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Judicial reform: brief considerations on Constitutional Amendment 45/2004

Reforma judicial: breves considerações sobre a Emenda Constitucional 45/2004

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ABSTRACT: This paper analyses the problems regarding the efficiency in the Judicial System, showing the difficulties in identifying that, once it has to deal with the output of the system, studying quality and quantity. It shows the possible reasons for the inefficiency and studies the solutions suggested to improve the system, including some reforms in the legislation. After, it focuses on the constitutional amendment in Brazil, no. 45\2004, that has established another demand for the appeals to be accepted at the Supreme Court. It also questions the utility, once most of the appeals were retained in the lower-level courts waiting for the Supreme Court's decision in similar cases. It concludes that reforms to search for a more efficient system have to study each country's condition to adopt the best solution for the problem.

KEYWORDS: justice, legal reform, legal norm, constitution, political system.

ABSTRACT: Esse artigo analisa os problemas de eficiência nos sistemas judiciais, demonstrando a dificuldade na sua identificação, uma vez que lida com o *output* do sistema judicial, que mescla qualidade e quantidade. O artigo mostra as possíveis razões para a ineficiência e estuda soluções

sugeridas para melhorar o sistema, dentre elas a reforma das legislações. Passa, então, a analisar a Emenda Constitucional 45\2004, que estabeleceu outra exigência para que os recursos extraordinários fossem aceitos no Supremo Tribunal Federal. Na sqeuência, questiona a utilidade da reforma, uma vez que a maioria dos recursos foram sobrestados, esperando a decisão final do Supremo Tribunal Federal. Conclui que as reformas para a melhoria do sistema judicial devem estudar a particularidade de cada país de modo a adotar a solução mais indicada para a melhoria do sistema.

PALAVRAS-CHAVE: justiça, reforma jurídica, norma jurídica, constituição, sistema político.

INTRODUCTION

This paper will analyse the measures suggested for greater jurisdictional efficiency because of the global judicial system's crisis, focusing on the general repercussion instituted by Constitutional Amendment 45/2004.

By way of introduction, we will indicate the causes that are doctrinally pointed out as responsible for the delay and lack of quality of the jurisdictional provision and the various solutions proposed, collating statistics that seek to delimit the spectrum of actions aimed at an improvement in the system.

Next, we will make a brief study of the modification made to the Constitution about the processing of extraordinary appeals, citing examples and statistical data.

1. EFFICIENCY OF JUDICIAL PROVISION

It can be stated that the central aspect of the crisis that affects the jurisdiction throughout the world is precisely the fact that the jurisdictional provision arrives late, failing to effectively grant the holder of the right the subjective right pursued.

According to Dakolias (1999, p. 5), the performance of the Judiciary can be analysed based on efficiency, access to jurisdiction, fairness of decisions, trust of the population and independence, which, in turn, are interrelated concepts, efficiency being measured by the quality and time of the process.

Thus, measuring efficiency is an arduous task since it mixes quality and celerity, the former being challenging to conceptualize. Indeed, what are the apt parameters to qualify the jurisdictional provision?

Botero et al. (2003) teach that the concept of efficiency and how to evaluate it is controversial. For Hassan (1999), the difficulty in the analysis and adoption of measures for judicial reform is precisely that of measuring the output of the judicial system.

The reasons for the inefficiency of justice are varied. Based on an analysis of the world's legal systems, Botero et al. (2003) point out four doctrinal reasons. One relates inefficiency to the scarcity of resources, making it necessary to increase the number of judges and legal professionals and modernise the judicial system through computerisation and training. Another, which indicates that facilitating access, which should bring more justice, has ended up flooding the Judiciary with irrelevant lawsuits, delaying the provision of justice, and advocates its limitation through measures such as restricting the fees paid to lawyers. As an example of a legal system that would benefit from this measure, he mentions the American system since the high amounts received would stimulate litigation (Olson, 1992). A third reason points to the need to encourage alternative means of conflict resolution, such as out-of-court settlements, by all law operators, be they judges, lawyers or third parties. Finally, it blames inefficiency on the complexity of the procedure and the rigidity of the rules of law (Botero et al., 2003; Tsuro, 2003).

Proposed solutions

Botero et al. (2003) point out that financial support would be of interest in systems that do not have structures and that there are concrete examples of improvement through the hiring of personnel in Argentina and Ecuador, while there is no positive effect in the United States and the countries of Latin America and the Caribbean. In Paraguay, there was a combination of factors, such as financial support and changes in legislation, leading to the adoption of the oral procedure (Dakolias, 1996).

