

## Seeking efficient management for the judiciary: An agenda under construction?

Buscando uma Gestão Eficiente para o Judiciário:  
Uma Agenda em Construção?

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### ABSTRACT

The purpose of this theoretical essay is to reflect on the current discussion about the management of the Judiciary. We are currently living in a moment of rupture, in a scenario of disproportion between the offer of services and the number of conflicts to be resolved. Co-production has been advocated as an alternative through the participation of users of these services in decision-making. For this discussion, we bring in the New Public Management that proposes reforms based on the same logic of action that governs private companies. And the New Public Service, which defends productivity and efficiency in a larger context of democracy and public interest. We conclude that there is no dichotomous thought in the construction of a management model that is coherent with the difficulties and the complexity of the provision of justice. But there is a rupture with the conservative past, the search for a new identity, without losing its legitimacy and commitment to democratic principles.

**Keywords:** Judiciary, Coproduction, New Public Management, New Public Service

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## RESUMO

A proposta deste ensaio teórico é fazer uma reflexão sobre a atual discussão acerca da gestão do Poder Judiciário. Vive-se um momento de rutura, num cenário de desproporção entre a oferta de serviços e a quantidade de conflitos a serem sanados. A coprodução tem sido defendida como uma alternativa através da participação dos utilizadores destes serviços na tomada de decisão. Para esta discussão, traz-se a Nova Gestão Pública que propõe reformas a partir da mesma lógica de ação que rege as empresas privadas. E o Novo Serviço Público, que defende a produtividade e a eficiência num contexto maior de democracia e interesse público. Conclui-se que não há um pensamento dicotómico ao se construir um modelo de gestão coerente com as dificuldades e a complexidade da prestação jurisdicional. Há sim rutura com o passado engessado, busca por uma nova identidade, sem perder a sua legitimidade e compromisso com os princípios democráticos.

**Palavras-chave:** Poder Judiciário, coprodução, nova gestão pública, novo serviço público

## 1. Introduction

This theoretical essay proposes to reflect on what is currently being discussed for the management of the Judiciary. The Judiciary, which has been the target of criticism due to the so-called “judiciary crisis”, is going through a moment of rupture and reflection regarding the new directions of a management that responds to social yearnings and gives it more dynamism and flexibility in face of the scenarios that present themselves.

Over the years, the Brazilian public administration has undergone changes in its management, being constituted by different approaches that range from a patrimonial perspective, where private interests and the State were mixed, to the bureaucratic State, where efficiency, standards and use of rationality and formalism were proposed, to the managerialist State, focused on results and performance, where one seeks to tune the logic of the market to the *modus operandi* of the Brazilian State. Although the characteristics of these main approaches are mixed, showing remnants of old customs coexisting with new contexts, the Brazilian public administration has been an inspiration for different schools of administration to defend practices, tools, fads, among other possibilities that leverage the State that increasingly needs to provide quick answers to a world thirsty for changes and innovations.

This discussion on the management of the Judiciary is divided in this essay into five parts.

After the introduction, in the second topic we will deal with the main aspects that characterize the current context of this management. The crisis of the Judiciary and the efforts made to overcome it; the understanding or “new understanding” of its role before society and new alternatives for the provision of services expressed in the co-production mechanisms.

The third topic addresses two main currents in Public Administration. The New Public Management which advocates reforms that boost efficiency and agility through the logic of action of private companies. And the New Public Service, which proposes productivity and efficiency within a broader context of democracy and public interest.

In the fourth part the answers found in this search for greater efficiency in the Judiciary are discussed, presenting some of these coproduction mechanisms, their characteristics and repercussions for management.

Finally, some final considerations are made regarding this garment that is being proposed for the Judiciary. Will it be a continuation of practices and tools used by the market? Will it innovate? Or will it be a mixture of distinctive formats that best suits its *raison d'être*? Is the management of the judiciary an agenda in the making after all?

