councils in Brazil indicate that if after more than one decade of their rollout, they, on the one hand, succeeded in partially reducing a historical transparency gap as regards the financial administration and productivity of the members of the country's judicial institutions (Tomio & Robl Filho, 2013), on the other, they have been little effective in overseeing their members' conducts and enforcing discipline (Kerche, Oliveira, & Couto, 2020).

That is, even though the constitutional reform that created these Councils established control functions hierarchically superior to those of the Judiciary and Prosecutor's Service internal affairs *corregedorias*, in practice, such attributions never materialized.

The mimetic organizational isomorphism concept helps us explain this reality: in both cases, the constitutional change roadmap was permeated by the capacity of the Judiciary Branch and the MP to impose their strength on aspects not previously regulated by the new constitutional and institutional framework. There was mimesis in replicating an institutional model that came from other countries, but also its adaptation to the corporatist interests of the members of the justice system.

It is interesting to recall that, in the comparative study carried out by Garoupa and Ginsburg (2008), they classify Brazil in an analytical category of a housekeeping type, that is, a judicial council whose functions are related to administrative aspects, including career-related, budgetary, and resource availability matters, as well as conduct investigations. Considering that the authors, in this international comparative study, only examined formal rules, their categorizing Brazil as exhibiting housekeeping functions mostly is quite understandable, since the Brazilian Councils do have such functions.

¹⁰For more details on the normative activity of CNJ and CNMP, see: Viegas, Loureiro & Abrucio (2022c).

¹¹Respectively, LOMAN, Complementary Law nr. 35 of 1979, and LONMP, Law nr. 8,625 of 1993.

However, if we consider the informal practices guiding appointments and consequently appointee decisions, as emphasized herein, the institutional isomorphism process that led these Councils to emulate internal affairs departments, only exerting control of a corporatist type, becomes even clearer. That is, the classification proposed by Garoupa and Ginsberg is only partially correct. The judicial Councils in Brazil are not democratic accountability Councils, but hybrid bodies more akin to corporatist control Councils.

The fact is that the profile and career background of Council members, dimensions which have not been adopted in the formal rules, also need to be considered as explanatory factors for fully understanding how these institutions operate and, foremost, the type of control they exert. Actually, as pointed by the literature, the majoritarian composition is reflected in the decisions made in each of the Councils. For instance, selection of the national *corregedor*, oversight, probes, and punishment are decided in sessions attended by every member and by a majority in both judicial Councils (see CNJ and CNMP Rules and Regulations), leading to a merely corporatist type of control. Also, the strategies for composing the CNJ and the CNMP have consolidated power around the highest echelon of the justice system, insofar as it is incumbent on the higher spheres to appoint most of those members coming from careers in the Judiciary and the MP.

Two aspects not entirely explored by the literature, regarding non formalized practices for the provision of members of both Councils, also further strengthen power concentration at the higher bodies: the first one refers to the way members appointed by Federal Senate are chosen to compose the Councils and, the second one, to the profile itself of the members sitting on the Councils. Regarding appointments by the Senate, it is worth recalling that in Brazil, as a rule, senators systematically approve most of the nominations submitted to them, such as of senior managers of the Central Bank, diplomats, Supreme Court Justices, and of the members nominated to the Councils studied herein. According to a survey, the average rate of approval by the Senators of nominations exceeds 90% (Albuquerque & Belieiro, 2019). Therefore, as effective veto power on the part of the Legislative Branch does not exist, once again the autonomy of the members of the justice system is ensured, to the detriment of accountability.

As for the profile, surveys suggest the importance of the profile of the CNJ chair and of the *corregedor*, or internal affairs officer, profiles as a defining factor of the “identity” of the Council during their terms, as well as of the way it works over that period. Ribeiro and Paula (2016), for example, contend that the chair’s and the *corregedor*’s profiles not only influence the agenda, but also the possibility of the Council acting vigorously in favor of accountability. That is, research into the CNJ signal that their functioning depends on forces endogenous to the Judiciary Branch, especially if its chair and *corregedor* are individuals aligned with the same vision of accountability. This is likely to be reproduced in the CNMP.

Systematizing the informal data that defines the profile of nominees to both

Councils as regards the endogenous and exogenous political forces at play in these processes, three profile types can be distinguished:

a) **associative profile**, engaged in advocacy of corporatist interests (private professional associations nationally represented).

b) **political negotiator/coordinator profile**, stemming from political experience prior to career as judge or head of the MP nationwide.

c) **advisory profile**, previous work with higher echelons of Judiciary Branch and MP (notably the power to recruit and co-opt ancillary judges for the Supreme Federal Court and the Prosecutor General's Service).

