

## Magistrates Training: Why to Crave for More Creative Cities and Judges?

GILSON JACOBSEN & JOÃO BATISTA LAZZARI

TABLE OF CONTENTS: 1. Introduction; 2. Challenges for the Judiciary and Training of Magistrates; 3. Urban Development; 4. Judicial Creativity; 5. Final Considerations.

ABSTRACT: This study seeks to identify the contemporary challenges of the judiciary and the need for training of judges focused on skills aimed at resolving these adversities. To demonstrate this approach, it points out the importance of judicial creativity in face of the disorderly urban development with the exclusion of the poorest people. The study concludes that the Magistrate's Judicial Schools for Training and Improvement have the role of establishing training activities that combine legal techniques with knowledge of management, socioeconomics and creativity. The paper also encourages socio-judiciary research programs and exchanges with universities, so that judges are encouraged to enroll in Master and Doctoral courses, and possibly attend a second graduation.

KEYWORDS: *Magistracy; Formation; Competencies; Creativity; Urban Development*

## 1. INTRODUCTION

The purpose of this article is to demonstrate that there is - or at least must exist - a relationship between the development of cities and the judges who live and work there, especially in these times which involve complex and great challenges to be faced by all, especially by the Judiciary, which primarily resolves social conflicts, reconciles the parties or says how the legal system should be applied in each case.

More than this, this work faces the burning theme of judicial creativity and the humanistic and pragmatic formation of magistrates, trying to understand if this is something that should be sought in these times when even more creativity is charged from the cities.

Therefore, the study is structured into three topics. The first provides a brief notion of some challenges faced by the Judiciary in recent times and the skills that magistrates develop in training. The second investigates how the idea of urbanism was raised and discusses some challenges also faced in relation to urban development. The third identifies any relationship that may exist between the cities and the judges nowadays. After all, people believe that a judge must be one who is active in his community, so that he can know it better and thus give fairer judgments. More than that, the third topic deals with the issue of judicial creativity, thematic that comes back to approach the theme of cities, since much is proclaimed nowadays, that cities, in addition to sustainable, must also be creative.

In the end, what is really going to be discussed is how to select and train more creative judges in these times when even from the cities, creativity is expected.

The research, data treatment and drafting of this research report are based on the deductive method,<sup>1</sup> and the techniques used are those from the

---

<sup>1</sup> Gilson Jacobsen is Doctor in Legal Science by Universidade do Vale do Itajaí – UNIVALI (Brazil); Doctor in Public Law from the University of Perugia / Italy. He is currently attending a post-Doctorate in Constitutional Law at the University of Bologna, Italy. Federal Judge in Brazil. João Batista Lazzari is Doctor in Legal Science by Universidade do Vale do Itajaí-UNIVALI (Brazil); Doctor in Public Law from the University of Perugia (Italy). He is currently attending a post-Doctorate in Constitutional Law at the University of Bologna, Italy. Federal Judge in Brazil.

<sup>1</sup> “DEDUCTIVE METHOD: logical basis of the scientific research dynamics that consists in establishing a general formulation, and then pick up the phenomenon parts in order to sustain the

referent,<sup>2</sup> from categories<sup>3</sup> and from the operational concepts,<sup>4</sup> with bibliographic research referenced at the end.

## 2. CHALLENGES FOR THE JUDICIARY AND THE TRAINING OF MAGISTRATES

Nobody else can ignore, considering the social and political transformations of this 21st century beginning, that we live in a risk society. It is because we live surrounded by risks that accumulate and of all order - ecological, financial, military, terrorist, biochemical, informational ones.<sup>5</sup>

According to Barroso<sup>6</sup>, unemployment, underemployment and the informal work have made our streets sad and dangerous places. This is because the state seems to have forgotten people, caring little about their projects and dreams.

There is, moreover, a current trend to reclassify the poverty, "the most extreme and problematic sediment of social inequality" in the words of Bauman,<sup>7</sup> as a law and order problem, requiring measures to deal with the criminals.

However, any statistical relationship between poverty and chronic unemployment with crime does not justify treating poverty as a criminal

---

general formulation." (see CESAR LUIZ PASOLD, *METODOLOGIA DE PESQUISA JURIDICA: TEORIA E PRÁTICA* 86 (12th ed. 2011)).

<sup>2</sup> "REFERENT: prior explanation of the motive, objective and desired product, delimiting the thematic scope and approach to an intellectual activity, especially for a research." (see PASOLD, Cesar Luiz. *Metodologia da Pesquisa Jurídica: Teoria e Prática*. p. 209).

<sup>3</sup> "CATEGORY: Strategic word or phrase to the elaboration and/or the expression of an idea." (see PASOLD, Cesar Luiz. *Metodologia da Pesquisa Jurídica: Teoria e Prática*. p. 197).

<sup>4</sup> "OPERATIONAL CONCEPT [COP]: Established or proposed definition for a word or expression, with the purpose that such a definition be accepted for the purposes of the ideas set forth." (see PASOLD, Cesar Luiz. *Metodologia da Pesquisa Jurídica: Teoria e Prática*, p. 198).

<sup>5</sup> See Arthur Bueno, *Diálogo com Ulrich Beck, in SOCIEDADE DE RISCO - RUMO A UMA OUTRA MODERNIDADE [LIVING IN THE RISK SOCIETY, AN INTERVIEW WITH ULRICH BECK - TOWARDS ANOTHER MODERNITY]* 361 (Ulrich Beck ed., Sebastião Nascimento trans., 1st ed. 2010).

<sup>6</sup> LUIS ROBERTO BARROSO, *O NOVO DIREITO CONSTITUCIONAL BRASILEIRO - CONTRIBUIÇÕES PARA A CONSTRUÇÃO TEÓRICA E PRÁTICA DA JURISDIÇÃO CONSTITUCIONAL NO BRASIL [THE NEW BRAZILIAN CONSTITUTIONAL LAW - CONTRIBUTIONS FOR THE THEORETICAL AND PRACTICAL CONSTRUCTION OF THE CONSTITUTIONAL JURISDICTION IN BRAZIL]* 102-103 (2012).

