Volume V | Number 1 | June 2019
SPECIAL EDITION

Public Sciences & Policies

Ciências e Políticas Públicas

ISSN 2183-7384 | e-ISSN 2184-0644 | PUBLICAÇÃO BIANUAL | DISTRIBUIÇÃO GRATUITA

Justice Administration and Policies

Administração e Políticas de Justiça

Director | Diretor
PEDRO CORREIA

Guest Editors | Editores Convidados
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UNIVERSIDADE DE LISBOA


Public
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Ciências e Políticas Públicas

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Volume V
Number 1
2019

Public Sciences & Policies | Ciências e Políticas Públicas

Volume V, Number 1, June 2019 – SPECIAL EDITION

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ESTATUTO EDITORIAL
O Estatuto Editorial pode ser visto na internet na página:
http://capp.iscsp.ulisboa.pt/publicacoes/cienciasepoliticaspublicas

PERIODICIDADE
Bianual

ISSN 2183-7384
e-ISSN 2184-0644

DISTRIBUIÇÃO GRATUITA

TIRAGEM
250 exemplares

DEPÓSITO LEGAL: 434704/17

IMPRESSÃO

Capa: Hong Kong, fotografia de Xiang Ji / Unsplash.

PUBLICAÇÃO ANOTADA NA ERC – ENTIDADE REGULADORA PARA A COMUNICAÇÃO SOCIAL

FCT Fundação para a Ciência e a Tecnologia

This work was supported by Portuguese national funds through
FCT – Fundação para a Ciência e a Tecnologia, under project UIDP/00713/2020.

PUBLIC SCIENCES & POLICIES
CIÊNCIAS E POLÍTICAS PÚBLICAS

Volume V, Number 1, June 2019

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Justice Administration and Policies

EDIÇÃO ESPECIAL

Administração e Políticas de Justiça

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Editorial

Pedro Miguel Alves Ribeiro Correia

DOI: 10.33167/2184-0644.CPP2019.VVN1/pp.9-12

This edition of *Public Sciences & Policies* marks the start of a new phase in the life of our journal. As the journal's director and chief editor, I would like, first of all, to acknowledge and express my thanks for all the support and confidence shown in the new editorial team by the President of ISCSP, Prof. Manuel Meirinho, and by the President of CAPP, Prof. Miguel Pereira Lopes. Aware that the path ahead is built on the foundation of the endeavors of the past, I feel it is important also to extend our thanks to CAPPS' previous editorial team, whose significant success was the fruit of a steady combination of dedicated effort and commitment, which did much to ensure that this journal established itself within the ac-

A revista *Ciências e Políticas Públicas* inicia com a presente edição especial uma nova fase do seu percurso. Enquanto Diretor e Editor-chefe desta publicação quero, desde o primeiro momento, sublinhar e agradecer todo o apoio e confiança depositada na nova equipa Editorial por parte do Presidente do ISCSP, Professor Catedrático Doutor Manuel Meirinho e do Presidente do CAPP, Professor Doutor Miguel Pereira Lopes. Consciente de que o caminho a trilhar tem importantes raízes no trabalho desenvolvido no passado, importa deixar também uma palavra de gratidão à anterior direção, que desenvolveu um importante trabalho alicerçado num constante binómio de esforço e empenho que muito contribuiu para que a revista do CAPP desse os primeiros passos no

ademic community. Congratulations are due to all those who contributed directly and indirectly to this achievement.

At this moment of transition, aware that science and the communication of science need to look beyond national frontiers — because only then will we have a voice and be able to take part and stay abreast of what happens in the most advanced forums of learning in the varied fields of the social sciences — and as part of the process of conferring an international dimension on *Public Sciences & Policies*, in line with CAPP's strategic priorities, this edition breaks new ground in including an English language version of each of the articles, with some translated also into another language. With this, CAPP is eager to raise the bar for our publication.

We cannot ignore the fact that it is vital to keep up with the highest quality standards in the publication of knowledge and its consequent dissemination. The editorial team has therefore made significant efforts to modernize its working methods and to establish partnerships with the best platforms for the dissemination of scientific learning. At present, all articles published in *Public Sciences & Policies* have a DOI which is already listed across a range of platforms and indexing services: Publons; CrossRef; Qualis/CAPES; ERIH PLUS; Livre; Journals for Free; Colorado Alliance of Research Libraries; Copernicus – ICI Journals Master List; Scientific Journal Impact Factor (SJIF); Scien-

seio da comunidade académica. Bem-haja a todos os que, direta e indiretamente, colaboraram nesse sentido.

Neste momento de transição, ciente de que a ciência e a sua comunicação devem ter como projeção a dimensão internacional — pois só assim teremos voz e conseguiremos acompanhar e participar nos mais avançados fóruns de conhecimento nas mais diversas áreas das ciências sociais — e no quadro do processo de internacionalização da revista *Ciências e Políticas Públicas*, alinhada com os pilares estratégicos do CAPP, a presente edição revela desde logo uma inovação, relacionada com o facto de todos os artigos terem uma versão em língua inglesa, tendo alguns uma versão também noutra língua. A ambição do CAPP é que este passe a ser um novo padrão editorial.

Estamos hoje igualmente atentos à importância de nos mantermos a par dos mais elevados padrões inerentes à qualidade da publicação de conhecimento e sua consequente disseminação. Nesse sentido, a equipa editorial tem desenvolvido um trabalho importante na modernização das suas metodologias e no estabelecimento de parcerias com as melhores plataformas de disseminação do conhecimento científico. Atualmente, todos os artigos da revista Ciências e Políticas Públicas têm DOI e esta encontra-se já listada num conjunto de plataformas e indexadores: Publons; CrossRef; Qualis/CAPES; ERIH PLUS; Livre; Journals for Free; Colorado Alliance of Research Libraries; Copernicus – ICI Journals Master List; Scientific Journal Impact Factor (SJIF); Scientific In-

tific Indexing Services; and Biblioteca Nacional de Portugal. This process of indexing in knowledge platforms is an ongoing process, which will be periodically updated and reported on.

This thematic edition of *Public Sciences & Policies* has been designed to broaden our knowledge of the administration of justice and related policies, and to help disseminate innovations and good management practices in organizations in the judicial system, It has sought at the same time to provide an organized and broad forum for disseminating knowledge in this field of research. Directly or indirectly, explicitly or implicitly, the articles published address topics such as justice systems, organization and society, the institutional environment of justice systems, innovation, change and enterprise in justice, access to justice, alternative dispute resolution procedures, restorative justice, governance in justice sector organization, performance in justice sector organizations, management and innovation in courts, regulation and management in organizations in the judicial system, and many others.

For this special edition on "Administration of Justice and Related Policies", our journal has invited a trio of guest editors, of whom I myself am one (an invitation I accepted from the previous editorial team, before taking on my current role in the journal). It has been a privilege to work with two prestigious international guest editors: Philip Langbroek (Utrecht School of Law,

dexing Services; e Biblioteca Nacional de Portugal. Este processo de indexação em plataformas de disseminação de conhecimento é um processo contínuo, que será periodicamente atualizado e divulgado.

Esta edição temática da *Ciências e Políticas Públicas* teve como propósito ampliar o conhecimento sobre administração e políticas de justiça e contribuir para a disseminação de inovações e boas práticas de gestão em organizações do sistema judiciário. Pretendeu simultaneamente proporcionar um fórum organizado e amplo para a divulgação de conhecimento neste campo de pesquisa. Entre os artigos publicados é possível encontrar, de forma mais direta ou indireta, explícita ou implícita, abordagens a tópicos como sistemas de justiça, organizações e sociedade; ambiente institucional dos sistemas de justiça; inovação, mudança e empreendedorismo na justiça; acesso à justiça; mecanismos alternativos de resolução de litígios; justiça restaurativa; governança em organizações do setor da justiça; desempenho em organizações do setor da justiça; gestão e inovação em tribunais; e regulação e gestão de organizações do sistema judiciário, entre outros tópicos.

Tratando-se de uma edição especial sobre Administração e Políticas de Justiça, este número contou com um trio de editores convidados do qual eu próprio faço parte (compromisso assumido com a anterior direção, antes de ter assumido as minhas atuais funções na revista). Tivemos o privilégio de contar com dois editores convidados internacionais de renome, Philip Langbroek (Utrecht School of Law,

Utrecht University; Montaigne Centre for Judicial Administration and Conflict Resolution, Holland) and Tomás de Aquino Guimarães (University of Brasilia, Brazil). Both have been tireless in promoting this edition internationally, and I take this opportunity to express my sincere gratitude for their contribution. Thanks to their efforts, for the first time in the history of *Public Sciences & Policies*, all the authors and co-authors of the articles in this special edition will be from abroad. This fully confirms the international dimension attained by our journal and its interest in publishing work from different international standpoints.

Public Sciences & Policies is not and never will be shy of hard work and challenges. In our determination to further the good name of ISCSP, CAPP and its publication, the Director and Chief Editor of the journal is joined by the whole editorial team in expressing our thanks to the ISCSP and CAPP, and to our reviewers and authors, for their vital contributions. It is our wish to invite and encourage the entire academic community to contribute to improving the quality and raising the profile of *Public Sciences & Policies*.

Utrecht University, e Montaigne Centre for Judicial Administration and Conflict Resolution, Holanda) e Tomás de Aquino Guimarães (Universidade de Brasília, Brasil), que foram incansáveis na promoção internacional desta edição e aos quais deixo o meu profundo agradecimento. Graças ao seu esforço e pela primeira vez na história da revista *Ciências e Políticas Públicas*, todos os autores e coautores dos artigos da edição especial serão de nacionalidade estrangeira, o que não só sinaliza como atesta a aposta na internacionalização da nossa revista científica e a abertura que se promove à publicação de trabalhos com base em diferentes perspetivas internacionais.

Cientes de que o trabalho e os desafios serão uma constante no presente e no futuro da *Ciências e Políticas Públicas*, mas determinados a elevar o bom nome do ISCSP, do CAPP e da sua publicação, o Diretor e Editor-chefe da revista, juntamente com a equipa editorial, agradecem todo o apoio da estrutura do ISCSP e do CAPP, bem como a imprescindível colaboração dos revisores e dos autores, e convidam e incentivam toda a comunidade académica a contribuir para o crescimento da qualidade e da notoriedade da revista *Ciências e Políticas Públicas*.

Case Study – Improving Commercial Case Management in Courts in the Federation of Bosnia and Herzegovina

Estudo de Caso – Melhorar a Gestão de Casos Comerciais nos Tribunais na Federação da Bósnia e Herzegovina

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DOI: 10.33167/2184-0644.CPP2019.VVN1/pp.13-31

ABSTRACT
High-performing commercial courts are essential to attract investment and maintain a healthy business climate. This article presents efforts of the Government of the Federation of Bosnia and Herzegovina (FBiH) to improve performance of courts and analytic work that ensures informed decision making during the justice reform process. Through 2016, the World Bank led an analytical Study and analyzed the performance of the FBiH courts and presented options for improving their efficiency and quality, based on quantitative and qualitative data and a highly consultative process with stakeholders. The Study offered three options, recommending the one that was found feasible in FBiH. It concluded that the establishment of specialized commercial courts is not justified in FBiH and will not lead to the improvement of court performance. Its analysis and recommendations have attracted consensus among stakeholders and, in 2016, the FBiH Government amended the Reform Agenda to accommodate the Study's findings and recommendations.

Keywords: commercial courts, case processing, case management, specialization

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RESUMO
Os tribunais do comércio de alto desempenho são indispensáveis para atrair investimentos e manter um clima empresarial saudável. Este artigo mostra os esforços do governo da Federação da Bósnia e Herzegovina para melhorar o desempenho dos tribunais e também o trabalho analítico que permite um processo de tomada de decisão informada durante o processo de reforma do sistema judicial. No ano de 2016, o Banco Mundial realizou um estudo analítico do desempenho dos tribunais da Federação da Bósnia e Herzegovina. Baseando-se em dados quantitativos e qualitativos e mantendo um processo de consultas aprofundadas com as partes interessadas, apresentou possibilidades de melhoramento da eficiência e qualidade dos tribunais. O estudo ofereceu três opções e recomendou aquela que foi considerada a mais exequível na Federação da Bósnia e Herzegovina. A conclusão do estudo foi que a instauração de tribunais do comércio especializados não é justificada na Federação da Bósnia e Herzegovina, por se considerar que não conduziria à melhoria do desempenho dos tribunais. A análise e as sugestões do estudo recolheram um amplo consenso entre as partes interessadas e, em 2016, o governo da Federação da Bósnia e Herzegovina alterou a Agenda de Reformas para se adaptar às conclusões e às recomendações do estudo.

Palavras-chave: tribunais do comércio, tratamento de processos judiciais, gestão de processos judiciais, especialização

1. Introduction

In the Federation of Bosnia and Herzegovina (FBiH)[1] there are approximately 63,000 unresolved commercial cases clogging the courts and the amount of these pending court claims is estimated at 4.3 billion BAM[2], representing approximately 22 percent of GDP in FBiH. Approximately 270 judges and legal associates work on commercial cases in FBiH Municipal Courts; however, few judges and associates truly specialize in commercial cases, and not all courts have separate commercial departments. Across Bosnia and Herzegovina (BiH), training on commercial law and procedure is limited and ad hoc. The 2016 Investment Climate Statement found that over the last five years, the poor business climate was the predominant cause for the stagnation of private investment in BiH. The article presents efforts of FBiH Government to improve performance of the courts and analytic work that ensures informed decision making during the justice reform process.

In recognition of this challenging situation, the Reform Agenda for BiH 2015-2018 and the Arrangement with the International Monetary Fund under the Extended Fund Facility (IMF EFF) each commit all levels of Government in BiH to deepening judicial reforms to foster a more competitive economy that will attract

1. The Federation of Bosnia and Herzegovina is one of two political entities in Bosnia and Herzegovina, and one other entity is Republika Srpska. The Federation of Bosnia and Herzegovina consists of 10 autonomous cantons with their own governments.
2. Data provided by the HJPC based on case management system (CMS) data.

private investment and create jobs. The Reform Agenda for BiH included the establishment of separate specialized commercial courts in FBiH as a measure that will improve both the efficiency and quality of the commercial justice system.

In response to described situation and planned reforms through 2016, in cooperation with the FBiH Government, the World Bank (WB) led an analytical study. The Study Improving Commercial Case in the Management Federation of Bosnia and Herzegovina[3] analyzes the performance of the FBiH courts and presents options for improving their efficiency and quality, based on quantitative and qualitative data and a highly consultative process with stakeholders. Having in mind the constitutional setup in FBiH the Study concluded that the establishment of specialized commercial courts is not justified and will not lead to the improvement of court performance. Workloads in commercial matters do not justify the effort of establishing a new court structure, and, financially, this would not be sustainable. The Study recommends a package of reforms to improve commercial justice in FBiH: strengthen commercial departments, equalize the distribution of cases, fast-track small claims cases, and develop a comprehensive training program for judges and associates. Its analysis and recommendations have attracted consensus among BiH stakeholders, and, in 2016, the FBiH Government amended the Reform Agenda to accommodate the Study's findings and recommendations.

2. Caseloads, workloads, and resources

Jurisdiction over commercial cases in FBiH resides in ten Municipal Courts, ten Cantonal Courts, and the Supreme Court of FBiH. Only certain Municipal Courts have jurisdiction over first instance commercial cases within a Canton;[4] commercial departments exist in Municipal Courts in Bihac, Orasje, Tuzla, Zenica, Gorazde, Travnik, Mostar, Siroki Brijeg, Sarajevo, and Livno. However, all Municipal Courts have jurisdiction over commercial enforcement cases. Commercial cases are not equally distributed between Municipal Courts or between the Cantonal Courts since caseloads obviously correlate with concentrations of economic activity in FBiH. As of December 31, 2015, there were 63,020 unresolved commer-

3. Harley, G., Svircev, S., Matic Boskovic, M., Krnic, A. & Esquivel Korsiak, V. (2016). Improving Commercial Case Management in the Federation of Bosnia and Herzegovina. Retrieved from <http://documents.worldbank.org/curated/en/736251485261261184/Improving-commercial-case-management-in-the-Federation-of-Bosnia-and-Herzegovina-feasibility-study>. The World Bank.

4. Article 23 of the FBiH Law on Courts determines which Municipal Courts have jurisdiction in commercial matters for each Canton. Commercial cases are disputes between legal entities or entities that carry out economic activity. Commercial cases relate to the rights and obligations arising from the trade in goods, services, securities, property rights, maritime rights, intellectual property rights, competition violation, bankruptcy and liquidation.

cial cases in FBiH. Ninety percent of these (57,565) were pending in the Municipal Courts, 4,996 at Cantonal Courts, and 459 at the Supreme Court.

At a national level, courts are not under-resourced, but resources are not allocated effectively or executed efficiently. Court expenditure in BiH[5] is approximately 0.85 percent of GDP, which is more than double the averages in the EU (0.3 percent) and more than three times the average of Council of Europe countries (0.21), according to data from the European Commission for the Efficiency of Justice (CEPEJ). However, budgets are fragmented: courts and prosecutors' offices are financed from 14 different budgets. As a result, courts' resources are unpredictable, uneven and not linked to performance or needs. This problem is more severe in FBiH where capacity for planning remains weak.

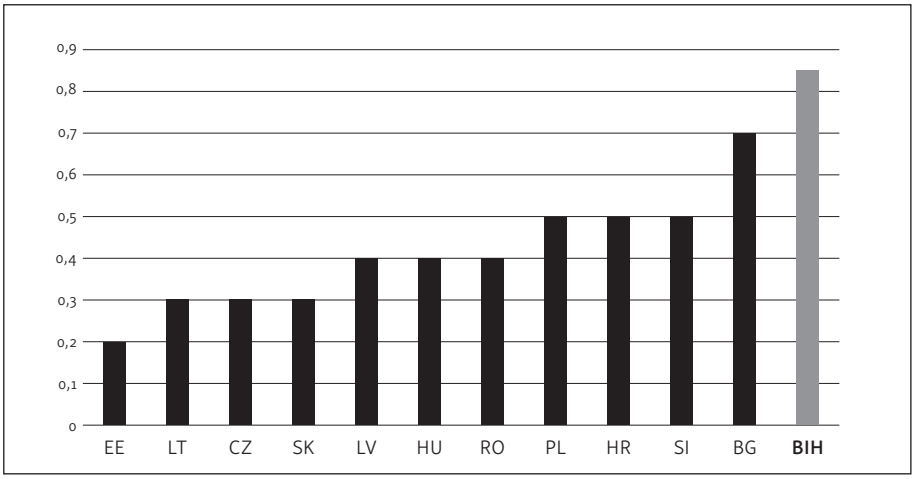

FIGURE 1. National Court Expenditure as a share GDP, BiH and EU-11 in 2014
Source: Eurostat.

2.1 Efficiency, timeliness, and productivity

In FBiH, Municipal Courts proved more efficient in resolving commercial cases than higher instance courts. Between 2012 and 2015 the number of unresolved commercial cases in FBiH decreased by six percent, largely due to resolutions at

5. Bosnia and Herzegovina is divided into two entities, Federation of Bosnia and Herzegovina and Republika Srpska, and Brcko District, each with its own government and judicial structure. Court expenditure here is given for Bosnia and Herzegovina in total.

the Municipal Courts.[6] However, the Municipal Court in Sarajevo, which carries the largest caseload, struggled with performance: backlogs increased in all years except 2014, causing delays in case processing.[7]

In Municipal Courts, backlogs mostly comprise utility bill enforcement (27,021 of 57,565 backlogged cases), small claims (18,184 cases) and bankruptcy (480 cases). According to the CEPEJ, the disposition time for utility bills enforcement was 8,897 days in 2012.[8] The clearance rate[9] in that year was only 33 percent. Occasional progress can be seen but the problem remains immense. Efficiency in Cantonal Courts and the Supreme Court of FBiH decreased from 2012 to 2015, causing a backlog and prolonging disposition times. Growing cantonal backlogs were primarily the result of appeals from Municipal Courts in litigation and enforcement cases. The Supreme Court of FBiH also experienced a growing backlog and prolonged disposition times, predominantly due to extraordinary legal remedies cases, which comprise the main share of the court's caseload. If improved performance in Municipal Courts is not mirrored by higher courts, backlogs will simply relocate to a higher court, as seen between Cantonal Courts and the Supreme Court of FBiH.

According to High Judicial and Prosecutorial Council (HJPC) data for 2015, the average duration of resolved commercial cases in Municipal Courts was 528 days.[10] Six courts had average durations of both resolved and unresolved commercial cases of over 500 days. According to HJPC data, 269 judges and legal associates[11] worked on commercial cases in Municipal Courts in July 2016 (compared to 317 in 2015). It should be mentioned that not all courts have separate commercial departments and judges do not always specialize in one domain. Specialization is more common in larger Municipal Courts.

6. Municipal Courts decreased their stock of unresolved cases by nine percent. By contrast, Cantonal Courts increased the number of unresolved commercial cases by 53 percent and the Supreme Court of FBiH by 37 percent.
7. When observing non-utility commercial cases in Municipal Court in Sarajevo, backlog in 2014 and 2015 was reduced. Unfavorable results are primary attributed to utility cases.
8. WB calculation based on data provided by HJPC. Disposition time is calculated by comparing the number of resolved cases during a reporting period with the number of unresolved cases at the end of that period. It measures how frequently a court turns over the cases received or how long it takes to resolve a case. CEPEJ Guidelines are available at <http://www.coe.int/t/dghl/cooperation/cepej/textes/Guidelines_en.pdf>.
9. WB calculation based on data provided by HJPC. Clearance rate is calculated by dividing the number of resolved cases by the number of incoming cases. It shows the ability of a court(s) to handle the inflow of cases. CEPEJ guidelines are available at <http://www.coe.int/t/dghl/cooperation/cepej/textes/Guidelines_en.pdf>.
10. The average duration of unresolved cases is 602 days.
11. The total number consists of 224 judges and 45 legal associates in July 2016 assigned to at least one unresolved commercial case.

Republika Srpska (RS), as one entity of Bosnia and Herzegovina, established specialized commercial courts in 2010 in an effort to improve efficiency and quality of commercial case management. RS established five District Commercial Courts and one Higher Commercial Court in Banja Luka.[12] The results of specialization appear to be mixed. RS courts have been able to handle incoming cases and keep the clearance rate over 100 percent,[13] and in some case types, RS courts process cases more quickly than in FBiH. However, first instance litigation cases take longer in RS. From the perspective of a court user with a two-instance litigation case, the wait is equally long and frustrating while the resolution of bankruptcy cases takes twice as long in RS as in FBiH (688 days).

3. Procedural bottlenecks in case processing

The World Bank team has found that procedural bottlenecks undermine court efficiency and efficacy in BiH. Court performance is deeply affected by court management and organization, practice and procedure, and party discipline. Despite a general opinion that performance can be improved simply by hiring more judges, more significant improvements in FBiH could be achieved through procedural changes.

Delays in scheduling court hearings are a significant procedural obstacle influencing efficiency and timeliness in FBiH courts. Several years may pass (in certain cases over five years) between case filing and the first hearing, and hearings are canceled or adjourned frequently without strong justification. Case management systems available in courts should be used to monitor the efficiency of hearings and detect irregularities to enable competent authorities, such as the Court President, the HJPC, and the Federal MOJ, to respond. Often, proceedings lack clearly defined procedures, so practice is inconsistent between courtrooms and courthouses. Stakeholders report that abuse of process is extensive and that judges do little to control it. Abuses include avoiding service of process, failing to appear at hearings, requesting adjournments without sufficient justification, and interfering with witnesses prior to giving evidence. Procedural tools are available for judges to tighten control of proceedings but judges rarely deploy them. Stakeholders report that certain cases tend to take priority over others and that powerful parties find

12. As of May 1, 2010, all commercial cases in the general jurisdiction in RS were transferred to these newly established commercial courts. There are 39 appointed judges in commercial courts in RS, 32 in District Commercial Courts and 7 in Higher Commercial Court in Banja Luka. The number of appointed judges has not increased since 2010. In October 2016, the HJPC passed a decision to increase the number of judge positions in District Commercial Court in Banja Luka by 8 judges; these positions will be filled only after the budget is provided.

13. The specialized District Commercial Courts achieved clearance rates of 105 percent in 2012 and 101 percent in 2015.

ways to have their cases heard faster (or slower) as desired. Disciplinary measures against attorneys and judges are rare and ineffective. Another source of delay are expert witnesses commonly employed by judges to prevent their cases being overturned in appellate courts. However, there are instances where expert opinions add little or no value to the case and their excessive use drives up the cost of the case for the parties. Users also express frustration when related procedures are conducted in parallel without coordination which manifests most commonly in enforcement cases, where courts often fail to relate new cases to those that have already been initiated.

4. Quality and consistency in decision-making

4.1 Structural fragmentation and the use of case law harmonization tools

Effective harmonization of case law is a complex task in all court systems and is especially complex in BiH[14] where each Canton has its own case law and practice. Not all cases are eligible to seek extraordinary legal remedies from the Supreme Court of FBiH to harmonize case law between the Cantons, and there is no supreme body to harmonize case law on similar matters between Cantonal Courts in FBiH and District Commercial Courts in RS. Although commercial departments exist in FBiH, very few judges are truly commercial law specialists, and judges move between departments. Many judges receive only a handful of commercial cases each year while also working on criminal or administrative cases. Tools for case law harmonization exist, such as departmental meetings, issuing of legal opinions, and the establishment of a Judicial Documentation Center at the HJPC, but these are not effective. Firms find this lack of harmonization particularly frustrating since their operations straddle several Cantons or both entities, and may be subject to different regimes in the same country without their knowledge. When disputes arise, firms and attorneys are often unable to predict the outcome of the case which makes it difficult for them to decide to litigate, and makes negotiation and out-of-court settlement unpredictable.

4.2 Appeals and reversal rates

The quality of decision-making in FBiH courts in commercial cases can be improved. Municipal Courts in 2015 had the lowest number of confirmed decisions in the last four years (76 percent), and had the highest number of reversed decisions (14 percent). The data points to a gradual decline in the quality of decision making.

14. In BiH, case law is not a formal source of law. By applying provisions of prior decisions in current decisions the courts give direction for the practical application of law to others. Case law then becomes an important tool for interpreting the law, filling legal gaps, and establishing rule of law and legal certainty.

In the last three years, appeals rates in Cantonal Courts in commercial cases varied between 11 and 14 percent, depending on the individual court and case type. First instance courts in both entities had appeal rates in commercial cases ranging from 6-8 percent and appeal rates in commercial cases were similar to those in non-commercial cases.[15] However, commercial litigious cases in Municipal Courts had a higher than average appeal rate of 22 to 30 percent. In 2015, the share of confirmed decisions was between 76 and 81 percent in Municipal Courts, and between 80 and 89 percent in Cantonal Courts.[16] The higher proportion of confirmed decisions in Cantonal cases can be explained by the fact that these cases have passed two instances of judicial consideration and not all cases are legally eligible for revision. The rate of confirmation by higher courts of RS District Commercial Court decisions is lower than in FBiH. This suggests that establishing self-standing specialized courts does not necessarily guarantee better quality decisions.

5. Training of judges, lawyers, and court staff

The quality of justice delivered by courts depends in large part on the quality and consistency of the education that judges and staff receive. In a survey of over 2,500 legal academics and practitioners by the World Justice Project, the inadequate selection and training of judges was ranked among the most serious problems facing the BiH judiciary.[17] The quality and quantity of training for commercial cases is inadequate. In FBiH, the mandate for judicial training rests with the Public Institution Center for Judicial and Prosecutorial Training of FBiH (CJPT). Judges and prosecutors are obliged to attend at least three days of training organized by CJPT each year. However, there is no obligation to choose trainings in one's field of work. Stakeholders report that attractive training venues are often the decisive factor in selecting one. CJPT does not provide any courses on financial literacy covering the basics of accounting, finance and economics, although businesses complain that judges often lack sufficient expertise in and understanding of complex commercial transactions. Although regulations recognize that commercial law is a separate domain for educators, little progress has been made in creating a pool of expert educators for commercial matters. Training focuses on criminal

15. Municipal and Cantonal Courts presented similar confirmation rates in commercial and non-commercial civil cases. Both Cantonal and Municipal Courts retained slightly more confirmed decisions in commercial matters. There were more reversed decisions in commercial matters while in non-commercial matters more decisions were modified by a higher court.

16. The highest rate of confirmed decisions in commercial cases was recorded in 2013 in both Cantonal and Municipal Courts: 89 percent in Cantonal Courts and 81 percent in Municipal Courts.

17. See the World Bank (2015). Report on the Observance of Standards and Codes Insolvency and Creditor/Debtor Regimes Bosnia and Herzegovina, p. 11.

law, leaving commercial law on the margin; of the 202 training courses that the CJPT conducted in 2016 only eight covered commercial matters. The quality of training courses appeared to be high, but diversity and the number of trainings was considered insufficient. There is no effective quality assurance process for training, such as entrance or exit quizzes. These would enable training assessment, contribute to motivation, influence personal engagement, and could also be connected to certification.

6. Accessibility of courts for businesses

Stakeholders report that access to justice for businesses in FBiH is inadequate, particularly for MSMEs. Due to their size, MSMEs are particularly constrained by an ineffective and inefficient judicial system and cumbersome court procedures in setting up, operating, and growing a business. Unclear and/or complex requirements for Court Registry entries, inconsistent application for the opening of access to public registries, inconsistent legal practice, excessive length of proceedings, and non-compliance with legal deadlines, are only some of the factors that hinder access to justice for businesses. Small claims cases take an average of 702 days to be resolved. It would not be unusual for a court case to be adjudicated long after an MSME has been liquidated. Firms can self-represent in FBiH courts, but most firms choose to hire an attorney to represent them mainly because the relevant legal expertise cannot be found among their employees and sometimes because attorneys provide good connections within the judiciary.

Court fees are extremely complex in FBiH, making it difficult for parties to estimate likely costs. There are 14 laws on court fees and fee tariffs which apply in BiH, and which depend on court jurisdiction. For proceedings at the Supreme Court of FBiH, court fees are regulated by a special law. For proceedings under Municipal and Cantonal Courts, individual Cantonal laws are applied. Some fees are several times higher in one Canton when compared to another. The fees for decisions in merit and appeals sometimes have the same value as fees for claims, but can be up to double that amount.

6.1. Analysis of the most problematic case types

In the Study, four case types were identified as the most problematic areas in FBiH commercial justice. These are business registration, small claims, enforcement, and bankruptcy, all of which suffer from large backlogs, long processing times, low clearance rates, and unsatisfactory court service, and cause the most frustration for court users. The analysis detailed below reveals particular reasons why each of these case types under-perform.

6.2 Business registration

At FBiH level, the business registration procedure is regulated by a range of laws[18] and other regulations, leading to inconsistent practice. Registration of a business entity is the responsibility of the competent court, determined by the location of the business entity. For example, business registration procedures in the Municipal Court in Sarajevo last for 25 days without any legal reason, while the Municipal Courts in Livno and Orasje resolve them in a single day. Backlog of business registration cases in courts in FBiH is probably caused by abandoned registrations, most likely because the party which initiated the procedure decided not to pursue registration leaving the case "open" in the system. It is not known whether these cases are abandoned because parties became frustrated by the complex procedure or for other reasons. Also, businesses are required to undergo the full registration procedure any time there is a change in their documentation. The quality of processing in business registration cases is declining. Few registration cases are appealed, but when they are, their confirmation rate was only 74 percent in 2015, down from a peak of 94 percent in 2014.

6.3 Small claims

FBiH applies simplified procedures to disputes involving small claims of sums up to a threshold of 1,500 EUR for persons and 2,500 EUR for legal entities.[19] Small claims can be resolved through a dedicated procedure in which self-representation is allowed and appeals against judgments are limited. Small claim cases make up a decreasing proportion of commercial cases; the number of incoming small claims cases has fallen by more than 45 percent over the last four years. However, a backlog remains due to the lengthy processing times for unresolved small claim cases, which average 655 days. Small claims cases have the longest disposition time among all cases, possibly due to judicial discretion since stakeholders report that judges may be choosing to deal with the more complex cases first and not prioritizing small claims cases. Small claims cases show a relatively high percentage of confirmed decisions but the highest percentage of modified decisions (10

18. There are two laws regulating establishment of business entities in FBiH (Framework Law on Registration of Business Entities in Bosnia and Herzegovina, and Law on Registration of Business Entities in the Federation Bosnia and Herzegovina) and the Law on Companies of the Federation of Bosnia and Herzegovina. There is a separate legislation for Republika Srpska and Brcko District.