Among the political forces engaged in setting the profile of the members of both Councils the professional associations stand out, for their activities involve the endogenous and exogenous forces present in council member profiles, in addition to constant filings with the STF contrary to decisions taken by the two Councils. Based on what has been researched on the theme thus far, these associations have a long tradition in lobbying Congress (Almeida, 2014, Viegas, 2022). This lobbying seeks to influence the approval of the budgets of judicial institutions and legislative changes, which have ultimately led to increased autonomy and spaces of action for the members of the justice system.

This flow between the political world and the high bureaucracy of the justice system reveals how the associations succeed in selecting and getting the Federal Senate to approve their nominees. More than that, the frequency with which the associations are part of the compositions of both Councils, but especially of the CNMP, shows moreover the presence of a political force that imposes itself on both Councils.

Therefore, in the case of the Brazilian national Councils, organizational change seems to be heavily supported by the accountable, who seek to maximize their independence. In this sense, in face of a design overwhelmingly composed of members coming from judicial careers and of an absence of formal nomination criteria, the way those accountable responds to the world outside, appointing those who will be their controllers, is of critical explanatory value, as it establishes parameters to frame and to channel the behaviors of judicial council members.

This is the finding made by analyzing all the resolutions issued, showing how the Councils misrepresent the original reformist intention with which they disagree. In political terms, the space of action of members of the Judiciary and of the MP has been and is still being established not by the democratically legitimized body, National Congress, but by the members of the justice system themselves (Arantes & Moreira, 2019; Kerche, Oliveira, & Couto, 2020).

In this regard, analysis of the resolutions enabled two non-dissociated inferences that further strengthen the isomorphism hypothesis:

a) the CNJ and the CNMP act overwhelmingly to satisfy their respective corporatist interests on a regular and coordinated basis, giving rise to a **sympiosis between controllers and controlled**.

b) the CNJ and the CNMP exceed the duties they were attributed by the 1988

Constitution, orienting themselves toward *independence to the detriment of democratic accountability*.

Thus, the data in this survey confirm what the literature has already shown: the control exerted by the CNJ and the CNMP is far from what was intended by the lawmakers who created them. Rather than accountability, what prevails is a symbiosis between controllers and controlled (Figure 1).

This process, moreover, is often carried out in coordination between the CNJ and CNMP Councils, including by setting rules and normative standards, violating the limits established in the constitutional rules. But here the symbiosis is combined with coordination between Councils, since members of the MP and of the Judiciary, including the Federal Supreme Court, are represented and assimilate these institutions. This also takes place at the Legislative level because the process through which these appointments are confirmed is based on previous negotiations by candidates with some previous political experience, thus ensuring a convergence of positions between lawmakers and those elected to the Councils.

In summary, through the influence of the members of the MP and of the Judiciary over appointments and on the agendas of the Councils that should oversee them, new rules were introduced that benefit the corporatist interests of the accountable. We may conclude therefore that the CNJ and CNMP are moving further away from their original objective and the international models that inspired them. Thus, a unique opportunity was missed to increase the Brazilian State's democratic accountability.

We think that the tendency towards the symbiosis between who control and the controlled that prevails in these Councils can help to explain, for example, why they did not create limits for Operation Car Wash, although this is not the focus of our work here. In the beginning, Car Wash was created to fight corruption in the federal government, but several studies have highlighted a series of abuses practiced during it and its orientation towards political ends (Avritzer, 2017; Arantes & Moreira, 2019; Abrucio et al., 2020; Kerche, Oliveira, & Couto, 2020; De Sa e Silva, 2020; Engelmann, 2020; Setzler, 2020). It's even mentioned that the protagonism of Car Wash members, without democratic control, was able to interfere in the functioning of the rule of law and in Brazilian democracy, being in line of convergence of political events of discredit the democratic institutions, which led the election of Jair Bolsonaro in 2018.

The political system in Brazil plays a significant role in influencing control over judicial institutions. Particularly, the ruling government or political parties in power has a significant influence on the selection and appointment of judges (fifth constitutional and Superior Courts). The Legislative branch can also influence the budget allocation for the Judiciary and MP, which can impact its operational capacity and independence. In addition, the political system can influence the appointment and promotion of judges through political connections and patronage networks. Although there are not yet enough studies to state, it is necessary to strongly consider a hypothesis that political affiliations and alliances