<sup>7</sup> See ZYGMUNT BAUMAN, *DANOS COLATERAIS - DESIGUALDADES SOCIAIS NUMA ERA GLOBAL [COLLATERAL DAMAGE: SOCIAL INEQUALITIES IN A GLOBAL ERA]* 10 (Carlos Alberto Medeiros trans., 2013).

problem. On the contrary it shows the need to treat juvenile delinquency as a social problem.<sup>8</sup>

As we have seen, in social phenomenon roots there is a combination of consumerist life philosophy and lack of opportunity for the poor.

Looking only at São Paulo (Brazil) there are 522,000 people living in the so-called *risk areas*, which are those unfit for the urban settlement.<sup>9</sup> There are also speeches about the amazing phenomenon of *shanty towns of the world*, with the poor being used as a reservoir of labor and treated as socially excluded.<sup>10</sup>

To begin to change this picture it seems necessary to break with the legalism tradition and seek legal professionals who have a holistic concept of reality.<sup>11</sup> This is the great challenge. Thus "the problem . . . is not the lack of normativity, but the absence of a proper reading, from its own logic, the new legal regime, inspired by a truly Citizen Constitution ".<sup>12</sup>

On the other hand, the Judiciary Power growth seen in recent years is not a phenomenon limited to Brazil, as it also occurs in Italy and in almost all contemporary democracies.<sup>13</sup>

Indeed, in Italy, as Facchi<sup>14</sup> observes, there is the perception that the immediate effects of scientific and social transformations often escape from the Legislative Power control and the courts assume the task of capturing or understand the social issues and formalize or translate them into new rights or new forms of guardianship. In addition the Judiciary no longer operates alone, imprisoned in the realm of law, but increasingly requires assistance or extra juridical specialized knowledge because of the complexity of issues which it deals with. Judicial decisions often assume a political role, with public visibility that exposes the judges to external relations and influences. This accentuates the interaction and reciprocal influence between society and legal institutions.

---

<sup>8</sup> *Id.* at 10, 11.

<sup>9</sup> See JOSÉ RENATO NALINI, *DIREITOS QUE A CIDADE ESQUECEU*, [RIGHTS THAT THE CITY HAVE FORGOTTEN], 26 (2011).

<sup>10</sup> *Id.* at 46-76.

<sup>11</sup> *Id.* at 137.

<sup>12</sup> *Id.* at 138.

<sup>13</sup> See CARLO GUARNIERI, *LA GIUSTIZIA IN ITALIA* [JUSTICE IN ITALY] (2nd ed. 2011).

<sup>14</sup> Alessandra Facchi, *Diritti*, in *DIRITTO COME QUESTIONE SOCIALE* [LAW AS A SOCIAL QUESTION] 82 (Emilio Santoro et. al. eds., 2010).

However, as Faria<sup>15</sup> points out, the political and economic systems react and tend to counteract the judiciary's position, usually with loss of autonomy on the part of the latter. On the other hand, when courts are burdened with functions that are not their own and it results in collisions with other Powers, the society feels the effects of speed loss, coherence and quality of the judicial services, leading to denial of justice, especially for people of lower income.

In the second quarter of 2011, Cunha<sup>16</sup> stated that the Index of confidence in Justice - (hereinafter ICJBrasil)<sup>17</sup> was 5.6 points, on a scale that ranges from zero to ten. Already in the second half of 2013, ICJBrasil was 5.1.<sup>18</sup> The results follow a tendency of Judiciary's poor judgment as a public service provider. Nevertheless, regarding the behavioral questions, most of the interviewees stated that they would seek the Judiciary to resolve their eventual conflicts.<sup>19</sup>

Even economic globalization, according to Faria, calls into question the juridical and judicial structures exclusivity of a state that has always been settled: in the division and balance of powers; principles of sovereignty and territoriality; in the distinction between the public and the private, between individual and collective interest. Everything is under the pallium of positive law, which always wanted to be a logical-formal system of abstract, clear and precise standards. However, a Power that loses decision-making autonomy,

---

<sup>15</sup> José Eduardo Faria, *A crise do Judiciário no Brasil: notas para discussão [The Crisis of the Judiciary in Brazil: Notes for Discussion]*, in JURISDIÇÃO E DIREITOS FUNDAMENTAIS [JURISDICTION AND FUNDAMENTAL RIGHTS] 30 (Ingo Wolfgang Sarlet ed., 2006).

<sup>16</sup> Luciana Gross Cunha et al. *Por que devemos confiar no Judiciário?*. RELATÓRIO ICJBRASIL - 2º SEMESTRE DE 2013 - 172 (2014). <http://bibliotecadigital.fgv.br/dspace/handle/10438/11575>.

<sup>17</sup> "The Index of confidence in Brazilian Justice - ICJBrasil - is a statistical survey of qualitative nature, carried out in seven Brazilian states, based on a population representative sample. Its objective is to systematically monitor the population's sentiment in relation to Brazilian Judiciary. To portray the trust of the citizen in an institution means to identify if the citizen believes that this institution fulfills its function with quality, if this is done in a way that benefits of its performance are greater than its costs and if this institution is taken into account in the day-to-day life of ordinary citizens. In this sense, ICJBrasil is composed of two sub-indexes: (i) a perception sub-index, by which the public's opinion on Justice and the manner in which it renders the public service is measured; and (ii) a behavior sub-index, by which it tries to identify if the population uses the Judiciary to solve certain conflicts. Under the coordination of Prof. Luciana Gross Cunha, ICJBrasil is published quarterly, through her reports, by FGV RIGHT SP." FGV RIGHT SP. ÍNDICE DE CONFIANÇA NA JUSTIÇA BRASILEIRA [INDEX OF CONFIDENCE IN BRAZILIAN JUSTICE] - ICJBrasil.

