JUDICIARY ADMINISTRATION

Judiciary Studies Program

Selection and Discipline of Male and Female Judges in Argentina

INSTITUTO INTERDISCIPLINARIO DE ESTUDIOS CONSTITUCIONALES

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Judiciary Studies Program

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Judiciary Administration Studies Laboratory

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Benente, Mauro
Judiciary studies program : judiciary administration studies laboratory / Mauro Benente. - 1a ed . - José C. Paz : Edunpaz, 2019.
Libro digital, PDF
Archivo Digital: descarga
ISBN 978-987-4110-36-7
1. Derecho. I. Título.
CDD 342

1ª edición, septiembre de 2019
© 2019, Universidad Nacional de José C. Paz. Leandro N. Alem 4731
José C. Paz, Pcia. de Buenos Aires, Argentina
© 2019, EDUNPAZ, Editorial Universitaria

ISBN: 978-987-4110-36-7

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Judiciary Administration Studies Laboratory
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Selection and Discipline of Male and Female Judges in Argentina*

Mauro Benente**

I. INTRODUCTION

In 1853, with the enactment of the Constitution, the Argentine Republic adopted a federal government, which was broadened with the 1860 constitutional reform and has been maintained since then. In the judiciary, this federal model translates into two different levels: provincial and federal judicial branch-

* This paper summarizes part of the results obtained by the Judiciary Administration Studies Laboratory under my direction at the Universidad Nacional de José C. Paz (José C. Paz National University).

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es. As regards the former, the 23 provinces and the Autonomous City of Buenos Aires that comprise the Argentine Republic have the autonomy to design the scope of their judicial branches, as well as the selection, discipline and removal systems.

On the other hand, the National Government has the power to regulate the Federal Judiciary and the National Judiciary, as it will be explained below. Up to the latest constitutional reform that took place in 1994, unlike each of the 23 provinces, the Federal District had no autonomy to regulate its own judiciary, which was designed and regulated by the Argentine Government and was referred to as National Judiciary. After the 1994 constitutional reform, the Federal District became the Autonomous City of Buenos Aires and was vested with powers to regulate its own Judiciary, which coexists with the National Judiciary under the scope of the Argentine Government. In this paper, any reference to the Judiciary as well as the election, discipline and removal methods shall mean the Federal and National Judiciary. The specific features of the provincial judicial branches will not be addressed.

Before going any further into the main topic of this paper, that is, the selection, discipline, and removal of male and female judges, it is worth mentioning that all judges from all instances and jurisdictions are vested with the power of constitutional review. Of course, from a democratic perspective, this power is subject to debate. In Argentina, constitutional review is diffuse, and the declaration of unconstitutionality only repeals the legal provisions applicable to the specific case brought before the court. In my opinion, the judiciary is endowed with significant political powers, and therefore, the selection, discipline, and removal of judges become a delicate issue.

Under the 1853 Constitution, judges held their offices for life, were elected by the Executive with the Senate's approval and could only be removed by impeachment. Following this institutional mechanism, the Chamber of Deputies accused judges based on one or more of the following grounds: poor performance, professional misconduct or ordinary offenses. After the impeachment, the Senate was in charge of removing the accused from office or maintaining them in their office. The impeachment was quite

an expensive institutional mechanism, and also required special majorities: two-thirds of members present were required in the Chamber of Deputies, and the same majority was required in the Senate to decide the removal from office. In 1994, this system was partially modified. On the one hand, when attaining the age of 75 years, judges must be reappointed by the Senate for another five years. Furthermore, the selection and removal system for judges of any courts other than the Supreme Court was modified, and two new institutions were created: the Judicial Council and the Jury.

As regulated by section 114 of the Argentine Constitution, the Judicial Council started to operate in November 1998, after Law No. 24,937, enacted on December 10, 1997, defined its operating structure. On the one hand, the Jury is regulated in section 115 of the Argentine Constitution and Law No. 24,937. The aforementioned Law was amended in 2006 through the enactment of Law No. 26,080; in addition, Law No. 26,855, enacted on May 6, 2013, also entailed significant changes to the operation of the Council and election of its members, but was declared partially unconstitutional

by the Supreme Court the following month, on June 13, 2013.[1]

As provided by Law No. 26,080, the Council is made up of thirteen members: three judges, three representatives from the Senate, three representatives from the Chamber of Deputies, two representatives of licensed attorneys, one representative from the academic field, one representative from the Argentine Executive Branch. For operational purposes, the Council is divided into four committees: Finances and Administration; Discipline and Prosecution; Selection of Judges and the Judicial College and Regulations. Finally, as provided by Law No. 26,080, the Jury is made up of seven members: two appellate judges, two senators, two deputies, and one attorney. Members are elected by draw in December and July each year, among the lists of representatives of each of the aforementioned fields.

This paper is a critical review of the selection process, the accountability mechanisms and the process of the removal of

1. CSJN, "Rizzo, Jorge Gabriel (apoderado Lista 3 Gente de Derecho) s/ acción de amparo c. Poder Ejecutivo Nacional, ley 26.855, medida cautelar (Expte. N° 3034/13)" (Superme Court. "Rizzo, Jorge Gabriel (acting on behalf of Lista 3 Gente de Derecho) *in re* amparo action vs Argentine Executive Branch, Law No. 26855, injunction (Case File No. 3034/13)].

judges. This assessment is based on the results obtained at the Judiciary Administration Studies Laboratory of Universidad Nacional de José C. Paz.

II. MALE AND FEMALE JUDGES SELECTION AND PROFILE

In a representative democracy, special attention should be given to the mechanisms for the selection of political authorities. In my opinion, the notion of democracy should not be limited to representative democracy or, in other words, democracy should not be limited to a mere competition between elites fighting for a vote. Indeed, representative democracy should be as democratic as possible, self-managed democracy should be institutionalized, and therefore, democracy should be as less representative as possible. But even within the representative matrix, the issue of the system to elect political authorities should become the center of attention. Such election can always be more democratic, and more areas are always likely to be subject to popular election. Nevertheless, in the case of the Judiciary, we are faced with

a rule that should be an exception, in the most strict sense of this term: male and female judges are not democratically elected. On the grounds of this exception, which was turned into a rule, we should be more strict and rigorous with the mechanisms for the selection and appointment of judges, more thorough in our analysis and more adamant in our criticism.