19. Disputes involving small claims also include cases that are not of a pecuniary nature for which the plaintiff has accepted a sum of money not exceeding that amount, as well as disputes relating to the transfer of property not exceeding that amount. Notably, plaintiffs can also obtain a temporary security over the defendant's movable assets if there is a risk that assets may convey.

percent) suggests that there are opportunities for second instance courts to unify court practice and signal the correct practice to the Municipal Courts.

6.4 Enforcement

Enforcement of unpaid claims is inefficient and is one of the biggest challenges of the legal system in FBiH. Enforcement of commercial decisions needs to be streamlined, accelerated, and made more consistent. Flaws in the execution system are the result of the general economic situation, ineffective legislation, and poor implementation of execution procedures. Substantial court backlogs are mainly caused by enforcement cases, predominantly deriving from utility bills. According to the European Commission Country Report for BiH 2015, and the Doing Business 2017 Report, enforcement of commercial contracts involves 37 procedures, costs 36 percent of the claim value, and takes, on average, 595 days. Court performance data in FBiH for enforcement cases reveal that the courts demonstrate little capacity to manage the caseload. No clear progress was seen from 2012 to 2015; quite the opposite, the backlog in utility enforcement cases[20] — which make up the majority — is increasing. Large creditors and debtors play an important role in the enforcement caseload sometimes causing double-counting and inflation of cases. Confirmation of enforcement cases by higher instance courts was in line with the average for commercial cases.

6.5 Bankruptcy

Bankruptcy proceedings in the first instance are handled by an individual judge. Although the number of bankruptcy proceedings remains quite low in proportion to total commercial cases, the number of incoming bankruptcy cases has increased by 65 percent over the last four years. One of the reasons for the backlog is the duration of unresolved bankruptcy cases in FBiH (on average 879 days). According to Doing Business 2017, most delays in proceedings are due to delays in the sale of immovable property. 88 percent of bankruptcy decisions are confirmed compared to an average of 78.5 percent for all cases. Most of the decisions that are not confirmed are sent back to the first instance court to start again, rather than amended by the appellate court. Divided competence between bankruptcy and litigation judges contributes to the delay of bankruptcy proceedings, and creates the risk of inconsistent interpretation of similar conflicts related to the same bankruptcy case.[21] The fact that appeals usually stay the bankruptcy process can

20. Utility enforcement cases are registered under Ip kom.

21. The World Bank (2015), Report on the Observance of Standards and Codes Insolvency and Creditor/Debtor Regimes.

further cause significant delays. Bankruptcy judges appoint, supervise, and may remove a trustee from a particular bankruptcy case at their own discretion, but liabilities are rarely enforced. Furthermore, the lack of a clearly specified remuneration system for bankruptcy trustees in the Bankruptcy Law impedes efficiency in these proceedings.[22] Judges use several criteria at their discretion for establishing trustee remuneration, such as the value of the bankruptcy estate, number of creditors and complexity of the case. Bankruptcy trustees come from different professions, may lack a legal background, and are not required to seek legal assistance.

7. Models of specialization and lessons from comparator jurisdictions

A growing number of countries have chosen to specialize commercial cases in one form or another. Of the 190 economies considered in Doing Business, 101 have a specialized commercial jurisdiction, whether in the form of dedicated stand-alone courts, specialized commercial departments within existing courts, or specialized judges within general civil courts.[23] In 2013, the World Bank published guidance on how policymakers can determine if specialization is required and what model of specialization may be most appropriate.[24] The 2013 World Bank Guidance reviews the available evidence on specialization and emphasizes that its impacts are not straightforward and should not be assumed.[25] It concludes that the specialization is justified where it promotes the efficient administration of justice and ensures the quality of proceedings and judicial decisions.[26] To determine the effects of specialization, some studies have tried to find the evidence. However, no study convincingly resolves whether specialization improves judicial performance.[27] In addition, there are significant costs to specialization.[28] A specialist court enhances the quality and uniformity of decisions, particularly in complex areas of law,[29] but strict specialization has several drawbacks, which can reduce efficiency

22. Ibid.
23. The World Bank (2019). Doing business 2019, Training for reform. Retrieved from <http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf>.
24. Gramckow, H., & Walsh, J. (2013). Developing specialized court services – International experience and lessons learned. The World Bank.
25. Ibid, p. 6-7.
26. CCJE (2012). Opinion No. 15, para 30.
27. Hansford, E. (2011). Measuring the effects of specialization with circuit split resolutions, *Sanford Law Review*, vol. 63.
28. Posner, R.A. (2006). The role of the judge in the twenty-first century, *Boston University Law Review*, vol. 86.
29. CCJE Opinion No 15 assessed advantages of judge's specialization in para 8-13.

and quality of justice.[30] There is a greater chance that specialized judges will be captured by special interests and, if this occurs, their decisions can systematically undermine the field of law. Furthermore, strict judicial specialization can also create a two-tiered system where repeat court users gain an advantage[31] through more informal engagements which increase the risk of favoritism and corruption.[32] It remains difficult to assess quality of specialized courts in comparison to courts of general jurisdiction, which in turn makes it challenging to provide specific support to specialization versus generalization.[33] Although there are benefits of judicial specialization, countries should prevent situations where the judicial specialization generates confusion, conflict of jurisdiction, or even consequences for costs of justice for users.[34] The creation of specialist chambers or courts should be strictly regulated to continue to meet all fair trial requirements set out in Article 6 of the ECHR, and to provide the same safeguards and quality.

Country specifics should be taken into consideration when policymakers are discussing judicial specialization. In former socialist countries specialization could "become a tool for political instrumentalization, an inclination to bounce cases from one court to another in an attempt to avoid final decision-making".[35]

7.1 Different models of specialization

Across Europe, there are different types of commercial specialization.[36] Distinctions regarding models of specialization are important since any generalization about impacts of specialization applies more accurately to some forms of specialization than others.[37] The assessment of comparator jurisdictions found three distinct specialization models based on comprehensiveness: a) specialized separate court; b) specialized court department or bench within a court; or c) mixed model.

30. CCJE Opinion No 15 assessed limits and dangers of judge's specialization in para 14-22.
31. Baum, L. (2009). Probing the effects of judicial specialization, *Duke Law Journal* 58, p.1667–84.
32. Legal Resource Center from Moldova (2014). Specialization of judges and feasibility of creating administrative courts in the Republic of Moldova.
33. Oldfather, M. C. (2012). *Judging, Expertise, and the Rule of Law*, vol. 89.
34. European Commission for the Efficiency of Justice (CEPEJ), European judicial systems. Edition 2008 (data 2006): Efficiency and quality of justice, 76. Retrieved from <https://rm.coe.int/16807477ba>.
35. Uzelac, A. (2014). Mixed blessing of judicial specialization: The devil is in the detail, *Russian Law Journal*, 4, pp. 146-164.
36. Even in countries with only generalist judges, judges in practice tend to specialize in certain areas. See Cheng, E. K. (2008). The myth of the generalist judge, *Stanford Law Review*, vol. 61.
37. Baum, L. (2009). Probing the effects of judicial specialization, *Duke Law Journal*, 58, pp. 1673-1675.

8. Specialized departments in courts of general jurisdiction

The most widespread method of specialization is through specialist chambers or departments[38] which can be achieved by means of internal court rules. In Europe, this model is increasingly used, but tends to follow a more formal approach, such as through amendment of the law pertaining to courts, and sometimes a change in the procedural code.[39] Special departments can be a highly flexible way of pursuing specialization without significantly increasing administrative effort and costs. A specialized department of an existing court may be established with less formality than by special legislation, sometimes it can be done only by administrative direction or by rules adopted by the court itself.

Specialized judges may work in a specialized department or unit within the court of general jurisdiction. The division of tasks in the particular court may be invisible for the court users, as they will only be required to approach the territorially competent court, while the distribution of the cases to a specialized department or unit within the court is done internally, as a matter of administrative routine within that court. Judges may be allocated to a special department either indefinitely or as needed to meet temporary specialization needs. A good example is the Companies and Business Court which is an independent section of the Court of Appeal in Amsterdam. The cases are heard by chambers consisting of five people, three of whom are professional specialized judges. The other two have financial experience as auditors, businessmen, or labor union officials, depending on the case at hand.[40] The experience from the Netherlands shows that having judicial assistants working together in teams can be a major advantage allowing for specialization.[41] Ireland has also successfully applied the model of specialized commercial departments. Ireland's High Court has a commercial division which hears, exclusively, commercial disputes of high value and all intellectual property cases. Judges in commercial cases manage the litigation and impose short deadlines, allowing the court to fast-track disputes.[42]

38. CCJE Opinion No. 15, para 42.
39. Gramckow, H., & Walsh, J. (2013). Developing specialized court services – International Experience and Lessons Learned. The World Bank, p. 11.
40. Kroeze, M. J. (2007). The companies and business court as specialized court. Retrieved from <https://www.oecd.org/daf/ca/corporategovernanceprinciples/37188740.pdf>.
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42. Joint project of the International Intellectual and United States Patent and Trademark Office, Property Institute Study on Specialized IPR Courts (2012). Retrieved from <http://iipi.org/wp-content/uploads/2012/05/Study-on-Specialized-IPR-Courts.pdf>.

8.1 Separate commercial courts

Separate specialized commercial courts can be part of the jurisdiction's general court system, or a separate hierarchy of courts that may include distinct specialized appeals courts. This form of specialization requires division of work among courts, which operate as several branches of jurisdiction with separate appellate instances, eventually meeting (or not) with other branches of jurisdiction at the top level (the level of 'supreme' court). These separate specialist courts in commercial cases are less common than other types of separate specialist courts in Europe. Specialized courts are established to better respond to differences in the procedural codes (commercial vs. civil procedural rules), or because administrative processes and internal court rules are adjusted to better address the special needs of the cases the courts handle.[43] Specialization of this kind means not only that a special institution or individual will deal with this special type of case, but also that there may be differences in the ways cases are treated. If these methods are regulated and prescribed by law, they may grow into special procedural codes. However, there is little evidence that establishing standalone courts improves the processing of commercial cases any more than specialized departments within courts. For example, several Nordic countries that have strong economies do not specialize in commercial cases and have low average durations for contract enforcement.[44] On the other hand, Croatia (with an economy three times larger than BiH) specializes in commercial cases but contract enforcement time is only marginally shorter at 572 days.[45]

8.2 Mixed models

Some countries have mixed models, notably Austria and Switzerland. Often, the mixed model is in one or several specialized courts in the country's economic centers, along with specialized departments in courts of general jurisdiction in the rest of the country. In Austria, only the capital, Vienna, has specialized civil courts for commercial cases.[46] In all other districts, commercial cases are heard by commercial departments *(Handelssenate)* within the courts of ordinary juris-

43. Gramckow, H., & Walsh, J. (2013). Developing specialized court services – International experience and lessons learned. The World Bank, p. 10.

44. For example, Norway ranks 10th on the 2016 Doing Business report at 280 days, Sweden ranks 14th at 321 days, and Finland ranks 23rd at 375 days.

45. According to the latest statistical yearbook for 2015 in Croatia, where standalone commercial courts exist, the duration in commercial litigation was 324 days (288 in FBiH), while in the bankruptcy procedures 1304 days (420 in FBiH). In Republika Srpska duration in commercial litigation was 789 in 2015.

46. These are the District Court for Commercial Matters (Bezirksgericht für Handelssachen) and the Vienna Commercial Court (Handelsgericht Wien), which has the status of a regional court.

diction. In Switzerland, the Cantons of Aargau, Bern, St. Galen and Zurich have each established a Commercial Court *(Handelsgericht)* to deal with national and international commercial disputes in the first instance. In other Cantons, courts of general jurisdiction are competent for commercial disputes.[47]

9. Conclusions on feasibility of improving commercial case processing

After the analysis was conducted, the World Bank team identified three possible options on improving commercial case management, and assessed their feasibility and implications. The Study finally concludes Option 3 is feasible, and recommended a package of reforms to improve commercial justice in courts in FBiH.

OPTION 1. Establishing first-instance and second-instance Commercial Courts in each Canton

This option is not a feasible solution for FBiH. No constitutional amendment would be required. However, this option would require extensive legislative amendments at the Federal level and in each Canton. Operationally, the intensity of effort needed to implement this option in a Federation of just over 2 million people is not warranted. Dozens of courts would need to be created, and an additional 300+ judges and staff hired, along with intensive investments in ICT and infrastructure. There is not sufficient workload to justify the effort required. Financially, this option is neither viable nor sustainable. The fiscal impact on the wage bill for judges is estimated at 5.45 million BAM and for court staff at 4.72 million BAM. Significant funding would also be required to build new courts or lease office space. These investments are beyond the capacity of the federal and various cantonal budgets to absorb while the court expenditure in BiH is already higher than EU and CEPEJ averages. Furthermore, lessons from comparator states show little evidence that the establishment of separate commercial courts would ensure significantly better efficiency and quality of commercial case processing. Finally, none of the justice sector stakeholders interviewed for this feasibility study advocated for Option 1, so significant reform effort and change management would be required to generate the political will to ensure its implementation.

OPTION 2. Establishing first-instance courts in selected Cantons and a second-instance commercial court at the level of FBiH

Option 2 is also not a feasible solution for FBiH. This option would require Constitutional amendments, which is a difficult and protracted process. Option 2 would

47. <http://www.homburger.ch/fileadmin/publications/RESCUE.pdf>.

also require legislative amendments at the Federal and Cantonal levels. Operationally, this Option requires close and continued coordination, cost-sharing and personnel-sharing among the Cantons. This has failed in FBiH in the past and is unlikely to succeed in this case. Financially, this option would likely be as expensive as Option 1, given that the transferal of judges and staff would likely be difficult to coordinate between stakeholders, and strongly resisted by courts of general jurisdiction. As with Option 1, the cost of renovation, refurbishment, or leasing of office space would be high, and there is insufficient evidence that separate court structures would significantly improve efficiency or quality of commercial case processing.

OPTION 3. Reorganizing and strengthening existing commercial case departments without establishing separate court structures

This is the most feasible solution for FBiH. Option 3 would require only minor amendments to procedural laws to enable the equal distribution and delegation of cases between Cantons and the accreditation of specialist commercial judges. Operationally, this option has the highest likelihood of improving the efficiency and quality of work because it focuses on the substantive work involved in processing commercial cases, and targets the key bottlenecks through better management, more systematic training, and incentives for performance. This option includes a comprehensive TNA and the delivery of specialized commercial training programs for judges and staff in commercial departments, leading to an elite accreditation as commercial specialists. Option 3 causes the least upheaval, and implementation could start immediately. Furthermore, all justice sector stakeholders consulted for this Study support this option, which suggests it requires the least amount of political capital and change management, and has a higher likelihood of being successful. Financially, the medium-term cost of this option would be manageable. Hiring additional judges and court staff, with a phased approach, would cost 1.6 million BAM in the first year, and approximately 3 to 4 million BAM each year thereafter. This option would require some additional investment in court infrastructure; however, infrastructure costs would be lower than under the other options. Ultimately, Option 3 is the easiest to implement and the most cost effective available.

10. Recommendations and next steps

In conclusion, the World Bank team identified a package of reform measures for Option 3 as detailed below. The measures were designed to tackle identified challenges while taking into account all FBiH specifics. Some of the measures are applicable to Republika Srpska, and would improve commercial justice in that entity also.

The identified measures entail:

- Strengthening commercial departments which would require undertaking a series of measures to ensure they have the capacity to resolve commercial cases in a timely manner and with high quality within the existing organizational model.
- Fast-tracking the resolution of small disputes. A rudimentary system exists, but it does not operate well, and processing times for small claims are longer than for other cases. Several EU Member States have adopted high-performing systems for the fast and fair resolution of small claims, and lessons from these States should be applied to FBiH.
- Incentivizing performance using know-how of comparator countries, including how institutions can boost performance by rewarding teams through non-financial awards and recognition. By applying these lessons, the judiciary in FBiH could do more to recognize and incentivize better performance of Municipal and Cantonal Courts. Awards programs vary but often require little or no legislative change and can be implemented consistently with ethical rules. Programs require reliable and objective data, which the HJPC has, and only a small budget for prizes and plaques.
- Developing a high-quality training program for commercial judges. Comprehensive and high-quality training should be provided for judges and associates working in the commercial departments. Based on the training needs analysis, a curriculum and learning tools should be developed, adopted, and delivered. That training should then be compulsory for all judges and associates working in the commercial departments.
- Closing procedural loopholes and ease bottlenecks in case processing as described on multiple occasions in the Study.

In 2016, the FBiH Government advised the Bank that the Reform Agenda and the IMF EFF have been adjusted to accommodate the Study's findings and recommendations, and the FBiH Prime Minister requested that the World Bank support the implementation of the Study's recommendations. The Republika Srpska authorities also plan to further improve performance of already established commercial courts, and expressed their interest in a targeted sub-set of these measures. The follow up project will be delivered starting from early 2018, under the Good Governance and Investment Climate Reform Fund (GGICR) implemented by the World Bank and financed by the UK Good Governance Fund.

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Connecting the European e-Justice Community: Towards a New Governance Model for e-CODEX

Conectar a Comunidade de e-Justiça Europeia: Para um Novo Modelo de Governação do e-CODEX

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DOI: 10.33167/2184-0644.CPP2019.VVN1/pp.33-51

ABSTRACT
The latest Multiannual European e-Justice Action Plan (2014-2018) embraced e-CODEX as the solution for achieving cross-border judicial cooperation by facilitating the digital exchange of case related data. Since the start of the project in December 2010, e-CODEX has transformed from a ambitious project to an operational Digital Service Infrastructure (DSI) in the judicial domain. Currently, the focus lies on the transition of the e-CODEX

The work reported in this document has been part of the collaboration within the European Me-CODEX project, co-financed by the Justice Programme. While this work aims to provide input and support the on-going discussions on e-CODEX sustainability and future governance, the opinions expressed here solely express the views of the authors.

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project towards a long-term sustainable solution for the maintenance of e-CODEX. In this article, the authors present the challenge to establish a comprehensive governance model for e-CODEX. Five PRINCEII-inspired governance roles are introduced to set a framework for the interaction between the involved actors. Special attention is given to the unique position of the judiciary in this context.

Keywords: e-CODEX, governance model, e-Justice, European Union

RESUMO
O último plano de ação plurianual europeu de justiça eletrónica (2014-2018) adotou o e-CODEX como a solução para alcançar a cooperação judiciária transfronteiriça, facilitando o intercâmbio digital de dados relacionados com os casos. Desde o início do projeto, em dezembro de 2010, o e-CODEX passou de um projeto ambicioso para uma Infraestrutura de Serviço Digital (DSI) operacional no domínio judicial. Atualmente, o foco está na transição do projeto e-CODEX para uma solução sustentável de longo prazo para a manutenção do e-CODEX. Neste artigo, os autores apresentam o desafio de estabelecer um modelo abrangente de governação para o e-CODEX. São introduzidas cinco funções de governação inspiradas no PRINCEII para estabelecer uma estrutura para a interação entre os atores envolvidos. É dada especial atenção à posição única do poder judicial nesse contexto.

Palavras-chave: e-CODEX, modelo de governação, e-justiça, União Europeia

1. Introduction

The continuous flow of goods, services, capital, and labor in the European Union, as part of the European Single Market, has resulted in increased attention towards cross-border legal procedures. Within this new context, the protection of citizens' rights and economic activities requires better cross-border access to justice and justice service provision (Hess and Kramer, 2017; Ontanu, 2017; Velicogna, Lupo and Ontanu, 2017). In order to respond to this increased demand, cross-border justice must become faster, more efficient, and more accessible to European citizens and businesses.

As legal instruments deployed by the EU are proving insufficient support to satisfy this demand (Hess and Kramer, 2017; Ontanu, 2017), e-Justice initiatives have been undertaken to tackle the existing deficit (Pangalos, Salmatzidis and Pagkalos, 2014). Within this context, the e-CODEX project (e-CODEX, n.d.) aimed to improve the cross-border access of citizens and businesses to legal justice in Europe as well as to improve the interoperability between legal authorities within the European Union (Borsari et al., 2012), developing and piloting an e-Justice services interoperability infrastructure. The European e-Justice Strategy, with e-CODEX as one of the main cross-border e-Justice achievements, has laid the foundation for the interoperability in the domain of European Justice (Steigenga and Velicogna, 2017).

The e-CODEX project ended on 31 May 2016. Currently, the e-CODEX infrastructure is still governed through a typical project structure, with an Executive Board and a General Assembly. It is, however, foreseen that in the future, the activities for e-CODEX maintenance are transferred to an existing EU agency. In order to ensure the sustainability of the e-CODEX infrastructure beyond its current project-based funding model, it is important to focus on the associated governance challenges lying ahead.

In this article, the authors present the challenge to establish a comprehensive governance model for e-CODEX. On the one hand, the challenge is profound as e-CODEX has to deal with being a 'supplier' of a core service platform within the definition of the Connecting Europe Facility (CEF)[1], whose governance model has to be adhered to. Moreover, because in the near future e-CODEX will be maintained by an existing EU agency, its governance will also need to fit within the existing governance structure of that EU agency. Finally, some Member States use PRINCEII-inspired governance roles to achieve clear competences of the actors and the communication channels between them.

On the other hand, the 'demand' for e-CODEX support requires governance too. For example, prioritization between cross-border legal procedures to be supported by e-CODEX has to be catered for. Similarly, the communication and explanation to stimulate demand and the management of user communities will need to be steered. Furthermore, e-CODEX should respect the core values of the EU, including the independence of the judiciary. Respecting judicial independence offers the e-CODEX community an additional complexity amidst the already described diverging governance context.

The rest of the article is structured as follows: section two provides an introduction to the main elements characterizing the digital transformation of justice in the European Union, and positions the e-CODEX project and e-CODEX infrastructure within it. Section three investigates the current e-CODEX governance, its limits and future challenges applying PRINCEII project management concepts and method. Section four analyzes the e-CODEX governance by considering one of its key challenges, which is ensuring the independence of the judiciary. Finally, section five provides some discussion and concluding remarks on the challenges to be faced by the EU e-Justice community.

1. The Connecting Europe Facility (CEF) supports trans-European networks and digital service infrastructures (DSIs) in order to facilitate cross-border interaction between public administrations, businesses and citizens. For more information about CEF, visit the official CEF website: <https://ec.europa.eu/inea/en/connecting-europe-facility>.

2. Background

In this section, a short introduction is provided on the digital transformation of justice in the EU. Against this background, the different elements of the e-CODEX solution are exemplified and further explained.

2.1 The digital transformation of justice in the European Union

Europe is already experiencing the effects of the fourth industrial revolution. A growing competitive European market, throughout which individual companies are scaling up, calls for a concurrent digital transformation of the national public sectors. Public services should become digital, open and cross-border by design. E-Justice is one of the cornerstones of the efficient functioning of justice in the Member States and at the European level. It is an essential instrument to provide legal protection to citizens and companies in the digital era. As such, it is one of the key areas addressed by the Digital Single Market Strategy, in which "citizens and businesses have the necessary skills and can benefit from interlinked and multi-lingual e-services, from e-government, e-justice, e-health, e-energy or e-transport" (Carullo, 2016, p. 1).

Each of these areas has developed their own strategies in the Digital Single Market as well as in associated multiannual Action Plans. Nevertheless, they all rely (and are dependent) on the e-Government strategy and associated Action Plan.

In addition, the eGovernment Action Plan (2016-2020), being inclusive of several government sectors, focuses in particular on e-Justice actions with a multisector impact. An example is the IT platform for exchange of electronic evidences between judicial authorities (DG JUST, n.d.). This action aims to effectively combat cybercrime. Furthermore, there is a need to improve the possibilities for judicial authorities in different Member States to exchange electronic evidence between them. In the context of its work on e-Justice, the Commission will develop a secure online platform for requests and responses between judicial authorities of the EU Member States concerning e-evidence. This will be completed by the end of 2019. Member States that currently lack such capacity will be able to install the portal in their national context.

E-Justice aims to facilitate access to justice and the functioning of judicial systems, including cross-border cases, for citizens, legal practitioners, and (judicial) authorities, taking into account judicial independence and separation of powers. The Strategy on European e-Justice 2014-2018 defined the general principles and objectives of European e-Justice and set out a general framework for the multiannual European Action Plan 2014-2018 on e-Justice. The latter builds on what has

already been achieved and has prioritized those actions to be supported by European financial instruments based on Member States' priorities as defined by the Working Party on e-Law (e-Justice).

Briefly, there are three main groups of e-Justice services to be supported:

1. Access to information in the field of justice, to be pursued through the maintenance and further development of the e-Justice Portal and the interconnection of national registers, and to be accessed through the e-Justice portal;
2. Access to courts and extrajudicial procedures in cross-border situations through the availability of communication by electronic means between courts and parties to proceedings, as well as witnesses, experts and other participants, i.e. through the use of video conferencing, teleconferencing or other appropriate means of long-distance communication for oral hearings;
3. Communication between judicial authorities of the Member States, more specifically in the framework of instruments adopted in the European judicial area in the field of civil, criminal and administrative law, with the e-Justice Portal to be developed as an efficient tool by providing a platform and individual functionalities for effective and secure exchange of information, including via the e-CODEX network.

2.2 From the e-CODEX project to an operational digital service infrastructure

E-CODEX is the primary instrument of the third main group of e-Justice services. The e-CODEX project started in December 2010 as one of the Large Scale Pilots (LSPs) in the Competitiveness and Innovation Program (CIP), which is now merged into the CEF. CIP aimed to build on initiatives in Member States or associated countries to ensure the EU-wide interoperability of ICT-based solutions. "The e-CODEX system was developed in the context of the Digital Single Market by a group of Member States with the help of EU grants" (European Commission, 2017), reusing, whenever possible, building blocks developed in previous LSPs.[2]

The pilot phase of the project started in 2013. The technical solutions developed by e-CODEX were used in real life scenarios within the civil and criminal justice field. Several civil and criminal law procedures were selected as use cases

2. Some of the e-CODEX technical solutions comes from PEPPOL: e-procurement, epSOS: e-health, STORK: e-identity and SPOCS: e-business services. More information can be found here: <http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=1250>.

(Justizministerium, n.d.). These use cases are currently being deployed by an increasing number of Member States.[3]

Today, e-CODEX is a Digital Service Infrastructure (DSI), which makes use of DSI building blocks (maintained by CEF), through which it supports the interconnection of national e-Justice systems. It allows the exchange of legal documents, forms, evidence or other judicial information, in a secure manner (European Commission, 2017). More parties and users are now relying on the proper operation and maintenance of this infrastructure. Within the e-Justice domain, the CEF is the financial instrument providing the funding to DSIs, such as e-CODEX.

E-CODEX is designed as a decentralized system based on a distributed architecture. It enables communication between national and European ICT systems through a network of decentralized access points. This is done without the use of a centralized system (Velicogna et al., 2016). In addition to the exchange of messages between national access points, e-CODEX supports the adaptations required to allow meaningful communication between national and European level ICT systems (i.e. semantic interoperability) (Velicogna and Steigenga, 2016). Also, a trust mechanism is installed which allows legally valid communication through messages generated with national instruments across national borders (Velicogna, 2018).

The key non-technical component of e-CODEX service provision, which supports the legally valid communication, is an agreement called the Circle of Trust. This agreement is signed by all e-CODEX partners participating in the piloting of the services (Velicogna et al., 2016). The extension of the agreement beyond the end of the project and the piloting phase is part of the long-term effort to provide a sustainable solution for e-CODEX. An important technical feature enabled by the Circle of Trust is the recognition of e-Identification and e-Signature, through national systems across national borders. To achieve this recognition, a Trust-OK token was created. The objective of the Trust-OK Token is to provide the possibility for the receiving party to 'trust' the legal documents from the sending party, based upon a verification of the signature by the competent authority of the sending access point. The Circle of Trust stems from before the eIDAS regulation.[4] It is foreseen that eIDAS has delivered the legal base to trust electronic identities from other Member States. At the moment governance of eIDAS instruments follows CEF governance.

3. The Access to e-CODEX project, funded under CEF, aims to support more Member States to join the cross border e-Justice community.

4. eIDAS is the abbreviation for electronic identification, authentication and trust services. The eIDAS regulation is an EU regulation which provides a set of standards for electronic identification and trust services for the Digital Single Market.

The e-CODEX project ended on 31 May 2016. However, its continuous functioning and sustainability is a top priority for the European Commission and the Member States. The European Commission is supporting the functioning of e-CODEX in the interim period until a long-term sustainable solution for the maintenance of e-CODEX is found. The maintenance of the Justice domain components of e-CODEX infrastructure is the competence of the Me-CODEX project, while its extension has been delegated to a number of loosely aligned EU co-funded projects such as Pro-CODEX (extended until July 2018), e-SENS (ended in April 2017), API for Justice (ended in June 2017). The EU Commission is currently working on several topics such as the e-Justice portal e-CODEX European Payment Order procedure functionality for citizens and the e-Evidence initiative, and the Permanent Expert Group on e-CODEX related issues (PEG) established by the Working Party on e-Law (e-Justice) of the Council of the European Union.

Ongoing discussions will most likely lead to the conclusion that the European Agency for the Operational Management of large-scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) will be a suitable hosting organization for e-CODEX. eu-LISA is a newly established EU agency that is already managing Eurodac, the second-generation Schengen Information System (SIS II) and the Visa Information System (VIS).[5] The future handover to eu-LISA means that there are some governance challenges e-CODEX needs to consider. This is partly due to the fact that eu-LISA is currently not focused upon justice systems. Also, the current governance structure of eu-LISA does not specifically aim to facilitate e-CODEX. However, in the EU context, eu-LISA is still the most viable candidate to host e-CODEX.

Due to the foreseen handover of e-CODEX maintenance activities to eu-LISA, it is important to identify the key governance roles and responsibilities for the future context of e-CODEX. In the next section, five PRINCEII-inspired basic governance roles are introduced. Based on these roles, the governance challenges of e-CODEX, resulting from the foreseen handover to eu-LISA, will be discussed.

3. Towards the identification of governance roles

PRINCEII (Project In Controlled Environments), is a prescriptive method of project management. PRINCEII is process-driven and, as such, offers a structured approach to project management. It is the standard used by the English government, but in the last two decades it has become widely recognized as a standard for project management which can be used in any type of project, scale, culture, and organization (Matos and Lopes, 2013). One of the main advantages of applying

5. For more information, visit: <www.eulisa.europa.eu>.

a methodology like PRINCEII is that it provides a common language across all parties involved in a certain project (Matos and Lopes, 2013).

Within PRINCEII, responsibilities are not defined on the basis of individual jobs, but in terms of roles (Bradley, 2002). In this article, the focus lies on five PRINCEII-inspired governance roles: the owner, the contractor, the supplier, the customer, and the user. Based on these governance roles, a reference model is created by the Dutch ministry of Justice and Security (Nordhausen et al., 2016). This reference model partly diverges from the sole project focus of PRINCEII (i.e. effectively managing a project), and instead focuses on "the positioning of the different governance roles for delivering the common IV [information provision]/ICT services" (i.e. effectively managing a common IV/ICT service, such as e-CODEX) (Nordhausen et al., 2016, p. 5). The clear separation between the five governance roles in the reference model is also inspired by the recommendation of the Dutch Elias Committee[6] that stresses the need for transparency and the clear division of responsibilities in the context of larges-cale ICT projects.

Table 1 briefly introduces these governance roles. Figure 1 presents a simplified graphical representation representing the governance roles in the reference model.

TABLE 1. Governance roles

SUPPLY SIDE	DEMAND SIDE
Owner The owner is responsible for the vision and long-term strategy of the service.	**Customer** The customer is responsible for correctly articulating the user requirements – on behalf of the users – to the owner.
Contractor The contractor monitors whether the service delivery is in line with earlier made agreements.	**User** The user is the actual beneficiary of the service delivered by the contractor.
Supplier The supplier is responsible for the delivery of the (technical) building blocks to the contractor.	

Source: Nordhausen, S., Boersma, R. Van Oldenbeek, N., Lousberg, J., & Appelboom, D. (2016). *Reference model for governing common IV/ICT services within the Dutch Ministry of Justice and Safety.* Ministry of Justice and Safety: The Hague.

6. Parlementair onderzoek naar ICT-projecten bij de overheid [Parliamentary research into government ICT projects]. Final report of the Dutch Elias Committee. Kamerstuk 33 326 Nr. 5 (2014-2015).