<sup>18</sup> Cunha et al., *supra* note 16, at 11.

<sup>19</sup> *Id.* at 173.

and an order threatening its ability to program behaviors, choices and decisions emerges before this new globalized scenario.<sup>20</sup>

In any case, the Judiciary does not necessarily leave the scene, although it may lose its adjudicative monopoly on certain areas and matters. In fact, its future depends on how it will behave in the face of: a) social exclusion often generated by globalization; b) its increasing presence at the center of political discussions, having to assume more and more the role of conflict manager and, for this reason, increasingly difficult decisions; c) socioeconomic requirements of efficiency and prediction of its courts; and d) expectations generated by the creation and installation of special state and federal courts, which were created precisely to "make it possible for the population's expressive contingents to access the courts".<sup>21</sup>

Faced with this reality, the Schools of Judiciary have a fundamental role, which is to develop and implement training programs directed toward the development of competencies identified with this new world scenario, so that the judges have the creativity expected and required to deal with the new social challenges of today.

Thus, this study defends that the programmatic content of educational actions that integrate the initial and continuous formation would stimulate the magistrates to know the social reality in which they are inserted and to have creativity for solutions that can promote social peace. Socio-juridical research programs and exchanges with national and international institutions aimed at the production and dissemination of scientific knowledge must follow this same line.

It is also essential to demonstrate the importance of judicial creativity in coping with one of the major social disorders of the present, such as disordered urban development and exclusion of the poorest people.

---

<sup>20</sup> Faria, *supra* note 15: notas para discussão [notes for discussion]. p. 33.

<sup>21</sup> *Id.* at 40-43.

### 3. URBAN DEVELOPMENT

To dwell, according to Choay,<sup>22</sup> "is the occupation by which man has access to being, letting things arise around him, rooting himself."

The industrial revolution and the social modernization brought new airs and gave a new aspect to the urban spaces of the nineteenth century, with many and brief contacts, but few real meetings between people, as in the train stations that appeared then, full of strangers. Something similar to the anonymity that is felt today when walking through our great cities..<sup>23</sup>

However, sociologists at the University of Chicago conducted modern urban studies of their own city, which began after World War I and during the 1930s. This would give rise to other important social research on cities in the contemporary world.<sup>24</sup> It was soon realized that several institutions linked to the city, such as the family, the church, and the courts of justice were also worthy of study. Moreover, it was necessary to study the new organizational forms that emerged as a result of urbanism. It is that a great and important change that urbanism brought was the growing division of labor, subverting some traditional types of social organization supported, for example, in caste, kinship and ties with the place. With urbanism, a new type of man emerges from the point of view regarding his relation and specialization to work: the clerk, the taxi driver, the policeman, the night watchman, the bartender, the theater actor, the teacher, the reporter, the stockbroker.<sup>25</sup>

The same, and with even greater reason, can be said of the judge, who is the figure with the specialized function of conflict resolution. This is why the judge must be someone inserted in the community, aware of his reality and his values.

Since then, the city has become so much and to such an extent that its ancestral concept no longer seems able to accompany it. It becomes - the city - the point of intersection of several functional concepts, inserted into abstract

---

<sup>22</sup> FRANÇOISE CHOAY, O URBANISMO: UTOPIAS E REALIDADES, UMA ANTOLOGIA [URBANISM: UTOPIAS AND REALITIES, AN ANTHOLOGY] 38 (Dafne Nascimento Rodrigues trans., 2015).

<sup>23</sup> See JÜRGEN HABERMAS, V A NOVA OBSCURIDADE: PEQUENOS ESCRITOS POLÍTICOS [THE NEW DARK: SMALL POLITICAL WRITINGS] 45 (Luiz Repa trans., 1st ed., 2015).

<sup>24</sup> See, e.g., ULF HANNERTZ, EXPLORANDO A CIDADE: EM BUSCA DE UMA ANTROPOLOGIA URBANA 29 (Vera Joscelyne trans., 2015).

<sup>25</sup> *Id.* at 34.

systems, allowing one to question whether the concept of city itself is not outdated.<sup>26</sup>

Distant airports are opposed to commercial buildings without an identity in the centers of cities. There is an absence of functional links in the banks, in the courts, in the administrations of large conglomerates, in the establishments that house editorials and press; finally, in private or public bureaucracies. The own writing in luminous advertisements reveals something different from that formal language of architecture.

What is now perceived is that urban life is replete, more and more, with what Habermas calls *non-configurable systemic contexts*, with urban agglomerations that do not recall the idea of a city that inhabits one's memory or heart.<sup>27</sup>

There is a separation between the places of residence and work. Physical contacts become close, however, social contacts become increasingly cold and distant.<sup>28</sup>

In fact, before the urban explosion people grew up in environments where everyone knew and recognized each other throughout their lives. With this, people's sense of identity was closely related to the community they belonged to, to the real knowledge that some people had of others.<sup>29</sup>

Today, people are always following the clock and traffic signs. There is, however, a stress and a permanent irritation in transit. Outside of vehicles, that contrast between physical proximity and social distance increases reserve and often flows into solitude. Thus, launched into the heterogeneity of the city, the urban inhabitant "comes to accept instability and insecurity as normal, an experience that adds something to its cosmopolitanism and sophistication. No single group has its total loyalty".<sup>30</sup>

---

<sup>26</sup> HABERMAS, *supra* note 23, at 56–57.

<sup>27</sup> *Id.* at 58.

<sup>28</sup> See HANNERTZ, *supra* note 24, at 72.

<sup>29</sup> See RICHARD WILKINSON & KATE PICKETT, O NÍVEL: POR QUE UMA SOCIEDADE MAIS IGUALITÁRIA É MELHOR PARA TODOS [THE SPIRIT LEVEL: WHY EQUALITY IS BETTER FOR EVERYONE] 85 (Marilene Tombini trans., 2015).