Although studies indicate that increasing the number of judges is not the solution to inefficiency, one cannot fail to observe that, once all other needs are met, more judges would bring about better performance of the jurisdiction. Not necessarily in quantitative terms, but in qualitative terms (Dakolias, 1996, pp. 19-21; Sadek, 2004).

It is valid to collate the data related by the World Bank, establishing that the number of judges in Brazil per 100,000 inhabitants in 2000 was 0.54, with an average of 6.38, and that it reached 18.06 in Colombia, 10.79 in Italy and 9.61 in Spain. (Albers, 2003).

In Brazil, and essentially in the federal courts, this problem is aggravated by excessive litigation by the executive branch, with the constant filing of appeals. According to Linn (2004), it is a way to control expenses, denying the concession of the right in administrative matters.[1] . Moreover, it concludes, in the end, that the Executive Power, although it is the worst critic of the system, is one of those who most contribute to the

1 *In original wording:* "We also found, unexpectedly, that government litigation is often a large part of the growth in demand, and that government attorneys have a habit of increasing congestion by appealing every negative judgment. This is true whether the government was the plaintiff or the defendant, although the latter situation is increasingly linked to a practice of controlling the cash flow by sending routine administrative cases (e.g. calculation of pension benefits) to the Court. Hence, while the executive branch is often one of the Judiciary's strongest critics, it is also a major contributor to the problems".

problem.[2]. This conduct is also perpetrated in private suits as a way to postpone the fulfilment of the obligation. [3-4] .

Regarding the reduction of access to jurisdiction, leaving aside the legal issue of its unconstitutionality, which in Brazil would be insurmountable, given the provision outlined in Art. 5, XXXV, of the Federal Constitution, the same authors cite studies which indicate that in some countries the effective reduction of the demands in the course had positive effects (Argentina and Ecuador, Buscaglia; Dakolias, 1996 apud Botero et al. 2003), and in others, the irrelevance of this factor (Latin America and the United States, Buscaglia; Ulen, 1997 apud Botero et al. 2003; Church et al., 1978 apud Botero et al. 2003; Feeley, 1983, apud Botero et al. 2003; Goerdet et al. 1989, 1991, apud Botero et al. 2003; Mahoney et al. 1985 apud Botero et al. 2003).

Reforms to encourage more efficient prosecution are analysed from the perspective of all legal practitioners. Studies indicate that rules imposing trial deadlines are not always observed. (Dakoilas, 1996). The author adds a factor that would provide further incentive, which links the judge to the demand, which has led to more incredible speed in the United States (Church et al. 1978 apud Botero et al. 2003). In Latin America, its importance has been noted in some countries

2 This is also the thought of Sadek (2004, p. 89-139).

3 Pinheiro (2002) states that: "The survey assessed two types of causes for the slowness of justice. The first concerns the large number of cases brought before the courts by individuals, companies and interest groups, not to fight for a right, but rather by exploiting the slowness of the Judiciary to postpone the fulfilment of an obligation. As the results in Table 5.1 illustrate, the magistrates observe that this is a widespread practice in the tax area, particularly at the federal level. It is also frequent in cases involving loans, rents, and commercial and labour disputes. This suggests that there is room to unclog the Judiciary by penalising this type of behaviour and that measures that speed up the progress of cases, particularly in the tax area, can bring significant gains in terms of reducing the workload of magistrates since they would discourage the misuse of justice".

4 "Our evaluation of the Brazilian experience was mixed. Courts provided relief rapidly to individual plaintiffs, but the proceeding used ("mandado de segurança" to protest a violation of protected rights) only fixed the individual case. It left the abusive administrator to continue the practice undeterred. The finding in both senses has wider relevance, as most judicial reforms have assumed it is commercial and not administrative law that most affects private sector activity" (Linn, 2004).

(Buscaglia; Dakolias, 1996 apud Botero et al. 2003), but no relevant results have been obtained in others. (Nimmer, 1978 apud Botero et al. 2003).

Here, the specialization of jurisdiction is added as a means of increasing effectiveness. He specifically mentions the example of Brazil, concerning the creation of the State Special Courts in 1995 (Bermudes, 199:347), as an experience that yielded good results.

In addition, it establishes that specialized courts for simplified collection have been created in Germany, Japan and the Netherlands (Blackenburg 1999; Kojima 1990; Rohl 1990 apud Botero et al. 2003); specialized courts for labour cases in Ecuador and commercial courts in Tanzania have shortened case processing times (Cole 2001; Dakolias, 1996; Finnegan 2001 apud Botero et al. 2003).