Under the institutional framework of the 1853 Constitution, the judges were elected by the Executive with the Senate's approval, and this mechanism has been maintained after the 1994 constitutional reform. However, the Judicial Council should be involved in the election of all judges other than Supreme Court judges, and prepare a list of three candidates, among which the President must choose one, who will be subject to the Senate's approval. This list of three candidates is drafted after a selection process that involves a competitive examination, a background evaluation and an interview with the candidates. This system of competitive examination and background evaluation is paramount since it defines the profile of the male or female judge that, eventually, will be included in the list of

three candidates. Even though the Executive submits the list to the Senate, the topics included in the competitive examination and which kind of background is taken into account are aspects that stylize a certain type of male or female judge.

The approval of the open competition and submitting the list of three candidates is a power vested in the Judicial Council in full attendance, and a two-third majority of members present is required to adopt such decisions (section 13(c) of Law No. 24,937, as amended). Irrespective of this final approval, most of the process is pursued by the Committee for the Selection of Judges and the Judicial College, which is made up by three judges members of the Council, three deputies, the representative of the Executive and the representative of the academic and scientific field (section 12 of Law No. 24,937, as amended). The three senators or the two representatives of licensed attorneys are not members of the Selection Committee.

Most of the operation of the open competitions, the evaluations and the process to define the list of three candidates is provided for in the regulations issued by the

Council itself,[2] but the following statutory guidelines must be observed:

a) The invitation to take part in the open competition must include the dates for the competitive examinations and the names of the members of the evaluation panel.
b) At the proposal of the Selection Committee and the Judicial College, the Council in full attendance must draft lists of evaluators for each field of expertise, on a regular basis. The Rules for Open Competitive Examinations and Background Evaluation for the Appointment of Judges of the Argentine Judiciary (hereinafter, the OCE-BEAJAJ Rules) make it clear that the lists shall include attorneys who are law professors of each of the fields of expertise and general areas of law, as appointed by open competition in public universities, who shall also meet the eligibility criteria to become members of the Council.

2. The Rules for Open Competitive Examinations and Background Evaluation for the Appointment of Judges of the Argentine Judiciary were approved by Resolution No. 7/14, issued by the Council in full attendance, as amended by Resolutions No. 95/15 and 235/18. The first Rules were approved by Resolution No. 288/02, as amended by Resolutions No. 367/02, 203/03, 333/03, 52/04, 580/06, 331/07, 350/07 and 47/08; and the second Rules were approved by Resolution No. 614/09, as amended by Resolutions No. 36/11, 84/11 and 181/12.

c) The Committee shall draw four members from this list of evaluators and, pursuant to the OCEBEAJAJ Rules, at least one of them must be a male or female judge, and another one must be a male or female professor in public universities.
d) The competitive examination must be the same one for all applicants and it must "include topics directly related to the office to be held, and must evaluate both theory and practice" (section 13, Law 24,309, as amended).
e) The evaluation panel must take and grade the competitive examinations, whereas the Committee is vested with the power to assess and score the background information. The score obtained must be informed to the applicants, who shall be entitled to raise objections, which will eventually be settled by the Selection Committee.
f) Based on the score of the competitive examination, the background information and the personal interview with the applicants, the Committee shall submit a list of the candidates in order of priority to the Judicial Council in full attendance.
g) Upon receipt of the Committee's opinion, the Council in full attendance

must call for a public hearing and notify, at least, the candidates included in the list. The purpose of such hearing is to assess the eligibility, functional qualifications, and democratic vocation of the candidates.

h) Taking into account the Committee's opinion and the outcome of the public hearing, the Council in full attendance shall decide on the approval of the open competition by an absolute majority of its members and, in this case, submit the binding list of three candidates to the Executive Branch.

i) If the Senate rejects the file of one of the candidates submitted by the Executive, a new open competition must be held to fill such vacancy.

II. A. BACKGROUND EVALUATION

At the meeting held at the Committee for the Selection of Judges and the Judicial College after the competitive evaluation, a member of the Council responsible for the evaluation of the background information of the applicants that took the written examination must be selected by draw. Section 35 of the OCEBEAJAJ Rules defines the background information scoring system

and sets different scores and several scoring methods in accordance with the offices the candidates applied for. The background information must be scored with up to 100 points, and the first classification makes a distinction between the following items: 1. Professional background, up to 70 points; 2. Academic background, up to 30 points.

The following items are assessed in the professional background category, up to a maximum number of points as stated below: 1.a experience, up to 30 points; 1.b field of expertise, up to 40 points.

As regards experience, the following issues are taken into consideration:

- Any experience in the Judiciary or the Attorney General's Office (Defense or Prosecution) and the score is awarded on the basis of the position held and seniority. For example, in open competitions to apply for the office of first instance judge (the scoring is different for appellate judges or judges of the Court of Cassation), the following score is awarded: being an employee, 1 point per year; being clerk at a First Instance court, 2 points per year during the first 5 years of seniority, and 2.5 points per year as of the

fifth year and up to the tenth year; being a first instance judge, 3 points per year.

- Any experience in the "private legal practice and/or holding a public office, and/or in the academic or scientific fields" (section 35 I.b of the OCEBEAJAJ Rules). The foregoing combines mixed types of "background" and the evaluation criteria rely exclusively on seniority, with no regard whatsoever to the position held. For example, in an open competition to hold office as first instance judge: the first two years of seniority add 1.5 points per year; between three and five years, 1.75 points, and between five and ten years, 2 points, regardless of whether such seniority is as private litigant, full professor in a public university or researcher at the National Scientific and Technical Research Council (CONICET as per acronym in Spanish). In addition to making no differentiation, fewer points are awarded if the experience was gained in the Judiciary or the Attorney General's Office; for example, as of the fifth year, a first instance court clerk is awarded 2.5 points per year, whereas a CONICET researcher with the same seniority is awarded 2 points per year.