<sup>30</sup> See HANNERTZ, *supra* note 24, at 73.



The inhabitant of the city, after all, passes through many jobs, neighborhoods and various interests throughout life. In doing so, he doesn't commit much to other people and, because of the constant rush, he does not acquire a vision of the whole complexity of his community. This helps to make him insecure about his own interests and vulnerable even to the pressures of advertisements, which explains to some extent why collective behavior in the city is often unpredictable.<sup>31</sup>

The city dweller "tends to formal justice and a thoughtless harshness".<sup>32</sup> People's own sense of identity is drifting in mass society.<sup>33</sup>

It seems that the era of tradition is over, "undermined by the impulse of values and individualistic aspirations".<sup>34</sup>

In Bauman's view, "the new individualism, the fading of human bonds and the loss of solidarity are engraved on one side of the coin that brings the effigy of globalization on the other side".<sup>35</sup>

The most disturbing phenomenon of contemporary urbanism, however, is one that opens the kind of frontier that grows most: that of the urban frontiers that the rich raise to exclude the poor. These are the exclusive urbanizations, which some call exclusive neighborhoods, others call them gated communities, but they end up being neither neighborhoods nor communities.<sup>36</sup>

Alphaville, on the outskirts of São Paulo (Brazil), and Nordelta, near Buenos Aires (Argentina) are emblematic examples of gated communities because they represent the tendencies of the new middle classes to erect walls in the eagerness to save their exclusivity and their comfort in front of other

---

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 74.

<sup>33</sup> See WILKINSON, PICKETT, *supra* note 29, at 85.

<sup>34</sup> GILLES LIPOVETSKY, O IMPÉRIO DO EFÊMERO: A MODA E SEU DESTINO NAS SOCIEDADES MODERNAS [THE EPHEMERAL EMPIRE: FASHION AND ITS FATE IN MODERN SOCIETIES] 317 (Maria Lucia Machado trans., 2009)

<sup>35</sup> ZYGMUNT BAUMAN, MEDO LÍQUIDO [LIQUID FEAR] 189 (Carlos Alberto Medeiros trans., 2008).

<sup>36</sup> See JOSEP MARIA MONTANER & ZAIDA MUXÍ MARTINEZ, ARQUITECTURA Y POLÍTICA: ENSAIOS PARA MUNDOS ALTERNATIVOS [ARCHITECTURE & POLICY: ESSAYS FOR ALTERNATIVE WORLDS] 88 (Frederico Bonaldo trans., 2014).

people who are left excluded and discriminated. In practice, 20% of planet's inhabitants seek to defend themselves from misery of other 80%.<sup>37</sup>

As a result, the public and the civil culture gradually fade away, giving rise to spatial fragments replete with social segregation between elites and the excluded. Not just an increasingly urban world, but a world of walls, with their coldness, separations and inequalities.<sup>38</sup>

It happens that unequal societies are also, as a rule, unhealthy societies. And this is related to the chronic stress of the population.<sup>39</sup> This is true even for murder rates, often many times higher in more unequal societies, being evident that the effects of this inequality are not restricted to the less favored people. On the contrary, they affect the vast majority of population.<sup>40</sup>

However, the problems that society faces today are so complex and urgent that they do not fall within the scope of just one discipline or profession.<sup>41</sup> From the risks and disasters viewpoint, the tough experience reveals that "a nuclear catastrophe at any place can be a nuclear catastrophe in all places".<sup>42</sup> One of the worst examples of this occurred thirty years ago in Chernobyl, now a ghost town, because it has been abandoned in haste and forever.

Other cities are connected, because the world is connected.<sup>43</sup>

They are times of gigantic scale and enormous complexity,<sup>44</sup> in which the emerging reality is new and surprising.<sup>45</sup>

In 1800, only 3% of the world's population lived in cities. However, since 2007, the world is faced with a radical new reality: People who live in cities are already a majority compared to those who live in the countryside. It is

---

<sup>37</sup> *Id.* at 89.

<sup>38</sup> *Id.* at 89-91.

<sup>39</sup> See WILKINSON, PICKETT, *supra* note 29, p. 133.

<sup>40</sup> *Id.* at 224.

<sup>41</sup> See KIM VINCENTE, *HOMENS E MÁQUINAS [HUMAN FACTOR: REVOLUTIONIZING THE WAY WE LIVE WITH TECHNOLOGY]* 14 (Maria Inês Duque Estrada trans., 2006).

<sup>42</sup> *Id.* at 14.

<sup>43</sup> *Id.* at 40.

<sup>44</sup> See FRANS DE WAAL, *A ERA DA EMPATIA: LIÇÕES DA NATUREZA PARA UMA SOCIEDADE MAIS GENTIL [THE EMPATHY ERA: NATURE LESSONS FOR A GENTLER SOCIETY]* 45 (Rejane Rubino trans., 2010)

<sup>45</sup> See ERVIN LASZLO, *UM SALTO QUANTICO NO CEREBRO GLOBAL: COMO O NOVO PARADIGMA CIENTÍFICO PODE MUDAR A NÓS E O NOSSO MUNDO [QUANTUM SHIFT IN THE GLOBAL BRAIN]* 11 (Newton Roberval Eichenberg trans., 2012).

estimated that by 2050 the inhabitants of the cities correspond to three quarters of the world population.<sup>46</sup>

In this urban and unequal planet, 280 million people live in megacities. In fact, until 1950, the only megacity in the world was New York. However, in 1996 there were already sixteen megacities in the world, and by 2025 there will be more than twenty-five megacities, many of them located outside of developed countries.<sup>47</sup>

The great global challenge, both for governments and for the society, will be to review the standards of comfort as well as the taste of urban life, with an excess of cars and emission of gases<sup>48</sup>. Hence the great concern of sustainable urbanism with transportation corridors and their commitment to integrate public transport technology - subway, tram, bus - with the density and multiple use of the surrounding soil.<sup>49</sup>

But perhaps this alone is not enough in the face of the inequality generated by poverty.