Regarding procedural changes and simplification, in Brazil, reforms have been made in the Constitution and the procedural codes, and other proposals have been implemented, implying changes of great relevance, with the creation of institutes such as the anticipation of jurisdictional guardianship, the reduction of applicable appeals.[5]And the creation of more straightforward procedures for certain types of actions.[6 and 7].

5 The Federal Senate Bill 166/2010, which aims to reform the Code of Civil Procedure, establishes a change in the procedural system, with the prohibition of appeals to interlocutory decisions, except for some hypotheses, since this is one of the factors that considerably increase the number of proceedings in the courts.

6 Constitutional Amendment 45/2004 established the possibility of issuing a binding precedent, that is, the pronouncement of the STF on a given matter, which is binding on the other organs of the administration and the Judiciary, in verbis: "Art. 103-A. The Federal Supreme Court may, ex officio or at its initiative, upon the decision of two-thirds of its members, after repeated decisions on constitutional matters, approve a precedent which, as from its publication in the official press, shall be binding on the other bodies of the Judicial Power and the direct and indirect public administration, in the federal, state and municipal spheres, as well as revise or cancel it, as established by law".

7 Concerning this issue, Linn (2004) takes the opposite view when he states that the problem of inefficiency in Latin American judicial systems is generally attributed to the codes, when in fact they originate in the week selection, training and motivation of staff and political interference, inadequate supervision and poor organisational design.

The studies carried out by Botero et al. (2003) conclude that, in general, the measures are taken simultaneously, making it challenging to identify which measure generated the positive effects.

Thus, for example, about the special courts, it is not possible to say whether the greater efficiency was due mainly to the specialisation of the Court or to procedural simplification.

Moreover, many of the measures end up achieving the desired goal only in some countries, leading to the conclusion that a specific study of local peculiarities is indispensable before seeking judicial reform (Dakolias, 1996)[8].

2. THE INSTITUTE OF GENERAL REPERCUSSION: BRIEF CONSIDERATIONS ON STATISTICAL DATA

Having highlighted the most relevant problems that are usually indicated concerning the lack of celerity of the Judiciary and the measures that could be adopted, a more specific question arises. What would be the solution to the crisis that the Judiciary is going through in Brazil, given its characteristics?

Here, we will briefly address the institute of general repercussion as a requirement for processing extraordinary appeals and its scope.

As we pointed outlines ago, the greater efficiency of the jurisdiction cannot be sought as a mathematical formula. According to Linn (2002), what is necessary for an excellent judicial reform is an investigation to propose changes in the legal system. Furthermore, it is essential to analyze the utility generated, employing a study of costs and benefits.

8 In this sense, Dakolias (1996): "The most important elements include Independence of the Judiciary - appointments, appraisals, disciplinary system; judicial administration - administration of the Courts of Justice, case management, procedural legislation; access to justice - alternative dispute resolution mechanisms, costs of the Courts of Justice, public defenders, small claims courts, and gender issues; legal education - for students and the general public, and training for lawyers and judges; and professional bar councils. Although these are the basic elements, the particularity of each judicial system does not allow for complete specificity in the recommendations proposed in this document. These specificities may only emerge as a result of in-depth analysis and review of the judicial sector in each country" (Translated by Sandro Eduardo Sarda, 1996).

As we have already established, Dakolias (1999) states that effectiveness can be measured by the quality and time of the process. More timely jurisdictional provision, but also of higher quality. Thus, it should be observed if there was the maximization of utility for society with the rule's implementation.

2.1. The Federal Supreme Court

Sadek (2004) points out that a positive measure would be the specialisation of the Supreme Federal Court, transforming it into a Constitutional Court.[9], determining the binding of other organs to its decisions[10] and having as a consequence the reduction of the number of cases in progress[11].

The Constitutional Amendment 45/2004 partially operated this form of specialization of the highest organ of the Brazilian Judiciary,[12] introducing some of the proposed changes.

Thus, Art. 103-A[13] established the possibility of the Court issuing binding precedents, with mandatory compliance by lower courts and the public administration.

9 Dallari explains that "the Supreme Federal Court should be transformed into a Constitutional Court, keeping only the competencies that directly concern the interpretation of the Constitution, the verification of the Constitutionality of rules and acts issued by public authorities, the solution of competence conflicts derived from doubts about the correct application of constitutional provisions, as well as other facts and other circumstances that involve the guarantee of supremacy and effectiveness of constitutional rules".

10 Since the pronouncements in diffuse control do not have binding force, but only those of complete control.

11 According to data contributed by the same doctrinaire, more than 80% of the cases brought before the STF refer to matters that have already been judged, and there are repeated cases that have been judged more than 10,000 times by the body (Sadek, 2004, p. 126).