## **2. What can be said about the management of the judiciary?**

One of the aspects that must be reflected upon when understanding the management of the judiciary is its role before society. There are two views on this, some authors understand that the Judiciary is a decision-maker and that the authority of the judges removes a provision of services character from judicial activity. The second view already encompasses the Judiciary as a service provider, since it meets specific social demands, in the form of public services. Gomes and Moura (2018) defend the Judiciary as a major service provider and that it should be managed based on this understanding. Variables such as the significant increase in the social demand for justice, the large number of congested cases, the increasing judicialization of conflicts, and especially the judicialization of public policies (revealing the disbelief in traditional representative institutions), have overburdened judges and courts and demanded new ways for the Judiciary to think and meet its demands. The so-called crisis of the Judiciary brings to light, as Calmon (2015) points out cited by Junior and Nascimento (2018), the disproportion between the supply of services and the number of conflicts to be solved.

Achutti (2014) points to the limitations of the Brazilian legalist juridical culture and the need to recognize the importance of the radical democratization in the way citizens access Justice services, reducing the gap between formal access to the Judiciary and material access to Justice.

Grangeia (2013) considers that this Power was not prepared to receive the excessive and growing number of demands resulting from this unrestricted access to jurisdiction. Magistrates and servers did not see the notary offices as production lines that needed to be managed. According to the author, the Judiciary has sought to adapt itself to a new context of changes in the scenario of public organizations,

which prioritizes greater dynamism, quick responses to trends, and meeting the needs of citizens. He understands that in face of the difficulties encountered in the judiciary crisis, the judiciary has been trying to provide answers to social changes. In the meantime, it emphasizes the relevance of giving priority to managerial problems, since there is an unpreparedness of magistrates and servers in dealing with this work overload, inefficiency in the distribution and use of material resources, and the absence of a culture of administrative management.

Resolution N.198, of 2014 of the National Council of Justice, which provides for the Planning and Strategic Management of the Judiciary, in its appendix, describes as its mission “To Accomplish Justice” and as its vision “to be recognized by society as an effective instrument of justice, equity, and social peace”, identifying aspects for the desired scenario of the Judiciary for the 2015/2020 sexennium such as: a more accessible justice, de-judicialization, decongestion of the Judiciary, timely justice, public probity, professional valorization, among others. This demonstrates, for the Judiciary 2020 strategy, a concern with the image and strengthening of the institution, the need for a greater interface with society and its expectations, transparency in public spending, with control and inspection measures, the modification of a culture of excessive judicialization, as well as the importance of valuing employees, humanizing work relationships.

Junior (2018), when evaluating accountability actions in the State Courts of Justice for the period 2005-2015, identifies advances in initiatives such as management based on statistical data, placing the National Council of Justice as the main actor in the guidance and direction regarding the strategic planning of the National Judiciary; the institution of the Judiciary’s Statistics System and the availability of this data in the “Justice in Numbers” report; the institution of segmented and anticipated goals in order to enable the planning and budgetary forecast of actions that would lead to the fulfillment of the objectives; and initiatives that would strengthen democracy and the Republic, such as the prohibition of hiring people with a “dirty record” and the priority service to the first degree in the Courts of Justice.

For Gomes and Moura (2018), there should be a change in the attitude of judges and managers in relation to users of judicial services, expanding their participation from the operational level all the way to strategic decision-making levels. This mechanism, referred to as coproduction, would allow for the provision of innovative services and the reduction of congestion in the courts. A network of permanent relationships should be created, allowing different internal and external actors to participate in strategic planning, definition of goals and objectives, thus including expectations and criticisms of the recipients of the services. Creating internal efficiency in the Courts would not be enough to improve judicial perfor-

mance, the authors argue that there should be a search for effectiveness through the participation of users. In other words, internal efficiency and effectiveness would contribute to innovation and the formation of sustainable Courts in the provision of jurisdictional services.