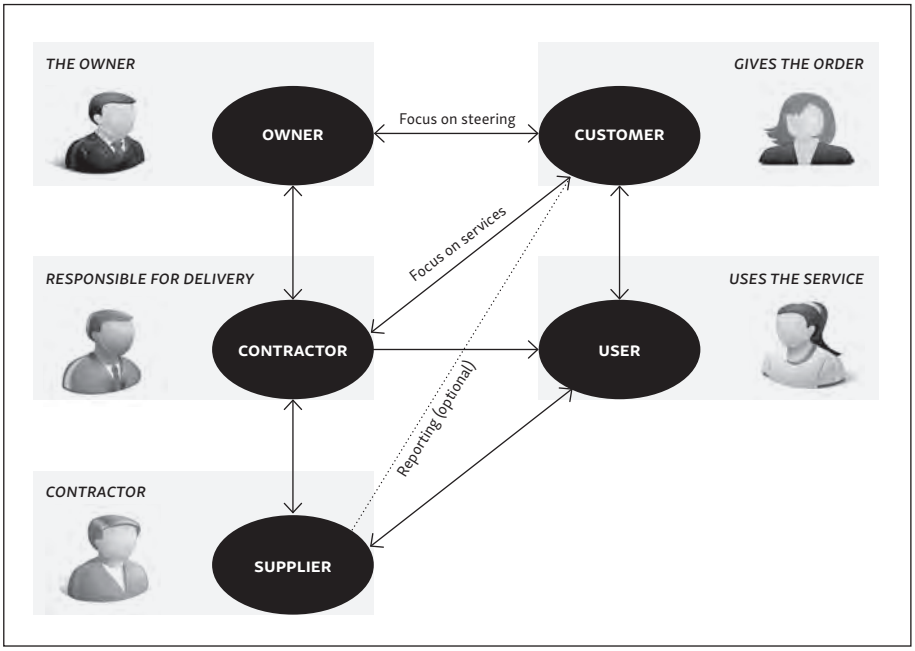

FIGURE 1. The reference model

In order to create a clear and workable governance structure for e-CODEX, it is of crucial importance to clearly assign the above roles to different parties within the given context. Although this seems to be a rather simple exercise, the contrary is true as many complicating factors need to be taken into account. In this section, firstly, the current project governance structure of e-CODEX will be introduced. Secondly, the scope of the e-CODEX governance will be presented. Thirdly, the future governance of e-CODEX will be discussed on the basis of the five governance roles. Finally, an overview of governance challenges related to these governance rules is presented.

4. The current project governance structure of e-CODEX

Currently, e-CODEX is still governed through a typical project governance structure. The Executive Board and the General Assembly share the decision-making capacity at the executive and strategic level. Because not all Member States participate in e-CODEX and its sequel projects, the decisions and directions taken need to reflect a broad consensus among all Member States, leaving room for future participants. Hence, the European Commission and Member States have estab-

lished the PEG, within the Working Party e-Law (e-Justice) (Council Presidency, 2015). The PEG consists of representatives of the Member States, the e-Justice unit of the European Commission and of observers (the Netherlands Delegation, 2018). Observers are mostly representatives of the European organizations of legal professionals.[7] PEG meets approximately six times a year in addition to the meetings of the Working Party e-Law (e-Justice). The mandate for the expert group lists as tasks:

- Engage with the future hosting organization;
- Develop a governance structure;
- Perform an impact analysis;
- Set up a business case;
- Engage stakeholders;
- Maintain relations with (e-CODEX) related projects; and
- Carry out a technical examination of the e-IDAS Regulation with a view to identifying its possible use cases in the context of e-Justice.

The presence in PEG of representatives of Member States that do not participate in Me-CODEX is important because of several issues. First, all European institutions[8] acknowledge the importance of e-CODEX for cross-border cooperation in the domain of Justice. Therefore, all Member States must be enabled to be involved in deliberation on that topic. Second, sharing knowledge and presenting progress reports on e-CODEX minimizes chances of divergence of ideas and products aiming for digital cross-border exchange of case related data. In principle, the cross-border exchange of case related data in civil law does not differ from that in criminal or family law. Third, in the exploration of electronic possibilities for advancing information exchange on the existence and content of wills (Council of the European Union, 2017) between EU Member States, the expertise stemming from e-CODEX experiences proved illustrative for the opportunities and approach. Similarly, such availability of expertise is valuable as well for the development and maintenance of other cross-border procedures.

Moreover, the presence of the European Commission in PEG is essential to go beyond communication on project administration and finances, as is the case in Me-CODEX, and also exchange ideas on e-CODEX related policies and the cross-border exchange of case related data. Such discussion is of increasing importance, especially since, in the near future, e-CODEX will also be accessible

7. CCBE, CNUE, CEHJ and UIHJ.

8. E-CODEX delegates have met with several MEPs on the topic of e-CODEX.

from the European e-Justice portal, and given the result of the (inception) impact assessment of e-CODEX indicating the possibility for e-CODEX regulation (European Commission, 2017).

The participation of representatives of the legal professions ensures that the practical reality is not forgotten within the PEG discussions. E-CODEX offers professionals, businesses as well as citizens, easy access to cross-border justice (Me-CODEX, 2017, p. 7): in practice, these groups or individuals are often assisted by legal practitioners. The combined experiences, expertise, and expectations of the legal professions in dealing with cross border justice are therefore essential to ensure e-CODEX delivers that which is demanded. Their presence in PEG enriches the discussions with examples from real life, and with ideas to take full profit of both the technical possibilities of e-CODEX and their potential impact for cross border Justice.

5. The scope of e-CODEX governance

The figure below presents the scope of e-CODEX governance graphically. E-CODEX reuses CEF DSI building blocks (e.g., e-Delivery), but the governance of these building blocks lies outside the direct scope of the (future) e-CODEX governance. Still, e-CODEX shares a common future with CEF (or the post-CEF reality which starts after the ending of the CEF program in 2020). Close collaboration with CEF

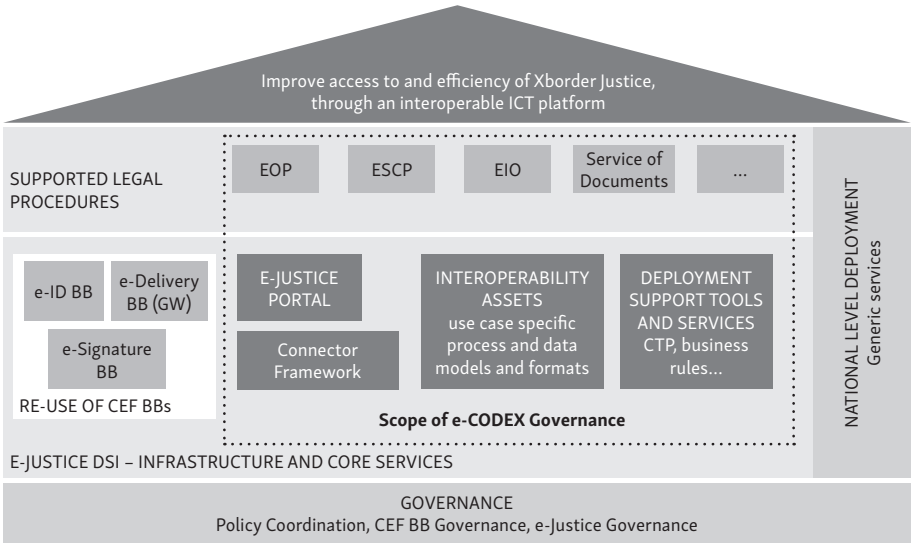

FIGURE 2. The scope of e-CODEX governance

should ensure that "all the necessary technical components used within e-CODEX are maintained and enhanced where possible" (Velicogna and Steigenga, 2016, p. 21). In fact, e-CODEX Plus, representing deployment efforts beyond piloting, is supported by CEF, while more cross-border e-Justice initiatives are foreseen in the CEF 2018 Work Programme. Hence, for better understanding of the future e-CODEX governance, it is important to take the current and post CEF reality into account as well.

6. The foreseen governance roles

Owner and contractor

Within the EU, eu-LISA is the most viable candidate for hosting e-CODEX. The formal governance structure of eu-LISA, whose owner is DG HOME, currently consists of a management board, an executive director and three advisory groups.[9] From a governance perspective, selecting the hosting organization (i.e. the contractor) is, however, only step one of creating clear and workable governance structure for e-CODEX.

Supplier

CEF provides reusable DSI building blocks, making it the supplier delivering the DSI building blocks to the contractor (i.e. eu-LISA). Within the CEF governance structure, a distinction is made between the e-Justice DSI owners and the e-Justice DSI solution providers. The e-Justice DSI owners are both the Member States and the European Commission, according to their area of responsibility (e.g., DG DIGIT, DG JUSTICE). They are accountable for the policy side of the DSI, through the EU level e-Justice policy bodies, and the functional side of the DSI. The e-Justice DSI solution providers are accountable for the delivery of the DSI building blocks, including the design and implementation of solutions in the form of specifications, software, and services.

Customer

The Permanent Expert Group (PEG) is the customer of e-CODEX. On the political level, the Justice and Home Affairs (JHA) Council can be referred to as the customer as well. When eu-LISA becomes the hosting organization of e-CODEX (with DG HOME as its owner), is it likely that the PEG and the JHA Council will stick to their shared role of customer.

9. VIS, EURODAC and SIS II. See: <https://www.eulisa.europa.eu/Organisation/Documents/eu-LISA%20Organisational%20Chart.pdf>.

User

Within the given context, there is not just one type of user. E-CODEX supports a wide range of judicial procedures (e.g., European Investigation Order, European Payment Order). In the future it is likely that this range of procedures becomes even wider (e.g., European Account Preservation Order, Service of Documents). As a consequence, different user communities are involved. Next to the variety of user communities, it is important that the unique position of the judiciary is taken into account. This is one of the foreseen governance challenges which will be further explored later in this article.

7. The foreseen governance challenges

When focusing on the responsibilities associated with the different governance roles, it becomes clear that there are several governance challenges to overcome. In this section, four governance challenges will be discussed briefly.

A first challenge refers to a broad and divergent user community of e-CODEX, and the addition of new legal procedures. During the project, e-CODEX started to support cross-border legal procedures in civil and criminal law. Although the methodology to support these procedures has been identical, the approach to the user communities involved in each of the supported procedures has been different. The e-CODEX community has had to get used to different cultures, modes of operations, and requirements towards digital support for processing data in cross border legal procedures. One has to presume that the diversity of user communities will only increase with a growing number of procedures supported by e-CODEX.

The 'value chain', as the Business Modeling Canvas approach describes that process, has to be accommodated from e-CODEX and e-CODEX governance. In particular, this part might be the biggest challenge for the e-CODEX community. A working group for each supported procedure might be a proper solution for the time that the amount of procedures is limited enough to assure coordination between the groups. However, one can easily foresee that once the amount of supported procedures has passed 25 or 30, even the coordination will require coordination, let alone proper influence by all user communities into the further development of e-CODEX. This is where ideas on governance or user influence from commercial software vendors or other providers of other types of services becomes interesting. E-CODEX might look at mechanisms used by Google, Apple, Airbnb or eBay. The idea of distributed responsibility and its governance might be the way for e-CODEX to learn of useful models for governance on the demand side of e-CODEX.

A second challenge refers to the mutual ratio between eu-LISA and CEF. eu-LISA is the contractor of e-CODEX with CEF as the supplier of the building blocks. Discussions about the future sustainability of the building blocks lies within the realm of CEF, but it also has an effect on the task responsibilities of eu-LISA. The governance structure of CEF is a given, which makes it a challenge for eu-LISA to deal with this set reality.

A third challenge refers to the ending of the CEF program in 2020. It is still unclear how the post-CEF reality after 2020 will exactly look like; and how it will affect e-CODEX.

A fourth challenge refers to the unique position of the judiciary as one of the users of e-CODEX. This challenge will be reviewed in more detail in the next section.

7.1 Independence of the judiciary

As has already been mentioned several times in this article, e-CODEX has many different user communities, all of which need to be accommodated in the governance in their own way. One of the most unique challenges, however, lies in a core value of the EU and its Member States, and a fundamental principle for the existence of the rule of law: judicial independence.

The judiciary as a user community brings along many opportunities and dilemmas that reach to the very core of the judiciary as a branch of government and its versatile activities. This is not limited to the different (possibly future) use cases, but also touches upon the fundamental principle of judicial independence. E-CODEX will only be of added value to the judiciary in its use cases if it is able to respect this value. An important opportunity for countering possible concerns regarding this dilemma lies in the future governance of e-CODEX, which needs to sufficiently ensure the involvement of the judiciary in the decision-making process, and guard other potential independence issues, such as encryption and the protection of case related data.

While, at first, this may seem as a rather straightforward problem with an equally straightforward solution, in reality, it is a particularly challenging topic, as there are many different interpretations of what independence means, and many Member States have different applications of the concept, all of which, to a certain extent, need to be reflected in the governance of e-CODEX.

Defining Independence

The first step towards safeguarding judicial independence in e-CODEX would then be to provide a basic definition of what it means. Judicial independence is

inherent in the rule of law, a building block of both national and EU democratic principles (Article 2, TEU). It means that Courts do not only review the decisions of other governmental bodies, but they ought to be independent when doing so (Jacobs, 2007).

Basically, judicial independence means that there is no unwarranted pressure or influence of external parties on the decision-making by Courts (Vanberg, 2008). The concept seems vague, and interpretations vary wildly based on national or cultural contexts. Defining judicial independence is also a *moral* discussion on the operationalization of the role of the judiciary within the *trias politica* and the rule of law (Vanberg, 2008). The manner in which it is defined determines the way in which it is operationalized in national law and institutional structures. Without a clear definition and corresponding benchmarks and criteria, proposed measures to preserve judicial independence will not be able to fulfill their objective. Therefore, this section will propose two different understandings of judicial independence, *decisional* and *institutional* independence.

Firstly, *decisional* independence regards the ability of an individual judge to act as an autonomous moral agent, without influence of ideological or corruptible considerations (Scirica, 2015; Vanberg, 2008). Because judges are only humans, certain institutionalized guarantees to prevent individual damages to judges or possible bribes for decision-making should be in place (Ferejohn, 1998). Contentious issues in this regard may be the renewability of terms and what this depends upon, or salary provisions (Jackson, 2007; Power, 2012).

Secondly, *institutional* independence refers to the structural autonomy of judiciary as a branch of government from the other branches (Scirica, 2015). Complete independence from the other branches is unworkable as well as undesirable (Scirica, 2015), as interference is not *per se* "bad", but could also provide otherwise unavailable expertise. However, interference cannot be legitimatized if it unjustifiably limits the power of the judiciary or inclines judges to act partially (Ferejohn, 1998). Although the aim of interference may not be aimed at limiting judicial power, it may be its effect. Controversial issues could be the allocation of budget, provision of real estate, or the establishment of technical infrastructure, aimed to increase efficiency (Van Opijnen, 2014). Outsourcing such measures to other branches could, without safeguards, limit the ability of the judiciary to perform their tasks properly and independently, be it intentional or not. To prevent such a situation, a careful system of checks and balances with sufficient institutional safeguards should be in place (Reiling, 2009i).

National differences in interpreting independence mean that it is operationalized differently in the governmental frameworks of Member States. Whereas the judiciary in some MS manages its own IT and budget, in others it has little input

on managerial and financial affairs; this is not necessarily problematic (Reiling, 2009ii).

The discussion on judicial independence is not limited to abstract arguments on the structure of the national or European governmental system. It is a highly relevant discussion in the light of IT innovations, which are mostly aimed at increasing the efficiency and decreasing the workload of the judiciary. However, these innovations could decrease the institutional independence of the judiciary. A similar problem may arise with e-CODEX, if its servers would be governed by a non-judiciary body, that may have undue insight into and control over how the system would be used.

This is not necessarily a problem in itself. From the inception of the project, the question of ensuring judicial independence has been carefully assessed. As a result, important steps have already been taken, e.g., the encryption of messages (Appelboom, 2017; Ferrand, 2018). Moreover, e-CODEX merely connects the systems and transfers the messages, with no role in their content. This also implies that the responsibility for judicial independence lies primarily with the national guarantees of the participating MS. Thus, e-CODEX is an independent instrument in itself, because it respects national diversity with regard to the operationalization of independence, thereby enabling national safeguards for independence, no matter who governs the servers and the system (Groustra, 2018).

However, this does not absolve e-CODEX from all responsibility with regard to independence. A principle of mutual trust at the EU level is no sufficient guarantee. Potential safeguards must go beyond encryption and track and trace, but must also be sought in future governance, such as in the eu-LISA scenario (Groustra, 2018).

The formal governance structure of eu-LISA currently consists of a Management Board (MB) where Member States' representatives from Home Affairs and an alternate, results in a situation where national Home Affairs departments take the decisions regarding e-CODEX. Even though an expert advisory group prepares these decisions, the ultimate decision-making power lies with a body without any representation from the judiciary. Consequently, there would be no safeguards in place for the judiciary to ensure that there is no improper influence from the MB (Groustra, 2018). Solutions could be found, however, in providing that the alternate in the MB comes from the judicial field, or the involvement of the European Network of Councils of the Judiciary (ENCJ). Nevertheless, the first option does not solve the problem of the ultimate decision-making power lying with representatives from Home Affairs, and the second one poses the problem of where their involvement would be appropriate, and that they do not represent the

judiciaries of all the EU MS. Furthermore, one can also suggest the representation of the ENCJ in the e-CODEX consortium (Groustra, 2018).

These options and dilemmas are not limited to the specific governance structure of eu-LISA, but also may present themselves as possible safeguards in alternative governance proposals. Without careful consideration of these potential issues, e-CODEX risks unwittingly harming judicial independence within its use cases.

8. Discussion and concluding remarks

The paper tried to describe the sheer complexity that has to be faced in the development of a governance mechanism capable of governing a *core service platform* in a specific domain like Justice using newly developed instruments or methodologies and existing generic instruments. The friction between global governance constructions of generic instruments and the nuanced governance of domain specific instruments easily leads to a labyrinth of governance constructions. Such a labyrinth would bypass the initial goal of clear distribution of competences and effective lines of communications between all partners. In the ongoing process the e-CODEX community will need to look for examples in other domains or for other types of solutions. One might think of how the governance of building a plane is dealt with. A plane also consists of generic instruments coming from multiple sources and customer specific demands that need to be catered for.

The assignment for the Me-CODEX project is to find ways to reduce complexity in the governance and at the same time respect the existing governance models. Inevitably with complexity reduction will come a perceived, or real, loss of competence of some or all of the actors. Such a loss will need to be compensated for either by trust or by good services, preferably both.

The article has provided an insight into ongoing discussions and lines of reasoning inside the Me-CODEX project on the topic of future governance of e-CODEX. Whereas the effective differentiation between governance roles helps to realize a sustainable solution for e-CODEX governance, the actual implementation of such as structure remains a challenge.

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Administration of Justice and Courts' Budget: An Independence and a Managerial Issue

Administração da Justiça e Orçamento dos Tribunais: Uma Questão de Independência e Gestão

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DOI: 10.33167/2184-0644.CPP2019.VVN1/pp.53-68

ABSTRACT
How, and how much, justice systems and courts gain from the State budget, and in which way they are accountable for what they spend, is of paramount importance for judicial independence and for the competent functioning of courts. Since the New Public Management wave started, budget has played a major role as a powerful managerial tool to improve planning, policies' development, services delivered, and accountability mechanisms. However, generally speaking, European justice systems have been unresponsive to the application of managerial techniques, and this is particularly true for budget planning and expenditures. Courts' budgets have been, and still are in many cases, drafted only based on historical costs, and although so important for the court functioning, they have been one of the most neglected subjects in court administration studies. In recent years, some countries have been developing new approaches to justice systems and court budgeting, using a "performance-based" budget perspective, which relates organizational costs and organizational outputs, policies development and resource allocation, performance targets and resource appropriation, managerial discretion and accountability. This paper addresses the topic of justice system and courts' budget, focusing on three cases studies (Finland, France, and the Netherlands). After a brief overview of the literature available on the topic, the paper will

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present three case studies particularly interesting in the European landscape, because of their innovative approaches about court budgeting, within different judicial system governance settings. The three case studies will be compared in terms of assessing budget needs, budget appropriation processes, and criteria used for budget allocation to courts. The concluding remarks will focus on the peculiarities of these three case studies, and then will consider to what extent a performance-based budget can enhance both the independence and the quality of justice.

Keywords: budget, court management, judicial administration, allocative efficiency

RESUMO

Como e quanto os sistemas de justiça e os tribunais ganham com o orçamento do Estado, e de que forma eles são responsáveis pelo que gastam, é de suma importância para a independência judicial e para o bom funcionamento dos tribunais. Desde o início da nova onda de gestão pública, o orçamento tem desempenhado um papel importante como uma poderosa ferramenta de gestão para melhorar o planeamento, o desenvolvimento de políticas, os serviços prestados e os mecanismos de prestação de contas. No entanto, de um modo geral, os sistemas de justiça europeus não responderam à aplicação de técnicas de gestão, e isso é particularmente verdadeiro no planeamento e nas despesas orçamentais. Os orçamentos dos tribunais foram, e ainda são, em muitos casos, elaborados apenas com base no histórico de custos e, embora sejam tão importantes para o funcionamento do tribunal, eles foram um dos assuntos mais negligenciados nos estudos de administração dos tribunais. Nos últimos anos, alguns países vêm desenvolvendo novas abordagens para sistemas de justiça e orçamento de tribunais, usando uma perspetiva orçamental «baseada no desempenho», que relaciona custos e resultados organizacionais, desenvolvimento de políticas e afetação de recursos, metas de desempenho e apropriação de recursos, discrição de gestão e responsabilização. Este artigo aborda o tema do sistema de justiça e do orçamento dos tribunais, concentrando-se em três estudos de caso (Finlândia, França e Holanda). Após uma breve visão geral da literatura disponível sobre o tema, o artigo apresenta três estudos de caso particularmente interessantes no cenário europeu, devido às suas abordagens inovadoras sobre o orçamento de tribunais no âmbito de diferentes configurações de governação do sistema judicial. Os três estudos de caso são comparados em termos de avaliação das necessidades orçamentais, processos de apropriação orçamental e critérios utilizados para afetação orçamental aos tribunais. As observações finais irão destacar as peculiaridades desses três estudos de caso e, em seguida, promover o debate sobre se e até que ponto um orçamento baseado no desempenho pode melhorar a independência e a qualidade da justiça.

Palavras-chave: orçamento, gestão dos tribunais, administração judicial, eficiência de afetação de recursos

1. Introduction

"New Public Management" (NPM) is primarily a label, which implies the private sector's management techniques to improve public sector efficiency (Hood 1991). The NPM deals mainly with institutional and organizational change related to budget planning and financial management, organizational development, labor relations, audit, and evaluation (Barzelay, 2003).

Budgeting is a central issue in NPM. Budgeting can be defined as "a comprehensive and coordinated plan, expressed in financial terms, for the operations and resources of an enterprise for some specified period in the future" (Fremgen, 1976).

The budgeting process in public administration, thanks also to the NPM approach, has moved from a historical *line-item* budget, based on the expenditures needed to supply public services, to a budget more focused on the results they are supposed to achieve.

NPM affected most of the public sector since the beginning of the '90s, while only in the late '90s, judiciaries started to feel some pressure for improvements and to deal with their effectiveness and efficiency (Maier, 1999; Fabri and Langbroek, 2000; Fabri et al., 2003).

On the one hand, there may be some grounds for the claim that: "Calls for increased accountability in performance were often discarded based on an understanding of judicial independence largely perceived as an entitlement of judges" (The World Bank, 2011). On the other hand, funding mechanisms, and budget allocation in particular (i.e., personnel, salaries, facilities, operational costs, information technology, etc.) given to the judiciary, can affect access to justice, judicial independence, and judges' impartiality. A low level of resources allocated to the courts can result in a deterioration of the quality of services to the citizens and force court managers to raise funds from other organizations, exposing the courts to some kind of indirect external pressures.

In the United States, this issue is known as the "Inherent Powers of the Judiciary" (Jackson, 1993; Shapiro, 1994). It was triggered by a decision of the North Carolina Supreme Court, which confirmed a judge's inherent authority to require the executive to provide necessary financial support for the judicial branch to carry out their constitutional duties.

In addition, an evidence-based and fair distribution of resources can contribute to guarantee judicial independence from the other governmental branches, while, at the same time, a transparent allocation of resources can improve the trustworthiness of the judiciary. Finally, through a performance-based approach, an allocation of resources aimed at pursuing equal performance of the different courts is reflected, in a sense, on equality of citizens before the law (Webber, 2007).

Some forms of performance-based budgeting, where performance-information is somehow integrated into the budgetary process, can be found in the judiciaries of Albania, Denmark, Estonia, Finland, France, Ireland, Switzerland, the Netherlands, and the UK.

The challenge for judiciaries is to adapt a performance-based budget to their peculiar features to avoid possible threats to judicial independence, but also to improve the court functioning thanks to a more managerial approach.

Performance-based budget models, especially the ones using incentives for organizations and their professionals, have to be carefully implemented in the judiciary. They have to be finely tuned to avoid giving "absolute priority to productivity and figures, to the detriment of the quality of legal work" (Langbroek, 2008), or there is a high risk of dysfunctional behavior, if they are based upon imperfect performance measures (Paul and Robinson, 2007).

This paper addresses the "performance-based" budget for the judiciary, focusing on three cases studies: Finland, France, and the Netherlands. These three countries have been selected because they have experienced different ways to implement a performance-based budget in three different governance settings: Finland and France enjoy a traditional ministerial model, while in the Netherlands the Judicial Council has a leading role in the budget drafting.

After a brief description of the main performance-based models, this paper will focus on the three case studies, and draw some conclusions based on their comparative analysis.

2. Models of performance budgets

The performance-based budgets aim to: a) rationalize the allocation of public expenditure, b) prioritize services of higher social value, c) increase efficiency and productivity.

There are different performance budget models, but all of them have some basic principles in common: a) They use and integrate performance information into the budget process, b) they aim to improve government's planning, c) they focus on goals and priorities, d) they have a long-term approach, e) they monitor and measure results, f) they pay attention to transparency, g) they use incentives, h) they pursue flexibility and accountability of public managers.

Different performance-based models are based on different combinations of these principles. Governments can then use different models for different areas of policy.

"Program budgeting" is one of the first PB models implemented. It was introduced by the US government in the '60s, and its primary objective is to reach allocative efficiency through expenses prioritization. Its primary characteristics are the classification of expenditure into objective-based programs, and the use of performance information to address budgetary decisions. The performance information is related to output (and outcomes) achieved by programs. In this model, budgeting is strictly related to the "policy cycle", and budget decisions are based on the evaluation of the results achieved by programs, and on the resources used to achieve those results. In this model, the link between performance information is loose, and the budget is mainly allocated to the program activities.

"Zero-based budgeting" is a specific model of program budgeting adopted from the '70s. Its purpose is to ensure allocative efficiency through marginal prioritization techniques. It is based upon the "systematic application of marginal analysis techniques to the budget formulation" (Taylor, 1977), to rationally allocate and shift funds between programs, taking into consideration priorities. Programs are broken down into "decision packages", with different levels of priority and alternative budgets. Zero-based budgeting allows the shifting of funds from one package to another, based on the relative priorities. As the name suggests, every year, the budget is supposed to start from zero, and every expense must be justified and approved. In practice, in modern zero-based budgeting models, only the portion of program activities and marginal costs and benefits of each decision package are discussed. The performance information regards marginal costs and marginal benefits of decision packages. Compared to the "program budgeting", the "zero-based budgeting" is supposed to be more effective in reallocating resources and realizing allocative efficiency using formal methodologies for expenditure prioritization. As for program budgeting, "zero-based budgeting" also has a loose link between performance and funding.

The "Budget-linked performance targets" is characterized by the setting of specific levels of performance targets, and it is aimed at improving efficiency (output targets) or effectiveness (outcome targets). Performance targets are calibrated to the level of funding provided, and they describe the level of performance expected at any point in the expenditure: any additional request for money from departments should be justified by an improvement in output and outcome.

The three models just mentioned are loosely linked through performance information and funding. Some other PB models have a tight link between information and funding such as: the "Agency level budgetary performance incentives", the "Formula funding", and the "Purchaser-provider model", the latter being similar to the "Formula funding".

The "Agency level budgetary performance incentives model" entails mechanisms of incentives or sanctions depending on performance. Best performing agencies receive more money, while poor performing agencies receive less money. In this model, incentives can also be related to a certain flexibility in the allocation of resources. The forecasted budget is related to past performance, and the amount of funding is not calculated by an algebraic formula, but by a more discretionary analysis of the performance information collected.

In the "Formula funding model", the link between funding and performance information is very tight: it depends on an algebraic formula that links the planned output to the amount of funding, which can be the total amount or a part of the amount to be allocated. Its purpose is to improve performance and allocative ef-

ficiency. The formula can be "activity cost-based" or not. "Activity cost-based" means that the formula is strictly related to the costs that occurred to perform that specific activity. The formula can also be "not cost-based" when, for example, the calculation of a bonus funding is not related to the specific costs of the activity, but on the performance achieved.

The "Purchase-provider model" is a peculiar cost-based model. Its purpose is to enhance technical efficiency and performance through incentives (payment for results). The budget is calculated by multiplying a given "price" per unit of output: the more the output, the higher the budget allocated.

In the next section, we will examine which ones of the performance-based budgeting models described have been applied to the judiciary in the three case studies: Finland, France, and the Netherlands, and what performance measures they rely on.

In the judiciary, the performance-based budget is primarily a tool to have a rational and balanced distribution of resources among courts. The calculation of the resources needed to make the judiciary function properly should take into consideration the pastas well as any forecasted performance, to better estimate the resources needed, and then allocate them to the courts in the most effective possible way (Viapiana, 2018).

The issue at stake is "allocative efficiency", which is very important in the judiciary landscape to grant equal access to justice and comparable services to court users, as well as a fair distribution of the caseload among courts and judges. The budget is a fundamental tool to try to balance efficiency and effectiveness among courts, and, in so doing, to ensure equal treatment of citizens before the law.

3. The funding mechanisms of Finland, France, and the Netherlands

Although all the performance-based budgets are related to the performance information, the overall approach, the indicators used, and the links between performance information and funding allocation are quite different in the three countries.

The budgeting process is affected by the governance structure. The governance model adopted in both France and Finland is ministerial, while in the Netherlands there has been a shift of several functions, including the budget, from the Ministry of justice to the judicial council.[1]

Finland started from a "management by results" overall approach, and then moved to a "result-oriented budget process" with a model that can be associated

1. Wittrup (2010) distinguishes two models: the traditional "Ministry of Justice model", where the budget is managed and allocated by the MoJ, and the more recent "Council model", where the budget is managed and allocated to a more or less independent body, that can be either the Judicial Council or an agency for Court Administration.

with the "Funding-linked performance targets" model. The explanatory notes to the State budget are used to list performance targets for each ministry and agency. However, these targets are not quantified regarding costs, and the budget allocation for the different ministries does not directly depend on performance. Performance information is just used to inform decision-makers.

In Finland, the Ministry of Justice based on the State budget frame, decides guidelines and principles for budget allocation. The Department of Judicial Administration within the Ministry of Justice is in charge of negotiating the budget needs and setting targets for the next year "face to face" with each Court President. The discussion starts from the evaluation of the results of the previous year, and then moves to the forecasting of incoming and solved cases for the following year, together with a proposal of budget and resources needed. During this discussion, additional judges or temporary staff, where appropriate, are negotiated. Before individual negotiations, a kick-off meeting with all the courts is arranged, with the aim of increasing transparency and providing a general overview of the situation for the judicial sector. At the end of the discussion, the funding appropriation of the court and the targets are decided. Efficiency targets consider productivity, economic efficiency (cost per weighted case) and timeliness. Court management can also decide to set additional quality standards, such as timeliness and transparency of judicial procedures, consistency, and readiness of judgments, etc. The accomplishment of the targets is settled in the annual reports, which are used as a tool in the negotiation process. Even though the targets and the budget are negotiated through the same process, there is no direct link between them (Contini, 2017).

The principal instrument for performance management is the annual central government budget, which includes resources and agreed targets and indicators to analyze the achievement of the targets. In the justice sector, the Department of Judicial Administration, with the collaboration of the courts, establishes indicators to assess the operational performance of the courts (Aarnio, 2003).

However, "[e]ven though these indicators were developed to allocate resources to particular court offices, their use for this purpose does not follow automatically. The indicators instead form a source of knowledge on which to base discussion around the negotiation of the budget of each court. They are also used during annual meetings to help the Ministry of Justice and the heads of each court office to define the objectives to be met" (Contini and Mohr, 2008).