There is a need to seek new solutions for cities. Therefore, it is no surprise that there are people who try to plan cities in dialogue with people and, often, with the trace of an anti-modernism or with a touch of something banal.<sup>50</sup>

It occurs that the urban perception generated by cities in people is not always easily readable. Therefore, despite the goals of city builders, whether they have a more progressive ideology or a more culturalist bias, their intentions must appear and be decipherable by the inhabitants and "only the experience of the city can do it".<sup>51</sup>

As for the coexistence between people of different classes or between nationals and foreigners - a great challenge being faced by many European

---

<sup>46</sup> See CARLOS LEITE AND JULIANA DI CESARE MARQUES AWAD, CIDADES SUSTENTÁVEIS CIDADES INTELIGENTES: DESENVOLVIMENTO SUSTENTÁVEL NUM PLANETA URBANO [SUSTAINABLE CITIES SMART CITIES: SUSTAINABLE DEVELOPMENT ON AN URBAN PLANET] 20 (2012).

<sup>47</sup> *Id.* at 22-23.

<sup>48</sup> *Id.* at 23.

<sup>49</sup> See DOUGLAS FARR, URBANISMO SUSTENTÁVEL: DESENHO URBANO COM A NATUREZA [SUSTAINABLE URBANISM: URBAN DESIGN WITH NATURE] 34 (2014).

<sup>50</sup> See HABERMAS, *supra* note 23, pp. 59-60.

<sup>51</sup> CHOAY, *supra* note 22, p. 49.

cities, in the face of the influx of thousands of immigrants from Africa, who risk crossing the Mediterranean Sea aboard precarious vessels – it is important to know that it is possible to be different and yet live together. It is possible to "learn the art of living with difference, respecting, preserving the diversity of one and accepting the diversity of another. It is possible to do this every day, imperceptibly, in the city".<sup>52</sup>

Cities, therefore, should promote meetings among their inhabitants always remembering that a very important source of social integration is the very sense of gratification that one reaches when it manages to satisfy the needs of others. This, which for many seems a mystery, because of all explanation above, only occurs or is only reached in an egalitarian community.<sup>53</sup> The more egalitarian societies tend to be more creative, which also helps to reduce their ecological footprint, as they contribute to the emergence of so-called "weightless" sectors of the economy, thanks to continuous and rapid advances technology, a combination of high standards of living and low resource consumption and emissions.<sup>54</sup>

For that, it is not enough to stay on the level of ideas or discourses. It is necessary to start for action, an integrative action that truly brings people together and gives them a sense of acceptance and belonging to urban and social space.<sup>55</sup> In this regard, modern societies will depend more and more on their ability to be creative, adaptable, inventive, well informed and flexible.

However, this can only be achieved in populations accustomed to work together and respect themselves as equals, and they depend on a change in the priorities and values of all: without so much consumption, ostentation and search for status.<sup>56</sup>

In this context, the reality of the unfortunate occupation of cities at the beginning of this century, the inevitable question emerges: what can be expected from the magistrates' action to appease the distress of millions of

---

<sup>52</sup> ZYGMUT BAUMAN, *CONFIANÇA E MEDO NA CIDADE*. [CONFIDENCE AND FEAR IN THE CITY] 89 (Eliana Aguiar trans., 2009).

<sup>53</sup> See WILKINSON, PICKETT, *supra* note 29, p. 259.

<sup>54</sup> *Id.* at 274.

<sup>55</sup> See CHOAY, *supra* note 22, p. 55.

<sup>56</sup> See WILKINSON, PICKETT, *supra* note 29, p. 323.

human beings who are deprived of their fundamental right to dwell and live in dignity in urban spaces?

There is no magical nor easily noticeable solution to this serious problem, but judicial creativity is expected to at least give specific answers. We will further develop this in the next section.

#### 4. JUDICIAL CREATIVITY

Currently, the role assigned to the Judiciary requires judges to adopt a new posture, challenging them to exercise their creative powers in light of the values extracted from the Constitution.<sup>57</sup>

Thirty years ago, Boaventura de Souza Santos advocated that the new generations of judges "shall be equipped with a vast and diversified knowledge (economic, sociological, political one) about society in general and on justice administration in particular".<sup>58</sup> The feeling today is that all the exclusively legal learning obtained in the Faculties of Law - the legal text, legal hermeneutics, precedents, jurisprudence, legal doctrine - seems insufficient to the jurist and the judge in the face of the complexity of the questions to which they must respond to. It is why, "since formalism has been irreversibly dismantled along with the positivist methodology of law study, legal doctrine is seeking refuge in other areas of knowledge".<sup>59</sup>

Originally from a conception of jurisdiction as an activity that only promotes conflict resolution, it has evolved into a current one, in which it plays a guarantor role of fundamental rights "and implementer of counter majority

---

<sup>57</sup> See NELSON JULIANO SCHAEFER MARTINS, *PODERAS DO JUIZ NO PROCESSO CIVIL* 41-42 (2004).

<sup>58</sup> Boaventura de Souza Santos, *Introdução à sociologia da administração da justiça [Introduction to the Sociology of the Administration of Justice]*, 37 *REVISTA DE PROCESSO*, 10-11 (2014), <http://revistadostribunais.com.br/>.