12 Although the body's jurisdiction nevertheless remains very broad. Arts. 102 and 103 of the Federal Constitution.

13 "Art. 103-A. The Federal Supreme Court may, ex officio or at its initiative, upon the decision of two-thirds of its members, after repeated decisions on constitutional matters, approve a precedent which, as from its publication in the official press, shall be binding on the other bodies of the Judicial Power and the direct and indirect public administration, at the federal, state and municipal levels, as well as review or cancel it, as established by law.

Furthermore, access was restricted to extraordinary appeals, indicating the general repercussion for their processing, as can be extracted from the reading of Art. 102, paragraph 3[14][15].

The evolution of the STF's procedural progress can be seen in the following graphs:

Graphic 1: Movements STF (1990-1999)
Source: Supremo Tribunal Federal (2021, s. p.)

Movements STF	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Field cases	18.564	18.438	27.447	24.377	24.295	27.743	28.134	36.490	52.636	68.369
Distributed procedures	16.226	17.567	26.325	23.525	25.868	25.385	23.883	34.289	50.273	54.437
Judgements	16.449	14.366	18.236	21.737	28.221	34.125	30.829	39.944	51.307	56.307
Published rulings	1.067	1.514	2.482	4.538	7.800	19.507	9.811	14.661	13.954	16.117

Graphic 2: Movements STF (2000-2009)
Source: Supremo Tribunal Federal (2021, s. p.)

Movements STF	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Filed cases	105.307	110.771	160.453	87.186	83.667	95.212	127.535	119.324	100.781	84.369
Distributed procedures	90.839	89.574	87.313	109.965	69.171	79.577	116.216	112.938	66.873	42.729
Judgements	86.138	109.692	83.097	107.867	101.690	103.700	110.284	159.522	130.747	121.316
Published rulings	10.770	11.407	11.685	10.840	10.674	14.173	11.421	22.257	19.377	17.704

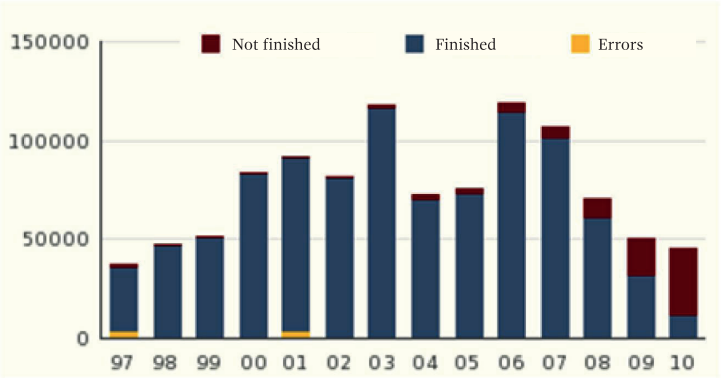
14 Processing the case would suspend other appeals pending judgment and refer one or more other appeals to the STF. A decision denying the general repercussion would apply to all the suspended appeals. If accepted and judged, the Courts could dismiss them or retract their decisions, or, failing this, the STF would hear all the cases in "limine".

15 The general repercussion occurs whenever the decision is contrary to the dominant jurisprudence of the body or a precedent.

Graphic 3: Movements STF (2010-2011)
Source: Supremo Tribunal Federal (2021, s. p.)

Movements STF	2010	2011
Files	71.670	4.274
Distributed procedures	41.014	2.073
Judgements	103.869	2.143
Published rulings	10.814	- –

Graphic 4: Judicial Process (1997-2010)
Source: Jurídico High Tech (2010, s. p.)



The graph represents the number of cases that have been filed with the STF, starting in 1997, with the red ones being non-finalised, the blue ones finalised, and the yellow ones contain errors.

After an increase in the number of new cases in 2006, there was a reduction in 2007, from 119,324 cases filed in 2007 to 71,670 in 2010.

It should be noted that, although Constitutional Amendment 45 dates back to 2004, the legislation that established the general repercussion procedure, Law 11,418/2006 of 19 December 2006, came into force sixty days after its publication in 2007, the year in which the number of cases filed began to decrease. There was a significant increase in the number of cases heard, surpassing, since 2007, the number of cases distributed.[16].

Indeed, a more detailed empirical study is needed to extract whether the reasons for the decrease are directly related to the legislative change, treating the present question as a starting point for studying the topic[17] (Meritíssimos, 2015).

According to data gathered from the STF *website*, from 2007 to 2012, there was a 64% reduction in the distribution of appeal cases. Of the cases brought before the STF, 70.59% had their general repercussion recognized, 28.3% were denied, and 1.11% are still under analysis. Of those whose general repercussion was recognized, 72.99% are pending trial (Supremo Tribunal Federal, 2021).