The primary criterion in resource allocation is the estimation of the weighted caseload (using weighted scores) for the following year, also taking into consideration the available resources, which are the basis for the budget negotiation process between the Ministry of Justice and the Presidents of the courts.

Other indicators used in the budgetary negotiations are: a) Productivity (defined as the ratio between output and input) — the number of decisions per judge, or the number of decisions per court personnel (calculated by dividing the number of decisions of a court by the number of judges or total staff working in that court); b) Effectiveness (defined as the capability to reach the goal), the length of court proceedings; c) Efficiency (defined as the capability to reach the goals with the minimum use of resources), total court budget divided by the number of solved cases in that court (Aarnio, 2003).

As it was mentioned, the Finnish budget has a loose link between court performance and allocation of resources. Nevertheless, there is a very important aspect of this budgeting process. Performance targets are set in an open discussion between the Ministry and the Presidents of the courts, through regular meetings that enhance mutual trust and the sharing of common goals. This open discussion, based on performance and available resources, allows for the setting of feasible targets, which increase courts' productivity.

France has been using a "Program-budgeting" approach since 2006. The country introduced a programmatic budget law (*Loi organique aux lois de finances* – hereinafter LOLF) based on Missions, Programs, and Sub-programs, with the goal of increasing the autonomy of the Ministerial departments and program managers, appointed for each program. They have the flexibility to allocate and re-allocate resources within programs to achieve performance targets. Targets are related to three different standpoints: a) the citizens, interested in social and economic effectiveness; b) the users, concerned with the quality of service; c) the taxpayers, concerned with efficiency.

The "Justice Mission" is divided into five Programs. Each Program is under the responsibility of a program manager, and is divided into operational budgets. For the Justice Mission, Presidents of the courts of appeal are responsible for the operational budgets, but the program manager controls the fungibility of funds (Kirat, 2010).

In France, the preparation of the budget for the judiciary, as well as for all the other public sectors, falls under the exclusive competence of the government" (Contini, 2017). In this case, one of the key phases of the budget cycle is the discussion and the determination of objectives, indicators, and targets[2]. At the beginning of the year, the Ministry of Justice discusses with the Ministry of Finance the budget amount allocated for next year and the actions to be undertaken. At the same time, the Budget Directorate staff of each Ministry gets together to de-

2. B. Lannaud (2007) Performance in the new french budget system, in Marc Robinson, *Performance budgeting. Linking funding and results*.

termine their financial needs. After these conferences, the Prime Minister can fix for each Ministry, and for each Mission, the maximum appropriation amount. In parallel, Performance Conferences are organized with the aim of establishing and evaluating the objectives and the related indicators of performance for each Mission. The result of these conferences is the "Annual Performance Program", which is annexed to the Budget Law. Then, the budget appropriations are broken down by Programs. In September, the budget is submitted to Parliament, to be approved in October.[3] The performance information and the objectives for the three coming years are not used to determine the budget allocation between Programs; targets are set after the allocation of budget to Programs. "The challenge is to assure Parliament that government units will seek the best possible use of the funds granted to them, for a given policy." (Lannaud, 2007)

The Judicial Council is not involved in the budgeting cycle. Once the budget has been approved by Parliament, it is allocated to the Ministry of Justice, which is responsible for the various programs managed by program managers appointed by the Minister, usually the head of a ministerial department. Since 2004, the Presidents of the court of appeal are responsible for the implementation of the operational budget. They also authorize expenditures.

The budget of the judiciary is included in the "Justice Mission", which is divided into five programs. In 2018, the Program had three objectives and twelve indicators:

- OBJECTIVE 1 – IMPROVING QUALITY AND EFFICIENCY
  - Indicator 1: Average processing time for each type of court
  - Indicator 2: Percentage of courts exceeding 15 percent of the targeted average processing time
  - Indicator 3: Average processing time in criminal matter
  - Indicator 4: Solved civil cases by a judge
  - Indicator 5: Solved criminal cases by a judge
  - Indicator 6: Solved civil and criminal cases by a staff employee
  - Indicator 7: Court of appeal reversal rate

3. <http://www.vie-publique.fr/decouverte-institutions/finances-publiques/ressources-depenses-etat/budget/quelles-sont-etapes-elaboration-adoption-loi-finances.html>.

- OBJECTIVE 2 – IMPROVING THE EFFICIENCY OF CRIMINAL JUSTICE RESPONSE, THE ENFORCEMENT, AND ARRANGEMENTS OF CRIMINAL PENALTY
  - Indicator 1: Percentage of criminal cases subject to an alternative to prosecution
  - Indicator 2: The average time for recording a judgment on the National Criminal Record
  - Indicator 3: Enforcement rate of suspended or effective prison sentences

- OBJECTIVE 3 – MODERNIZING THE ORDINARY JUSTICE MANAGEMENT
  - Indicator 1: Average cost per criminal case
  - Indicator 2: Number of electronic filings to be dealt with by the registry and number of electronic filings from the police

The indicators try to measure efficiency (productivity and expenses), effectiveness (length of judicial proceedings), and quality (reversal rates, enforcement, and alternatives to prosecution). These indicators are integrated into the budget, and the annual performance plan is annexed to the Budget Law. This plan includes actions, costs, objectives, and results obtained and expected. However, it is not clear the extent to which these indicators are linked to the number of financial and human resources granted to each court. Indicators are mostly used to evaluate whether resources are efficiently allocated to programs and whether actions are coherent with the objectives. "This information may, when necessary and along with other factors, lead members of parliament to propose amendments aimed at reallocating appropriations between programs grouped under the same mission" (Lannaud, 2007).

Presidents of the appeal courts allocate the operational budgets among the first instance courts within the court of appeal jurisdiction. This allocation is made after consultation with presidents of first instance courts in a so-called "budget conference". However, it is still not clear how performance indicators affect the results of this consultation, since "the allocation of funds to courts remains broadly speaking, disconnected from the performance achieved in courts management" (Kirat, 2010).

The Netherlands uses different budgeting models, depending on the public sector. Performance information is disconnected to budget in those sectors where results are weakly connected to funding, and where Government has low control over the outcome. Performance budgeting is used in those sectors where per-

formance can be more affected by the public authorities' actions (De Jong, 2013; OECD, 2016).

The funding mechanism used in the Netherlands' judiciary is the "Purchaser-provider model". Budget amounts and courts' funding allocation are based on a "Price x Quantity" formula; where quantity is the number of solved cases, and the price is set by the Judicial Council. After a negotiation with the Ministry of Justice, costs to process different categories of cases are taken into consideration.

In the Netherlands, there are two separated and overlapping flows to the budget formulation, approval, and execution. The first flow deals with the Ministry of Justice and the Judicial Council; the second one deals with the Judicial Council and the courts. As far as the first flow is concerned, in January, the Council submits to the Ministry a budget proposal based on the forecasted number of solved cases and their prices. The number of cases solved is subject to annual negotiation between the Council and the Ministry, while the prices for each category of cases are discussed every three years, starting from the prices determined in the previous years. In September, the Ministry submits the proposal to the Parliament. Every change from the Council's proposal must be justified by the Ministry of Justice. In October and in November, the Parliament discusses the proposal which can be amended.

The budget preparation for allocating budget funds to the courts follows a different timing. In May, courts are asked to fill in a form with the performance of the previous year, and a forecast for next year, about the caseflow (incoming and solved cases), the forecasted "revenue" (Price × Quantity) and forecasted expenses. Based on these data, in October the Council prepares its budget plan to allocate funds to the courts.

As mentioned, in the Netherlands, the Ministry is responsible for reviewing the plan and the budget proposal put forward by the Council. Then, the budget of the Council is integrated into the total budget of the Ministry, and it goes to Parliament.

As for the management of the budget within the courts, one of the main features of the budgetary reform in the Netherlands is the autonomy of the courts.

Courts are self-administering organizations, under the supervision of the Judicial Council: each court has its management board, which is in charge of the general management. The management board is composed of the president of the court, the "director of operations" (usually someone with a managerial background), and another judge of the court appointed by the Council (CCEJ, 2016). The board is in charge of the allocation of resources within the court. Since no amount is earmarked, the board has a large discretion about how to spend the money.

In the Netherlands, the use of resources in the courts is subjected to audit by a private external auditor every year. The courts must account to the Judicial Council for the resources' used, but not to the Ministry of Justice.

The Dutch budget allocation criteria for courts is straightforward. The allocation is based on the formula "P × Q" (prices of cases multiplied by the number of cases solved — the calculation is done per different case categories).

The budget allocation from the Ministry of Justice to the Judicial Council is based on 11 case categories, which consolidate 70 case categories that are then used to allocate funds from the Judicial Council to the various courts.

It is also worth noting that the budget allocated from the Ministry of justice to the Council with the price for quantity mechanism is 95 percent of the total budget. The five percent left is allocated by the Ministry of Justice to the courts for mega cases, or for other particular circumstances. Then, only 75 percent of the budget available to the Judicial Council is allocated to the courts through the price for quantity calculation; 25 percent is managed directly by the Council for information and communication technology projects, and for building rents.

The prices for case categories are discussed by the Ministry of Justice and the Judicial Council every three years, while quantities are negotiated every year, based on the forecasted number of solved cases. In the second flow, the Council sets every year both prices and quantities used to allocate funds to the courts, based on forecasted caseflow and courts' outputs.

In the last years, some "quality measures" have been integrated into the calculation of prices per case category. For example, the number of cases that are decided by a panel of judges, or the number of cases reviewed by another judge[4] have higher prices.

Each court obtains the same amount of money for a given case category. Courts that define more cases than expected receive 70 percent of the agreed price on the surplus of cases. Courts that define fewer cases than the forecast must return 70 percent of the price of the unsolved cases into an "equalization account" managed by the Council for the Judiciary.

4. Concluding remarks

The European Network of Judicial Councils for the Judiciary has carried out a survey among judges in Europe (see, *Report on Independence, accountability and Quality of the Judiciary*, adopted at the general assembly in Bratislava the 7th of June 2019 — www.encj.eu).

4. This can be the case of a senior judge who reviews a case of a less experienced judge.

The figure below (ENCJ, 2019, 46) shows that in all the European countries, with different intensity, judges perceived as dramatically important the relationship between court resources and their independence.

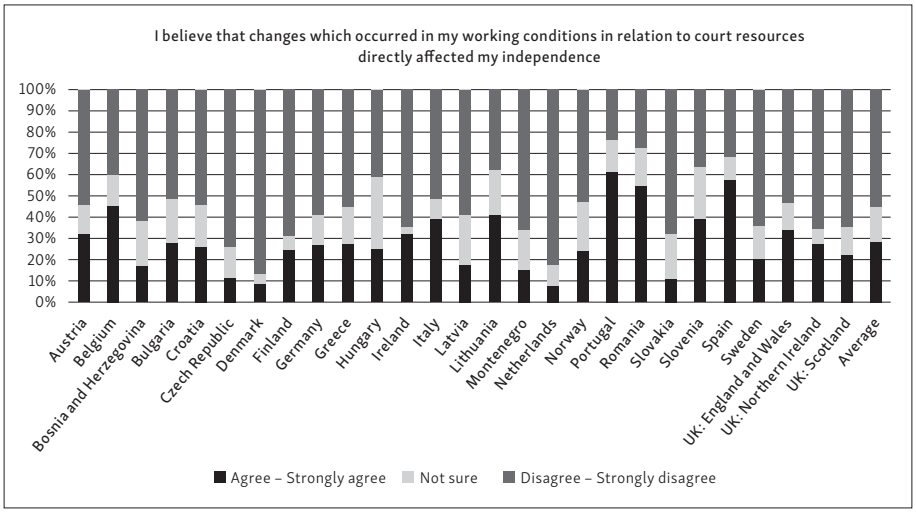

FIGURE 1. Judges' perception about court resources and judicial independence

This is further evidence of the important role that budget and allocation of resources have in the judiciary, which should be more proactive in the innovation processes that are taking place.

Within these innovation processes, there is the use of performance-based models, which may be used to improve performance, equalize the distribution of resources, pursue a more consistent delivery of justice across the country, and ensure judicial independence.

Only a few judges respond "I strongly agree" to the sentence "I believe that changes which occurred in my working conditions in relation to court resources directly affected my independence". Therefore, a conclusion can be made that, generally, judges do not perceive court resources as directly affecting the independence of those countries which have adopted a performance-based budget. Obviously, further analysis is necessary.

In this paper, we have taken into consideration as a starting point of analysis three performance-based budget models that have been implemented in the judiciary of Finland, France, and the Netherlands.

In Finland, the performance-based budget has stimulated more attention on courts' performance and judges' accountability. The allocation of resources is managed at the central level through negotiation with the local courts, to take into consideration their local peculiarities but also to have a more equitable distribution of resources among courts.

In the Netherlands, the Court of Audit emphasizes that: "Since the introduction of performance-based funding, the cost of a court case stabilized after having increased for a long period of time (1983-2002), and the cost differences between courts and cases have declined. It is reasonable to assume that this is due in part to the introduction of performance-based funding".[5]

Based on the data collected, the performance-based budget, in its price by quantity version, has produced a more equitable allocation of resources among courts and a kind of ceiling on courts' expenses.

In addition: "the performance-based budget has made the resource allocation process more transparent and based on clear and shared criteria, which contribute to improving allocative efficiency" (Viapiana, 2018).[6]

In France, at this stage, it is not clear what kind of results the performance-based budget (LOLF) has produced, and further research is needed. There is some concern about the list of performance indicators, because they "do not reflect the reality of the judicial activities within the courts" (Kirat, 2010), while, some others, such as the appeal reversal rate, should be handled with extreme care because they do not necessarily measure judicial quality.

Both in Finland and in the Netherlands, judges indicated that the pressure on efficiency would shift their attention to the number of cases rather than their quality. This is why performance indicators cannot only focus on the number of cases that have to be solved but also on their complexity and age from filing, to avoid opportunistic behaviors such as prioritizing easy cases to avoid complicated and time-consuming ones.

For this reason, it is important that the performance-based budgeting is grounded on a proper performance management system, which both takes into account and balances different values and indicators of quantitative and qualitative performance.

The change in budgeting approach can be affected, but can also affect, the organizational governance of the judiciary. For example, in Finland, it is nowadays debated that the establishment of a Court Administration Agency in the Nether-

5. <https://english.rekenkamer.nl/publications/reports/2016/04/21/funding-the-judiciary-system-consequences-for-efficiency>.

6. Interview with Jos Puts (Council for the Judiciary) – 11 April 2018.

lands as the new budget model contributed to creating more autonomous courts managed by a local management board. Changes in the allocation of resources can also lead to changes in the case assignment systems or in setting case priorities, which are two typical points for attention regarding judicial independence.

This kind of organizational changes can be carried out by explicit norms, or they can rely on practices. This is one of the reasons why more empirical research in the field is needed to better understand the changes undertaken, and the implications for judicial independence and court functioning.

We would like to assess the effects of performance-budget on courts' efficiency and judicial independence through more in-depth data analysis and interviews in the three selected countries. The final goal is to draft "guidelines" to design and to implement a performance budget model in the judiciaries, which would be able to balance efficiency and quality without jeopardizing judicial independence.

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Improving Access to Courts and Access to Justice in Cross-border Litigation: Lessons from EU Experiences

Melhorar o Acesso aos Tribunais e o Acesso à Justiça na Litigação Transfronteiriça: Lições de Experiências da União Europeia

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DOI: 10.33167/2184-0644.CPP2019.VVN1/pp.69-92

ABSTRACT
Seeking to guarantee both citizens and companies the possibility to defend and enforce their rights in a Europe of open borders, a number of EU legal instruments have been adopted to support access to justice in cross-border litigation. Several years into their application, key questions remain to be answered. Do these instruments actually facilitate parties' access to courts and justice? What are the problems encountered in practice and which are the envisaged solutions? What are the reasons why European procedural instruments are rarely used? Through quantitative and qualitative data, the paper explores the legal practitioners' experience with European instruments, and their perception of the usefulness and usability of these instruments dedicated to cross-border litigation. Furthermore, the analysis seeks to determine whether these instruments succeed in facilitating parties' access to courts in a transnational setting, and looks into the use of information and communication technology as an additional means contributing to achieving justice.

Keywords: access to justice, cross-border litigation, EU cross-border judicial procedures, e-justice

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RESUMO
Ao procurar garantir aos cidadãos e às empresas a possibilidade de defenderem e fazerem valer os seus direitos numa Europa de fronteiras abertas, foram adotados vários instrumentos jurídicos na UE para apoiar o acesso à justiça em litígios transfronteiriços. Após vários anos da sua aplicação, há questões importantes que ainda precisam de ser respondidas. Esses instrumentos facilitam efetivamente o acesso das partes aos tribunais e à justiça? Quais os problemas encontrados na prática e quais as soluções previstas? Por que razão os instrumentos processuais europeus raramente são utilizados? Através de dados quantitativos e qualitativos, o artigo explora a experiência dos profissionais do direito com instrumentos europeus e a sua perceção sobre a utilidade e funcionalidade desses instrumentos dedicados a litígios transfronteiriços. Além disso, a análise procura determinar se esses instrumentos conseguem facilitar o acesso das partes aos tribunais num cenário transnacional e analisa o uso das tecnologias de informação e comunicação como meio adicional que contribui para alcançar a justiça.

Palavras-chave: acesso à justiça, litigação transfronteiriça, procedimentos judiciais transfronteiriços na UE, e-justiça

1. Introduction

Access to justice and, implicitly, access to courts, is crucial for a European Union built on the rule of law. The national procedural rules together with the present fragmented EU procedural framework have the task of assuring parties have proper access to justice, guarantee their rights, support economic activities and provide for expeditious and efficient mechanisms to enforce court decisions (see Ontanu, 2017a).

Seeking to guarantee both citizens and companies the possibility to defend and enforce their rights in a Europe of open borders and free circulation of goods, the EU and the Member States have taken actions to facilitate access to justice (and more recently to prevent abusive litigation). Over the last two decades, the EU has adopted a number of instruments addressing specific areas of cross-border litigation: jurisdiction and enforcement (Brussels I bis), service of documents and taking of evidence (Service and Taking of Evidence Regulations), special enforcement mechanisms (European Enforcement Order), alternative uniform procedures (European Order for Payment, European Small Claims Procedure, European Account Preservation Order), family matters (Brussels II bis and Maintenance Regulation), as well as alternative dispute resolution (ADR Directive and ODR Regulation). The legislative approach is based on a mix of solutions that look to coordinate the application of national procedural rules, harmonize legal provisions, establish uniform procedures, and extend the use of information and communication technology (ICT). While intended to harmonize and simplify cross-border litigation, these developments have been fragmented and sometimes overlapping. The result is that the number of sectorial instruments has increased the complexity of the

regulatory framework. The increased complexity makes it more challenging for practitioners and courts to be familiar and at ease with the whole area of private international law and the available instruments, especially, when they handle, only occasionally, cross-border cases (Hess and Kramer, 2017). This does not favor an increase in familiarity with the available instruments, nor does it allow most courts and judges to develop an expertise in cross-border litigation or establish practices that would streamline the handling of such cases (Ontanu, 2017b). As empirical studies show, despite the European legislator's intention to simplify and facilitate cross-border litigation, procedures remain quite complex (Ontanu, 2017a; Gascon Inchausti & Requejo Isidro, 2017; Velicogna & Lupo, 2017). Furthermore, procedures designed for in-person litigation (e.g., European Order for Payment, European Small Claims Procedure) have been recognized as being too complex for non-professional users and require specialization, even for legal practitioners. A series of obstacles remain in the application of European cross-border procedures: namely, differences in national approaches and extensive reliance on domestic rules for the application of the European regulations (e.g., service methods, court fees, jurisdiction, activities that parties are expected to undertake, challenging mechanism), availability of too general information in relation to the European procedures and relevant national provisions, language requirements, difficulties in filling in the standard forms, identifying the competent enforcement authorities, and carrying out the enforcement (Ontanu, 2017a; Hess, 2017; Velicogna, 2017; Kramer, 2016; Mellone, 2014; Ng, 2013).

In view of the identified obstacles and the limited familiarity practitioners and courts might have at times with European uniform procedures and with the whole area of European private international law instruments, several questions arise. For example, do these EU instruments facilitate access to courts and justice? What are the problems encountered in practice and which are the envisaged solutions? What are the reasons why available European instruments are rarely used?

The paper explores the legal practitioners' experience with European instruments and their perception of the usefulness and usability of these instruments dedicated to cross-border litigation. Furthermore, it seeks to determine whether these instruments succeed in facilitating parties' access to courts in a transnational setting.

To answer these questions, the authors make use of quantitative and qualitative data. Section 2 is dedicated to the methodology aspects related to the collection and analysis of data. Section 3 focuses on presenting the quantitative data collected on the critical issues identified in relation to European legal instruments regulating cross-border civil procedures, as well as on their perceived usefulness and usability in Italy and Austria. Section 4 explores these instruments from a

qualitative approach addressing the challenges that the application of cross-border instruments poses to users and legal practitioners. Lastly, the paper concludes with the possible further steps that can be envisaged in order to facilitate access to courts in a cross-border setting, and access to justice.

2. Methodology

The core data set analyzed in this paper was collected through a survey that was conducted as part of an EU co-funded research project called Pro-CODEX. The survey was carried out to investigate cross-border procedures and the perception legal practitioners have of these instruments in order to collect information to support a decision concerning which procedures could be more suitable for digital support from the legal professional perspective, and to guide the choice over possible development activities to be carried out within the project. The survey targeted legal practitioners in Italy, Austria, the Netherlands, and Greece. The questions were drafted in English, German, and Italian, and distributed online to practitioners by using Google Forms (Velicogna et al., 2017, p. 32). The data collection was carried out between July 2016 and January 2017. The survey questions aimed to identify the main issues that affect EU cross-border procedures, the usefulness of the European instruments regulating specific steps of cross-border proceedings, the usefulness of the European uniform procedures, and practitioners' personal experience with these instruments (Velicogna et al., 2017, p. 32). The questionnaire required the respondents to provide an indication of how significant a given aspect is by using a Likert scale (i.e., serious problem, a problem, a minor problem, or if it is not a problem) (Velicogna et al., 2017 p. 34). Furthermore, the survey looked to collect information also on the legal and technical components that the respondents consider necessary for a proper implementation of these European instruments at the national and EU level in order to support cross-border procedures. Open-ended questions integrated the data collection allowing the respondents to provide additional information which did not emerge from the closed questions.

A total number of 257 valid answers were collected. The majority of respondents in the sample are lawyers working in small law firms or organizations having between two and five personnel units (Velicogna et al., 2017 p. 33). Other categories of respondents participating in the study are notaries, researchers, and consultants. Divided by country, the sample is composed of 37 respondents from Austria, 6 from Greece, 206 from Italy (Bars of Florence, Milan, Pordenone and Verona), and 8 from the Netherlands. Based on the size of the sample, the analysis will focus on Austria and Italy, the two Member States with the highest number of replies.

From the entire data set, the paper chooses to zoom in on the general perception of the EU cross-border civil procedures, the critical issues regarding these procedures, the perceived usefulness of EU cross-border procedural instruments, their usability, and the experience practitioners have with regard to these instruments. This perspective is, so far, unexplored, and this initiative allows the authors to investigate some aspects that have a significant influence on the use of the procedures and their success in facilitating access to justice. A better handling of these instruments will certainly improve access to justice in claims where parties opt for, or need to make use of, available European instruments, and, furthermore, improve access to courts.

The data used for the analysis present a number of limits, which should be kept in mind by the reader. This concerns in particular a) the focus of the data collection effort, aimed at acquiring theoretical understanding of the legal and practical context for supporting the Pro-CODEX project objective,[1] and not seeking to obtain a statistical representative sample; and b) the limited geographical representativeness of the data analyzed (e.g., only two EU Member States selected, data collection limited to the Central and Northern part of the country in the case of Italy). Although opened to possible methodological criticism, at the same time, this data analysis provides valuable input for useful qualitative reflections and theoretical explanations because no comparable data set is available to allow a similar exercise. Furthermore, the results of two additional studies are taken into consideration as additional sources of information and for data, theory, and methodological triangulation purposes (Patton, 1987; Yin, 2003). These studies are the study coordinated by the Max Planck Institute Luxembourg for Procedural Law regarding 'Mutual Trust and Free Circulation of Judgments' (Hess, 2017), and a doctoral research on the functioning European Order for Payment and European Small Claims Procedure (Ontanu, 2017a). This step significantly enhances the reliability of the results of the present analysis (Stavros & Westberg, 2009; Fusch & Ness, 2015).

3. Access to Justice and Access to Courts: A Theoretical Perspective

At first hand, for court users, access to court can be seen from the perspective of easiness of finding the court premises and specific offices or courtrooms, the avail-

1. Pro-CODEX objective was "to investigate the possibilities and to create the appropriate conditions to support the development of the technological components needed to make interoperable e-CODEX Digital Service Infrastructure (DSI) and the applications used by legal professionals at national level. This endeavor is based on an empirical research of feasible options to facilitate the use of the e-CODEX infrastructure and to increase the number of users among the different legal professions." (Pro-CODEX 2019 p. 3).

ability of information on opening hours, the presence of physical and language barriers, the attention of the personnel to the court users' needs, and availability of procedural forms that need to be filled with the court (Velicogna, 2011). However, access to court has to be understood from a much broader perspective and in close connection with the fundamental right of access to justice, as guaranteed by Article 6 European Convention of Human Rights and Fundamental Freedoms (ECHR) and Article 47 of the Charter on Fundamental Rights of the European Union (the Charter) (Reiling, 2009, p. 18). Although not an absolute right, access to court is 'inherent to a right to fair trial' (Stadler 2009). Furthermore, effective access to justice is not limited to the existence of a competent court and a formal entitlement to instituting proceedings. It also relates to the possibility of the parties to claim their rights in court and receive a judicial decision that is fair and of good quality, within a reasonable time, and at a reasonable cost (Velicogna 2011). In cross-border litigation, simplification of court proceedings through uniform European procedures or other procedural regulations should not result in a breach of procedural guarantees that have been recognized by the ECHR or the Charter. It is therefore imperative for courts and justice systems to address access to justice and reflect on the barriers that potential and actual court users must overcome, especially in cross-border litigation (Velicogna 2011). From a user's perspective, the justice system is frequently weakened by: (1) formalistic and expensive legal procedures; (2) long procedural delays; (3) prohibitive costs of using court systems; (4) lack of available and affordable legal representation; (5) lack of adequate information about legal provisions, prevailing practices, and limited knowledge of own rights; (6) lack of adequate legal aid systems; and (7) weak enforcement.

The predictability of procedural requirements as well as of the outcome demand clear norms and consistent case law. Unclear or conflicting norms and divergent judicial decisions reduce the predictability of the cases increasing their complexity (See Reiling, 2009, p. 118). This leads to higher justice costs and delays that for small and simpler disputes might easily reach disproportionate levels to the actual claims. In such circumstances, parties are incentivized to stay out of court and, possibly, use the threat of resorting to court as a bargaining tool. Thus, access to justice is limited and the result might be disconnected from the 'actual rights and obligations prescribed by the law' (Velicogna 2011).

3.1 A quantitative perspective on European cross-border litigation instruments

This section explores the Pro-CODEX survey data focusing on two areas: 1) the EU cross-border judicial procedures' critical issues as perceived by the legal professionals and 2) the perceived usefulness and the usability of European cross-border litigation instruments, and the experience of legal professionals with specific

EU cross-border procedural instruments. For each of the two categories, the data is first analyzed at country level, and then a cross-country comparison is undertaken.

4. The Critical Issues of EU Cross-Border Judicial Procedures

Pro-CODEX questionnaire stated that empirical research has shown the existence of a number of critical issues for the use of cross-border judicial procedures, and provided the respondents with a list of such issues asking them to provide an indication of how significant a problem each one of these is. In terms of assessing the significance of the issue, the respondents were given five options to choose from: namely, 'not a problem', 'minor problem', 'problem', 'serious problem', and 'I don't know'.

The issues the respondents were presented with included: (1) finding practical information on how to carry out the European procedure: (2) assessing the complexity of the European procedure for first-time or non-repetitive users; (3) having to deal with differences between procedures (e.g., different structure of the forms, diverging definitions, etc.); (4) determining the jurisdiction or competence of the court; (5) existing language barriers; (6) unstructured requests or communication needs between the parties and the court, not identified in the European procedures or supported by their standard forms; (7) calculating and paying the (court) fees; (8) carrying out the service of documents; and (9) undertaking communication exchange with the court (e.g., no feedback, no direct channel of communication).

In the Italian case, the respondents indicated the following aspects as most problematic in practice: (1) the communication exchange with the court, (2) the complexity of the procedure for first-time or non-repetitive users, and (3) the fact that the communication needs between the parties and the court were not identified in the procedures or supported by forms. These issues were identified as being a 'problem' or a 'serious problem' by over 70 percent of the respondents who expressed an opinion. With regard to language barriers, there appears to be a significant problem of cross-border litigation: more than 50 percent of Italian respondents rated this aspect as 'not a problem' or only 'a minor problem'. The reasons behind this result are not completely clear, but they may be related to the fact that the procedures were conducted before the Italian courts in Italian; hence, the use of a foreign language was not necessary. Another element that might contribute to these results could be related to the fact that the cross-border litigation involved the use of a language the legal practitioner was familiar with, or the parties used translated documents. Further qualitative research would be necessary in order to clarify the precise reasons for this outcome, and whether the result is matched by

situations in other Member States. Figure 1 below provides a visual representation of Italian respondents' opinions on the critical issues identified in cross-border judicial procedures involving European instruments. The results are ordered in an ascending trend based on the seriousness of the issue.

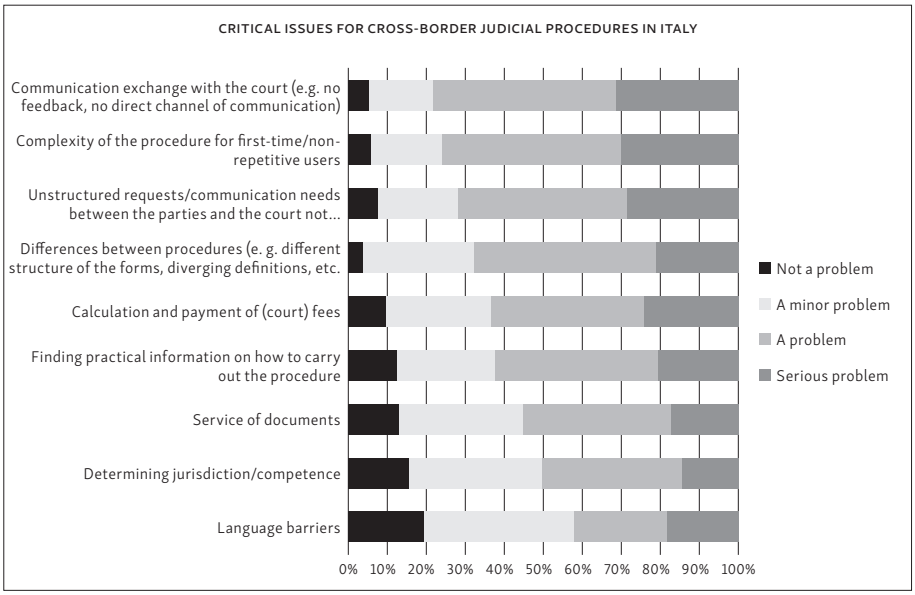

FIGURE 1. Cross-border procedures' critical issues in Italy

For the Austrian respondents, the complexity of the procedure for first-time or non-repetitive users is the most problematic issue. More than 86 percent of the respondents thought this is a 'problem' or a 'serious problem'. This difficulty is followed by the differences existing between cross-border judicial procedures. 77 percent of the respondents think this is a 'problem' or a 'serious problem'. Subsequently, the calculation and payment of (court) fees and the service of documents are the issues perceived as least problematic in practice. Less than 50 percent of the respondents rated these aspects as a 'problem' or a 'serious problem'. Figure 2 hereafter provides a visual representation of the results of the Austrian respondents' opinions ordered on an ascending trend based on the seriousness of the problem.