On the other hand, as regards the category of fields of expertise:

- The time spent in positions that are somehow related to the area of the office applied for is taken into consideration;

- The former offices and ranks are not taken into account. Therefore, to apply for the office of first instance judge, 20 points are awarded for 2 years of seniority in the required field of expertise, regardless of whether those years were spent as an officer of the court, litigant attorney, full professor in a public university or CONICET researcher. The fact that the points awarded for the field of expertise do not take into account the type of position is not a minor issue, because the evaluations to be admitted to and remain at the CONICET and the ones to become an officer of the court do not share the same level of rigorousness, whereas no examinations are required to practice as a litigant attorney.

Finally, the 30 points scored on account of the academic background are distributed as follows:

- Publications (up to 10 points): Up to 3 points per book published as an author on the required field of expertise and up to 1.5

points for books of another subject; up to 0.5 points per paper in connection with the required field of expertise, and up to 0.25 for other papers. It is quite surprising that the publication in indexed journals is not taken into consideration in this category, as opposed to the criteria applied in rigorous scientific fields.

- Teaching positions (up to 10 points): Unlike the experience category, this item –which awards one third of the experience overall score– has into account the teaching position held: the position of full professor by competitive examination awards up to 10 points, and the position of assistant professor, up to 3 points. In all cases, minimum tenure of two years must be shown, but unlike the experience and field of expertise categories, once such minimum tenure has been achieved, the time spent in the position is not taken into consideration.

- Postgraduate studies (up to 10 points): In this category, the scoring system is not very transparent or thorough. Up to 10 points are awarded for a Ph.D., and 8 points are awarded upon completion of the training at the Judicial College. In such an unclear scenario, it would not be advisable to

award almost the same number of points to a Ph.D. and to a training course.

This scoring system shapes and encourages a very specific type of male or female judge, which will be analyzed in detail after explaining the features of the competitive examination.

II. B. THE COMPETITIVE EXAMINATION

In addition to the scoring based on the background, that is, which achievements are taken into account or which ones are more valuable than others, another variable that determines the judge profile is the one that defines the topics to be included in or excluded from the competitive examination. Law No. 24,937 provides little to no guidelines on the competitive examination; it is only provided that the evaluation must be written and that theory and practice shall be assessed (section 13 A.3). On the other hand, pursuant to section 31 of the OCEBEAJAJ Rules, the evaluation of theory and practice is based on drafting a court ruling or a resolution. The evaluation panel is in charge of defining the topics of the written evaluation, which must be no-

tified to the applicants 7 days in advance. The evaluators shall grade the evaluation on the basis of 100 points, and in the event of disagreement, the grade awarded shall be the average grade of one of the members of the evaluation panel.

The written examination fails to include several issues: the ability to gather teams, teamwork skills, examination and cross-examination skills –which are vital in trial– writing skills to draft intelligible rulings, among other issues. Notwithstanding that, the topics to be included in or excluded from the written examination also define the intended profile of male and female judges, which can be analyzed from a critical standpoint.

Regardless of the distinct features of criminal, civil, commercial, labor, administrative and electoral jurisdictions, the courts shall hear cases in a country riddled with all kinds of injustice, in a context of structural unfairness. Although this issue is widely discussed in contemporary political theory, at least in principle and from an analytical point of view, injustice can be classified into redistribution and recognition injustices. The former refers to unfair cases in terms of the distribution of mate-

rial assets (*i.e.* income and wealth), and the latter is associated with despised identities or ways of life. In principle, it could be argued that injustice caused by the distribution of material assets can be settled with equal distribution, whereas the recognition injustice is solved by acknowledging the differences and respect for different ways of life. Finally, it should be noted that distribution and recognition injustices practically coexist in most social groups and depend one on the other, although none of them is a cause or consequence of the other one.[3]

In view of the foregoing, it is worth addressing whether the list of topics included in the evaluations covers any aspects in connection with the redistribution and/or recognition injustices. In other words, it should be questioned whether the applicants to become judges are evaluated in terms of the context of the injustice in which justice will be done. To address this issue within the framework of the Judiciary Administration Studies Laboratory, the topics of the competitive examinations have been studied, and the notions of redistri-

3. As regards the distinction between redistribution and recognition injustices, and the fact that one does not derive from but negatively depends on the other, see Fraser (2003, 2010).

bution and recognition were measured through a legal and conceptual indicator. The legal indicator was based on whether the contents of the International Covenant on Economic, Social and Cultural Rights (IC-ESCR) (as regards the redistribution injustice), the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, also known as the Belem do Pará Convention, and the Convention on the Elimination of All Forms of Discrimination against Women (in connection with the recognition injustice) were included. Conceptual indicators are referred to as class and gender perspective and are not so closed or restricted. For the class perspective indicator, which shows the injustice caused by redistribution, it was assessed whether the evaluation topics included items in connection with poverty, extreme poverty, the Gini coefficient, vulnerable groups, difficulty to access basic utilities. On the other hand, to create the gender perspective indicator –in terms of recognition injustice– it was observed whether any of the following issues were included in the topics: violence against women, dissident genders and sexual iden-

tities, protection of vulnerable groups, the wage gap, glass ceiling, and sticky floor. These conceptual indicators were based not on the legal regulation of these matters, but on whether such matters were included in the social, economic and political category.[4]

It is worth mentioning that, within the scope of the Laboratory, the legal and conceptual indicators were based on issues that should be oblique to any court case. In Argentina, any legal issue is settled in a context marked by redistribution and recognition injustices, and it is vital to know whether the evaluation system encourages the legal and conceptual approaches over the injustice caused by redistribution and recognition. In other words, it should be questioned whether the expected profile of male or female judge is aware of the context of the redistribution and recognition injustices, and has the conceptual and legal

4. For example, the issue of extreme poverty is addressed in the ICESCR, but as regards the conceptual variable, the purpose was to review whether the applicants to become judges are evaluated on the basis of their knowledge on how extreme poverty can be identified, the related financial, social, cultural issues, etc. On the other hand, the gender perspective indicator, related to redistribution injustice, relied on whether the evaluation topics included any of the following issues: violence against women, dissident genders and sexualities, protection of vulnerable groups, the wage gap, glass ceiling, and sticky floor. Once again, the issues generally related to gender-based violence have not been included, but these are found in the list of legal topics, such as sex trafficking.