<sup>59</sup> Daniel W. Lang Wang, *Introdução [Introduction]*, in: *CONSTITUIÇÃO E POLÍTICA NA DEMOCRACIA: APROXIMAÇÕES ENTRE DIREITO E CIÊNCIA POLÍTICA [CONSTITUTION AND POLITICS IN DEMOCRACY: APPROXIMATIONS BETWEEN LAW AND POLITICAL SCIENCE]* 16 (2013).

spaces for minorities that did not get a voice in the institutionalized policy arenas”.<sup>60</sup>

For a long time the role of the judge was neglected, because it was seen as a mere applicator or replicator of the norms dictated by others, much to Montesquieu's conception, for whom the judge should be only “the mouth of the law” (“Bouche de la loi”). It was believed that it would be enough to change the rules to automatically obtain better justice. Only recently it has become widely recognized that judges play a fundamental role in the administration of justice.<sup>61</sup>

Therefore, the stereotype of a judge distant from society, who transcends ordinary individuals as if he were a superhuman being, must be left behind. In fact, this idea of a demigod judge, according to Silva Santos, “is due to the behavior of the magistrates themselves who voluntarily or even unconsciously, given the quantity and nature of the work they perform, inclose themselves in their offices and distance themselves from the society to which they belong”.<sup>62</sup>

The judicial body must therefore be aware of the importance of its role as a social peacemaker, from “being a mere enforcer of the law, far from the reality that surrounds it”.<sup>63</sup>

It so happens that the present-day judge cannot be content to play the role of a bureaucrat. Rather, he must seek to act much more as a social analyst in the face of the complexity and challenges of the new times, which is expected, after all, from every jurist.<sup>64</sup>

---

<sup>60</sup> Dierle Nunes, *Uma breve provocação aos processualistas: o processualismo constitucional democrático [A Brief Provocation to Proceduralists: Democratic Constitutional Processualism]*, in: 40 ANOS DA TEORIA GERAL DO PROCESSO NO BRASIL: PASSADO, PRESENTE E FUTURO [40 YEARS OF THE GENERAL THEORY OF PROCESS IN BRAZIL: PAST, PRESENT AND FUTURE] 222 (2013).

<sup>61</sup> See GUARNIERI, *supra* note 13, p. 7-8.

<sup>62</sup> Bruno Henrique Silva Santos, *O magistrado cidadão e a legitimação social da justiça [The Citizen Magistrate and the Social Legitimization of Justice]*, in: CURSO MODULAR DE ADMINISTRAÇÃO DA JUSTIÇA: PLANEJAMENTO ESTRATÉGICO [MODULAR COURSE OF ADMINISTRATION OF JUSTICE: STRATEGIC PLANNING] 102 (2012).

<sup>63</sup> Arlete Inês Aurelli, *Função social da jurisdição e do processo [Social Function of Jurisdiction and Procedure]*, in 40 ANOS DA TEORIA GERAL DO PROCESSO NO BRASIL: PASSADO, PRESENTE E FUTURO [40 YEARS OF THE GENERAL THEORY OF PROCESS IN BRAZIL: PAST, PRESENT AND FUTURE] 128 (Camilo Zufelato & Flávio Luiz Yarshell eds., 2013).

<sup>64</sup> See UMBERTO VINCENTI, DIRITTO E MENZOGNA: La questione della giustizia in Italia [THE QUESTION OF JUSTICE IN ITALY]19 (2013).

Additionally, the judge can't take a chance on the path of divination, which, according to Calamandrei, "is not a matter of the jurist, who serves to certainty, not to hope; and that in studying the laws he must try to understand them and to put them in the clear, as they are, with all their contingent cruelties and also with those contradictions and with those illogisms"<sup>65</sup> typical of the "urgency of events that created them".<sup>66</sup>

The truth, however, according to Vincenti,<sup>67</sup> is that academics have often deceived students with a false right/ right that does not exist, as if justice were in the judicial bureaucracy, with their rites and praxes, which often hide and even supplant the justice that is sought to achieve.

According to Cambi, "postmodern law, contrary to modern law, is not content with judicial passivity, betting on the transformative will guided by the inter-social activity of responsible production of inclusive social justice projects (proactivity in the protection of relevant social interests)".<sup>68</sup>

As Prado affirms and demonstrates,<sup>69</sup> the legal world is gradually recognizing the value of emotion in the act of deciding, without leaving aside rationality, in a slow and gradual communion, in the act of judging, between thinking and feeling.<sup>70</sup>

However, conservatism still inhabits the judiciary domes, which finds shelter in a culture that reveres the norm and ends up passing off the social, economic and political contingencies, according to Sadek, who says:

Reality and unforeseeable circumstances threaten the dogma and tradition. Hence the hard work of these judiciary sectors relies on positivist normativism, to focus on the form and its commitment to

---

<sup>65</sup> PIERO CALAMANDREI, ESTUDOS DE DIREITO PROCESSUAL NA ITÁLIA [STUDIES OF PROCEDURAL LAW IN ITALY] 120 (Karina Fumberg trans., 1941).

<sup>66</sup> *Id.*

<sup>67</sup> VINCENTI, *supra* note 64, p. 28.

<sup>68</sup> EDUARDO CAMBI, PROCESSUAL NEOCONSTITUCIONALISMO E NEOPROCESSUALISMO: DIREITOS FUNDAMENTAIS, POLÍTICAS PÚBLICAS E PROTAGONISMO JUDICIÁRIO [NEOCONSTITUTIONALISM AND NEOPROCESSALISM: FUNDAMENTAL RIGHTS, PUBLIC POLICIES AND JUDICIAL PROTAGONISM] 246 (2016).

<sup>69</sup> LÍDIA REIS DE ALMEIDA PRADO, O JUIZ E A EMOÇÃO: ASPECTOS DA LÓGICA DA DECISÃO JUDICIAL [JUDGE AND EMOTION: ASPECTS OF JUDICIAL DECISION LOGIC] 122 (2013).

<sup>70</sup> *Id.* at 123.

curb the different, the creative, the new, in the end, the reflexes of the real in the legal.<sup>71</sup>

Despite this, there is no way to hinder the freed space for interpretation and creative power of judges. Therefore, Sadek concludes,<sup>72</sup> over the years there has been an increase in the percentage of judiciary members who move away from conservative positions, more attentive to economic and social consequences than merely to positivist normativism. The result is a less formalistic justice and more committed to the pacification of parties and with more viable solutions.