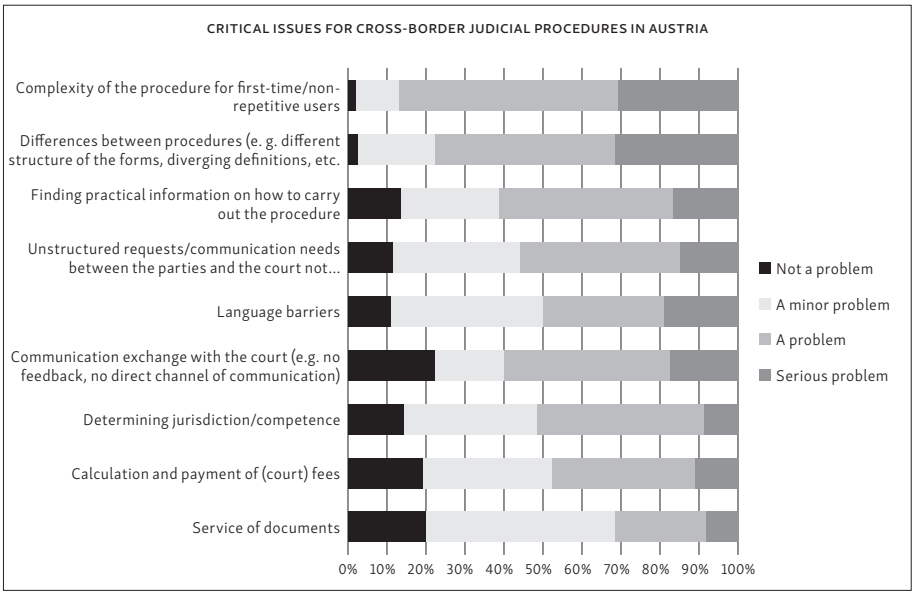

FIGURE 2. Cross-border procedures' critical issues in Austria

Based on the country results, Figure 3 confronts the Italian and Austrian legal professional perception on the relevance of the cross-border judicial procedures issues. The appreciation of the seriousness of a problematic is given a weight between 0 ('not a problem') and 3 ('serious problem') and then an index is calculated as the arithmetic average of the replies which have been weighted. Although relying on an uneven sample of responses between the two Member States analyzed, this numerical treatment of the data allows an immediate glance into the significant difference existing between national perceptions of the extent of the seriousness which various issues pose to practitioners. According to this assessment of the data, it becomes obvious that Italian legal professionals consider the communication exchange with the courts, the service of documents, and the calculation and payment of court fees much more problematic than their Austrian colleagues do. In return, the Austrians assess the differences between procedures, the language barriers, and the complexity of the procedures for first-time or non-repetitive users as more problematic than the Italian practitioners.

While this research is a helpful step in revealing some critical aspects related to the application of European cross-border procedural instruments, further more in-depth qualitative research would be necessary in order to acquire a more extensive understanding of the causes leading to these difficulties and why specific

aspects are more problematic than others in an investigated legal system. Additional qualitative research could also reveal whether these identified issues are related to specific characteristics of the national justice system, and of the applicable procedural rules, or whether other elements play a key role in leading to these specific outcomes.

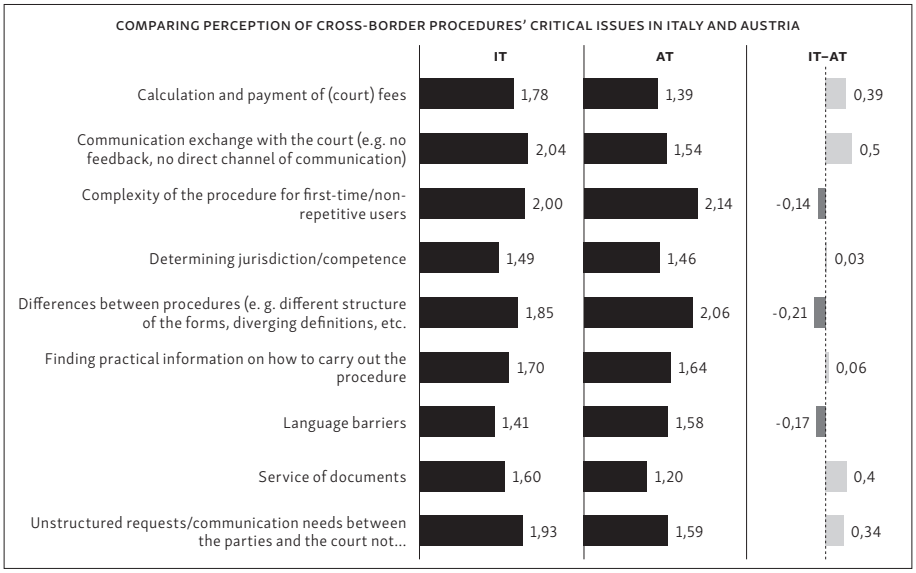

FIGURE 3. Comparing the perception of cross-border procedures' critical issues in Italy and Austria

5. Usefulness, Usability, and Experience with EU Cross-Border Instruments

The Pro-CODEX questionnaire investigated also the experience of the respondents with the European procedural instruments and their perception on the usefulness and usability of these instruments in EU cross-border litigation. The instruments assessed were:

- Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*Regulation (EU) No 1215/2012 Brussels I bis*);
- Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims (*Regulation (EC) No 805/2004 European Enforcement Order – EEO*);

- Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (*Regulation (EC) No 1393/2007 Service of documents*);
- Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (*Regulation (EC) No 1206/2001 Taking of evidence*);
- Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis) (*Regulation (EC) No. 2201/2003 Brussels II bis*);
- Regulation (EU) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (*Regulation (EU) No 4/2009 Maintenance*);
- Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession with the Commission Implementing Regulation (EU) No 1326/2014 establishing the Forms referred to in Regulation (EU) No 650/2012 (*Regulation (EU) No 650/2012 Succession*);
- Regulation (EU) No 606/2013 on mutual recognition and protection measure in civil matters with the Commission Implementing Regulation (EU) No 939/2014 establishing the certificates referred to in Regulation (EU) No 606/2013 in OJ 263/3.9.2014 (*Regulation (EU) No 606/2013 Protection measures in civil matters*);
- Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (*Regulation (EU) No 2016/679 General Data Protection*);
- Regulation (EC) No 1896/2006 creating a European order for payment procedure (*Regulation (EC) No 1896/2006 European order for payment – EOP*);
- Regulation (EC) No 861/2007 establishing a European Small Claims Procedure (*Regulation (EC) No 861/2007 European Small Claims Procedure – ESCP*);

- Regulation (EU) 2015/2421 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure (*Regulation (EU) 2015/2421 amending ESCP and EOP*);
- Regulation (EU) No 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (*Regulation (EU) No 655/2014 European Account Preservation Order - EAPO*);
- Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (*Regulation (EU) No 1259/2010 Rome III*).

With regard to each of the above regulations, the respondents were requested to rate their experience on the basis of the following scale: 'none', 'theoretical', '1 case', '2-5 cases' or 'more than 5 cases' handled. Furthermore, on the perceived usefulness and usability of EU cross-border civil procedure instruments, the respondents had to choose between 'very low', 'low', 'average', 'high' or 'very high'.

In Figure 4 below, the usefulness and usability of the legal instruments assessed have been compared on the basis of an index calculated as the arithmetic average of the replies that have been weighted between 1 ('very low') and 5 ('very high'). Further, the personal experience index regarding the cross-border procedural instruments has been calculated also as an arithmetic average of the replies that have been weighted between 0 ('no experience') and 4 ('more than 5 cases').

For the Italian respondents, the Service of documents, the Brussels I bis and the European Order for Payment (EOP) appear to be the most known procedures as well as the European instruments perceived to be the most useful and usable (Figure 4). The Austrian legal practitioners indicate more experience with two of the aforementioned procedures — Brussels I bis and the EOP — which are indicated also as the most useful and usable, in addition to the European Enforcement Order (EEO). The Service of documents Regulation, while perceived as useful and usable by Austrian respondents, appears to be relatively less known in practice (Figure 5). The high scores of perceived usefulness and usability of Brussels I bis are likely influenced also by the central role this regulation plays within European private international law, and other European regulations' reliance on its provisions, especially when it comes to jurisdiction (e.g., EOP, ESCP, EEO, EAPO).

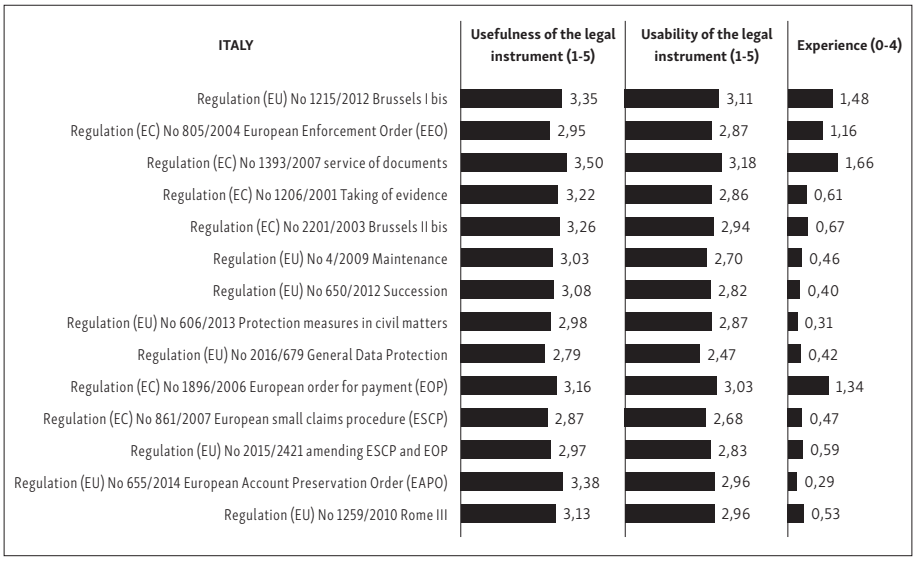

FIGURE 4. Usefulness, usability and experience of EU cross-border civil procedure legal instruments in Italy

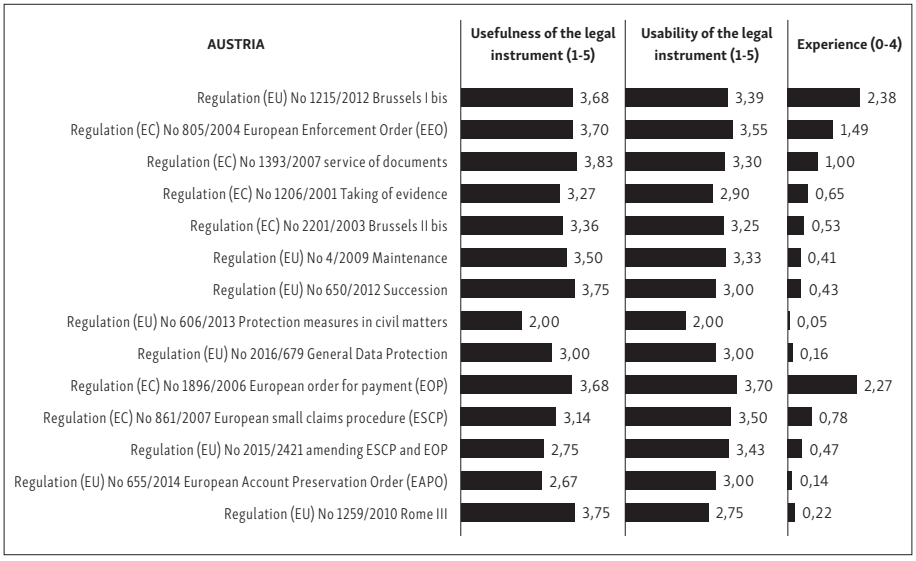

FIGURE 5. Usefulness, usability and experience of EU cross-border civil procedure legal instruments in Austria

The difference between experience and perceived usefulness and usability of the European procedural instruments by legal practitioners, in Italy and Austria,

participating in the study are presented in Figure 6. This creates a clearer image of practitioners' experience and their perception of the appropriateness of the available instruments. In most cases, the Italian respondents assess the usefulness and usability index at a lower level than their Austrian colleagues. This is the case for 11 (usefulness) and 12 (usability) out of 14 instruments respectively. The Italian respondents experience index is higher than the Austrian one for about half of the studied instruments. Given the economy of the paper, we decided not to further explore several interesting areas such as the differences between the perception of respondents with no experience, theoretical experience and practical experience. Such an inquiry will constitute a further research step that we intend to take in the future, also taking into account the feedback already received, the comments, and the discussions generated by the publication of the present work.

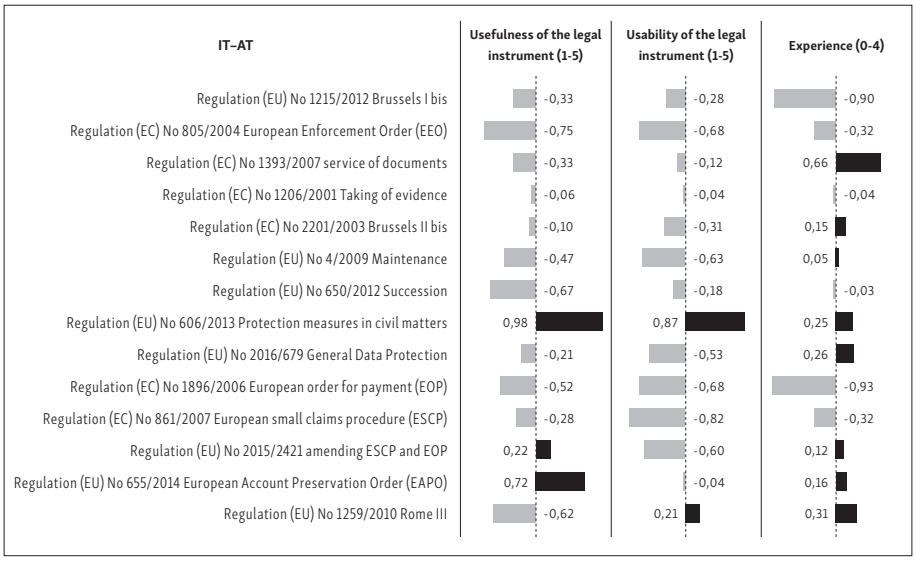

FIGURE 6. Different perception of usefulness, usability and experience of EU cross-border civil procedure legal instruments in between Italy and Austria

6. A Qualitative Perspective on the Application of Cross-Border Litigation Instruments

Issues generally affecting cross-border procedures

Based on the qualitative data collected through the open questions of the Pro--CODEX survey, the Austrian and Italian practitioners have identified a number

of impaired aspects on the functioning of cross-border procedures. One of the aspects most frequently referred to is 'limited knowledge' with regard to cross-border procedures by courts and national practitioners. This overall low level of knowledge with regard to European uniform procedures and procedural instruments across the Member States is confirmed by a number of other empirical and comparative studies carried out prior or covering the temporal framework that the present analysis relies on. (e.g., Hess, 2017; Ontanu, 2017a; Kacevskas, 2012) The European procedures are often different from the national familiar procedures. Additionally, Austrian practitioners perceive court fees for cross-border procedures as a problematic aspect because information is not always, or easily, available. This problem is more generalized across the Member States in relation to European uniform procedures as well as other procedural instruments. Access to relevant case law across the Member States and courts databases is not generally available at EU level, although different actions and projects are taking steps in identifying and providing easier access to national case law related to the application of cross-border procedural instruments. Both Italian and Austrian practitioners identify this situation as an element that can affect the cross-border procedures. Furthermore, practitioners in both countries see translation needs and lack of harmonized legal terminology as problematic in cross-border procedures. Dedicated legal ontologies are missing at the moment and as previous research revealed, there are language differences and variations. This results also from the translations of the provisions of the regulations in all EU official languages as well as differences of terminology being used between the EU texts and the national procedure (see for example Ontanu 2017a in relation to the EOP and the ESCP). This lack of precision and matching of concepts can create difficulties of interpretation and confusion (Ontanu, 2017a; Crifò, 2016; Oro Martinez, 2016).

In need of domestic implementation legislation (Usefulness of domestic implementation legislation)

The majority of European instruments adopted in order to facilitate cross-border litigation are regulations. In principle, this means that for their application they require no specific additional legislative actions at national level. However, the referral to domestic procedural rules when the regulations contain no specific provisions, as well as the explicit reference to national law in some instances, and the need to coordinate national and European procedural rules make additional actions necessary at national level (Ontanu, 2017b, p. 468). In facilitating the interrelation between the two levels of legal norms, Member States are free to choose the technique they retain to be the most appropriate. This ranges from amendment of national legislation to no specific action apart from communicating to the

European Commission the information required by the regulations. However, in practice, legal practitioners retain implementation legislation, a useful development. This facilitates also the judges' interpretative tasks with regard to European procedural instruments, and creates certainty as to which domestic procedural rules apply in connection with the European provisions in cross-border litigation, thus making access to courts services smoother.

Austrian and Italian practitioners participating in the Pro-CODEX survey confirm this need for implementation in the domestic legislation. This makes the coordination between national and European procedural rules easier and the necessary requirements clear to comply with for the parties and the practitioners handling such claims. Practitioners and courts require a comprehensive legislation that is practical to apply. This is also beneficial for the user who can receive clearer information as to procedural steps and requirements that need to be complied with in cross-border litigation. There are several areas of interest where the usefulness of implementation is particularly indicated (as needed) by respondents: the opposition stage, electronic service of documents, cross-border validity of proceedings undertaken, and court fees. The usefulness practitioners in these two Member States see in relation to the need for adopting domestic implementation legislation is doubled by a desire to achieve 'as much unification or standardization as possible' as cited by an Austrian respondent.

National legal instruments to support cross-border procedures

With regard to national legislative actions that can support cross-border procedures, practitioners' replies have identified a series of areas where such additional measures could be beneficial. Italian and Austrian stakeholders' answers can be grouped around the following cluster areas: electronic handling of claims and digitalization of procedures, simplification of procedural rules and unification of various procedural aspects, implementation of European regulations, improving access to information in relation to the procedures, and other actions.

Practitioners in both countries consider the introduction of homogeneous or uniform procedural rules for cross-border claims as a much-needed development. To quote an Austrian practitioner 'the material requirements must be the same for all EU Member States'. Respondents look for further standardization, a set of unified norms, and a unified framework for procedural rules, certifications and forms used. However, from a policy perspective this further unification of national procedural rules seems difficult to achieve for the time being. These suggested actions by respondents are closely connected with the identified need of providing clarity and further simplifying rules related to cross-border procedures. Italian practitioners look for a simplification of the service rules, access to public registers

across Member States, and payment order procedure, while their Austrian counterparts are interested in a simplification of aspects related to procedural rights. Furthermore, practitioners in both Member States support the development of a legal framework that can facilitate access to national information and communication platforms, and portals that can simplify, for example, the identification of the competent court. Access to unified databases is also emphasized by Italian practitioners. These developments can be further enhanced by actions digitalizing cross-border court procedures or certain procedural steps (e.g., service of documents). This could follow on the use of existing ICT infrastructure that is already available for national procedures. Exploratory studies on the topic, though, seem to suggest that this may not be an easy objective to achieve (Amato, 2019; Steigenga et al., 2018; Velicogna et al., 2018; Ontanu & Velicogna, 2018)

Together with national actions, additional European legal instruments can contribute to reinforcing cross-border procedures within the EU. Actions that practitioners consider to be useful developments at EU level are matching, to a significant extent, national suggested developments to support cross-border procedures. These concern actions for the digitalization of procedures, and achieving better coordination between Member States with regard to e-justice systems, further simplification of procedures, harmonization of various procedural aspects that remain regulated by national rules, establishing access to various national registries, and databases. These actions should be reinforced by additional training for practitioners and court staff involved in the handling of such cross-border claims. According to an Austrian respondent, in practice, there are situations in which courts in different Member States (e.g., France, Germany) are having familiarity difficulties (e.g., recognizing claim forms). Such situations have been confirmed also by other studies on the European uniform procedures (e.g., see Ontanu, 2017a).

The EU legal developments related to use of information and communication technology focus on two main aspects. One concerns the setting uniform standards and requirements for the use of technology and security standards related to the use of technology (e.g., signature forms). The other envisaged actions concern steps to achieve coordination between Member States' e-justice systems. According to the respondents, legislative steps at EU level should also be taken to establish and interconnect national registers and databases providing information for enforcement purposes. Together with this, practitioners in both countries aim for more clarity, standardization, and simplification of the European procedures. The simplification can be achieved also through a harmonization of various procedural aspects that are at the moment regulated by national procedural rules (e.g., costs of court proceedings — court fees and representation costs, service, enforce-

ment). However, this is not an easy development to achieve as procedural aspects are deeply rooted in national traditions and policies as well as being perceived as a matter of procedural autonomy and sovereignty of Member States.

Lastly, there are minority opinions voiced by practitioners in Austria and Italy. For example, an Italian stakeholder supports the establishment of a direct appeal to the CJEU for violations of EU law at national level. At the same time, there are Austrian practitioners who consider that no further actions should be taken in relation to cross-border procedures.

Technical developments to support cross-border procedures at national level

According to respondents, technical developments can further contribute to supporting cross-border procedures. They need to rely on the appropriate legal framework that will allow and support the development of a technical infrastructure that can support the handling of court claims in an electronic format.

The Austrian and Italian practitioners participating in this research agree on three main areas where technical developments are crucial to support cross-border procedures. These are the development and use of appropriate security measures for electronic communications and exchange of documents, the development of appropriate software solutions to connect legal professionals to court systems, and the development of national platforms and databases standards that allow a European interoperability of national systems, and an easy access to information across the EU.

In order to secure a high level of protection and inviolability of electronic communications and secure the authenticity of transmitted documents, practitioners in both analyzed jurisdictions consider the development and use of digital signatures, certified e-mail addresses, and certified security systems and secure accesses as necessary technical developments. Italian respondents welcome the idea of developing uniform digital signatures. However, such an enterprise would require a common agreement between Member States on the format of the digital signature. In this perspective, e-CODEX trusting mechanism based on the verification of the signature in the originating country by a trusted authority (i.e., the Ministry of Justice) would respond to the requirements of national digital signatures' interoperability. At the same time, the legal basis of this mechanism will have to be reinforced in order to satisfy the legal requirements of a full deployment. At this point, harmonization might be more difficult to achieve than securing interoperability and recension of national certifications, but it could be an approach that the European and national legislator may still choose to explore.

Some of the software developments practitioners in both countries refer to as desired advancements to support cross-border litigation are related to rein-

forcing security in electronic communication. Additionally, solutions for lawyers' software integration with other electronic solutions used by courts are seen as a useful technical development at national level. Furthermore, other technical solutions practitioners in both countries propose, concern the harmonious aspect of e-justice services in the EU. Respondents are also open to achieving additional standardization of technologies used, and establishing uniform interface standards. These aspects would also support and facilitate cross-border interoperability of national electronic platforms and databases, and contribute to reinforcing European solutions such as the e-CODEX initiative and the e-Justice portal as a 'one-stop-shop in the area of justice' for 'the whole European e-Justice system'.

Technical developments to support cross-border procedures at EU level

The technical developments suggested by respondents to be developed at EU level mirror developments and improvements retained as necessary at national level.

Both Italian and Austrian practitioners see the importance and usefulness of developing European technical components that lead to the establishment of a European certified e-mail system (or equivalent technology) that practitioners can use in their communication with courts and national authorities, as well as an identification system that would allow legal practitioners to have access to databases, registries, and to facilitate their communication with courts and authorities. Together with this, the development of a unique or dedicated software for cross-border procedures should be considered by national governments and the EU. Software developments can support and facilitate the access to technical infrastructure connection practitioners, courts, and authorities in the EU, as well as access to various registries and legal platforms.

A further step that mirrors national harmonization and unification proposals concerns achieving uniform interface standards and harmonizing access to public books and platforms for various purposes such as digital service of documents, video conferencing, public registries, the European Order for Payment procedure, and access to national information on various procedural aspects.

All these developments at European as well as national level, are also connected to and rely on the availability of information in different EU official languages. Therefore, technology development and use for facilitating access to courts in cross-border litigation has to be doubled by additional steps in different areas that are connected to justice such as access to information in languages both parties and professionals understand, appropriate case management systems, and procedural rules.

As this analysis reveals, while a number of ideas are shared by the respondents on how to improve cross-border legal instruments and their usability — also

through the use of technology — the focus is on incremental improvement of the existing framework, without reflection on possible reconfigurations that could be enabled by potential combinations of normative and technological changes.

7. Improving Access to Justice through Law and Technology: Concluding Remarks

The present research and analysis is a first attempt to identify the developments practitioners and courts consider more desirable and useful in cross-border litigation. Within the limits of the quantitative and qualitative data available (see the methodological section), this first attempt explores ongoing developments and practices that are of importance for European and national policymakers. As the paper shows, cross-border judicial procedures are characterized by a fragmented EU procedural framework and by a dispute over national procedural rules and practices, which generate further complexity to the user not expert in the local way of doing business.

Legal practitioners responding to Pro-CODEX questionnaire clearly indicated that many critical issues identified by the various research initiatives are a problem, even a serious problem to them. A number of suggestions on possible ways to improve the situation have been suggested, which could be used to support the on-going political discussion over legal and procedural evolution.

The use of ICT has been promoted and encouraged by EU as means to facilitate, simplify, and speed up cross-border litigation through the filing of claims, conducting court procedures, and enforcement of judgments. Building on their national experience, respondents think that technology could be helpful in reducing the complexity and uncertainties of cross-border judicial communication. While this may help provide a solution, empirical research and empirical experimentation carried out through projects like e-CODEX, API for Justice, and Pro-CODEX indicate that technical solutions are not sufficient to tackle the present limitations. The technical, legal, and organizational developments have to be addressed together to provide comprehensive solutions for cross-border litigation. The technical developments can support court activities and facilitate parties' access to courts in cross-border litigation, but such solutions must, at first, be available and function at national level in order to build a European interoperable infrastructure. ICT solutions can support cross-border procedures at EU level, but they cannot solve all the problems related to improving access to courts and access to justice. Particular attention should also be given to achieve a certain user-friendliness of the procedural architecture that guarantees procedural rights for the parties, and clear requirements for legal practitioners and courts.

As a final note, while the data collected by Pro-CODEX project and analyzed in this paper provide a useful contribution to the study of this complex topic, the authors are fully aware of its limits. Therefore, further research is necessary in order to extend the results of the present investigation to a representative sample of national courts and practitioners across the EU, and verify whether additional legislative or technology developments should be considered in supporting cross-border procedural instruments, and maximizing their use and usefulness.

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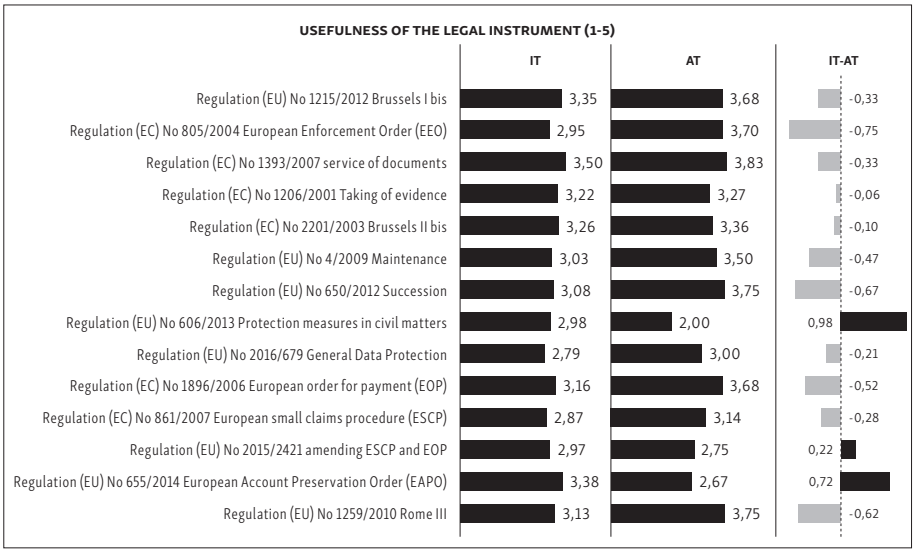
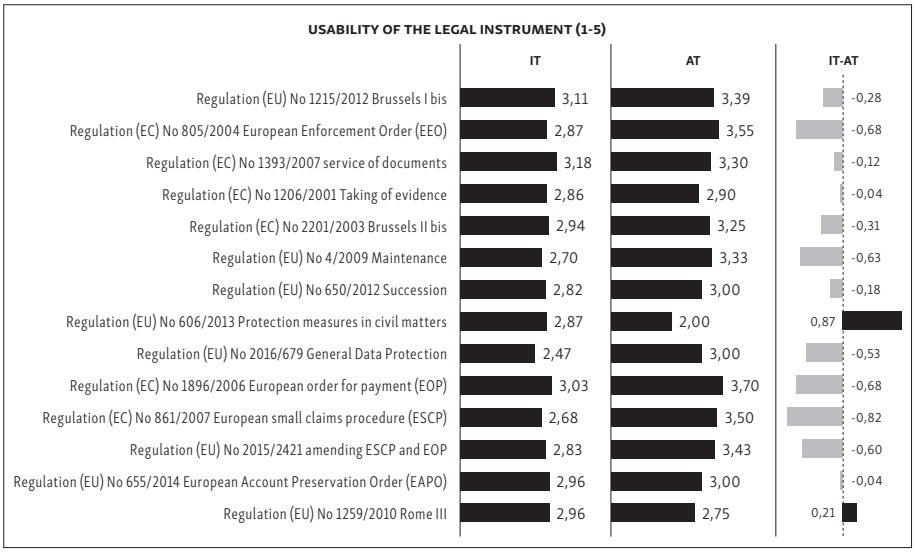
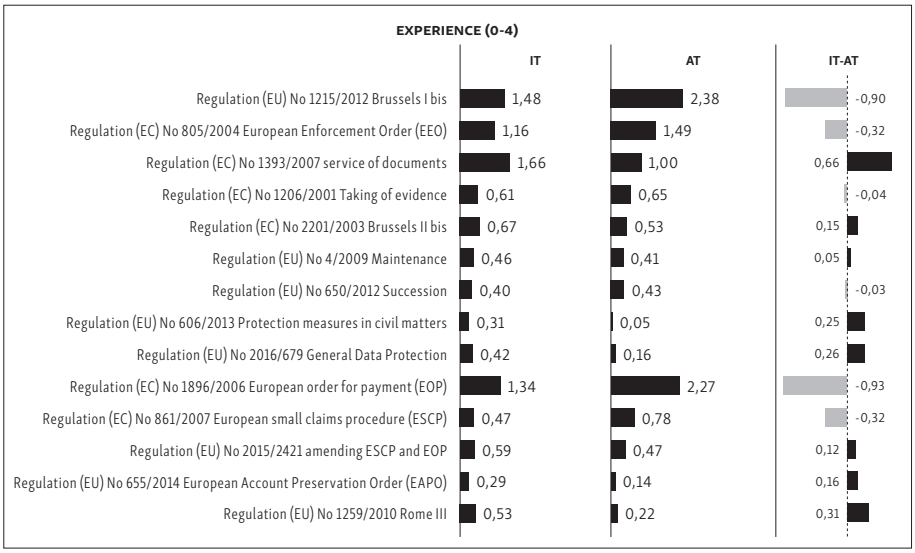
Annex 1: Additional Figures






EXPERIENCE (0-4)
IT
AT
IT-AT
Regulation (EU) No 1215/2012 Brussels I bis
1,48
2,38
-0,90
Regulation (EC) No 805/2004 European Enforcement Order (EEO)
1,16
1,49
-0,32
Regulation (EC) No 1393/2007 service of documents
1,66
1,00
0,66
Regulation (EC) No 1206/2001 Taking of evidence
0,61
0,65
-0,04
Regulation (EC) No 2201/2003 Brussels II bis
0,67
0,53
0,15
Regulation (EU) No 4/2009 Maintenance
0,46
0,41
0,05
Regulation (EU) No 650/2012 Succession
0,40
0,43
-0,03
Regulation (EU) No 606/2013 Protection measures in civil matters
0,31
0,05
0,25
Regulation (EU) No 2016/679 General Data Protection
0,42
0,16
0,26
Regulation (EC) No 1896/2006 European order for payment (EOP)
1,34
2,27
-0,93
Regulation (EC) No 861/2007 European small claims procedure (ESCP)
0,47
0,78
-0,32
Regulation (EU) No 2015/2421 amending ESCP and EOP
0,59
0,47
0,12
Regulation (EU) No 655/2014 European Account Preservation Order (EAPO)
0,29
0,14
0,16
Regulation (EU) No 1259/2010 Rome III
0,53
0,22
0,31

Small Claims: The Building Blocks of Access to Justice

Pequenos Litígios: A Base do Acesso à Justiça

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DOI: 10.33167/2184-0644.CPP2019.VVN1/pp.93-108

ABSTRACT
Special Courts in Brazil are a blend between, on the one hand, a need to guarantee access to justice and, on the other, a need for an efficient legal system. This essay argues that we can still return small claims courts to their original purpose: satisfying the individual litigant, and, therefore, (re)constructing the legitimization of our legal system. This article compares small claims courts in Brazil and in the United States, making the user of the law the key to empowering our legal system. Individuals have been driven away from small claims courts, both in Brazil and in the United States, mostly because of the strong predominance of businesses. As a solution, conflicts between individuals should regain value in small claims courts. Small adjustments can be made to adapt Special Courts in Brazil to the needs of the individual; in turn, citizens will garner a greater trust in the legal system.