tools to address such injustices, or whether the judge tends to settle his or her cases without taking into consideration such context. For that purpose, the lists of evaluation topics published between October 19, 2010 and October 22, 2018 were studied, and out of the 144 topics addressed, the following results were observed:

The ICESCR was included in only 3 open competitions.[5]

None of the open competitions evaluated the scope of the Convention on the Elimination of All Forms of Discrimination against Women, whereas in 2 open competitions, the Belem do Pará Convention was included.[6]

Gender perspective was seen in 8 lists of evaluation topics.[7]

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5. Open Competition #314 to hold an office in the Federal Court of General Roca; Open Competition #404 to hold an office in the Federal Court of Mendoza, and Open Competition #413 to hold an office in the Civil and Commercial Federal Court of Appeals in and for the City of Buenos Aires.

6. Open Competition # 369 to hold an office in the National Civil Court of Appeals; Open Competition #413 to hold an office in the Federal Civil and Commercial Court of Appeals in and for the City of Buenos Aires.

7. Open Competition # 267 to hold an office at the National Criminal Court No. 1 in and for the City of Buenos Aires; Open Competition # 367 to hold an office in a Criminal Trial Court; Open Competition No. 369 to hold an office at the National Civil Court of Appeals; Open Competition # 306 to hold an office in the Criminal Trial Courts; Open Competition # 365 to hold offices at the national First Instance Courts on Labor Matters; Open Competition # 366 to

Only one open competition included the issue of class perspective.[8]

According to these results, out of 144 lists of evaluation topics published between October 19, 2010 and October 22, 2018, 133 (92.36%) lists did not include any questions as to any issues in connection with the redistribution and recognition injustices. Furthermore, it should be noted that in the 10 open competitions that did evaluate the foregoing, representing slightly over 7% of all open competitions, 2 of these indicators were included in 3 cases (Open Competitions # 369, 393 and 413).[9]

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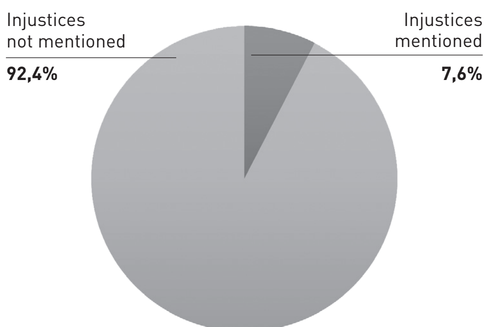
hold offices at the Criminal Trial Courts in and for La Plata; Open Competition # 400 to hold an office in a National First Instance Court on Civil Matters No. 26; Open Competition # 393 to fill a vacancy at the Federal Court of Appeals of La Plata.

8. Open Competition # 393, to hold an office at the Federal Court of Appeals of La Plata.

9. For a more detailed analysis of the lists of evaluation topics, see Judiciary Administration Studies Laboratory (2019: 41-46, and Annex 1).

Figure 1. Redistribution and/or Recognition Injustices in the Evaluation Topics of Open Competitions (2010-2018)



Source: Judiciary Administration Studies Laboratory (2019).

The omission of any topics in connection with redistribution and/or recognition injustices in the evaluation, both from a conceptual aspect as well as from a legal standpoint, is not only a weakness of the evaluation panel that prepared the list of evaluation topics, but also of the Judicial Council itself, and even of the Argentine Congress. The foregoing lies on the fact that such injustices could be included both in the Law regulating the operation of the Council and in the OCEBEAJAJ Rules issued by the Council. On the other hand, although this issue will not be addressed in this paper, the incorporation of perspectives in connection with redistribution and recogni-

tion injustices into the topics of evaluation should translate into an examination panel made up exclusively by attorneys.

II. C. PERSONAL INTERVIEW

Once the competitive examination has been graded, and upon completion of the scoring of background information, the Selection Committee and the Judicial College shall draft the first ranking by order of merit. In this order of merit (?), one of the most relevant aspects is seniority in the Judiciary or the Attorney General's Office, and the written evaluation only assesses the reproduction of strictly legal issues. Now, it is worth mentioning that this doubtful order of merit (it is doubtful because of the exaggerated score awarded for seniority and the limited topics dealt with in the written evaluation) may be modified by the personal interview.

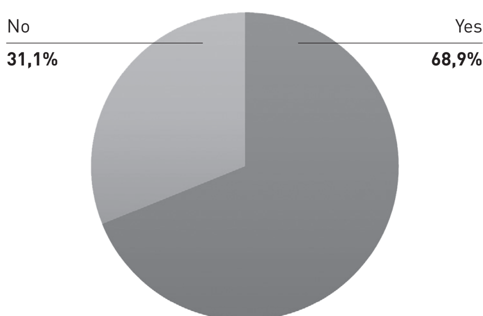
As provided by section 40 of the OCE-BEAJAJ Rules, the Committee shall interview at least the first six applicants ranked in the order of merit resulting from the competitive examinations and the background information. The purpose of the interview is

> to assess the (applicant's) motivation for the position, the eventual performance in the position, the applicant's points of view as regards basic issues of his or her area of expertise and the operation of the Judiciary, the applicant's criteria in terms of the interpretation of different sections of the Argentine Constitution and Supreme Court rulings in judicial review cases as well as on general principles of law. Their work plans, the suggested tools to perform an efficient task and to implement any suggested changes, their ethical values, democratic vocation and advocacy for human rights shall also be assessed (section 41 of the OCEBEAJAJ Rules).

Upon completion of the interview, which must be public, the Committee must approve the list of three candidates, indicating an order of priority. The outcome of the interview, which does not award any specific score, may change the order of merit defined by the background assessment and the competitive examination. Therefore, the interview may modify the order of merit –even as doubtful as such merits may be. In this sense, out of 45 opinions issued between January 2013 and December 2016

by the Selection Committee and the Judicial College, which referred to the completion of the interview process, the order of merit was confirmed or altered in 31 instances, that is, 68.8% of the cases, in more than 2 out of 3 open competitions, the order of merit was modified after the personal interview.