These expressions of coproduction, which are already beginning to appear in the Brazilian judiciary are, for the authors, still the beginning of a new phase. And it suggests that new judicial services be shaped based on coproduction. For this to occur, it becomes necessary to change the way those services are provided, which affects the relationship between the judge and the users, and the performance of the managers of the Courts and Judiciary bodies. The judge's profile, how he perceives his profession and conducts his work, may even be an important indicator of how the user is perceived in terms of their contribution to the services, whether passive or capable of exerting strategic influence, increasing improvements. Therefore, judges who value the resolution of social problems in their work would tend to reinforce this participatory role of the user, unlike those who value the strict application of the law, where the user would tend to be seen as having a passive role.

Within the mechanism of coproduction is evident the deposit of many expectations and the certainty that it would be the remedy for the problems of the slowness in judicial proceedings, the growing congestion and the discredit of the population in relation to the judiciary. But what do the main currents of public administration defend with regard to management? This is what will be discussed in the next topic.

### **3. New public management or new public service?**

When reflecting on which management model would be more suitable for the Judiciary, the New Public Management and the New Public Service currents inevitably arise in this discussion.

According to Ribeiro and Mancebo (2013), as quoted in Fernandes (2016), public service has been undergoing changes since the 1980s, with proposed reforms that generate efficiency and agility based on the same logic of action that governs private companies. This is what is called the New Public Management.

Denhardt and Catlaw (2017), when discussing the New Public Management, quote the fiscal crisis of the 1970s and the efforts to shape a government that would function better and cost the State less. They relied on fiscal austerity measures, improved public productivity, outsourcing, and privatization, identifying solutions to government issues through economic calculation. Public administrators, in turn, began to focus on accountability and high performance. According to Pollitt (1990) as quoted in Denhardt and Catlaw (2017), management came to

be understood as a fundamental piece, giving the public manager a “freedom” that could not be curtailed by bureaucratic impediments, villains of productivity and performance.

It just so happens that this mercantile logic weakens aspects relevant to the proper functioning of public service, such as impartiality, equal treatment, and the ethics of the common good (Ramos, 1989 & Chanlat, 2002 as quoted in Fernandes, 2016). Bessière (2019) highlights the effects of this subordination to economic logic, highlighting the example of France, where New Public Management was presented as the miracle recipe in allowing the management of the public sector to be subordinated to the imperatives of profitability. For the author, the consequences of this new managerial proposal for the French public administration were not so successful. He refers to a study conducted at a university in eastern France, where a significant increase in occupational diseases among professors and research professors was identified. In view of the budget reduction measures for research, a large number of professors noted a relevant impact on the quality of their academic output, attributing this situation to overwork, due to the difficulty of reconciling teaching and research. Among the psychosocial problems and risks detected, those that stood out mainly were states of suffering and uneasiness; as well as situations of fatigue and stress; demotivation, violence and, finally, an imbalance between professional and private life. Hospitals have also been the target of these situations. Public agents in the hospital service have suffered serious dilemmas: lack of autonomy, ethical conflicts, degradation of interpersonal relationships at work seen as factors of burnout and of psychosocial risks at work.

And it was these gaps left by the managerialist approach that brought to the surface the need to perceive the singularities of the State and its management. Denhardt and Denhardt (2000) as quoted in Fernandes (2016), propose the New Public Service (NSP) approach, in which public management should be underpinned by democratic principles and citizen participation. Fernandes (2016) argues through this current that productivity and efficiency should be inserted in a larger context of democracy and public interest, through a substantive reason. The New Public Service points out a different path for public administration, where their greater closeness and cooperation between servers and citizens. The citizen participates in the decision-making process, aided by public administrators who act as intermediaries for that interaction.

Denhardt and Denhardt (2007) as quoted in Denhardt and Catlaw (2017) describe the New Public Service as a possible and alternative path to the old public administration and the new public management. And they set out seven principles important to the development of this New Public Service: Serve citizens and not consumers, where government and citizens work together for the benefit of

civil society; Pursue the public interest, the purpose of the government is distinct from the purpose of a business, the responsibility of the government is to provide citizenship and serve the public interest; Give more value to citizenship and public service than entrepreneurship, the role of the public administrator is not to manage consumers, but to serve citizens; Think strategically and act democratically, public organizations should stimulate the involvement of citizens in both the formulation of public policies and in their implementation; Recognize the complexity of accountability, identifying it not as a mere set of performance measures, but encompassing a balance between norms and responsibilities in the light of external controls, professional standards, citizens' interests, moral issues, and public interests; Serve rather than lead, wherein public servants should exercise a leadership based on values that help citizens satisfy shared interests rather than trying to define the paths of society; and finally, value people and not just productivity, public organizations should operate through collaborative and leadership processes, with respect for people at its core.