Keywords: small claims court, access to justice, Law 9.099/95, legitimacy

RESUMO
Os juizados especiais no Brasil enfrentam atualmente o embate entre a necessidade de garantir o acesso à justiça e a busca pela eficiência do judiciário. Este trabalho sustenta que ainda é possível retomar o propósito original dos juizados especiais: a satisfação do liti-

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gante individual e, desse modo, a (re)construção da legitimidade do nosso sistema jurídico. Por isso, este trabalho desenvolve uma comparação entre os juizados especiais brasileiros e americanos, com o objetivo de estabelecer que o usuário do sistema jurídico é a chave para o seu empoderamento. Tanto no Brasil quanto nos Estados Unidos, os indivíduos têm sido afastados dos juizados especiais devido à predominância de corporações. Como solução, propõe-se a valorização dos conflitos entre indivíduos.

Palavras-chave: juizados especiais, acesso à justiça, Lei 9.099/95, legitimidade

1. Introduction

What is the significance of small conflicts in a complex society? Let us take an example:

> It's a Friday morning, 6:30 AM. Luciana's alarm clock blares next to her ear and she instantly jumps out of bed. Quickly, she grabs a 10 real bill from the counter of her small kitchen and shoves it in her pocket. Rubbing her eyes to try to stay awake, she walks the full kilometer from her house to the bus stop, so she can get to her workplace – a small dentist's office where she works as a secretary – at 8 AM, in time to pick up the first phone calls.
>
> As she sits down in the bus, Luciana instantly doses off. She has not gotten a decent night's sleep in the past year, due to her upstairs neighbor's noisy activities during the night. Luciana has repeatedly asked her neighbor to refrain from throwing parties in the middle of the week, but she has had little success.
>
> Faced with this injustice, Luciana considers going to court. However, she soon realizes how much of a nuisance that would be: she has no legal education, and would wait years for the matter to be resolved, anyway.
>
> Luciana stares ahead at the bumpy road and lets out a quiet sigh of exasperation as she comes to terms with this small, yet painful, injustice.

Luciana is a fictional character, but she represents the reality of many citizens in Brazil. Her commonplace injustice could be taken to a small claims court; instead, it will become the root of her disbelief in her country's legal system.

To quell this distrust in the legal system, small claims courts were created in Brazil to guarantee a larger access to justice for low-income citizens. This original purpose has been distorted due to the increasing specialization of small claims courts in Consumer Law, the unequal powers between litigants and the strong presence of companies in the small claims system (Mello & Meirelles, 2010). Why does this have an effect on the legitimacy of the legal system for its users? Can this absence of trust in the legal system be reversed?

This paper suggests a comprehensive analysis of the role of small claims courts in the context of the need for a greater legitimization of the Brazilian legal system. To understand the functions of a small claims court as an instrument for preventing feelings of injustice, this article articulates small claims courts in Brazil with the United States' equivalent, albeit respecting the singularities of each legal system.

To ensure that the users of the law believe in its social function of justice, it is imperative that small, daily conflicts are not marginalized. The American and Brazilian legal systems, despite all their differences, face many similar challenges in effectively guaranteeing access to justice in small claims courts. Specifically, small claims courts have been at a standstill regarding what should be their main purpose: to prioritize the individual litigant, given that a legal system needs to have its user as its main driving force (Nader, 1984).

Part 1 of the paper advances the user theory of law as an approach for the legitimization of a legal system. Subsequently, Part 2 gives a brief explanation of the evolution of small claims courts in Brazil and their current situation. Part 3 provides an empirical juxtaposition of small claims courts in Brazil and in the United States. Building on the differences and similarities between the two different systems, Part 4 of this article discusses the legitimacy of small claims courts in Brazil and in the United States, with an emphasis on litigant satisfaction during the small claims process.

Finally, this essay concludes that, today, simple measures — such as training judges, having accessible court hours and providing litigants with more information about the Special Courts process — can be presented in order to return small claims courts to their original function as an instrument of access to justice, operated by the common citizen, thus contributing to the legitimization of the legal system.

2. The User Theory of Law

Effective access to justice depends on understanding the law as an instrument of justice. In this sense, the law operates within a complex system of interactions between institutions and interests. According to Professor Laura Nader's user theory of law, embracing the law as an interactive model allows us to acknowledge the plaintiff's role in making the legal system democratic (Nader, 1984).

Indeed, the plaintiff is driven by the justice motive. The justice motive can be described as feelings of right and wrong that lead to a sense of satisfaction with the resolution of a given conflict (Nader, 2005). Therefore, when the user of the law is driven by the justice motive, he is mostly seeking to resolve the conflict in a manner in which he feels he participated in the process, rather than feeling he

was subjected to an imposed solution to the conflict that does little to redress his complaints.

This ongoing debate supports the idea that a legal system should have the main purpose of making its users feel capacitated to promote concrete changes in their everyday reality. A user of the law that feels his claims are of little or no importance to the legal system will inevitably feel like a lesser part of a representative government, which can lead to a general sense of injustice — a term coined by Edmond Cahn that describes the disappointment of a consumer of the law. This sense of injustice, in turn, can lead to a failure of the legitimization of a legal system (Cahn, 1959).

In Brazil and the United States, both industrialized societies, legal procedures between two strangers are increasingly frequent. Consequently, when facing disputes between parties of unequal power, the common citizen's role as a plaintiff atrophies when compared to large corporations (Nader, 1984). This dilemma indicates that one of the flaws in the small courts system is the failure to guarantee equality between parties.

However, if an individual does not believe in the power that the law has to resolve his grievances, he will soon become disenchanted with the system and will no longer want to participate in the molding of the very institutions on which he is supposed to rely. A plaintiff who firmly believes that his demands are of little or no importance to the legal system will garner distrust in the law that can lead to broad consequences of delegitimization of the legal system.

In the following sections, this article will analyze the performance of the legal system from a perspective that ensures small claims courts can address cases in a quick, but, most importantly, fair manner.

Additionally, in order to assure long-term access to justice by satisfying the user of the law, it is necessary to combat the notion that higher litigation rates are a sign of social malfunction. On the contrary, an active legal system is a consequence of improved well-being in a society. In fact, citizens tend to use courts when they are economically well endowed.

There is a clear relationship between higher litigation rates and human development in Brazil. The states in which new cases per 100,000 residents are lowest are the states with the lowest HDI indices, such as Piauí, Pará, Maranhão and Alagoas. States with a higher HDI index, such as Rio Grande do Sul, have superior rates of new cases per 100,000 residents (Curado Silveira, 2016).

Therefore, high litigation rates should not always be viewed as an immediate warning sign. In fact, it could be a result of positive change: citizens participating in the resolution of conflicts and in the administration of justice.

3. The Context of Small Claims Courts in Brazil

The creation of small claims courts in Brazil is intimately tied to the Access to Justice movement. In its original form, this movement initiated a discussion about the need to make justice less formal and to introduce alternative methods of dispute resolution (Matta Chasin, 2012). A strong access to justice movement arose in 1980, combating the restricted access to justice that lower income citizens faced. As a part of this movement, in 1988, Cappelletti and Garth proposed the creation of small claims courts.

Since its origin, small claims courts in Brazil were inspired by the United States' system of small claims courts. In Brazil, they emerged to serve as a mechanism to reach a suppressed demand for the legal system, preventing what Professor Kazuo Watanabe calls "contained litigation" — the lack of access to justice for citizens from lower classes, due to the high costs of litigation (Andrighi, 1996).

However, due to the increasing delay and overcrowding in ordinary courts, the Access to Justice movement adjusted in the 1990s, instead of providing entrance into the legal system for low income citizens, the predominant issue became easing the heavy volume of cases in courts (Matta Chasin, 2012).

Therefore, beginning in the 1990s, the Access to Justice movement also became a plan for judicial reform in Brazil. In many ways, the movement for access to justice became fundamentally geared towards efficiency, and small claims courts converted into a tool for an optimization of the smooth functioning of the legal system (Matta Chasin, 2012).

Additionally, a greater significance was given to the relationship between court efficiency and the country's economy. As a result, from a structural perspective, the Access to Justice movement in the 1990s became a solution to the call for an autonomous and efficient judicial system (Matta Chasin, 2012).

The guarantee of access to justice and the importance of resolving citizens' everyday claims transitioned into a discourse used for the legitimization of Judicial reform, with the specific intent of stressing the perceived necessity of decongesting courts. As a result, small claims courts were given a marginal role in the legal system, since cases under its jurisdiction were seen as less important from an economic perspective. Small claims courts suddenly became a way of mitigating the high volume of cases in ordinary courts, so that these courts could resolve only the issues that were worth the highest monetary value — the latter were seen as conflicts of critical importance to the economy (Matta Chasin, 2012).

Small claims courts were first launched in Brazil in between the first and second waves of the access to justice with a law in 1984 that created the "Special Courts for Small Claims". Therefore, ever since the emergence of small claims courts in Brazil, there has been an inherent tension between making courts ac-

cessible to citizens of lower economic standing, and reducing the case volume in overcrowded courts (Matta Chasin, 2012).

These historic factors, at the root of the creation of small claims courts in Brazil, contribute to perpetuating the debate regarding the creation of courts with less bureaucracy than ordinary courts, to increase efficiency, while, at the same time, to broaden access to the legal system (Matta Chasin, 2012).

In this context, Congress passed the current statute that governs small claims courts in Brazil, the Special Courts Law (Lei dos Juizados Especiais 9.099/95). Despite the events that took place in the 1990s and the move for Judiciary efficiency, Law 9.099/95 was created with the intent of making access to justice universal to all Brazilian citizens. The discourse for the creation of this law was never about alleviating the courts of their case overload. Instead, the goal was to guarantee access to justice for those who were not able to pay judicial fees and had less complex claims. The original idea was to have a parallel court system to resolve individual's common and frequent conflicts, with reduced bureaucracy (Carvalho Xavier, 2016).

As a matter of fact, small claims courts were already envisaged in the Federal Constitution of 1988. As Article 98 of the Constitution states:

> Article 98. The Union, in the Federal District and in the territories, and the states shall create:
> I – special courts, filled by togated judges, or by togated and lay judges, with powers for conciliation, judgment, and execution of civil suits of lesser complexity, and criminal offenses of lower offensive potential, by oral and summary proceedings, allowing, in the cases established in law, the settlement and judgment of appeals by panels of judges in the first instance. (…)

In accordance with this constitutional provision, Law 9.099/95 establishes two criteria for the jurisdiction of Special Courts. The first, already foreseen in Article 98 of the Constitution, is qualitative: small claims courts should judge claims of "lesser complexity". Law 9.099/95 specifically determines that these cases are: eviction orders and civil repossession suits. The second is quantitative: Special Courts will have jurisdiction over cases worth less than 40 minimum wages (calculated at the time of the initiation of the legal action[1]).

1. Art. 3. The Special Civil Court has jurisdiction to conciliate, prosecute and adjudicate the less complex civil cases, as follows:
   I – Causes whose value does not exceed forty times the minimum wage;
   II – Those listed in art. 275, item II, of the Code of Civil Procedure;
   III – The eviction action for own use;
   IV – The reposition actions on real estate of a value not exceeding that set forth in item I of this article.

Additionally, Law 9.099/95 is based on five fundamental pillars: oral communication, simplicity, informality, economy of procedure and celerity[2]. Conciliation and mediation are central and obligatory parts of the small claims process[3]. Contrary to the civil procedure in other courts, the parties cannot waive the right to a conciliation or mediation hearing in Special Courts.

Considering the historical context of Special Courts in Brazil, it is plausible to state that there is a pressing dilemma regarding the initial purpose of Law 9.099/95 –to answer small claims and prevent the social consequences of citizens not having their claims heard by the legal system — and the current function of small claims courts as a mechanism to mitigate the high volume of cases in Federal and State Courts, due to the delay in the delivery of justice and the increase of judicial actions (Carvalho Xavier, 2016).

4. A Comparison between Small Claims Courts in Brazil and in the United States

An accurate comparison of small claims courts in Brazil and in the United States should avoid simulating the functions of small claims courts as if they were in two identical legal systems. Although small claims courts in the United States largely influenced small claims courts in Brazil, it would be inaccurate to say they were simply imported into the Brazilian legal system. In fact, it is necessary to recognize the inherent differences between the two legal systems and the complex manner in which institutions interact with the characteristics of each legal system.

To begin with, the United States has adopted a responsive legal system — it can respond to citizens' demands with greater ease because a judge is permitted to consider the broader consequences of his individual decision, as opposed to the Brazilian legal system, in which a judge must remain strictly impartial and apply the law to the specific case (Mello & Meirelles, 2010).

In Brazil, judges are trained to focus on principles rather than consequences. There is a significantly greater focus on the written law, not on legislative intent or on the results of a given decision. Furthermore, the absence of a centrality on *stare decisis* makes it easier for judges in Brazil to decide without considering the larger impacts that their decision will have on the overall system (Taylor, 2005). How-

2. Art. 2. The process will be guided by the criteria of orality, simplicity, informality, procedural economy and celerity, seeking, whenever possible, conciliation or transaction.

3. Art. 17. If both parties initially attend, the conciliation session will be opened immediately, with no need for prior registration of the request and citation.
Single paragraph. If there are opposing requests, the formal defense may be waived and both will be considered in the same judgement.

ever, Law 9.099/95 innovatively attempts at binding decisions in Special Courts to the social function of the law and the consequences of a decision[4].

Having noted the basic differences between the two legal systems, we now turn to the distinctions between legal procedures in small claims courts and how this contributes to litigant satisfaction. Assuming that the American and Brazilian legal systems have different ways of interacting with the consumer of the law (in other words, the individual that uses the law: the plaintiff), the small claims process can contribute to different results in litigant satisfaction in each country.

Let's say that Luciana, the fictional character previously introduced, had decided to file a claim in a small claims court instead of remaining silent. In the United States, Luciana would walk into the small claims court and be provided with information about the small claims procedure by the court clerk. This is done over the counter or through a booklet or another type of printed material. However, clerks are strictly prohibited from giving legal advice. There are consequences to this restriction: the individual plaintiff might not get enough information. Since the line between legal advice and information about the small claims process is often blurry, the clerk will avoid getting into the specifics of the plaintiff's case (Elwell & Carlson, 1990).

To file a claim in an American small claims court, Luciana would need to fill out a relatively simple form. Forty-one percent of plaintiffs interviewed in a study in Iowa small claims courts said that they were able to file a claim in fifteen minutes or less; 80 percent said they were able to file their claim within a half hour (Elwell & Carlson, 1990).

Alternatively, in Brazil, Luciana would, most likely, arrive in the Special Civil Court closest to her place of residency. With the help of employees of the Special Civil Court, Luciana would write the writ of summons to be presented to the court, or she could choose to present her request orally[5]. She would then present

4. Art. 6. In each case, the Judge shall adopt the decision that he/she considers most just and equitable, taking into account the social purposes of the law and the requirements of the common good.

5. Of the request:
Art. 14. The proceedings will be initiated with the submission of the written or oral request to the Court Registry.
§ 1. The request will contain, simply and in accessible language:
I name, qualification and address of the parties;
II – the facts and the fundamentals, succinctly;
III – the object and its value.
§ 2. When it is not possible to determine from the outset the extent of the obligation, it is lawful to formulate a generic application.
§ 3 The oral request shall be made in writing by the Court Registry. The system of printed files or forms may be used.
Art. 15. The requests mentioned in art. 3 of this Law may be alternative or cumulative; in the latter case, provided that related and the sum does not exceed the limit set in that device.

all documents that relate to her claim, in addition to all possible witnesses and their addresses.

Regarding attorney assistance, in the United States Luciana would most likely belong to the 41 percent of plaintiffs that sought some form of legal assistance. Attorney representation can largely influence a case in an Iowa small claims court: both plaintiffs and defendants would have better outcomes when they were represented. Represented plaintiffs won 98 percent of their cases, whereas unrepresented plaintiffs won 95 percent. The defendants who had representation won 13 percent of the cases, compared to the unrepresented defendants who won only 3 percent (Elwell & Carlson, 1990).

Similarly, in Brazil, since her case is worth less than 20[6] minimum wages, Luciana would be able to litigate without a lawyer. Luciana is filing a claim against another individual, so it is most likely that a lawyer will not accompany her. Were she proposing a claim against a corporation, Luciana would probably opt for legal assistance, according to a study conducted by the National Council for Justice (CNJ) (Da Silva, 2015).

As for the costs of filing a claim, in the United States, Luciana would have to pay a filing fee plus the costs of servicing the defendant. Luciana could service her neighbor through the small claims court (mailed service) or she could choose a personal service — a private investigator or sheriff, for example (Elwell & Carlson, 1990). In North Carolina, the filing fee is US$ 96, and US$ 30 for servicing each defendant, meaning that Luciana would pay a total of US $126 for filing her claim (Legal Aid of North Carolina, Inc., 2015). On the other hand, in Brazil, Luciana would be able to file her claim for no cost[7].

If Luciana were filing her claim in the United States, she would probably be one of the 40 percent of plaintiffs who reported that they settled their claims prior to trial. However, small claims courts in the United States do not have a formal process to encourage Luciana and her neighbor to settle before a trial. This would avoid putting pressure on the parties, since as most individual litigants are not cognizant of their rights, and could agree to settle without examining all their

Art. 16. After the request, regardless of distribution and assessment, the Court Registry will designate the conciliation session, to be held within fifteen days.
Art. 17. If both parties initially attend, the conciliation session will be opened immediately, with no need for prior registration of the request and citation.
Single paragraph. If there are opposing requests, the formal defense may be waived, and both will be considered in the same judgement.

6. Art. 9. In cases worth up to twenty minimum wages, the parties will appear in person and may be assisted by a lawyer; in higher value cases, assistance is compulsory.

7. Art. 54. Access to the Special Court shall in the first instance of jurisdiction be independent of the payment of costs, fees or expenses.

options (Elwell & Carlson, 1990). In Brazil, conciliation is the primary goal of the small claims process, and it is mandatory for the parties to attempt a settlement, which is why the court provides conciliators.

When the time for the hearing arrives, Luciana will spend about half an hour at an American small claims court trial. The amount of time for hearings in the United States is adjusted according to the circumstances of the case, but one third of the hearings were only half-hour trials. The average time between filing and trial was forty days (Elwell & Carlson, 1990).

During trial in an American small claims court, Luciana needs to prove why she is entitled to an order requesting the defendant to move out or how much the defendant owes her for damages caused by the noise in the middle of the night. In turn, Luciana's neighbor needs to prove why she should not move out or why she does not owe Luciana anything (Elwell & Carlson, 1990).

In an American small claims court, witnesses can be brought to trial and, if they fail to show up, they can be subpoenaed. However, even if Luciana's neighbor does not show up to trial, Luciana will still be required to prove her case. If the plaintiff does not prove the case, the Magistrate will dismiss the case. At the end of the trial or up to 10 days after the hearing, the Magistrate will deliver his judgment (Elwell & Carlson, 1990).

In a Special Court in Brazil, Luciana would wait an average of 168 days between filing her claims and the hearing. At the time of the hearing, the judge would briefly present Luciana and her neighbor with the advantages of conciliation. If the parties do decide to conciliate, the Judge then validates the agreement in his sentence. On the other hand, if the parties decide not to participate in conciliation, they will have the option of choosing arbitration.

As for the types of litigants and claims submitted in small claims courts, both the American and Brazilian small claims courts face the same dilemma: the majority of claims have businesses as parties, diverting small claims courts from their original purpose of solving individual citizen's quotidian problems.

In Iowa, the predominant plaintiffs were businesses (62 percent). Individuals represented only 14 percent of the total. Moreover, a litigant survey showed a high number of repeat players in small claims courts. In fact, 79 percent of plaintiffs had used small claims courts before (Elwell & Carlson, 1990). The high rate of repeat plaintiffs in small claims courts could indicate that there is an asymmetry between parties in terms of knowledge about the small claims process.

Similarly, in recent years the Special Courts in Brazil have become extremely specialized in Consumer Law and have stopped answering to other types of conflicts, such as disputes between neighbors (Mello & Meirelles, 2010). Today, most plaintiffs are still individuals, but the most common type of case in Special Courts

are of individuals against a company. This shows how businesses are advancing into the small claims system, defying the idea that conflicts between individuals should prevail in small claims courts. However, in all state capitals of the country, there are still cases where both parties are individuals (Da Silva, 2015).

Having analyzed the main procedural differences in Brazil and in the United States, particular recognition is due to a fundamental actor: the person who decides the case. In the United States, judges have a vast influence on the level of formality and the pace of the trial. Therefore, they are largely responsible for litigant satisfaction. Considering that small claims courts in the United States vary in structure and procedure depending on the state, this comparison will focus on small claims courts in Iowa.

In Iowa, 44 percent of judges had been hearing small claims cases for five or fewer years. It is not a requirement for a judicial magistrate to be licensed to practice law in Iowa, but 66 percent of the judicial magistrates interviewed had a license to practice law. In order to become a Magistrate in an Iowa small claims court, the judges attend a training session (Elwell & Carlson, 1990).

When both parties had an attorney, the judges were more passive in comparison to cases in which only one or neither of the parties had an attorney. In these situations, the judge acted as an investigator rather than a passive observer. Additionally, small claims judges refrained from using legal language and made an effort to explain the risks of the case to the parties in layman's terms. However, a certain degree of formality was maintained — most likely to lend legitimacy to the small claims proceedings (Elwell & Carlson, 1990).

In Keokuk County (Iowa), 47 percent of the judges ruled from the bench. Should judges not decide at the end of the trial, they are permitted to take the case under advisement, and decide up to ten days after the trial. Even though they are granted extra time, some judges rushed through the trial, which can leave litigants feeling that the case was not completely resolved (Elwell & Carlson, 1990). In most instances, ruling at the time of the trial can have a positive result on litigant satisfaction, because the judge is able to, personally, explain to the parties the reasoning behind his/her judgment, and what their options are (Elwell & Carlson, 1990).

As explored above, the small claims court process in Brazil and in the United States share many similarities. However, small details — the judge's involvement with the case, the types of claims brought to small claims courts and legal representation — can impact heavily on the litigant's satisfaction. Having examined the legal process in both legal systems, the subsequent section focuses on the legitimacy of small claims courts in Brazil and in the United States, based on the perception of the user of the law.

5. The Legitimacy Crisis of Small Claims Courts

In the United States, small claims courts have been able to simplify the filing process and eliminate bureaucracy, when compared to the "traditional" court system. In Iowa, most litigants did not complain about an overly complicated process, and difficult or bureaucratic forms. Additionally, the claims in small courts went to trial in a reasonable amount of time after being filed, as previously mentioned. Costs were also lower than in a normal district court (Elwell & Carlson, 1990). In this sense, the small claims movement in the United States was largely successful in eliminating the delays and expenses that made the ordinary litigation inaccessible to the poor.

Notwithstanding, we should be cautious in concluding that now all citizens have access to justice. In Brazil, civil justice is increasingly available to the lower-middle class who, previously, did not have a mechanism to bring their claims to the judicial system. On the other hand, unemployed *favela* residents still do not have a sufficient level of education to seek out the small claims courts system, or, even if they do, the economic burden imposed by the bureaucratic procedures is still more than they can afford. Consequently, a large class of citizens still lives on the outskirts of the legal system (Moulton, 1969).

Additionally, the biggest beneficiaries of small claims courts turned out to be business interests and government agencies. Small claims courts in California are increasingly being used to enforce commercial contracts. There is now a large class of business plaintiffs, a phenomenon that creates a complex issue for small claims courts: these agents quickly become familiar with small claims courts and turn into experts of the system, leaving the first-time defendant at a disadvantage (Moulton, 1969).

This is where the role of the judge becomes crucial. Originally, a judge was supposed to act as counsel for both sides in a small claims court. However, when the litigants are of unequal power, the judges need to make an extra effort to elucidate both sides of the story. The business plaintiff will most likely be better at arguing his case and justifying his claim. The result of this inequality significantly increases the need for a judge who is willing to compensate differences in legal education between parties.

In these situations, the role of the judge should be to help the inexperienced defendant. A passive judge would only contribute to widening the inequality between the business plaintiff and the individual defendant (Moulton, 1969).

Furthermore, legal education in Brazil and in the United States has led to the idea that large claims are more important than the small claims, even though small claims are much more common than the large ones. Legal education focuses largely on a synthesis of landmark cases. Additionally, legal professionals adopt

an attitude that sees large cases as the ones out of which they can make a living. Cases with higher stakes often have a more significant impact on the economy, and, therefore, are considered more important than small claims (Kosmin, 1976).

In conclusion, small claims courts in the United States are predominantly used by businesses, which has lead to unequal power between litigants. The citizens who could most benefit from small claims court — those from lower classes — show little interest in improving the small claims court system. Therefore, it is necessary to encourage lower class citizens to use small claims courts as a mechanism for having their claims heard (Kosmin, 1976).

In Brazil, Special Courts for small claims have a strong predominance of consumer claims, such as complaints against public utility companies, banks and big chain stores. In a Special Court in Niterói, a city in the state of Rio de Janeiro, the majority of claims were against six specific companies. In November of 2007, the ten most recurring defendants in this court were telephone companies, electric power supply companies, and banks. This data demonstrates how companies fail to guarantee consumer rights and the role Special Courts play in ensuring the accountability system's functionality (Mello & Meirelles, 2010).

Another threat related to the specialization of Special Courts in Consumer Law is that a new kind of case has arisen: the *"expressinho"*. These cases are claims for compensations for material and moral damages caused by inefficient services, and have become a standard procedure against a small number of companies. Though these cases should not be disregarded, many judges rule without paying much attention to the peculiarities of the case, contributing to litigant dissatisfaction (Mello & Meirelles, 2010).

Therefore, neighborhood conflicts have become rare in Special Courts, although the original design of Special Courts was to make these the main category of claims. Instead, they ended up marginalized and are still not fully included in the legal system (Mello & Meirelles, 2010).

Furthermore, corporate interests are largely responsible for distorting the original purpose of Special Courts (guaranteeing access to justice). Judges, lawyers and public prosecutors lobbied for a formal system in Special Courts, which prevailed over efforts for a wider democratization of these courts. This has led to a feeling of distrust in Special Courts by the individual litigant (Mello & Meirelles, 2010).

Although complex, the issue of small claims courts in Brazil and in the United States is straightforward: small claims courts need to adopt measures to salvage their legitimacy in the eyes of the user of the law. First, the business interests must be unobtrusive in small claims courts. Second, claims between individuals, such as neighborhood conflicts, must regain predominance in small claims courts. Fi-

nally, legal education regarding small claims courts must stress the importance of cases of lower value.

6. Conclusion

A core finding of this analysis is that small claims courts are an important tool for the legitimization of the legal system. In order to implement effective access to justice, courts must be understood by the user of the law as a place in which they can resolve the mundane conflicts that cause unease in social relations.

Special Courts in Brazil, secured by the Federal Constitution of 1988, were created with the intent of guaranteeing access to justice for citizens whose legal claims were marginalized due to an economic and/or educational disparity. In the United States, small claims courts have the same purpose. However, in both countries, there is a present crisis regarding the absence of relevance granted to small claims courts, both by the legal system as well as by the potential users of small claims courts. This creates a continuing view of the legal system as overly complicated and expensive, affecting its legitimacy.

Therefore, Luciana, who was introduced at the beginning of this essay, is faced with two hostile options: (i) she can decide not to take her claim to a Special Court, or (ii) she can litigate, and end up dissatisfied with the small claims process and the legal system.

The question then becomes: how can this outcome be changed? Could Luciana receive a third alternative, one that addresses her claim? Indeed, this transformation is not only possible, but also necessary.

First, Luciana has to have access to information. Professor Kazuo Watanabe suggests a "parallel service" to work concurrently with Special Courts to guarantee that the users of small claims courts have enough information about the filing and legal proceedings. This service can be composed of volunteers or staff from the Special Court (Watanabe, 1988). If we go one step further, it is possible to implement a "friend of the defendant/plaintiff" system, offered by the court to help the plaintiff or defendant prepare his/her case and answer any questions they might have (Moulton, 1969). It is conceivable to have students from law schools as volunteers in Special Courts for this purpose.

The judge is a fundamental part of guaranteeing litigant satisfaction. It is necessary to train lay judges that act in Special Courts in Brazil, perhaps immediately prior to the investiture in their positions, to make an effort to diminish inequality between parties by acting to clarify and conduct the process in a manner that helps the inexperienced parties question witnesses and present their cases. Additionally, legal forms can be written in a manner that is easy to understand and interactive to fill out.

There is also a need to recapture the individual litigant. This can be done through government campaigns to make citizens aware of the existence of Special Courts, and the types of claims they can bring to Special Courts. In this sense, the individual litigant will most likely have more access to Special Courts if these are available in hours that are convenient for the working person. In New York City, over 70,000 claims were tried and settled by judges and arbitrators each year in courts that had evening hours or were open on weekends, so implementing these on a larger scale could be feasible (Moulton, 1969). Indeed, Law 9.099/95 expressly authorizes this in article 12.[8]

This paper has thus far argued that the small claims court system in both Brazil and the United States has a number of problems that make it difficult for the ordinary citizen to access. However, small changes can have a big impact on how the consumer of the law feels at the end of the judicial process. If Luciana is left feeling that her claims are important to the legal system, and that the justification for the decision in her case was fair, she will become an indispensable building block in the composition of access to justice in her country's legal system. If, like Luciana, there are millions of other citizens feeling that justice has been done, people at all levels of society will compile a sense of trust in the Judiciary's ability to resolve conflicts.

Therefore, on closer inspection, it is important for individuals to trust in the Judiciary's ability to solve their injustices because this creates a feeling that the continuation of courts is necessary to uphold a democratic society. The legitimation of the Judiciary system avoids the rejection of democratic institutions, and increases the user of the law's belief in these institutions as protectors of rights.

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Efficacy of Performance: Administrative Metrics in the Brazilian Judiciary

Eficácia do Desempenho: Métricas Administrativas no Poder Judiciário Brasileiro

(PT: 127-145)

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DOI: 10.33167/2184-0644.CPP2019.VVN1/pp.109-126

ABSTRACT
The objective of this work was to understand the relationship between the administrative metrics of the State Courts of Justice of Brazil, with the efficacy (relationship between goals achieved and planned) of these courts between 2009 and 2016. The National Justice Council (CNJ) is the organization responsible for manage the Judiciary in Brazil and annually establishes a set of targets for the Brazilian courts. In addition, it prepares the "Justice in Numbers" report, published annually, containing, in addition to the achieved percentage of established goals, administrative data that can be analyzed. With the use of the Multiple Linear Regression method, we obtained as results that nineteen variables were statistically significant. The estimated model and its identified variables account for 39.68 percent of the variations that occur to the explanatory variable (efficacy). The results suggest that the Judiciary is liable to administrative actions to improve the procedural speed of its proceedings.

Keywords: judicial governance, celerity, courts of justice, CNJ

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RESUMO
O objetivo do trabalho foi perceber qual a relação entre as métricas administrativas dos Tribunais de Justiça Estaduais e do Distrito Federal do Brasil com a eficácia (relação entre metas alcançadas e planejadas) desses tribunais, entre 2009 e 2016. O Conselho Nacional de Justiça (CNJ) é o órgão responsável pela administração do poder judiciário no Brasil e estabelece anualmente um conjunto de metas para os tribunais brasileiros. Além disso, elabora o relatório Justiça em números, divulgado anualmente, contendo a porcentagem alcançada das metas estabelecidas e dados administrativos passíveis de análise. Com o uso do método de regressão linear múltipla, obteve-se como resultados que dezenove variáveis foram estatisticamente significativas. O modelo estimado e suas variáveis identificadas respondem por 39,68 por cento das variações que ocorrem à variável explicativa (eficácia). Os resultados sugerem que o poder judiciário é passível de ações administrativas para melhorar a celeridade processual de seus trâmites.