Thus, there was a significant decrease in distributed cases (64%). However, according to Almeida (2013), 89.29% of the extraordinary appeals filed currently were suspended, awaiting the decision of the Supreme.[18] .

Thus, another question arises: whether there has been a practical improvement in efficiency through the measure adopted in light of the delay in judging the cases submitted for review. It is observed that the delay in the judgment of extraordinary appeals has led to a chain reaction throughout the Judiciary's structure, as countless cases have come to a standstill awaiting the Supreme Court's final decision on the matter.

16 The form of processing and judgment affected all cases with the same law to be analyzed and established the possibility of suspending appeals in the STJ.

17 This, however, is the understanding endorsed by the NGO Transparency Brazil and the STF itself.

18 Repercussão geral: quando a busca por eficiência paralisa o Judiciário. Revista Consultor Jurídico, January 28, 2013, available at: <http://www.conjur.com.br/2013-jan-28/fabio-portela-quando-busca-eficiencia-paralisa-poder-judiciario>.

An analysis of the data found on the STF website shows that there were 423,468 appeals stayed on 20/10/2012, as shown in the table below:

Graphic 5: Total number of cases stayed by the general repercussion per Court

Source: Supremo Tribunal Federal (2021, s. p.)

Total number of cases stayed by the general repercussion per Court		
Court	**Latest Update**	**Processes**
Federal Special Court of the Federal Regional Court for the 2nd Region	13/09/2011	8.683
Federal Special Court of the TRF of the 3rd Region	13/09/2011	33.325
Federal Special Court of the Federal Regional Court for the 4th Region	13/09/2011	29.878
Federal Special Court of the TRF 5th Region	13/09/2011	15.775
Superior Court of Justice	05/03/2012	2.027
Court of Justice of Minas Gerais	05/06/2012	16.015
Court of Justice of Santa Catarina	16/10/2012	2.725
Court of Justice of São Paulo	22/10/2012	194.907
Court of Justice of Rio de Janeiro	20/03/2012	6.554
Court of Justice of Rio Grande do Norte	20/09/2012	834
Court of Justice of Rio Grande do Sul	05/03/2012	47.085

That is, there was effectively a reduction in the number of cases in progress. Nevertheless, could it be said that utility was maximised?

Almeida, Fábio Portela Lopes states that there was a 41% increase in the filing of extraordinary appeals after

implementing the legislative change, compared to the previous year. This data should be considered but cannot be considered a direct consequence of the change.

Indeed, to analyse the improvement in the provision of justice, about the previous system, the average number of appeals lodged and appeals heard must be taken into account to glimpse a possible increase.

We believe that, given the existence of dual constitutional control in our jurisdictional system, with the possibility of a comprehensive analysis in the concrete case, it was salutary to impose a limitation on access to extraordinary through diffuse control instances.

Then, the current problem is to implement the constitutional amendment to achieve the desired goals, and the Court must prioritise the trial of extraordinary appeals.

Moreover, it is necessary to question the other constitutional competencies of the body, which are too extensive, eventually influencing the celerity of the trial, and the reduction of these competencies cannot be ruled out, aiming at greater efficiency of the constitutional judicial provision.

The economic advantage of seeking a solution through a change in procedure is apparent compared to other measures, such as hiring more public servants, expanding computer systems and the number of judges, although these cannot be dismissed out of hand.

CONCLUSION

The crisis experienced by the Judiciary throughout the world has its origin in the lack of efficiency of judicial provision. The holders of subjective rights are unable to protect their rights in an adequate time and manner. The consequences of this crisis are manifold. In Brazil, for example, it is estimated that the delay in the jurisdictional provision is the cause of the reduction of 10% of the investments and 9% of the offer of employment (Pinheiro, 1998 apud Dakolias, 1999).

Many are the measures indicated as adequate by the doctrine to improve the panorama. However, what is observed is the need to analyse the country situation, since research indicates that the providence chosen brings positive effects in only a few countries.

It is necessary to seek the maximization of utility by analysing costs and benefits, which is measured by the celerity and quality of the jurisdictional provision.

It was observed that the modifications operated by the Constitutional Amendment 45/2004, seeking to restrict the role of the STF to that of a Constitutional Court, even if timidly, led to a decrease in the number of cases filed and an increase in the number of cases sentenced, even exceeding annually the cases that entered the Court. Nevertheless, the number of cases that stayed in the lower courts has grown too much, and we cannot conclude that there has been a practical improvement in the outcome of the jurisdiction.

The studies made serve as a start since many variables can influence the data investigated and have not been adequately analysed.

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