Ataide Junior<sup>73</sup> also makes reference to the need for a *new judge*, who, in addition to his technical training, also enjoys an interdisciplinary training that allows him to know the social, economic and even psychological reality related to the deal.<sup>74</sup>

Hence Bedaque realizes that "legislative changes are insufficient to give effect to the process if they do not find interpreters in a position to understand them . . . .".<sup>75</sup>

Thus, as noted by Gomes, "the judge, today, besides applying the law to specific cases, also has an indirect function to interpret our legal system and, with creativity, decide the cases according to the circumstances that are implemented";<sup>76</sup> as already pointed out before, "when interpreting, magistrates begin to create juridical norms, which are not properly norms per se, but judicial decisions that will serve to the same purpose." They do so

---

<sup>71</sup> Maria Tereza Aina Sadek, *O Judiciário e seus desafios [The Judiciary and its Challenges]*, in *IMPASSES E APORIAS DO DIREITO CONTEMPORÂNEO: ESTUDOS EM HOMENAGEM A JOSÉ EDUARDO FARIA [IMPASSES AND APORIAS OF CONTEMPORARY LAW: STUDIES IN HOMAGE TO JOSÉ EDUARDO FARIA]* 91, 93 (Emerson Ribeiro Fabiani ed., 2011).

<sup>72</sup> *Id.* at 93.

<sup>73</sup> VICENTE DE PAULA ATAIDE JUNIOR, *O NOVO JUIZ E A ADMINISTRAÇÃO DA JUSTIÇA: REPENSANDO A SELEÇÃO, A FORMAÇÃO E A AVALIAÇÃO DOS MAGISTRADOS NO BRASIL [THE NEW JUDGE AND THE JUSTICE ADMINISTRATION: RETHINKING THE SELECTION, TRAINING AND EVALUATION OF MAGISTRATES IN BRAZIL]* 69–72 (2006).

<sup>74</sup> *Id.*

<sup>75</sup> José Roberto dos Santos Bedaque, *Juiz, processo e justiça [Judge, process and justice]*, in *ATIVISMO JUDICIAL E GARANTISMO PROCESSUAL [Judicial activism and procedural guaranty]* 111, 139 (Fredie Didier Jr. et al. eds., 2013).

<sup>76</sup> GUSTAVO GONÇALVES GOMES, *JUIZ PARTICIPATIVO: MEIO DEMOCRÁTICO DE CONDUÇÃO DO PROCESSO [PARTICIPATIVE JUDGE: DEMOCRATIC METHOD OF CONDUCTING THE PROCESS]* 120 (2014).



precisely because the system of rules is not something complete and self-sufficient.<sup>77</sup>

Nonetheless, the freedom of interpretation should be performed with care and caution, so that judges do not fail taking subjective decisions, with violation of legal certainty and the risk of committing injustices. That is why, in this task, they are never exempt from justifying their decisions.<sup>78</sup>

Gomes clarifies what this challenge imposed by the new times is for a participatory judge:

There are concrete situations in which denotes a certain degree of indeterminacy of legal concepts involved. There are other situations in which, given the lack of specific rules governing the matter, the Judiciary is unable to resolve the deal by classic subsuntive method. In these cases, it is admitted the use of creativity, by judicial magistrates, in situations in which the judge, not being able to escape from deciding, must develop creative initiatives with the scope to seek the most appropriate solution to demand.<sup>79</sup>

After identifying some examples of expressions with vague and indeterminate concepts typical of our days (hypossufficient, social function of the contract, reasonable duration of the process, public interest), the cited author stresses the importance of judicial creativity: "Judicial creativity is, therefore, a great ally of the modern procedural system, in that it allows us to have much wider judicial decisions and to effectively translate the reality of the case, especially in situations where ordinary legislation proves insufficient for the demand solution."<sup>80</sup>

Regarding the judges' creative role, Pinho and Cortês consider it "imperative that the judge be equipped with new ways of acting with greater flexibility in the adequacy of decisions to the reality of the case."<sup>81</sup> They further

---

<sup>77</sup> See JOSÉ ANTONIO SAVARIS, *UMA TEORIA DA DECISÃO JUDICIAL DA PREVIDÊNCIA SOCIAL: CONTRIBUTO PARA SUPERACÃO DA PRÁTICA UTILITARISTA [A THEORY OF THE JUDICIAL DECISION OF THE SOCIAL SECURITY: CONTRIBUTION TO OVERCOMING THE UTILITARIAN PRACTICE]* 230 (2011).

<sup>78</sup> See GOMES, *supra* note 76, p. 121.

<sup>79</sup> *Id.* at 123.

<sup>80</sup> *Id.* at 124.

<sup>81</sup> Humberto Dalla Bernardina de Pinho, Victor Augusto Vilani Cortês, *As Medidas Estruturantes e a Efetividade das Decisões Judiciais no Ordenamento Jurídico Brasileiro [The Structuring Measures and Effectiveness of Judicial Decisions in the Brazilian Legal System]*, 13 *REVISTA ELETRÔNICA DE DIREITO PROCESSUAL [ELECTRONIC JOURNAL OF PROCEDURAL LAW] – REDP*, 237 (2014), <http://www.redp.com.br/>.

add "However, only new 'procedural' weapons are not enough, it is required that judges' mentality also changes. . . ."<sup>82</sup>

Barroso also comes to the conclusion that ". . . abstract formulas of law and judicial discretion no longer bring all the answers", precisely because the legal paradigm which in modernity had already passed from the law to the judge, "is now transferred to the concrete case for the best solution, unique to the problem to be solved".<sup>83</sup>

Hence the feeling is that the Judiciary occupies all fields and that sentencing no longer entails applying the law or saying what is right but implies a decision. The judge, now fit with values and will, no longer finds gaps and voids in the law. On the contrary, he always has the answer. Thus, the judicial protection is now presented as an appeal to the third decision.<sup>84</sup>

According to Mitidiero, the judge is no longer tied to a legality agenda, since "The agenda of contemporary law is 'juridicity', which automatically points to the idea of justice".<sup>85</sup> In fact, the Brazilian Constitution of 1988 does not lead the judge to a strict legality.<sup>86</sup>

In the judge's case, the difficulty lies in the fact that "he looks back to facts necessarily passed, but decides at present with a horizon of future".<sup>87</sup>

The judge of a new time should also facilitate the emergence of novelty by facilitating the emergence of new things he is facilitating creativity. This, moreover, is another facet of leadership, which consists "more of creating conditions than of transmitting instructions; it is to use the power of authority to enable, strengthen and empower others".<sup>88</sup>

However, it is clear that in order to have such judges, with these multifaceted attributes, it is necessary for the Judiciary and society itself to

---

<sup>82</sup> *Id.* at 237.