Figure 2. Changes to the Order of Merit after the Personal Interview (2013-2016)



Source: Judiciary Administration Studies Laboratory (2019).

If we read again section 41 of the OCE-BEAJAJ Rules, it can be observed that the evaluation criteria of the interview are, on one hand, related to the operation of the Judiciary, knowledge of the Argentine Constitution and any other general features of the legal system; and, on the other hand, to the work plans to be implemented, the democratic vocation and respect for human

rights. As it can be seen, the first part of the issues to be taken into account overlaps with the topics assessed in the written competitive examination, and quite oddly, these are the reasons that (supposedly) cause a change in the order of merit after the interview. In the 31 opinions in which the order of merit is modified, the grounds for such decision are generally in connection with the knowledge of the Judiciary and the office to be held; commitment with the judicial task; sufficient technical knowledge and remarkable command of authors' opinions and case-law; previous experience in lower rank positions (this variable is subject to evaluation and is quite relevant in the background information evaluation category). Furthermore, general reasons which are difficult to prove and quantify are stated, such as consistent and clear arguments, common sense and caution, adequate use and organization of time when providing answers, high motivation to fill the position applied for. This way, the interview changes the order of priority built on the basis of criteria (?) of merit (?), paradoxically using very similar variables to the ones already assessed to set up such order of merit. The interview seems

to replicate the logic applied in the competitive examination and, in a lesser degree, the background evaluation, but the results fall under no scoring system whatsoever (as in the case of the background evaluation), and they are not anonymously graded (as in the case of the competitive examination).

III. (LACK OF) CRITERIA IN THE SELECTION OF MALE AND FEMALE JUDGES

The selection process is marked by a grading system that gives precedence to seniority in similar positions (although these are lower-ranked positions than the ones applied for); seniority is valued just for what it is, so the meritocracy is quite arguable in this case. Moreover, the competitive examination fails to assess knowledge in terms of redistribution and recognition injustices, both from a conceptual and legal point of view. Finally, in two-thirds of the cases, the resulting score awarded to the competitive examination and the background information evaluation is modified with discretionary criteria which, paradoxically, rely on issues that had already been graded.

Before the creation of the Judicial Council, judges were selected by the Executive, which provided the Senate with a list of one candidate to hold the office of judge, not supported by through criteria. This does not mean that all selections were made on an arbitrary basis, but the Executive could apply different criteria to appoint one or another judge. After the creation of the Judicial Council and the implementation of open background evaluation and competitive examination, it could be expected –or required– that a series of through criteria are applied which, in turn, shape the kind of male or female judge to be incorporated into the court structure. Now, based on the Council's rules and practices, it can be concluded that: the thorough criteria are not attractive, and that the system cannot ensure that the three proposed candidates are the best ones, even considering such unattractive criteria.

The unattractiveness of the thorough criteria, once again, is shown by the problems caused by limiting background information to mere seniority in office within the structure of the Judiciary or the Attorney General's Office. The exaggerated weight given to seniority in positions subject to no

accountability or periodic evaluations turns the mere passing of time into the most relevant variable to score background information. Furthermore, the written examination makes it impossible to assess other aspects of the judges' work, when the written form is limited to the drafting of a ruling or resolution with no assessment of any issues in connection with redistribution and recognition injustices. This way, the prevailing criteria in the selection process is to show as many years of service in a position similar to the one applied for, and taking a written examination that is quite similar to the everyday tasks performed in that similar position.

In a way, the aforementioned criteria imply the mere reproduction of the judge's current work. Although there are certain nuances, this implies that the positions applied for are to be held by applicants with long-term experience in similar positions. But if these criteria are followed, the system does even not ensure that the candidates included in the list are the best ones. This is shown by the fact that, based on the sample under study, in more than two-thirds of the cases, the interview with the

Council modifies the order of merit resulting from the background information and the examinations. Therefore, the system only ensures that the three candidates have passed an examination with poor topics of evaluation, and encourages having previous experience in a similar position, although, this cannot be guaranteed on account of the potential modifications after the interview.

The starting point of this critical review on the selection mechanisms was a worrying or at least disturbing issue: in a democratic system, male and female judges are not elected by the people. But this review entails a continuity, which is as much or even more disturbing, that will be addressed below: male and female judges shall not be accountable to the citizenship and they cannot be removed by the popular vote. Based on this disturbing starting point and this alarming continuity, it is worth studying the accountability mechanisms implemented in positions not democratically elected and practically held for life.

IV. DISCIPLINE AND REMOVAL OF MALE AND FEMALE JUDGES

Under the 1994 constitutional reform, judges that attained the age of 75 years shall be reappointed by the Senate;[10] before said reform, judges were to be removed by impeachment, but since the reform, such mechanism is only applicable to Supreme Court Justices; in the case of lower court judges, the Judicial Council and the Jury must be involved in the process. On the other hand, before the 1994 reform, judges could only be subject to disciplinary sanctions imposed by any of the higher instances: the court structure itself had the power to impose sanctions on its members. After the reform, the Judicial Council has been vested with disciplinary powers over judges, a power that before 1994 was exercised by the Supreme Court only, and it may warn or caution judges or impose fines of up to 50% of their wages. Some issues in the removal of judges will be addressed below, and the

10. Section 99(4) of the 1994 constitutional reform provided that judges who attained the age of 75 shall be reappointed by the Senate for a term of another five years. In 1999, in the "Fayt" case, the Supreme Court rendered these provisions ineffective, but in 2017, in the "Schiffrin" case, this provision was enforced once again.

remaining disciplinary mechanisms will be critically reviewed afterward.