The New Public Management encourages, as a counterpoint, the adoption of techniques from private administration and with values from the business world. It defends ideas that transcend the initial concern with improving the quality of government service, representing the interests of the so-called "clients" instead of sustaining the continuous quest for public interests, which are expressed by the citizens. To think of a production line for public administration activities, along the lines of the business world, is to disregard the specificities of public service. Denhardt and Catlaw (2017) exemplify services such as traffic fines or imprisonment, which are certainly not desirable by beneficiaries, thus mischaracterizing a mere consumer relationship.

Managerialism for Gaulejac (2007) as quoted in Fernandes (2016), expresses an ideology allied to instrumental rationality, limiting human activities to results and indicators. It moves away from foundations such as solidarity, cooperation, and the common good. Therefore, what public organizations risk losing most with the use of these tools and models coming from the market, in the view of Chanlat (2002), is public interest.

Denhardt (2012) as quoted in Fernandes (2016), highlights communication and participation as relevant to public service, and public administration should be a locus of promoting the good for everyone, which requires a greater sense of social responsibility and mutual aid. The public servant must exercise supported by values to help citizens, with commitment, integrity, and respect.

Faced with different visions of logics of action, but not antagonistic as to the purpose of providing greater dynamism in public services and deliveries to soci-



ety, the alternative paths proposed for a more efficient Judiciary will be discussed in the following topic.

#### **4. Responses to the quest for greater efficiency in the judiciary**

The Brazilian Judiciary has been reacting to criticisms and social changes and using alternative forms of conflict resolution such as mediation and restorative justice, and more dynamic structures to meet the growing demands, an example of which are the special courts.

Junior and Nascimento (2018) defend in the adoption of alternative mechanisms of dispute resolution, defend the expansion of the notion of access to justice, giving back reconfering parties with the possibility of resolving a dispute without interference from a third party.

According to Warat (2018), mediation is an alternative way together with the other to resolve legal conflicts without having the concern of fixing the agreement to the provisions of positive law. It is a new attitude and vision in the way of managing conflicts, which traditionally were handled through the eyes of the law. The author reasons that the social practices of mediation generate autonomy, democracy, and citizenship since they educate and facilitate the understanding of differences and help reach decision-making without the help of third parties.

Pozzatti Junior and Kendra (2015) defend and define mediation as an ecological way to solve conflicts, in replacement of the mere application of legal sanction by a third party (the State), establishing integrity and humanization of man deriving from autonomy and emancipation. As well as being an alternative for the expansion of access to justice. Mediation, therefore, can serve as a complement to the jurisdictional activity, assisting as an important service that allows for the transformation of the people involved and the psychological sense of justice.

With regard to restorative justice, this is a consensus procedure, which primarily involves the victim and the offender, as well as other people and community members. Restorative justice aims to achieve the social reintegration of the victim and the offender. It is more than a conflict resolution technique. It focuses on raising awareness of the relational, institutional and social factors that motivate violence and transgression.

According to Zehr (2008), Restorative Justice positions the victim's needs as the starting point. And the offender should be responsible for the harmful act and the obligation to repair the situation, acting no longer as a marginalized criminal, but as a protagonist. The community, in turn, takes on another role, which does not seek punishment as the major purpose, but the understanding of the need to repair damages, the restoration of relationships and the reorganization of those involved.