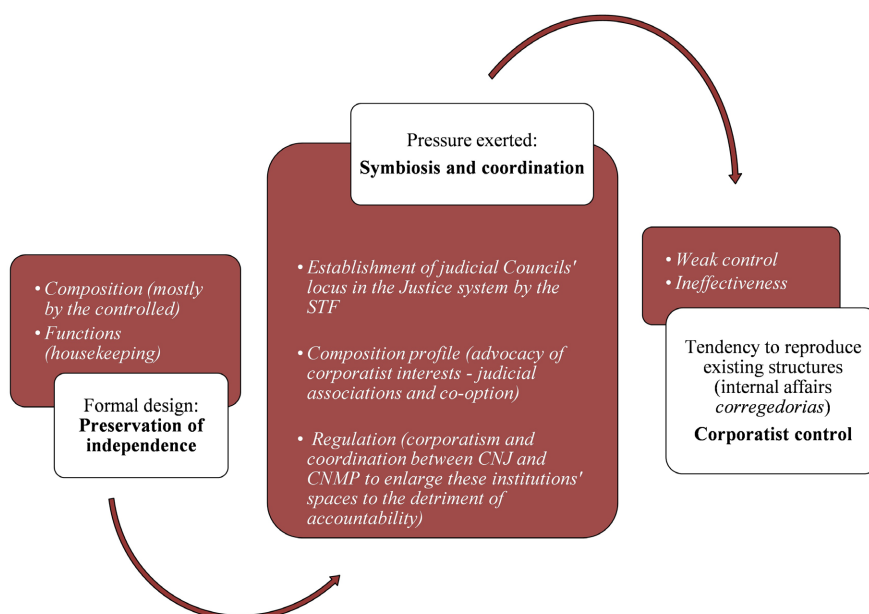


Figure 1. Workings of national judicial Councils in Brazil: symbiosis and coordination. Prepared by the authors.

can impact the career advancement and selection of judges and prosecutors, potentially compromising their independence and impartiality. The issue is that the actors of the justice system in Brazil are not oblivious to these processes, on the contrary, the associations of the Judiciary and MP class maintain constant interaction with the political system, and what this study shows is that these associations are successful in delimiting the contours of control over the Judiciary and MP.

The solution to rebalance democratic control in Brazil involves reforming the National Councils, giving them a more transparent and accountable organizational format, both in formal and informal rules. But it's not just that. To improve the performance and accountability of members of the Brazilian judicial bureaucracy, several measures can be considered:

a) Enhanced transparency and disclosure. Implementing measures to ensure transparency in the selection and appointment processes of judicial officials, including clear criteria and qualifications for appointments, public disclosure of vacancies, and publication of the selection criteria. In Brazil, removals and appointments of judges and prosecutors do not follow objective and transparent criteria.

b) Recruitment. Emphasizing selection processes that prioritize ethnic-racial diversity, low-income people, competence, qualifications, and integrity. This can help ensure that individuals appointed to judicial positions have the necessary skills and expertise, to deal with Brazilian inequalities.

c) Professional development and training. Providing continuous professional development programs and training opportunities for judicial officials to enhance their knowledge and skills, especially in public policies. This can include

specialized training in areas such as case management, legal ethics, and effective decision-making for complex public policy, for which currently judges and prosecutors do not receive training.

d) Performance evaluation. Implementing regular and objective performance evaluations for judicial officials to assess their competence, productivity. Performance evaluations can help identify areas for improvement and provide feedback for professional growth. Currently, the CNJ and CNMP resolutions do not establish adequate indicators for performance evaluation.

e) Ethical guidelines and codes of conduct. Establishing clear ethical guidelines and codes of conduct that define professional standards and expectations for judicial officials. These guidelines should address issues such as impartiality, integrity, and avoidance of conflicts of interest. There is a need of change in the legislation of both careers, including to create strict quarantine so that judges and prosecutors do not leave their positions to then contest elections and act in the private sector close to their areas of expertise in the judicial bureaucracy.

f) Independence and autonomy. Ensuring the independence and autonomy from external influence, including political interference or pressure, as pressures from class associations. Safeguarding the judicial independence can help to preserve the integrity and impartiality of the judicial system.

g) Adequate resources and infrastructure. Providing sufficient resources, including funding, staff, and infrastructure, to enable the effective functioning of the judicial bureaucracy. This can help reduce case backlogs, improve efficiency, and ensure timely delivery of justice. At the same time, there is a need to improve external control mechanisms over the exercise of administrative and financial autonomy.

h) Accountability mechanisms. Establishing effective mechanisms for public accountability, reforming the *corregedorias*, CNJ and CNMP, notably in relation to the composition of the two Councils, to oversee the conduct and performance of judicial officials. These mechanisms can promote transparency, investigate complaints of misconduct, and enforce disciplinary actions when necessary.

It's important to note that implementing these measures requires a comprehensive approach involving collaboration between judicial institutions, government authorities, legal professionals, and civil society organizations. One of the main challenges that presents itself is the historical resistance to democratic control by the careers of the judiciary and MP in Brazil.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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