IV.A. JUDGES REMOVAL AND JURY

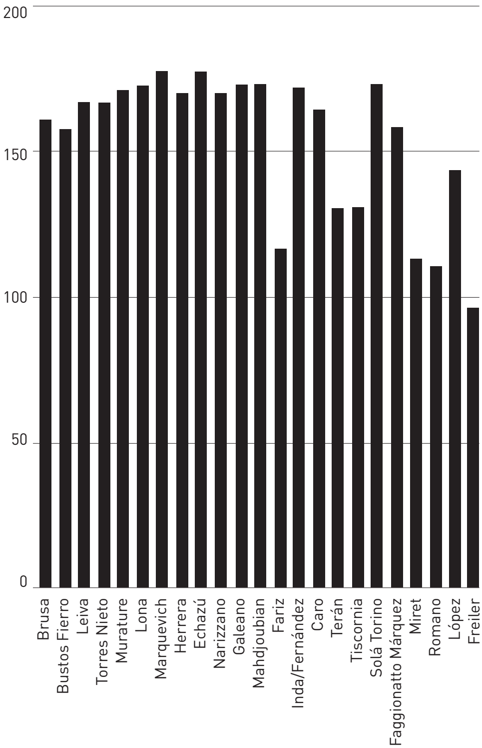
The Judicial Council may accuse or suspend judges on the grounds of poor performance, professional misconduct or ordinary offenses. The Discipline and Prosecution Committee is the body in charge of hearing the accusations against judges, and from its onset, 45 opinions containing accusations for poor performance and/or professional misconduct were issued, 37 out of which were admitted by the Judicial Council in full attendance, whereas 8 ones were dismissed. On the other hand, the Jury is the body in charge of removing or maintaining the accused judges in their offices.

In principle, the proceeding before the Jury should not be too extensive, given that the maximum term is 105 days (the law does not specify whether these are business or non-business days). Once the accusation has been filed by the Council, the judge is granted a term of 10 days to answer such accusation, and evidence shall be produced within a term of 30 days,

which can be extended for another 15 days. Upon lapse of the term for the production of evidence, both the representative of the Judicial Council filing the accusation and the accused judge shall draft a final report within a term of no more than 30 days. Once the final reports have been filed, the Jury shall issue a ruling within no more than 20 days.

The maximum term of 105 days was not complied with in any of the cases heard by the Jury: the proceeding brought against judge Romano lasted 112 days, and it was the closest one to the required term; the proceedings brought against judges Marquevich and Echazú were the ones that lasted longer, 180 days. The average duration of these proceedings is 156 days, from the filing of the accusation until the settlement of the case.

Figure 3. Duration of Proceedings Brought Before the Jury (1999-2019)



Days lapsed between the accusation and the ruling

Source: Judiciary Administration Studies Laboratory (2018).

The first proceeding brought before the Jury commenced on September 1999 and, since then, 36 accusations were filed, but these have not translated into 36 rulings from the Jury, because 13 accusations

were concluded before the ruling: one of them for irregularities found in the accusation, another one for removal of the judge as a result of another proceeding, and eleven ones due to the resignation of the accused judge. That is, almost one out of three accused judges resigned from their office before the ruling of the Jury. This is not a minor issue, because the resignation terminates the proceedings and, indeed, the alleged individual liability or the structural problems of the Judiciary never come to light.

Out of 23 rulings entered by the Jury, the accused judges were removed from office in 18 cases, and judges continued in their office in 5 cases. In order to remove a judge from his or her office, the agreement of two thirds of the Jury members is required, and 16 out of 18 removals from office were grounded on poor performance, 2 out of 18, on poor performance and offenses (either offenses committed in the fulfillment of their duties or common offenses), and no distinction was made on the exclusive ground of commission of offenses (either offenses committed in the fulfillment of their duties or common offenses). Out of

23 cases, 11 ones were settled by unanimous vote, whereas 12 cases had dissident opinions. Finally, as regards the jurisdiction and instance of each of the judges subject to a proceeding heard by the Jury, most of the judges accused and removed from office were first instance judges in federal courts in the provinces.[11]

Judges Brought Before the Jury Classified by Instance

First Instance Judges	Appellate Judges	Criminal Trial Court Judges
17	5	1

Judges Brought Before the Jury Classified by Jurisdiction

National Judges	Federal Judges in the City of Buenos Aires	Federal Judges in the provinces
5	3	15

Judges Removed from Office Classified by Instance

First Instance Judge	Appellate Judges	Criminal Trial Court Judges
14	3	1

11. For more details, see Judiciary Administration Studies Laboratory (2018: 29-32, and Annex 1).

Judges Removed from Office Classified by Jurisdiction

National Judges	Federal Judges in the City of Buenos Aires	Federal Judges in the provinces
4	3	11

IV.B. ACCOUNTABILITY AND DISCIPLINE

A judge is removed from office upon serious misconduct,[12] but judges may be suspected to implement other less serious practices that should not translate into removals from office but into some kind of redress, reproach or even sanctions. The only control and accountability institutional mechanism over judges is horizontal and operates under the scope of the Judicial Council; judges may be subject to disciplinary sanctions as a result of the accusations filed by private individuals, Judiciary officials, and the members of the Council themselves.

As provided by section 14 of Law No. 24,937, sanctions are imposed in the event of disciplinary offenses, as listed in the law: 1. Breach on the regulations currently in

12. For a brief reference to the grounds of removal from office due to misconduct, see Judiciary Administration Studies Laboratory (2017: 39-43).

force as regards incompatibility and prohibitions to hold office in the Judiciary; 2. Disregard or disrespect to other judges, officers, and employees; 3. Improper treatment of attorneys, expert witnesses, assistants, and clerks, or litigants; 4. Disrespect of the judicial functions, democratic institutions, human rights or any actions compromising the dignity of the position; 5. Reiterated breach of procedural rules and regulations; 6. Repeated absence from work or repeated non-compliance with work time schedules; 7. Non-fulfillment or negligent fulfillment of the duties and obligations defined in the Rules and Regulations for the Argentine Judiciary.