For Gomes and Moura (2018), the Judiciary still treats users as having a secondary role in relation to the production and delivery of services, which hinders the use of coproduction mechanisms. In the authors' view, some advances regarding coproduction have taken place, such as the creation of special courts where a faster and more effective Judiciary has been sought, allowing, in disputes of lower value, the direct participation of the user in the production and delivery of services, without the need for intermediaries. Conciliation and mediation are also considered practices that express coproduction mechanisms, in which, through the role of the mediator and the conciliator, agreements between the parties are enabled, seeking solutions that avoid the need for judicialization. The parties involved are the only ones responsible for resolving the conflicts. They also mention social services as forms of coproduction, known as restorative justice or therapeutic justice. In these services, the Judiciary seeks to contribute within specific social problems, such as drugs, child abuse, reinsertion of ex-convicts into society, and, for this purpose, these actions and strategies to be implemented are established together with individuals and communities.

Achutti (2014) warns that the idea of a judicial system concerned only with its internal efficiency does not constitute an adequate proposal for the Public Power, since the main objective of a Democratic State is to satisfactorily serve the citizen. Impressive numbers on Court celerity do not significantly represent its quality, if they are not accompanied by satisfaction indexes of the people who resorted to these judicial services. It must be considered that the purpose of the existence of the Judiciary is social pacification through a quality judicial rendering. The author concludes that although this quality requires procedural agility as an ingredient, it must not be treated as an isolated variable since it becomes insufficient to guarantee the credibility of the service provided.

Denhardt and Denhardt (2007) as quoted in Denhardt and Catlaw (2017) reinforce that the concept of coproduction is closely related to the concept of community and not to that of market. Which is to say that its major purpose is not cost cutting, but rather building and development of the community. Coproduction is based on the possibility of citizens and public servants identifying problems and proposing solutions.

Achutti (2014) brings forth an important reflection regarding Law No. 9,099/95 that provides for the Special Civil and Criminal Courts, in which the means established to provide a qualified access to Justice ended up being directed to the internal and formal organization of the criminal justice system, thus being reduced to instruments to meet administrative purposes to the detriment of the satisfactory resolution of cases.

Pallamolla (2009) also warns of the role of the special courts as a “gateway” to restorative justice, since from them occurs the referral of cases to the restorative nucleus, where the principles of procedural economics and celerity of process that govern these courts should not be confused with those of restorative processes. The reparation of the victim and the development of true communication between the parties involve a concept of time that is quite distinct from this agility that is necessary for the reduction of bottlenecks in the Courts. Restorative processes cannot be transformed into utilitarian mechanisms for reducing the burden of judicial processes.

These expressions of coproduction are, for the authors, still the beginning of a new phase. And they suggest that new judicial services be shaped on the basis of coproduction. It is necessary to change the way these services are provided, modifying the relationship of the judge with the users and the performance of the managers of the Courts and Judiciary bodies.

## **5. Final considerations**

This theoretical essay proposed to reflect about what is currently discussed for the management of the Judiciary. In a context of a significant increase in the social demand for justice, of congested cases and the increasing judicialization of conflicts, developing a management model that balances organizational efficiency, the quality of the jurisdictional provision and the guarantee of social peace is a challenge imposed on the courts. Is the management of the judiciary an agenda in the making after all?

The first point to elicit answers to this question is to understand what is the role, or perhaps the new role, of the jurisdictional provision. Is the judiciary a decision maker or a public service provider? Judicial activity has been questioned not because of the authority it holds, but because of the understanding that the exercise of this authority is not an end in itself, but one of the elements necessary to be able to meet social demands. And if this outlook on the provision of services has been changing, there is a necessary cultural change, as stated by Gomes and Moura (2018), transforming the posture of judges and managers in relation to users of judicial services. This would certainly have repercussions in the so-called radical democratization in the ways in which citizens access the services of justice advocated by Achutti (2014).

One cannot deny the efforts of the Judiciary to reverse this image of discredit in relation to social desires, establishing advances in the professionalization of its management. This can be observed in actions for transparency of public spending, with control and inspection measures, in the use of statistical data for the decision-making process, and in the concern to implement a strategic planning for the

National Judiciary. Even so, the challenges that are presented require solutions that match the complexity of the problems. Achutti (2014) considers that a judicial system concerned only with its internal efficiency does not constitute an adequate proposal for the Public Power, since the main objective of a Democratic State is to serve the citizen in a satisfactory manner.