Palavras-chave: governança judicial, celeridade, tribunais de justiça, CNJ

1. Introduction

The division of State powers, as proposed by Montesquieu and adapted in the Modern State, contains within itself the intersection between the fields of action and competence of those powers. The executive, legislative and judicial authorities act on matters that pertain solely to their specific *raison d'* être, but also on other aspects within the scope of the other authorities (Pinheiro, Vieira & Motta, 2011). The interaction between them can be observed at various levels, shaping various relationships between them. Due to this mutual interaction, it is necessary to proceed synaesthetically in order to identify procedural anomalies in the administrative field, in order to achieve efficiency and effectiveness in processes, exploring the whole administrative structure that exists in the State authorities.

The purpose of administration as an applied social science is to use resources efficiently in order to achieve specific goals in an effective manner. Constitutional Amendment (EC) no. 19 of 1998 is regarded as a milestone in the reform of the State, insofar as it set rules on efficiency as an integral part of the principles governing the Public Administrative Authorities (EC, 1998). It represents an attempt to improve procedures and to make better use of those resources in order to achieve the targets set (efficacy).

In this context, the Judicial Authorities act so as to administer justice in society, to guarantee compliance with legal rules and to apply penalties to those who deviate from those rules (Akutsu & Guimarães, 2012). The function of the judicial branch is to ensure that the rights of citizens are observed and complied with, and also to resolve disputes that may arise in interaction between social actors and to promote justice in these situations (Akutsu & Guimarães, 2015). In order to consolidate this function, access by citizens to the Judicial Authorities needs to be simple and direct.

Difficulty of access to the Judicial Authorities and lengthy delays in proceedings have consequences for society (Sadek, 2004) and undermine the democratic rule of law, where the State is duty bound to guarantee civil liberties and human rights and to promote the fundamental guarantees of citizens, which guarantees are established in Article 5 of the Federal Constitution of 1988. Violation of those guarantees undermines the practical workings and application of the democratic rule of law, for which the constitutional powers include the assurance of social justice, based on the fundamental principles of human dignity, of democratic forms and the sovereignty of the people.

Sadek (2004) found that the greatest difficulties experienced by Brazilian citizens seeking access in one form or another to the Judicial Authorities are lengthy delays in the system, low levels of efficacy and difficulty of access by persons in situations of social risk.

Inefficacy, lengthy delays and the lack of transparency, characteristics of the Judicial Authorities, are the result of shortcomings in administration actions (Pinheiro, 2003; Renault, 2005). The judicial branch was accordingly the institutional sector of the State that evolved least in the post-reform period (Renault, 2005).

The reform of the Judicial Authorities was instituted in EC no. 45 de 2004, allowing for procedures to be redesigned, along with the administrative-organizational structure in the various spheres of the public authorities. In addition, EC no. 45/04 established celerity as a governing principle for the judicial branch. This amendment added item LXXVIII to Article 5, with the following provisions: "in judicial and administrative proceedings, all persons are assured of the reasonable duration of those proceedings and of the means that ensure the celerity thereof" (EC, 2004), in an endeavor ensure that legal proceedings are effective. Of the various reforms proposed in EC no. 45/04, special attention may be drawn to the creation of the National Justice Council (CNJ), which is tasked with oversight and administration of the country's judicial bodies, corroborating the new philosophy of effective public administration.

According to Sena (2014), administrative activities are overseen through implementation of measures designed to achieve transparency in the exercise of jurisdiction, to prepare the judiciary and court staff for administrative management of the courts, to computerize judicial services and also to set targets which are to be assessed for the subsequent year.

In setting targets for Brazilian courts, the CNJ has provided a mechanism for assessing and measuring different aspects of administrative performance. This strategy seeks to instill a planning and management culture, geared to efficiency and efficacy. This fact makes it possible for managers to design and apply strategic management policies and also to assess the demands on them, in order to help

create positions and actions focused on improving the administrative and organizational structure of the courts (Sena, 2014).

Research into the judicial authorities is scarce (Ng, 2011; Akutsu & Guimarães, 2012), making this a territory relatively unexplored by public administration. This study took as its starting point the research and findings of Van Montfort, Jong, Herweijer and Marseille (2005), Schneider (2005), Beer (2006), Veronese (2007), Ribeiro (2008), Rosales-López (2008), Mascarenhas (2009) and Akutsu and Guimarães (2014) who, among other findings, highlight the following as indicative of the performance of the judicial authorities; the backlog of cases, the academic training of judges, the level of wealth production, distance between the court and the citizen's place of residence, number of judges per inhabitant, application of out-of-court dispute resolution systems such as negotiation mediation, conciliation and arbitration, the duration of proceedings, the relationship between the number of judges and the demand for judicial services and population, physical size of the court, additional staffing (outsourcing), budget allocations and the legal skills of court officials.

This study has therefore set out to assess the following question: How do the administrative variables relate to the efficacy of the State and Federal District Courts of Justice? The general aim was accordingly to identify and analyze the relationship between the administrative metrics of the Brazilian State and Federal District Courts of Justice and performance, assessed as the relationship between targets planned and achieved for that court (efficacy).

This study is important because it contributes to the debate concerning standpoints for analyses of the performance of the Brazilian judicial authorities in relation to their efficacy. With regard to the State and Federal District Courts of Justice, it offers an analytical model which can be replicated for other national courts, and makes it possible to identify which variables contributed directly and effectively to consolidating the courts' performance, helping in the administrative decisions to be taken and/or improved. As regards assessment of the quality of the acts of the judiciary, the difficulty of measuring this is generally regarded as an obstacle to proposing a model for assessing that which can be measured (Abramo, 2010). This research therefore sets out to analyze the efficacy of the State and Federal District Courts of Justice, and also to establish in quantitative terms the relationship between the different characteristics that may affect their performance.

2. Bibliographic Background

For Pinheiro, Vieira and Motta (2011), the division between the functions of legislating, executing and judging is the legacy left by Montesquieu, who sought to avoid the establishment of any form of tyranny by conceiving a system where

each branch is endowed with authority for the matters exclusive to its sphere of competence. This model of the division of power has been adopted, adapted and incorporated by the modern state, where each branch has its fundamental function, although participation and action on matters which, *a priori*, are entrusted to other branches, is not actually prohibited. Accordingly, the legislative, executive and judicial branches interact, in order to ensure that the supremacy of the public interest is observed in the acts and deeds of its public actors.

Seeking to respect the public interest and guarantee the democratic rule of law, Constitutional Amendment (EC) no.19 was promulgated on June 4, 1998, with provisions on the principles and rules governing the public administrative authorities (EC, 1998). In Article 3, this amendment adds the principle of efficiency to Article 37 of the Federal Constitution. Efficiency, regulated as an intrinsic principle of public authority, joined legality, impartiality, morality and publicity to form a set of principles to guide actions taken in the public sphere. This fact reveals the search for legitimation in the effective reiteration of the legal rules supporting the founding of policies and actions in establishing effective public governance. Public governance can be defined as a set of mechanisms and tools which combine leadership, strategy and oversight (TCU, 2014). These actions, when applied in public practice, make it possible to assess, monitor and steer management towards efficient forms of conduct that benefit society. Accordingly, public governance extends to all sphere of public authority, including the judicial authorities.

Public governance in the judicial authorities, or more simply, judicial governance, is understood as:

> A set of policies, administrative processes, actions, behaviors and decisions necessary for the exercise of Justice. This concept starts out from the assumption that judicial governance is based on institutions, i.e. on rules, norms, socially constructed and legitimized patterns of conducts, and is manifest in practices, actions and behaviors from the different actors in the judicial authorities (Akutsu & Guimarães 2015, p. 942).

Judicial governance presents itself as a set of administrative and legal observations and practices, which are intended to optimize administrative processes for the exercise of justice in an effective manner.

Concerning performance in the public domain, Torres (2004) states the efficacy represents the standard achieved in the outcomes which were planned by the public administrative authorities, without considering economy and feasibility in the use of resources and instruments. According to Souza (2008), efficacy is the relationship between targets achieved and those planned. This study takes efficacy

as the relationship, expressed as a percentage, between targets achieved and targets planned for a given court in a given year.

In reformulating the administrative and organizational structure and the processes of the judicial authorities, EC no. 45/04 sought to achieve efficacy in administrative processes by eliminating waste and operational obstacles, with the aim of guaranteeing fairness, effectiveness and efficacy by providing for celerity in the processes of the judicial authorities. Provided for in EC no. 45/04, the creation of the National Justice Council (CNJ) was consistent with the new vision of more efficient and effective public administrative authorities, based on EC no. 19/98 and regulated by EC no. 45/04. The creation of the CNJ therefore constituted a national endeavor to instill efficacy in the judicial authorities.

The CNJ is an organ of the judicial authorities, based in Brasilia, in the Federal District, but with nationwide powers. The Council is a public institution whose mission is to improve the work of the Brazilian judicial system, to develop administrative and procedural policies, to promote effective and unified justice, to strive for excellence in strategic planning, to consolidate governance and to promote effective judicial management which can be replicated within the Brazilian judicial authorities.

The powers of the CNJ can be divided into two main areas, one of which is correlational in nature, and the other administrative. In the first, the CNJ has powers to hear complaints, petitions and representations against the members and bodies of the judiciary, to decide disciplinary proceedings, to order disbarment and apply administrative penalties, and by so doing to assure the autonomy of the judicial branch. Under its administrative responsibilities, the CNJ is required to plan, organize and standardize the structures of the judicial authorities nationwide, in order to improve legal practices and the speed of proceedings. The CNJ is also responsible for strategic planning, establish programs for institutional appraisal of the judicial authorities, to draw up and publish the plan of targets and the statistical reports relating to jurisdictional activities.

The CNJ's institutional management responsibilities entail primarily the setting of a targets plan for the judiciary. The purpose of this is to set targets that represent and reflect the commitment of Brazilian courts to improving the quality of judicial performance, in order to provide a rapid, efficient, effective and quality service.

3. Methodological Procedures

The targets for the judicial authorities, set by the CNJ, form a structure for control and oversight of the workings of the Brazilian judicial system. In addition, the targets contribute to the planning of the Courts of Justice, in the search for and

development of mechanisms that help comply with the targets and measure the outcomes of the Courts of Justice in objective terms.

Each year, the bodies of the judicial authorities meet at the National Judicial Authorities Meeting (ENPJ), organized by the CNJ, where the presiding judges of all Brazilian courts meet to set the targets and strategic priorities for the next year, in line with the modelling of the process for formulating the national targets (Figure 1). National targets were set for the first time in 2009, in order to improve the performance of the Brazilian justice system, to clear the backlog of undecided cases and to reduce the rate of congestion in the courts.

At the end of the year, the courts' performance is determined and, using the data collected, a report entitled *Justice in Numbers* is drawn up and published, providing information on the efficacy (dependent variable) of the courts in attaining the targets set in the previous year. This report provides administrative metrics for that court in the year in question, such as the staffing level, number of computers, total of direct appointments, and other data. Information is given on the targets planned and attained, and on transparency of administrative data relating to the country's courts, and this data forms the basis for the dependent and independent variables, respectively, used in this study, which sets out to identify which administrative metrics affect the efficacy (performance) of the judicial authorities.

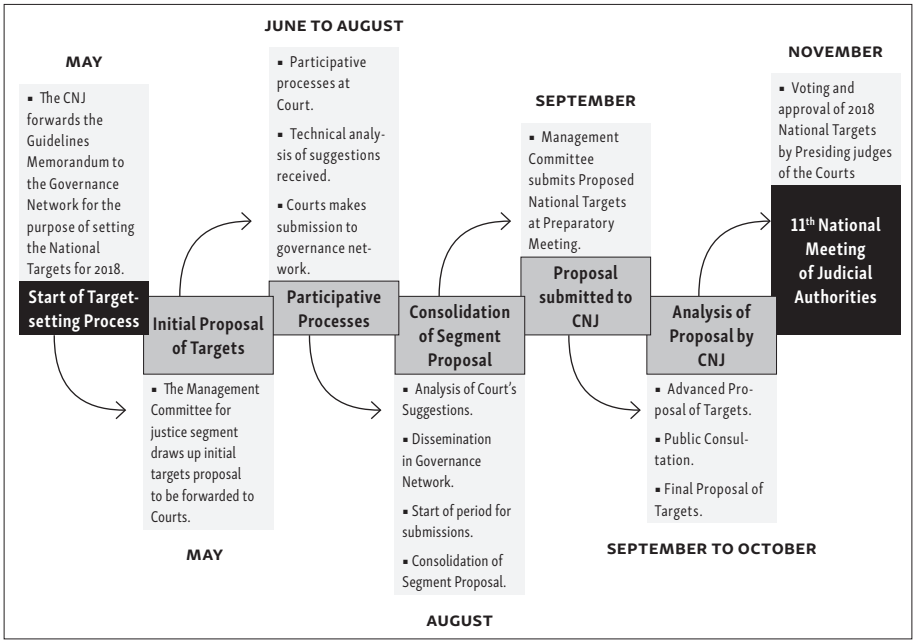

FIGURE 1. Formulation of national targets for 2018: process model. CNJ

Sulbrandt (1993) proposes combining the performance assessment targets in public programs and policies in order to determine their efficacy, and then relating the variables associated with the performance of the program under analysis. This study combines the relationship between the targets achieved and the targets planned by the CNJ (as a percentage) with the administrative metrics in the *Justice in Numbers* report on the State and Federal District Courts of Justice, in the period 2009 to 2016, organized in a panel, in order to estimate an equation offering a statistical representation of the relationship between those variables. In seeking to determine the relationship between a dependent variable and countless independent variables, the statistical technique used is multiple linear regression. This estimates a mathematical function that predicts the behavior of the dependent variable on the basis of the values of the independent variables.

3.1 Regression analysis

Multiple linear regression analysis is a multivariate statistical technique, used to examine the relationship between a dependent variable and a set of independent variables (Cunha & Coelho, 2014). The flexibility of the model means it can be applied in almost all dependency relationships. Its wide applicability has been exploited mainly in two major types of research problem: prediction and explanation. Prediction is about how far a statistical regression variable (one or more independent variables) can predict the behavior of the dependent variable. Explanation examines regression coefficients (their magnitude, sign and statistical significance) for each independent variable to develop a substantive or theoretical reason for the effects of the independent variables on the dependent variable (Hair, Black, Babin, Anderson & Tatham, 2009).

The linear combination of independent variables which, together, help to predict the dependent variable is called the equation or regression model. For this study, considering stacked data for each state *i* and for each of the years *t* between 2009 and 2016, it is represented as:

$$\widehat{efic}_{it} = a + b_1 gT_{it} + b_2 nS_{it} + b_3 pib_{it} \ldots + b_n VI_{it} + \varepsilon_{it}$$

Where:

$\widehat{efic}_{it}$ – is the dependent variable efficient for each individual *i*, in time *t*;

gT_{it}; nS_{it}; pib_{it} and VI_{it} – are the independent variables (gT_{it} – total expenditure, nS_{it} – number of court officials, pib_{it} – gross domestic product and VI_{it} – independent variable; all observed for each individual *i* in time *t*);

a, b_1, b_2, b_3, ..., b_n – are the regression coefficients;

ε_{it} – is the representation of the residual or regression error.

Term a is the intercept, or linear coefficient, representing where the straight line intercepts axis Y, in other words, where the values of the independent variables are equal to zero. The terms b_1, b_2, b_3 ..., b_n are the angular coefficients, which represent the gradient of the line, in other words, they measure the increase or reduction in the dependent variable for each unit increase or reduction in the independent variables. Each of these coefficients is estimated here using the Ordinary Least Squares method (OLS).

Independent variables

The scarcity of studies that assess the performance of the judicial authorities (Ng, 2011; Akutsu & Guimarães, 2012) makes it hard to establish and recognize patterns of variables which are closely connected to the efficacy of the Brazilian judiciary. The challenge has to do with the absence of defined and established indicators and variables that reveal the performance of the Brazilian courts. In response to this, Lemos (2009) argues that a consensus about appraisal should be based on indicators that help to represent public management aims. However, the scarcity of studies presents itself as an opportunity for this research to propose what the administrative metrics are and how they relate with efficacy. This study therefore used the stepwise command in the STATA® software, which specifies the significance level of the term which will be included in the model, excluding all terms which do not present the significance level established in the model, given that there were more than three hundred administrative variables. The independent variables are accordingly selected by the software, eliminating the subjective choice of variables for analysis. A significance level of ten per cent was therefore used in the command, in other words, a confidence interval of ninety per cent.

Data from the *Justice in Numbers* reports from 2009 to 2016 were accordingly analyzed used STATA® in order to estimate a statistical model representing the relationship between the dependent variable and the independent variables. By determining the correlation coefficient between these, this study may be able to point to those which directly affect the efficacy of the State and Federal District Courts of Justice, in order to increase the reliability of the planned model.

4. Findings and Discussion

The targets established by the CNJ assist the courts in their planning, making the CNJ an active agent in improving administrative practices in the judicial authorities. In setting these targets, the CNJ promotes a metric for assessing efficacy and measuring performance in the judicial authorities. The disclosure of these targets is in line with Judicial Governance practices, creating accountability as a means whereby this study set out to achieve its objective,

The data relate to all the Courts of Justice of second instance in the twenty-six States of the Union and of the Federal District Court of Justice, from 2009 to 2016, organized in a panel, making a total of 216 observations. The *Justice in Numbers* report published by CNJ presents data omissions in certain years, but this fact did not compromise analysis of the model, insofar as even with these occasional omissions, most of the data was usable in the study, as confirmed by the p-value presented by the explanatory variables and supported by the result provided by the stepwise command used.

In the preliminary findings, certain variables were not statistically significant, and so are not examined in the chapter on results, such as the dummy variables for geographical region from the Brazilian Institute of Geography and Statistics (IBGE), which show that geographical regions has no influence on the performance of Courts of Justice.

The data base consisted of more than three hundred variables provided and published by the CMJ in its *Justice in Numbers* report. With this quantity of data, different correlations between variables are expected, including a high rate of multicollinearity. This factor is perceived and eliminated by the stepwise command aligned with observation and consideration of the model's adjusted R^2. These filters allowed the study to identify nineteen variables which explain the performance of the judicial authorities in relation to the State and Federal District Courts of Justice (Table 1).

Attainment of the targets set by CNJ stands at an average of 93.53 percent, showing that targets are not being achieved in full. In addition, the large variation between minimum (14.8 percent) and maximum (125.96 percent) values observed suggests that there is no standard level of performance in Brazilian second instance Courts of Justice, revealing another shortcoming of the CNJ in its mission to standardize processes within the judicial authorities.

The multiple linear regression statistical model revealed by processing of the research data is set out in Table 2, presenting the variables and the respective estimated coefficients, as well as the estimated standard error and statistical significance.

In relation to the coefficient of determination of the explanatory variables, also assuming the existence of multicollinearity and in order to reduce bias, R^2_{adjusted} was adopted as determining the relationship between the independent variables and the variable dependent. For this purpose, the estimated model offers a R^2_{adjusted} of 0.3968, i.e. 39.68 percent of the variations that occur in the efficacy of Brazilian Courts of Justice are explained by the independent variables identified by the regression model. As regard the statistical representativeness of the model, the equation is significant as a whole, at 1 percent significance.

TABLE 1. Descriptive statistics for variables

VARIABLE	MEDIUM	STANDARD DEVIATION	MIN	MAX
metascnj$_{it}$	93.53364	14.9241	14.8	125.96
LNpibpc$_{it}$	9.810684	0.5038736	8.707994	11.18274
magaj$_{it}$	509.9065	2601.484	0	18036
cn$_{it}$	673645.6	1100154	33903	5811195
tc$_{it}$	0.684782	0.1030908	0.3741379	0.8793322
scoreacp$_{it}$	2.22e+08	8.08e+08	-0.7018586	4.33e+09
LNreceitas$_{it}$	18.18627	2.640489	7.328437	22.5656
serv$_{it}$	6248.611	8481.54	677	46291
mage$_{it}$	574,662	651.6542	50	3563
LNdpe$_{it}$	20.1856	0.9740668	17.89283	22.77747
LNdpea$_{it}$	20.06237	0.9629269	17.86702	22.63238
LNdk$_{it}$	16.80534	1.476263	11.44637	20.30866
g1$_{it}$	0.011584	0.0091298	0.0039192	0.0650649
cc$_{it}$	1336.455	2141.857	167	13354
LNdpjio$_{it}$	20.29121	0.9636777	18.0958	22,989
dm$_{it}$	0.6053861	0.2495568	0.0216231	1
i$_{it}$	0.2173056	0.1609495	0.0066715	0.8361876
tfauxt$_{it}$	1360.244	1884.047	0	10125
ts$_{it}$	9654.185	12446.05	985	69263
tpefet$_{it}$	5549.925	8177.158	521	44016

Source: Prepared by the authors

Note: **metascnj$_{it}$**: efficacy; **magaj$_{it}$**: number of judges removed; **LNpibpc$_{it}$**: Log of *per capita* GDP (Gross Domestic Product); **cn$_{it}$**: new cases; **tc$_{i}$**: case congestion rate; **scoreacp$_{it}$**: CNJ ranking score; **LNreceitas$_{it}$**: Log of total revenues; **serv$_{it}$**: total number of court officials; **mage$_{it}$**: total existing judge positions; **LNdpe$_{it}$**: Log of personnel expenditure and charges; **LNdk$_{it}$**: Log of capital expenses; **LNdpea$_{i}$**: Log of personnel expenses and charges for active employees; **g1$_{it}$**: total justice spending in relation to GDP; **cc$_{it}$**: total spending on direct appointments; **LNdpjio$_{it}$**: Log of total spending (except spending on non-active staff and works); **dm$_{it}$**: usable area in relation to total area (in square meters); **i$_{it}$**: charges collected over total justice spending; **tfauxt$_{it}$**: total auxiliary workforce: outsourced; **ts$_{it}$**: total court officials; **tpefet$_{it}$**: total permanent staff.

TABLE 2. Estimate of explanatory mathematical statistical model for performance in State and Federal District Courts of Justice

VARIABLE	ESTIMATED COEFFICIENT	ESTIMATED STANDARD ERROR	
magajit	-0.486749	(0.1738261) ***	
LNpibpcit	16.43155	(4.304308) ***	
cnit	0.0000221	(7.68e-06) ***	
tcit	41.76704	(15.75063) **	
scoreacpit	-1.41e-08	(6.81e-09) **	
LNreceitasit	13.23567	(4.630967) ***	
servit	0.0247422	(0.0052629) ***	
mageit	-0.0293443	(0.0114871) **	
LNdpeit	-25.82333	(14.17605) *	
LNdkit	3.352894	(1.333207) **	
LNdpeait	41.1165	(23.19094) *	
g1it	1064.11	(587.7789) *	
ccit	-0.0073203	(0.0021656) ***	
LNdpjioit	-45.16839	(21.32334) **	
dmit	-16.55873	(7.142684) **	
iit	-63.4754	(28.95786) **	
tfauxtit	0.0103896	(0.0027802) ***	
tsit	-0.0062615	(0.0024874) **	
tpefetit	-0.0147515	(0.0044626) ***	
constant	217.3309	(87.57651) **	
NUMBER OF OBS.	**R^2ADJUSTED**	**F(19,68)**	**PROB > F**
216	0.3968	4.01	0.0000

Source: Prepared by the authors
Note: *, **, *** correspond to statistical significance at levels of 10 percent, 5 percent and 1 percent, respectively.

4.1 Negative relationship between administrative metrics and efficacy

As a general equation, the study indicates the relationship of the independent variables with efficacy in the Courts of Justice. We can see that the following have an inverse effect on attaining efficacy: (a) the number of judges removed, (b) the

score in the CNJ ranking, (c) the number of positions for judges, (d) personnel expenditure and charges, (e) the number of direct appointments, (f) total expenditure incurred, (g) usable area in relation to total area, (h) the relationship between charges and total justice expenditure (i) total staff numbers.

The high index for judges removed entails a larger workload for the judges actually working the system. This excessive workload jeopardizes the effective processing of cases within the Court of Justice, resulting in delays in judicial proceedings, and consequently in administrative processes, as the judge also acts as manager. The score in the CNJ ranking grades courts, so as to highlight those which are more effective within the CNJ parameters. The ranking of the Courts of Justice can generate complacency and inertia in relation to efforts to improve their status, as there is no direct reward associated with such a change, This means that a Court with a good score will do little to innovate to achieve improvements and better use of the resources provided to it.

Quantity is not the same as quality, as is shown by the relationship between the number of positions for judges and the efficacy achieved by the Courts of Justice. This inversion in the relationship is inconsistent with the research by Beer (2006) which found that the number of judges by number of inhabitants acts as a positive factor on performance in the judicial authorities. Accordingly, this author's finding does not apply to the reality of the Brazilian courts under study here. The same is true of personal expenditure and charges, pointing to an old problem in the public administrative authorities, largely with regard to the executive branch, but here visible in the judicial branch: an overblown public machine, weighed down by excessive expenditure, which ends up having a negative influence on the performance of the judicial authorities.

The existence of direct appointments opens the way for staff being contracted without concern for their technical skills or expertise. This factor was also identified in the study by Schneider (2005), which concluded that academic training is a crucial factor in judicial performance, corroborating the view that a management body with a high standard of academic training contributes to better management of resources. In addition, direct appointments open the door to staff being hired for political ends. In relation to the total expenses incurred, we again see the situation identified in the research by Rosales-López (2008), which showed that courts are able to increase their productivity using the same resources as currently available, endorsing that author's conclusion.

The relationship between usable area and the total area of courts addresses the relationship between comfort and output. A building which is not easy for staff to move around in has an adverse effect on the court's work, as also found by Ro-

sales-López (2008) in her study, in which the physical size of courts was a relevant factor in their performance.

As for the financial aspect, the quotient between charges received and justice spending is revealed to be a factor that disrupts efficacy. This relationship is found to be linear, and offers the perception that the more is charged and the more is spent on justice, the less justice (in terms of targets) is done.

Lastly, we look at staffing numbers. Stability in civil service staff undermines efficacy; this is a clear phenomenon, not observed in the private sector labor market, that results in professional lethargy that brings down performance. This scenario is not observed in the auxiliary labor force, in the case of staff outsourced by the judicial authorities, who contribute directly and positively to the attainment of targets, corroborating the findings of Rosales-López (2008) who concluded that additional staff support contributes positively to court performance.

4.2 Positive relationship between administrative metrics and efficacy

Of the various factors that assist the Courts of Justice in achieving their targets, we may point to the *per capita* GDP ratio, which helps to explain the direct relationship between wealth production and the performance of GDP, i.e. efficacy does not reach out to citizens in situations of social risk. Kahan (2006) corroborates this finding when he shows that companies are predisposed to locate in regions where the judicial authorities are more efficient, creating a vicious circle, where companies move to regions where judicial effectiveness is to be found. This boosts the *per capita* GDP in the area where the company has established itself and, as shown by the model, *per capita* GDP has a positive influence on efficacy, creating a vicious circle between wealth creation and judicial effectiveness. It may therefore be seen that the judiciary is more frequently observed to be effective in regions that produce more wealth. These findings are consistent with those of Beer (2006), who identified poverty as an explanatory variable for the performance of the judiciary.

In the economic and financial sphere, the positive relationship identified between revenues passed on, *per capita* GDP, capital expenditure, personnel expenditure and charges for court staff and total Court spending in relation to GDP demonstrates the relationship between financial resources and efficacy in the judicial authorities. Insofar as this public body does not collect taxes, it is dependent on funds passed on from other public sector bodies. Communication and alignment between the three branches is therefore highly important in the quest for integration, in order to ensure that public interest is observed as a fundamental priority. The relationship between financial resources and performance in the judicial authorities was also identified in the research by Beer (2006) and

Akutsu and Guimarães (2012), who identified poverty and the quantity of budget resources allocated as important factors.

As regards human resources, administrative action is taken by people, and so the total staffing numbers has a positive impact on the efficacy of the courts, together with the rate of auxiliary staff. This fact reveals the importance of human resources planning for the general staff, in order to achieve efficacy, by investing in training and selection of skilled individuals for each position. As observed, the number of judges, additional staffing support, the legal training of staff, and their academic qualifications were explanatory variables in the studies of Schneider (2005), Beer (2006), Ribeiro (2008), Rosales-López (2008) and Akutsu and Guimarães (2012). Attention may also be drawn to the study by Van Montfort, Jong, Herweijer and Marseille (2005) who found that the management capabilities of the court directly influence the time taken to decide cases, meaning that control of administrative activities in the judicial authorities is highly relevant to ensuring access to justice by citizens, in an effective manner.

4.3 The implications of the study

In relation to the strong points, this study entailed a comprehensive bibliographical review, which sought to survey related research assessing the performance of the judicial authorities. The existence and availability of the CNJ data base with plentiful information is a relevant factor that lends credibility to this study, as well as an exploratory character allowing us to point out and understanding specific characteristics of the public authorities in Brazil. By corroborating the studies surveyed in the bibliographical review and introducing new variables to academic study, this research helps to broaden our understanding of the performance of the judicial authorities in Brazil. Showing that these authorities face similar challenges and limitations to those in a broad range of countries, and in refuting some of the conclusions the study is strengthened by the understanding that the Brazilian judicial authorities present particular features in their administration that seek to ensure better performance.

The methodology used to assess performance is an important issue, insofar as most of the studies assessed are qualitative in character, meaning that a quantitative study offers a fresh perspective on the performance of the judiciary as well as conferring statistical credibility on the findings, supporting our conclusions. The points which should be noted concerning this study relate to the incompleteness of the CNJ report data in the early issues, although there are very extensive data and reports in the last two years analyzed (2015 and 2016).

The construction of an estimated model that shows the performance of the State and Federal District Courts of Justice in the light of administrative variables

helps to answer questions by showing which the explanatory variables are and how they affect the variable response (performance/efficacy), providing managers with information for taking decisions and establishing programs geared to the issues revealed by the estimated model, by means of the explanation supplied by the estimated regression coefficient. In addition, it is possible to anticipate a number of scenarios, insofar as the behavior of the dependent variable is subject to the variations in the independent variables, so as to predict the behavior of performance. Faced with these possibilities of prediction and resolution of issues, the design of a model helps to identify focal points for administrative measures, in order to mitigate delays in proceedings and ineffectiveness in the judicial authorities. Accordingly, the estimated model acts as a mechanism for optimization through the relationship between the explanatory variables, which have an impact on the attainment of the targets set by the CNJ, helping to make the judicial authorities more effective in performing one of their roles: to ensure fast justice.

In future research the process of assessing the performance of the judicial authorities should be extended to other courts, in order to discover whether the same explanatory variables are reproduced in the estimated models for each court. In addition, the monitoring and identification of administrative actions that have had positive effects on the performance of the judicial authorities should be analyzed from time to time from an administrative perspective, making comparisons with the findings in this study and identifying focal points and actions in order to develop and pursue improvements to the performance of the judicial authorities. There is still a vast field to be explored, and countless possibilities will present themselves as researchers delve deeper. Academics are merely scratching the surface when it comes to study of the performance of the judicial authorities.

5. Conclusions

Considering the reasonable duration of judicial proceedings in conjunction with the principle of efficiency in public administration, this study has sought to identify which factors contribute to achieving efficacy in the work of the judicial authorities. The use of planning and target-setting for the Brazilian judiciary helps to make it possible to measure the execution and dissemination of those data, allowing researchers to monitor judicial activities in the country.

The targets set out each year in the ENPJ provide parameters to be achieved, and metrics allowing actions to be measured and controlled, so as to detect anomalies which can be investigated. These anomalies become clear when it is possible to measure and predict behavior in the face of different possible scenarios. The estimated model accordingly helps in predicting those different scenarios, considering different variables. The multiple linear regression model allows us to arrive

at a statistical estimate which is representative and that corresponds to around 49 percent of variations in efficacy as regards attainment of the targets set by the CNJ.

In the pursuit of judicial governance, the court managers can make use of the findings from this research in order to plan and guide their administrative measures in order to improve the efficacy of their court. Implementation of control measures and administrative support for judges and staff in the administrative management of the court are important in order for the bodies responsible and the court managers to be aware of the dimension consisting of the relationship between a court with a competent administrative system and effectiveness in the legal proceedings submitted to that court.

Failure to take administrative measures undermines the enforceability of the constitutional guarantee of the reasonable duration of proceedings. A strategy is therefore needed for implementing an organizational culture of planning and management in Brazilian courts so that, on the basis of the targets set by the CNJ, actions and principally indicators can be established in the courts in order to provide for monitoring of the evolution of outcomes. It is therefore necessary to map key competencies and to seek to use these so as to obtain advantages in carrying through administrative processes, improving their efficacy.