The sanctions are decided by the Council in full attendance, by the absolute majority of the members present, after filing of the opinion of the Discipline and Prosecution Committee. This proceeding is regulated by Resolution No. 98/2007 issued by the Council itself on March 22, 2007. Upon filing of the accusation, the Committee shall select the reporting member of the Council by draw, who may suggest the *in limine* dismissal of the accusation or open an investigation; in such a case, the accusation shall

be notified to the judge, who shall exercise his/her right of defense in writing, and may also challenge the members of the Council for grounds of family ties or manifest hostility. After an investigation in which all types of evidence are admitted, the reporting members of the Council shall write a draft opinion, and then the Committee shall propose the Council in full attendance: a) that the accusation be dismissed; b) that a disciplinary sanction be imposed; or c) that the removal proceeding be commenced before the Jury and that the judge be eventually suspended. Finally, it is worth mentioning that pursuant to Law No. 24,937, "the decision to commence a removal from office proceeding shall not take longer than three (3) years as of the time when the accusation was filed against the judge" (section 7(15)). Furthermore, it is added that "upon lapse of the aforementioned term, if the Committee failed to address the case, it will be immediately heard by the Council in full attendance". These provisions allow for different interpretations, for instance, that after three years, the removal from office proceedings cannot be commenced, but disciplinary sanctions may indeed be

imposed. Nevertheless, as observed from practice, upon lapse of this term, the Council dismisses the cases on the grounds of lapse of the required term.

In order to review, at least in part, the effectiveness of the control and accountability mechanism before the Judicial Council, all resolutions issued by the Judicial Council in full attendance between January 1, 2014 and December 31, 2017 on the accusations against judges have been studied within the scope of the Judiciary Administration Studies Laboratory. Within this period, the Council issued 1,126 rulings in connection with accusations against judges, which can be broken down as follows: 281 in 2014; 167 in 2015; 444 in 2016; 234 in 2017.

The accusations against the judges can be settled as follows: a- dismissal of the case; b- disciplinary sanctions; c- commencement a removal from office proceeding and suspension of the accused judge. The dismissal of the case may be: a.1- grounded, that is, invoking the reasons why such accusations do not fall within the scope of a disciplinary breach and/or have not been properly shown; a.2- *in limine*, that is, when the accusation is clearly irrelevant and the

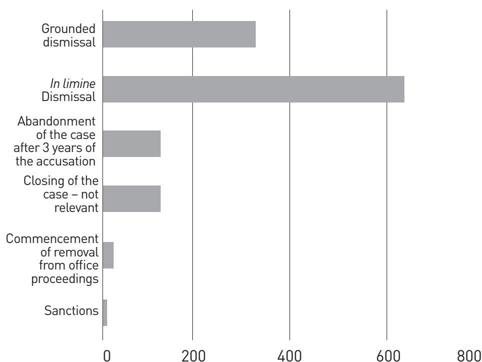
facts are not properly argued. On the other hand, sanctions may be b.1- a warning, b.2- a caution, b.3- fine up to fifty percent (50%) of wages. Finally, there are other possible ways of settlement: d- abandonment of the case for lapse of more than three years from the filing of the accusation; e- closing of the case due to resignation of the accused judge or for similar reasons; f- joinder of the accusation with other cases.

Our study addressed the issue of how the Council settled the accusations, and this was classified as follows: grounded dismissals of the case;[13] *in limine* dismissal of the case; abandonment of the case after 3 years; closing of the case; imposition of sanctions; commencement of proceedings before the Jury. Considering all of the period under study, the way in which the accusations were settled can be broken down as follows: a- Grounded dismissal of the case: 27.44% (309 cases); b- *In limine* dismissal of the case: 54.53% (614 cases);

13. In the case of grounded dismissal, a distinction could be drawn between dismissals based on procedural grounds –often in connection with the lack of evidence of the claimed breaches, or formal defects in the accusations– and the ones based on legal grounds, where there are insufficient facts at issue so as to amount to a breach, or these facts are intrinsic to the judge's functions and cannot be sanctioned. For more details on the procedural and legal grounds, see Judiciary Administration Studies Laboratory (2018: 48-54).

c-Abandonment of the case after 3 years from the accusation: 8.61% (97 cases); d- Closing of the case: 8.88% (100 cases); e-Commencement of removal from office proceedings: 0.36% (4 cases); f-Sanctions: 0.18% (2 cases). As far as I can see, there are different ways to interpret Figure No. 4, but regardless the number of sanctions and removal from office proceedings actually commenced, the most disturbing conclusion shows that almost three out of four accusations are settled without ruling on the merits of the case, because these are *in limine* dismissed, declared not relevant or closed after the lapse of three years.

Figure 4. Accusations Settled by the Judicial Council Classified by Ways of Settlement (2014-2017)



Source: Judiciary Administration Studies Laboratory (2018).

In the period under study, the cases in which accusations were filed were the cases of Rodolfo Freiler (Ruling No. 275/17), Néstor Montezanti (Ruling No. 232/15), Raúl Juan Reynoso (Ruling No. 268/15), and Axel Gustavo López (Ruling No. 303/14). On the other hand, a fine was imposed on judge Bonadío in 2014. The accusation was filed by a non-government organization due to the lack of action of the judge in a criminal case in connection with the sale of Tandanor (Talleres Navales Dársena Norte). The Council understood that the judge's inaction implied an alleged lack of diligence, and imposed a fine of 30% of the judge's monthly wages (Ruling No. 313/14). Notwithstanding that, the following year, the Supreme Court reversed the ruling because the fine was imposed after the maximum term of three years set forth by Law No. 24,937 had lapsed.[14] Furthermore, in 2015, the Council imposed a caution on judge Olga Pura Arrabal, who had removed copies from a file of her court to use it as evidence in another case in which she was a plaintiff (Ruling No. 19/15).

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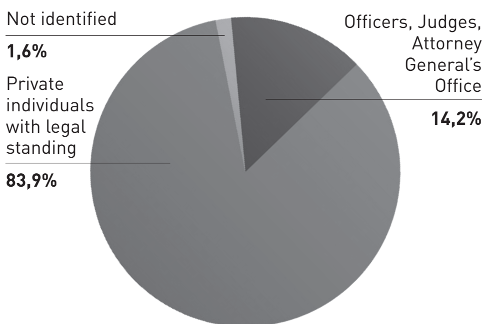
14. Supreme Court of Justice "Recurso- Bonadío s/ Res. 313/2014 del Consejo de la Magistratura" (Appeal- Bonadío *in re* Judicial Council Ruling No. 313/2014), ruling from August 20, 2015.