But what can be learned from the two main currents of Public Administration? The New Public Management reinforces the importance of improving the quality of government service through the use of techniques from private administration and values from the business world. The New Public Service points out a different path for public administration, with the necessary approximation and cooperation between public servants and citizens. The citizen participates in the decision-making process, aided by public administrators who act as intermediaries for that interaction. Perhaps the management of the Judiciary has already been observing and adopting some of the tools of the market over time. Terms such as efficiency, efficacy, effectiveness, strategic objectives, are part of the vocabulary of judicial administration. And the coproduction mechanisms, such as mediation, restorative justice, and the implementation of special courts, proposed by the New Public Service current, are given as real and possible alternatives in the Brazilian jurisdictional provision. Is it possible to coexist with different logics of action? Can instrumental rationality coexist with substantive rationality in a public management model? The experience of using this mercantile logic has shown the weakening of aspects relevant to the proper functioning of public service, such as impartiality, equal treatment, and the ethics of the common good (Ramos, 1989 & Chanlat, 2002 as quoted in Fernandes, 2016). To think of a production line for public administration activities, along the lines of the business world, is to disregard the specificities of public service.

But if the logics of action cannot coexist harmoniously, perhaps their instruments can provide more adequate answers to the problems of the Judiciary. Achutti (2014) brings a significant reflection when he argues that the purpose of the existence of the Judiciary is social pacification through a quality judicial provision. And that although this quality requires procedural agility as an ingredient, it cannot be treated as an isolated variable since it becomes insufficient to guarantee the credibility of the service provided.

And what can be expected from these coproduction mechanisms? Will they be responsible for reducing congestion in the Courts? In restorative Justice, for example, the reparation of the victim and the development of a true communication between the parties involve a concept of time that is quite distinct from this agility necessary for the reduction of bottlenecks in the Courts. Restorative processes cannot be transformed into utilitarian mechanisms for reducing the caseload in the Courts. Denhardt and Denhardt (2007) as quoted in Denhardt and Catlaw

(2017) reinforce that the concept of coproduction is closely related to the concept of community and not to that of market. Therefore, its major purpose is not cost cutting, but the building and development of the community. Coproduction is based on the possibility of citizens and public servants identifying problems and proposing solutions.

It should be noted that the coproduction mechanisms significantly bet on changing the culture, on seeking to serve rather than to direct, on a leadership based on values that help citizens to satisfy shared interests. This implies the understanding that people should be valued and not merely productivity, public organizations should operate through collaboration and leadership processes, having as their essence the respect for people. It is important to understand coproduction as a new way of providing jurisdictional services, as a new relationship between public agents and citizens, a new way of handling conflicts, transcending mere legal sanction and contributing to actions of human autonomy and emancipation. They are not managerial tools for gaining productivity, but instruments to increase the quality of public services and the relationship between the Judiciary and citizens. Impacts on the culture of excessive judicialization may be observed, since they act preventively in the solution of conflicts, since the litigant parties and the community are encouraged to be protagonists in the search for social pacification. Meanwhile, it is important to realize that coproduction is not a tool to reduce bottlenecks.

Attempts to model the management of the Judiciary should not be reduced to managing the amount of demand for judicial services, or transferring to society what the State has been incapable of providing. The logic of the market is not the same as that of the public sphere, which has already been experienced through the New Public Management in other spheres of the State. Public service is not expressed as a consumer relationship. Public servants are driven to experience a cultural change, where goals, results, and speed must coexist with ethics and citizens' values. There is no dichotomous thought in the construction of a management model that is coherent with the difficulties and the complexity of the provision of justice. There is however a rupture with the rigid past, a quest for a new identity through technologies, coproduction and alternative mechanisms for conflict resolution, without losing its legitimacy and commitment to democratic principles. Finally, there is much to be done and to be built on the agenda of the management of the judiciary.

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