<sup>83</sup> BARROSO, *supra* note 6, p. 103.

<sup>84</sup> See NATALINO IRTI, DIRITTO SENZA VERITÀ [RIGHT WITHOUT TRUTH] 70 (2011).

<sup>85</sup> DANIEL MITIDIERO, COLABORAÇÃO NO PROCESSO CIVIL: PRESSUPOSTOS SOCIAIS, LÓGICOS E ÉTICOS [COLLABORATION IN CIVIL PROCEDURE: SOCIAL, LOGICAL AND ETHICAL ASSUMPTIONS] 43, 43-44 (2nd ed. 2011).

<sup>86</sup> *Id.* at 66.

<sup>87</sup> José de Faria Costa, *O direito, a justiça e a terceira pessoa* [The Law, Justice and the Third Person], in O DIREITO E O FUTURO: O FUTURO E O DIREITO [THE RIGHT AND THE FUTURE: THE FUTURE AND THE RIGHT] 510 (Antônio José Avelãs Nunes & Jacinto Nelson de Miranda Coutinho eds., 2008).

<sup>88</sup> FRITJOF CAPRA, AS CONEXÕES OCULTAS: CIÊNCIA PARA UMA VIDA SUSTENTÁVEL [The Hidden Connections: Science for a Sustainable Life] 132 (Marcelo Brandão Cipolla trans., 2005).

invest on what Nalini<sup>89</sup> calls the *integral formation* of judges, since in Brazil, preparing judges is not a function of the university. In this sense, integral formation is subdivided into previous training, initial training and continuing training.

Grangeia,<sup>90</sup> in fact, emphasizes the importance of the Professional Masters in Judiciary, with its multidisciplinary characteristic, and praises the fact that a professional master's degree focuses on solving problems, and that its dissertation, in the end, represents a solution project for problems related to the Judiciary.

All taking Garapon to the following counterpoints and weights:

. . . . the judge has passed, in recent years, from the position of guardian of the temple to that of *researcher of law*. Where will the judge find in turn his references to resolve these issues? In the law? It is in decline. In his own subjectivity? It is unacceptable. In his conscience? Who will control it? In a reasonable and transparent adaptation of the principles that underlie our right? Perhaps, since redouble the rigor and intellectual honesty. Judge can no longer claim exclusively positivist legitimacy in a context that no more is. In order to be considered a censor of ethics in others, he must answer for his own ethics . . . .<sup>91</sup>

In short, this new and more creative judge who is being treated, or judge of the new times - who is not born ready and who, for this very reason, requires an integral formation - is no longer the judge who only judges, nor the judge who only reproduces or repeats the letter of the law, but the judge capable of managing, leading, who knows how to communicate, open to technological innovations and, mainly, committed to reality.<sup>92</sup>

---

<sup>89</sup> José Renato Nalini, *A formação do juiz brasileiro [The Formation of the Brazilian Judge]*, in FORMAÇÃO JURÍDICA [LEGAL TRAINING] 143 (José Renato Nalini ed., 2nd ed. 1999).

<sup>90</sup> MARCOS ALAOR DINIZ GRANGEIA, ESCOLA NACIONAL DE FORMAÇÃO E APERFEIÇOAMENTO DE MAGISTRADOS, A CRISE DE GESTÃO DO PODER JUDICIÁRIO: O PROBLEMA, AS CONSEQUÊNCIAS E OS POSSÍVEIS CAMINHOS PARA A SOLUÇÃO [NATIONAL SCHOOL FOR THE TRAINING AND IMPROVEMENT OF MAGISTRATES, THE CRISIS OF MANAGEMENT OF THE JUDICIARY: THE PROBLEM, THE CONSEQUENCES AND THE POSSIBLE PATHS TO THE SOLUTION] 25-26 (2013).

<sup>91</sup> ANTOINE GARAPON, O JUIZ E A DEMOCRACIA: O GUARDIÃO DAS PROMESSAS 253-54 (Maria Luiza de Carvalho trans.) (1999).

<sup>92</sup> See Maria Tereza Aina Sadek, *Justiça: novas perspectivas [Justice: New Perspectives]*, in CURSO MODULAR DE ADMINISTRAÇÃO DA JUSTIÇA: PLANEJAMENTO ESTRATÉGICO [MODULAR COURSE OF

## 5. FINAL CONSIDERATIONS

As we have seen, in the face of social and political transformations of the contemporary world, judges should be able to resolve conflicts on the basis of legal techniques coupled with management and social-economic knowledge and judicial creativity, which is the responsibility of the Judicial Schools of Training and improvement of magistrates.

However, these training actions should be complemented, as much as possible, by encouraging socio-legal research programs and exchanges with the academic world so that judges are encouraged to enroll in Master and Doctoral courses, and possibly attend a second graduation (Administration, Psychology, Economics, Social Sciences, Accounting, Computer Science, Anthropology, etc.), without prejudice to their daily activities as magistrates.

Finally, it is suggested that the competences developed in training actions should undergo periodic revisions in order to identify areas of social vulnerability that demand the judiciary efficient performance in favor of a more balanced and fair society.