Besides, it is interesting to address the issue of the accusing parties. Out of 1,126 accusations that were settled in the period under study, 945 accusations (83.92%) had been filed by private individuals with sufficient legal standing, 160 accusations (14.21%), by officers or judges of the Judiciary or the Attorney General's Office, 3 accusations (0.27%) were investigations that had been opened due to accusations filed by the members of the Council, and in 18 cases (1.6%), the origin of the accusation could not be identified.

Figure 5. Accusations Settled by the Judicial Council Classified by Type of Accusing Parties (2014-2017)



Source: Judiciary Administration Studies Laboratory (2018).

As seen in Figure No. 5, the percentage of accusations filed by private parties is six times the number of investigations opened due to accusations filed by officers and judges of the Judiciary and/or the Attorney General's Office. This interesting datum must be crossed with another one indicating that the percentage of *in limine* dismissals of the accusations filed by private parties is three times the percentage of the accusations filed by officers and judges: out of 945 accusations filed by private parties with sufficient legal standing, 574 (60.74%) were dismissed *in limine*, whereas out of the 160 accusations filed by judges or officers, only 39 (24.37%) were dismissed *in limine*. These data indicate an interesting and disturbing paradox: the ones who file more accusations, that is, private individuals, invoke grounds that are not addressed by the Council. In contrast, the scope of the facts at issue claimed by those who file the lowest number of accusations, *i.e.* officers and judges, is indeed addressed. In light of this data, it could be suspected that those who are really aware of the disciplinary breaches of judges are the officers of the judiciary, who omit to report actions known

by them for different reasons. This suspicion can be confirmed on the indication that when they make an accusation, the grounds surpass the minimum evidentiary threshold and the Council cannot dismiss the accusations without any grounds, *i.e. in limine,* and it must address the facts at issue and the arguments showing that a disciplinary breach has been committed.

IV.C. ACCOUNTABILITY AND DISCIPLINE?

Addressing the issue of the removal from office proceedings is not easy, given that each case should be reviewed more in detail. In this sense, it would not be advisable to jump into conclusions by saying that there were numerous removals from office or that these were fewer than expected. Without any rush, it could be argued that, in general, the accusations and removals from office were caused by extremely serious breaches, and it is not easy to know for sure whether these breaches are more often than the ones that translated into prosecutions. In this scenario, also without jumping into conclusions, it could be asked what happens in the case of minor breach-

es, which are surely more frequent and occur in everyday life, and which are not so serious to give rise to an accusation before the Jury, but should be reproached and corrected instead. In view of this question, the conclusive outcome of the rulings could not be set aside: in the 2013-2017 period, out of 1,126 accusations, only two sanctions were imposed. Although a more extensive study has not been conducted, these four years are not the exception, given that in the 1999-2017 period, only 44 sanctions were imposed, 14 of which were merely fines.

If in the four-year period only 2 breaches by the judges were subject to a caution by the Jury instead of an accusation; from an institutional standpoint, it is difficult to find a logic in the financial, symbolic and institutional resources triggered by the accusations filed before the Council year after year, if the almost unanimous rule is that the judges fulfill their duties without any fault. Another interpretation would be that, in fact, the judges are righteous because they know that even if they commit a minor breach, the Judicial Council will be ruthless. Finally, a third interpretation would be that it is not so true that the Judiciary is almost

perfect, that in four years, the behavior of many more than 2 judges should have been sanctioned and corrected, but for different reasons, the Council has not operated properly or the judges' actions were not even reported and were left unpunished, and are also repeated and reproduced.

Within the three scenarios described above, in the second one, the less likely to happen, the system seems to be (too) efficient. However, in the first scenario, the accountability required by the Council is useless, because there is no point in monitoring a structure such as the Judiciary, which seems to be operating smoothly. In the third scenario, the Council's system is pretty useless, because its structure is inefficient in terms of judges' accountability. How the accusations are addressed and settled is questionable in terms that reproachable actions are not reported and, in that case, other accountability mechanisms, such as audits, should be implemented to effectively review the work of the judges with no need of relying solely on accusations. Regardless of the differences, the two more likely scenarios have in common the need to modify

the monitoring system, either because it is not necessary or because it is harmless.

V. FINAL REMARKS

The aim of this paper is to show certain deficiencies in the system for the selection, removal, and discipline of male and female judges. As regards the selection system, the alleged meritocratic criteria were minimized because they were lost in a system in which the mere seniority in similar positions is rewarded. Furthermore, as it was highlighted, this situation becomes even worse with the discretionary matrix of the personal interview over this doubtful meritocratic scheme. On the other hand, regardless of the cases of removal of judges from office, the system is quite useless as an accountability mechanism.

Therefore, we have a system for the selection of judges which is almost for life and doubtfully meritocratic; judges hold positions in a structure that lacks accountability mechanisms. It is evident that these two issues depend on one another: the selection system is not remarkable at all, and it is implemented for positions in which no

accountability is required; conversely, there are no accountability systems in the positions applied for, which are held without the popular vote and almost without meritocratic criteria.

The foregoing must not be seen as a personal accusation against certain male or female judges, who in many cases are more than qualified and perform their tasks adequately and cannot be scorned for their behavior or performance. Instead of addressing specific cases, this paper aims to assess the structure beyond the individuals. This should neither be seen as an encouragement of the meritocratic systems with horizontal accountability. This critical analysis must be based on a scenario where there is still a risk of considering something that should be an exception a rule, maybe only as regards certain jurisdictions or instances: the people are completely absent from the selection and accountability of judicial officers. Finally, it should be seen in a context where it is impossible to think of non-comprehensive alternatives, given that the best selection system becomes obsolete if there are no accountability mechanisms. Likewise, even if we had the best account-

ability systems, these would be of no or little use if access to holding such offices is so unattractive.

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ISBN 978-987-4110-36-7
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