In Brazil, judicial efficacy is linked to the production of wealth, which shows the great influence still exercised by the private sector on the public sector, pointing to a very close relationship between the power of capital and the power of the State. This analysis made it possible to demonstrate that the judicial authorities present characteristics similar to those of other State authorities and that, in the judicial authorities, these similarities also represent poor management of the public apparatus.

It must be observed that the resources that exist and are used will always be scarce from an economic point of view. However, steps must be taken to apply these resources effectively, and this must extend to all and any structure in the public administrative authorities. These measures reflect the guidelines for today's public administrative authorities, which seek to do more whilst using less resources, and where economy and/or rational use of resources is conceived as a part of the State's intrinsic accountability.

The findings suggest that observation, by management in the judicial authorities, of issues such as the total number of auxiliary staff (outsourced) and the total number of staff may increase effectiveness in the State and Federal District Courts of Justice, irrespective of the IBGE region. Accordingly, as the body responsible for improving the work of the Brazilian judicial system, the CNJ should develop administrative policies to consolidate judicial governance.

The executive branch should provide tax breaks for the location of companies in less privileged areas, in order to break the vicious circle related to judicial efficacy and the production of wealth, democratizing access to justice in Brazil. The legislative authorities should approve a budget for the judicial branch that contributes to its improved effectiveness, insofar as revenue presents a positive relationship with efficacy, and the judicial authorities do not themselves generate revenues.

By proposing and estimating a model to pursue efficacy, this research provides pointers for future action by the CNJ and Court managers. This action must provide the resources for better management and reducing the gaps in administrative action within the judicial authorities, so as to improve the performance of courts and allow citizens to enjoy their constitutional right to celerity in judicial proceedings.

Eficácia do Desempenho: Métricas Administrativas no Poder Judiciário Brasileiro

Efficacy of Performance:
Administrative Metrics in the Brazilian Judiciary *(EN: 109-126)*

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DOI: 10.33167/2184-0644.CPP2019.VVN1/pp.127-145

ABSTRACT
The objective of this work was to understand the relationship between the administrative metrics of the State Courts of Justice of Brazil, with the efficacy (relationship between goals achieved and planned) of these courts between 2009 and 2016. The National Justice Council (CNJ) is the organization responsible for manage the Judiciary in Brazil and annually establishes a set of targets for the Brazilian courts. In addition, it prepares the "Justice in Numbers" report, published annually, containing, in addition to the achieved percentage of established goals, administrative data that can be analyzed. With the use of the Multiple Linear Regression method, we obtained as results that nineteen variables were statistically significant. The estimated model and its identified variables account for 39.68 percent of the variations that occur to the explanatory variable (efficacy). The results suggest that the Judiciary is liable to administrative actions to improve the procedural speed of its proceedings.

Keywords: judicial governance, celerity, courts of justice, CNJ

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RESUMO
O objetivo do trabalho foi perceber qual a relação entre as métricas administrativas dos Tribunais de Justiça Estaduais e do Distrito Federal do Brasil com a eficácia (relação entre metas alcançadas e planejadas) desses tribunais, entre 2009 e 2016. O Conselho Nacional de Justiça (CNJ) é o órgão responsável pela administração do poder judiciário no Brasil e estabelece anualmente um conjunto de metas para os tribunais brasileiros. Além disso, elabora o relatório Justiça em números, divulgado anualmente, contendo a porcentagem alcançada das metas estabelecidas e dados administrativos passíveis de análise. Com o uso do método de regressão linear múltipla, obteve-se como resultados que dezenove variáveis foram estatisticamente significativas. O modelo estimado e suas variáveis identificadas respondem por 39,68 por cento das variações que ocorrem à variável explicativa (eficácia). Os resultados sugerem que o poder judiciário é passível de ações administrativas para melhorar a celeridade processual de seus trâmites.

Palavras-chave: governança judicial, celeridade, tribunais de justiça, CNJ

1. Introdução

A divisão dos poderes do Estado, proposta por Montesquieu e adaptada no Estado Moderno, traz consigo a interseção entre a atuação e competência desses. O poder executivo, o legislativo e o judiciário atuam em matérias exclusivas à sua razão de existir, como também em aspectos que competem aos outros poderes (Pinheiro, Vieira & Motta, 2011). Assim, a interação entre eles se dá em diferentes vertentes, configurando diversas relações entre os mesmos. Devido a essa interação mútua, é necessário trabalhar de maneira sinestésica para identificar anomalias processuais no âmbito administrativo, objetivando alcançar eficiência e eficácia nos processos, explorando toda a estrutura administrativa que se faz presente nos poderes do Estado.

A administração como ciência social aplicada tem por finalidade o uso de recursos de maneira eficiente para alcançar metas específicas de maneira eficaz. A Emenda Constitucional (EC) n.º 19 de 1998 é considerada um marco importante na reforma do Estado quando normatiza a eficiência como parte integrante dos princípios que regem a administração pública (EC, 1998). Ela representa um esforço na busca pela melhoria processual e o melhor uso desses recursos para atingir as metas estabelecidas (eficácia).

Neste âmbito, o poder judiciário atua no sentido de administrar a justiça na sociedade, garantir o cumprimento de normas jurídicas e sentenciar ao cumprimento de penalidades os atores que destoam dessas normas (Akutsu & Guimarães, 2012). A função do poder judiciário é garantir que os direitos do cidadão sejam observados e cumpridos, além de resolver os conflitos que possam surgir na interação entre atores sociais e então promover a justiça (Akutsu & Guimarães, 2015). Para consolidar essa função é necessário que o acesso ao poder judiciário pelo cidadão seja simples e direto.

A dificuldade de acesso ao poder judiciário e a sua morosidade trazem consequências para a sociedade (Sadek, 2004) e aquieta o Estado Democrático de Direito, onde o Estado tem como dever garantir as liberdades civis, os direitos humanos e promover as garantias fundamentais dos seus, garantias essas previstas no art.º 5.º da Constituição Federal de 1988. A lesão a essas garantias coloca em discussão a real atuação e aplicação do Estado Democrático de Direito que, dentre suas competências constitucionais, inclui a garantia da justiça social para o povo, baseada no princípio fundamental da dignidade humana, de forma democrática e soberana.

Sadek (2004) revela que as maiores dificuldades encontradas pelos cidadãos brasileiros que buscam, de alguma maneira, o acesso ao poder judiciário são a morosidade do sistema, a baixa eficácia e a dificuldade de acesso por parte da população em situação de risco social. A ineficácia, morosidade, e falta de transparência, características do poder judiciário, são resultado da lacuna de ações administrativas (Pinheiro, 2003; Renault, 2005). Dessa forma, o poder judiciário foi o que menos evoluiu de entre as instituições do Estado pós-reforma (Renault, 2005).

A reforma do poder judiciário aconteceu por meio da EC n.º 45 de 2004, que possibilitou uma nova reformulação dos processos e da estrutura administrativo-organizacional nas diferentes esferas do poder público. Além disso, a promulgação da EC n.º 45/04 incorporou ao poder judiciário a celeridade. Este dispositivo legal acrescenta o inciso LXXVIII ao art.º 5º, com a seguinte matéria: «a todos, no âmbito judicial e administrativo, são assegurados a razoável duração do processo e os meios que garantam a celeridade de sua tramitação» (EC, 2004), de maneira a buscar efetividade junto aos trâmites processuais legais. Dentre as reformas propostas pela EC n.º 45/04 destaca-se a criação do Conselho Nacional de Justiça (CNJ), que corrobora com a nova filosofia de uma administração pública eficaz, ao atribuir a esta entidade o dever de fiscalizar e administrar os órgãos judiciais do país.

Para Sena (2014), o controle das atividades administrativas se dá por meio da implementação de medidas que objetivam conceder transparência à atividade jurisdicional, preparar os magistrados e servidores para a gestão administrativa dos tribunais, informatizar os serviços judiciais e ainda estabelecer metas que são observadas para o ano posterior.

Ao fixar metas para os tribunais brasileiros, o CNJ proveu um mecanismo para avaliar e mensurar diferentes aspectos administrativos. Essa estratégia busca implantar uma cultura de planejamento e gestão, voltados para a eficiência e a eficácia. Tal fato possibilita aos gestores a elaboração e aplicação de políticas de gestão estratégica e, ainda, a avaliação das suas demandas, de maneira a subsidiar a criação de cargos e ações focadas na melhoria da estrutura administrativo-organizacional dos tribunais (Sena, 2014).

Pesquisas que abarcam a temática do poder judiciário são escassas (Ng, 2011; Akutsu & Guimarães, 2012), caracterizando-se como um território pouco explorado pela administração pública. O estudo considerou como ponto de partida os trabalhos e resultados de Van Montfort, Jong, Herweijer e Marseille (2005), Schneider (2005), Beer (2006), Veronese (2007), Ribeiro (2008), Rosales-López (2008), Mascarenhas (2009) e Akutsu e Guimarães (2014). Dentre seus resultados, destacam-se como determinantes do desempenho no poder judiciário o estoque de processo sem julgamento; a formação acadêmica dos magistrados; o nível de produção de riqueza; a distância entre tribunal e domicílio do cidadão; a quantidade de magistrados por habitante; a aplicação de soluções extrajudiciais de conflitos como negociação, mediação, conciliação e arbitragem; o tempo de duração dos processos; a relação entre o número de magistrados e a demanda jurisdicional e a população; o tamanho físico do tribunal; apoio extra de pessoal (terceirizados); recursos orçamentários alocados, capacidade jurídica dos servidores.

A questão de pesquisa deste estudo é: De que maneira as variáveis administrativas se relacionam com a eficácia nos Tribunais de Justiça Estaduais e do Distrito Federal? Assim, o objetivo geral foi identificar e analisar qual a relação entre as métricas administrativas dos Tribunais de Justiça Estaduais e do Distrito Federal do Brasil com o desempenho acerca da relação entre as metas planejadas e metas alcançadas para aquele tribunal (eficácia).

Este estudo é relevante por contribuir com as discussões a respeito de perspectivas de análise do desempenho do poder judiciário brasileiro em relação à sua eficácia. No tocante aos Tribunais de Justiça Estadual e do Distrito Federal, oferece um modelo de análise replicável aos outros tribunais nacionais e permite identificar quais variáveis contribuem de forma direta e efetiva na consolidação do desempenho dos tribunais, auxiliando nas decisões administrativas a serem seguidas e/ou melhoradas. No tocante à avaliação da qualidade dos atos do judiciário, a dificuldade de mensurar essas ações geralmente é considerada empecilho para a proposta de um modelo de avaliação sobre aquilo que se pode medir (Abramo, 2010). Assim, o estudo propõe analisar a eficácia dos Tribunais de Justiça Estaduais e do Distrito Federal, bem como estabelecer quantitativamente a relação entre as diversas características que possam afetar o seu desempenho.

2. Referencial Bibliográfico

Para Pinheiro, Vieira e Motta (2011), a divisão entre as funções de legislar, executar e julgar é lição deixada por Montesquieu, que buscava evitar o estabelecimento de qualquer forma de tirania, onde cada poder é provido de autoridade nas matérias exclusivas referentes à esfera que o compete. Esse modelo da divisão dos poderes foi adotado, adaptado e incorporado pelo Estado Moderno, onde cada poder possui

sua função fundamental, porém não é vedada a participação e atuação em pontos que, *a priori*, compete aos outros poderes. Assim, o poder legislativo, o executivo e o judiciário se integram, de maneira a garantir que a supremacia do interesse público seja observada nos atos e fatos de seus atores públicos.

Na busca por observar o interesse público e garantir o Estado Democrático de Direito, foi promulgada, em 4 de junho de 1998, a Emenda Constitucional (EC) n.º 19 que, em seu átrio, dispõe sobre os princípios e normas da administração pública (EC, 1998). Em seu artigo 3.º, essa emenda trata da adição do princípio da eficiência ao art.º 37 da Constituição Federal. A eficiência, regulamentada enquanto princípio inerente ao poder público, junto à legalidade, impessoalidade, moralidade e publicidade, formam um conjunto norteador para as ações dentro da esfera pública. Tal fato revela a busca pela legitimação na reiteração efetiva de normas legais que amparem a instauração de políticas e ações no estabelecimento de uma governança pública eficaz. A governança pública pode ser definida como um conjunto de mecanismos e ferramentas que combinam liderança, estratégia e controle (TCU, 2014). Essas ações, quando aplicadas na prática pública, propiciam avaliar, monitorar e direcionar a gestão para uma conduta eficiente que beneficie a sociedade. Assim, a governança pública é extensiva a todas as esferas do poder público, inclusive ao poder judiciário.

A governança pública no poder judiciário, ou simplesmente governança judicial, é entendida como:

> Um conjunto de políticas, processos administrativos, ações, comportamentos e decisões necessários ao exercício da Justiça. Esse conceito parte do pressuposto de que Governança Judicial se fundamenta em instituições, isto é, em regras, em normas, em padrões de conduta socialmente construídos e legitimados, e manifesta-se em práticas, ações e comportamentos dos distintos atores do Poder Judiciário (Akutsu & Guimarães 2015, p. 942).

A governança judicial apresenta-se como um conjunto de observações e práticas administrativo-jurídicas, que tem como objetivo a otimização dos processos administrativos para o exercício da justiça de maneira eficaz.

A respeito do desempenho na área pública, Torres (2004) afirma que a eficácia representa o grau alcançado dos resultados que foram planejados por parte da administração pública, sem considerar economia e viabilidade no uso dos recursos e instrumentos. Para Souza (2008), eficácia é a relação entre as metas alcançadas e as planejadas. Para tanto, o estudo admite eficácia como o percentual da relação entre as metas alcanças sobre as metas planejadas para determinado tribunal em determinado ano.

Ao reformular a estrutura administrativo-organizacional e os processos do poder judiciário, a EC n.º 45/04 buscou a eficácia nos processos administrativos eliminando os desperdícios e empecilhos operacionais, com a intenção de garantir equidade, efetividade e eficácia e proporcionar celeridade aos processos do poder judiciário. Prevista na EC n.º 45/04, a criação do Conselho Nacional de Justiça (CNJ) vai ao encontro da nova perspectiva de uma administração pública mais eficiente e eficaz, baseada na EC n.º 19/98 e regulamentada na EC n.º 45/04. Assim, a criação do CNJ configura-se como um esforço nacional na busca por eficácia junto ao poder judiciário.

O CNJ é um órgão do poder judiciário, com sede em Brasília, no Distrito Federal, e com atuação em todo o território nacional. O CNJ é uma instituição pública que tem por objetivo aprimorar o trabalho do sistema judiciário brasileiro, desenvolver políticas administrativas e processuais, promover a efetividade e unidade da justiça, buscar excelência no planejamento estratégico, consolidar a governança e promover uma gestão judiciária efetiva e replicável dentro do poder judiciário brasileiro.

As competências do CNJ podem ser divididas em dois grandes grupos, um de cunho correcional e outro administrativo. No primeiro, cabe ao CNJ receber reclamações, petições e representações contra os membros e órgãos do Judiciário, julgar processos disciplinares, determinar remoção e aplicar sanções administrativas e, assim, zelar pela autonomia do poder judiciário. Nas suas atribuições administrativas, cabe ao CNJ planejar, organizar e padronizar as estruturas do poder judiciário a nível nacional, de maneira a melhorar as práticas jurídicas e a sua celeridade. Ainda é de responsabilidade do CNJ definir o planejamento estratégico, definir os programas de avaliação institucional do poder judiciário, elaborar e publicar o plano de metas e os relatórios estatísticos relacionados com as atividades jurisdicionais.

A gestão institucional realizada pelo CNJ faz-se, principalmente, por meio do plano de metas do judiciário. Essa ação tem por objetivo estabelecer metas que representam e traduzem o compromisso dos tribunais brasileiros com o aperfeiçoamento da prestação jurisdicional, para proporcionar um serviço célere, eficiente, eficaz e de qualidade.

3. Procedimentos Metodológicos

As metas do poder judiciário, estabelecidas pelo CNJ, formam uma estrutura de controle e fiscalização sobre as ações do sistema judicial brasileiro. Além disso, as metas auxiliam no planejamento dos Tribunais de Justiça, na busca e desenvolvimento de mecanismo que ajudem no cumprimento dessas metas e na mensuração dos resultados dos Tribunais de Justiça de maneira objetiva.

Anualmente, os órgãos do poder judiciário se reúnem no Encontro Nacional do Poder Judiciário (ENPJ), realizado pelo CNJ, onde os presidentes de todos os tribunais brasileiros se reúnem para definir as metas e prioridades estratégicas para o ano seguinte, que seguem modelagem de processo para a formulação das metas nacionais (Figura 1). As metas nacionais foram traçadas pela primeira vez em 2009, com o intuito de aprimorar a justiça brasileira, acabar com os estoques de processos sem decisão e diminuir a taxa de congestionamento nos tribunais.

Ao final do ano, o desempenho dos tribunais é apurado e, por meio dos dados levantados, é elaborado e divulgado o relatório *Justiça em números*, que permite verificar a eficácia (variável dependente) dos tribunais ao alcançar as metas estabelecidas no ano anterior. Esse mesmo relatório fornece as métricas administrativas relacionadas com aquele tribunal naquele ano em questão, como número de pessoal efetivo, quantidade de computadores, total de cargos comissionados, entre outras. Assim, esse relatório fornece as metas planejadas e as alcançadas, bem como a transparência dos dados administrativos dos tribunais nacionais, dados esses que formam a base das variáveis dependente e independente, respectivamente, utilizadas no estudo, cujo objetivo é identificar quais métricas administrativas afetam a eficácia (desempenho) do poder judiciário.

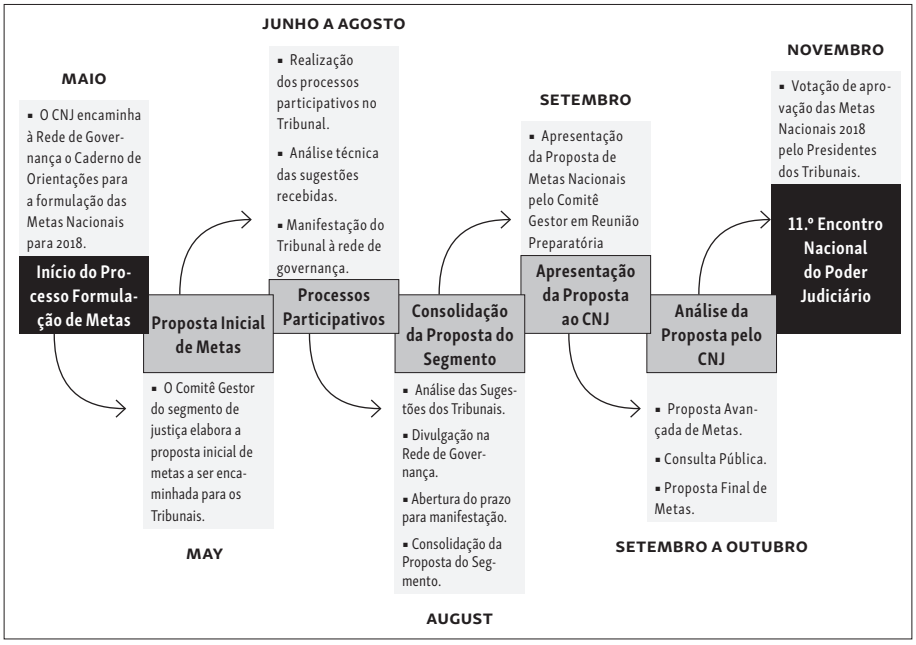

FIGURA 1. Formulação das metas nacionais para 2018: modelo dos processos. CNJ

Sulbrandt (1993) propõe agrupar as metas dos programas e políticas públicas com a finalidade de avaliar o desempenho dos mesmos para assim determinar a sua eficácia, e então relacionar as variáveis que estão ligadas ao desempenho do programa analisado. O estudo agrupa a relação entre as metas alcançadas e as metas planejadas pelo CNJ (em porcentagem) com as métricas administrativas do relatório *Justiça em números* dos Tribunais de Justiça Estaduais e do Distrito Federal, no período de 2009 a 2016, organizados em painel, com o objetivo de estimar uma equação que represente estatisticamente a relação entre essas variáveis. Ao buscar determinar a relação entre uma variável dependente com inúmeras variáveis independentes utiliza-se a técnica estatística de regressão linear múltipla. Assim, estima-se uma função matemática que prevê o comportamento da variável dependente com base nos valores das variáveis independentes.

3.1 Análise de regressão

A análise de regressão linear múltipla é uma técnica estatística multivariada, utilizada para examinar a relação entre uma variável dependente e um conjunto de variáveis independentes (Cunha & Coelho, 2014). A flexibilidade do modelo permite a sua aplicabilidade em quase toda a relação de dependência. Sua ampla aplicabilidade tem sido explorada, principalmente, em duas grandes classes de problemas de pesquisa: previsão e explicação. A previsão envolve quanto que uma variável estatística de regressão (uma ou mais variáveis independentes) pode prever o comportamento da variável dependente. A explicação examina os coeficientes de regressão (sua magnitude, sinal e significância estatística) para cada variável independente para desenvolver uma razão, substantiva ou teórica, para os efeitos das variáveis independentes na variável dependente (Hair, Black, Babin, Anderson & Tatham, 2009).

A combinação linear de variáveis independentes que, unidas, auxiliam na previsão da variável dependente é denominada equação ou modelo de regressão. Para este estudo, considerando dados empilhados de cada estado *i* e para cada um dos anos *t* entre 2009 e 2016, tem-se sua representação como:

$$\widehat{efic}_{it} = a + b_1 gT_{it} + b_2 nS_{it} + b_3 pib_{it} \ldots + b_n VI_{it} + \varepsilon_{it}$$

Em que:

$\widehat{efic}_{it}$ – é a variável dependente eficiência para cada indivíduo *i*, no tempo *t*;

gT_{it} ; nS_{it} ; pib_{it} e VI_{it} – são as variáveis independentes (gT_{it} – gastos totais, nS_{it} – número de servidores, pib_{it} – produto interno bruto e VI_{it} – variável independente; todas observadas para cada indivíduo *i* no tempo *t*);

a, b_1, b_2, b_3, ..., b_n – são os coeficientes da regressão;

ε_{it} – é a representação do resíduo ou erro da regressão.

O termo *a* é o intercepto, ou coeficiente linear, e representa onde a reta intercepta o eixo Y, ou seja, quando os valores das variáveis independentes são iguais a zero. Os termos b_1, b_2, b_3 ..., b_n são os coeficientes angulares, que representam a inclinação que a reta assume, ou seja, mede o aumento ou redução na variável dependente para cada aumento ou diminuição de unidade nas variáveis independentes. Cada um destes coeficientes é aqui estimado considerando o Método dos Mínimos Quadrados Ordinários (MQO).

Variáveis independentes

A carência de estudos que propõem avaliar o desempenho do poder judiciário (Ng, 2011; Akutsu & Guimarães, 2012) dificulta estabelecer e reconhecer padrões de variáveis que estejam intimamente ligadas à eficácia do judiciário brasileiro. O desafio está relacionado com a falta de definição e determinação de indicadores e variáveis que evidenciem o desempenho nos tribunais brasileiros. Para tanto, Lemos (2009) afirma que um consenso acerca da avaliação deve ser baseado em indicadores que auxiliam na representação dos objetivos da gestão pública. Contudo, a escassez de estudos apresenta-se como oportunidade para que o presente trabalho proponha reconhecer quais as métricas administrativas e como elas se relacionam com a eficácia. O estudo utilizou o comando *stepwise* dentro do programa STATA®, que especifica o nível de significância do termo que será incluído no modelo, excluindo todos os termos que não apresentam o nível de significância estabelecido junto ao modelo, visto que havia mais de trezentas variáveis administrativas. Dessa forma, a seleção das variáveis independentes é realizada pelo programa, eliminando a escolha subjetiva das variáveis a serem analisadas. Para tanto, foi utilizado no comando um nível de significância de dez por cento, ou seja, um intervalo de confiança de noventa por cento.

Os dados do relatório *Justiça em números* de 2009 a 2016 foram analisados via STATA® para estimar um modelo estatístico que represente a relação entre a variável dependente e as variáveis independentes. Por meio da determinação do coeficiente de correlação entre as mesmas, o presente estudo poderá destacar aquelas que afetam de maneira direta a eficácia dos Tribunais de Justiça dos Estados e do Distrito Federal, com a intenção de aumentar a confiabilidade do modelo previsto.

4. Resultados e Discussões

As metas estabelecidas pelo CNJ auxiliam os tribunais na realização do seu planejamento, tornando o CNJ um agente ativo na melhoria das práticas administrativas no poder judiciário. Ao estabelecer essas metas, o CNJ promove uma métrica

para averiguar a eficácia e mensurar o desempenho no poder judiciário. A divulgação dessas metas vai ao encontro das práticas de governança judicial, pelo que essa *accountability* se configura como um ponto de partida do presente estudo para alcançar o seu objetivo.

Os dados são referentes a todos os Tribunais de Justiça de 2.ª Instância dos 26 Estados da União e do Tribunal de Justiça do Distrito Federal de 2009 a 2016, organizados em painel, totalizando 216 observações. O relatório *Justiça em números* divulgado pelo CNJ apresenta falta de dados em alguns anos, fato que não comprometeu a análise do modelo, uma vez que, mesmo com ausências pontuais de dados, a maior parte dos dados se apresentavam de maneira satisfatória para o estudo, fato comprovado pelo *p*-valor apresentado pelas variáveis explicativas e sustentado pelo resultado que é fornecido pelo comando *stepwise* utilizado.

Como resultado preliminar, algumas variáveis não foram estatisticamente significantes, portanto, não receberam atenção no capítulo sobre os resultados. São exemplo disso as variáveis *Dummy* referentes à região geográfica do Instituto Brasileiro de Geografia e Estatística (IBGE), o que revela que a região geográfica não influencia o desempenho do Tribunal de Justiça.

A base de dados consistia em mais de trezentas variáveis disponibilizadas e divulgadas pelo CNJ no seu relatório *Justiça em números*. Com essa quantidade de dados espera-se diferentes correlações entre as variáveis, inclusive alta taxa de multicolinearidade, fator que é percebido e eliminado pelo comando *stepwise* alinhado à observação e consideração do R^2 ajustado do modelo. Esses filtros permitiram ao estudo a identificação de dezenove variáveis que explicam o desempenho no poder judiciário no tocante aos Tribunais de Justiça do Estado e do Distrito Federal (Tabela 1).

Com média de 93,53 por cento de cumprimento das metas estabelecidas pelo CNJ, percebe-se que os tribunais de justiça não estão atingindo totalmente as mesmas. Além disso, a grande variação entre os valores mínimo (14,8 por cento) e máximo (125,96 por cento) observados insinuam que os tribunais de justiça brasileiros de segunda instância não possuem um padrão de desempenho, revelando outra falha do CNJ em relação à busca por padronização dos processos dentro do poder judiciário.

O modelo estatístico de regressão linear múltipla revelado pelo tratamento dos dados da pesquisa desenrola-se na Tabela 2, na qual são apresentadas as variáveis e respectivos coeficientes estimados, além do erro padrão estimado e da significância estatística.

Quanto ao coeficiente de determinação das variáveis explicativas, pressupondo ainda a existência de multicolinearidade e no intuito de diminuir os vieses, adota-se o $R^2_{ajustado}$ como determinante da relação entre as variáveis independentes e

a dependente. Nesse sentido, o modelo estimado oferece um $R^2_{ajustado}$ de 0.3968, ou seja, 39,68 por cento das variações que ocorrem na eficácia dos tribunais de justiça brasileiros são explicadas pelas variáveis independentes identificadas pelo modelo de regressão. No tocante à representatividade estatística do modelo, a equação é significativa como um todo, a 1 por cento de significância.

TABELA 1. Estatística descritiva das variáveis.

VARIÁVEL	MÉDIA	DESVIO PADRÃO	MÍN	MÁX
$metascnj_{it}$	93.53364	14.9241	14.8	125.96
$LNpibpc_{it}$	9.810684	0.5038736	8.707994	11.18274
$magaj_{it}$	509.9065	2601.484	0	18036
cn_{it}	673645.6	1100154	33903	5811195
tc_{it}	0.684782	0.1030908	0.3741379	0.8793322
$scoreacp_{it}$	2.22e+08	8.08e+08	-0.7018586	4.33e+09
$LNreceitas_{it}$	18.18627	2.640489	7.328437	22.5656
$serv_{it}$	6248.611	8481.54	677	46291
$mage_{it}$	574,662	651.6542	50	3563
$LNdpe_{it}$	20.1856	0.9740668	17.89283	22.77747
$LNdpea_{it}$	20.06237	0.9629269	17.86702	22.63238
$LNdk_{it}$	16.80534	1.476263	11.44637	20.30866
$g1_{it}$	0.011584	0.0091298	0.0039192	0.0650649
cc_{it}	1336.455	2141.857	167	13354
$LNdpjio_{it}$	20.29121	0.9636777	18.0958	22,989
dm_{it}	0.6053861	0.2495568	0.0216231	1
i_{it}	0.2173056	0.1609495	0.0066715	0.8361876
$tfauxt_{it}$	1360.244	1884.047	0	10125
ts_{it}	9654.185	12446.05	985	69263
$tpefet_{it}$	5549.925	8177.158	521	44016

Fonte: Elaborado pelos autores.
Nota: **metascnj**$_{it}$: eficácia; **magaj**$_{it}$: número de magistrados afastados; **LNpibpc**$_{it}$: Log do PIB (Produto Interno Bruto) *per capita*; **cn**$_{it}$: casos novos; **tc**$_{i}$: taxa de congestionamento de processos; **scoreacp**$_{it}$: *score* do ranking do CNJ; **LNreceitas**$_{it}$: Log do total de receitas; **serv**$_{it}$: número total de servidores; **mage**$_{it}$: total de cargos de magistrados existentes; **LNdpe**$_{it}$: Log das despesas com pessoal e encargos; **LNdk**$_{it}$: Log das despesas com capital; **LNdpea**$_{i}$: Log das despesas com pessoal e encargos do quadro ativo; **g1**$_{it}$: gasto total da justiça em relação ao PIB; **cc**$_{it}$: total de cargos em comissão; **LNdpjio**$_{it}$: Log da despesa total (exceto gastos com inativos e obras); **dm**$_{it}$: área útil em relação à área total (em metros quadrados); **i**$_{it}$: arrecadações sobre despesa total da justiça; **tfauxt**$_{it}$: total de força de trabalho auxiliar: terceirizados; **ts**$_{it}$: total de servidores; **tpefet**$_{it}$: total de pessoas do quadro efetivo.

TABELA 2. Estimativa do modelo matemático estatístico explicativo do desempenho nos Tribunais de Justiça Estaduais e do Distrito Federal

VARIÁVEL	COEFICIENTE ESTIMADO	ERRO PADRÃO ESTIMADO	
magajit	-0.486749	(0.1738261) ***	
LNpibpcit	16.43155	(4.304308) ***	
cnit	0.0000221	(7.68e-06) ***	
tcit	41.76704	(15.75063) **	
scoreacpit	-1.41e-08	(6.81e-09) **	
LNreceitasit	13.23567	(4.630967) ***	
servit	0.0247422	(0.0052629) ***	
mageit	-0.0293443	(0.0114871) **	
LNdpeit	-25.82333	(14.17605) *	
LNdkit	3.352894	(1.333207) **	
LNdpeait	41.1165	(23.19094) *	
g1it	1064.11	(587.7789) *	
ccit	-0.0073203	(0.0021656) ***	
LNdpjioit	-45.16839	(21.32334) **	
dmit	-16.55873	(7.142684) **	
iit	-63.4754	(28.95786) **	
tfauxtit	0.0103896	(0.0027802) ***	
tsit	-0.0062615	(0.0024874) **	
tpefetit	-0.0147515	(0.0044626) ***	
constant	217.3309	(87.57651) **	
NÚMERO DE OBS.	**R^2AJUSTADO**	**F(19,68)**	**PROB > F**
216	0.3968	4.01	0.0000

Fonte: Prepared by the authors. Nota: *, **, *** correspondem à significância estatística aos níveis de 10 por cento, 5 por cento e 1 por cento, respectivamente.

4.1 Relação negativa das métricas administrativas com a eficácia

Como equação geral, o estudo indica a relação das variáveis independentes junto à eficácia nos tribunais de justiça. Assim, afetam de maneira inversa o alcance da eficácia: (a) o número de magistrados afastados, (b) o *score* do *ranking* do CNJ, (c) a quantidade de cargos de magistrados existente, (d) as despesas com pessoal e encargos, (e) a quantidade de cargos em comissão, (f) as despesas totais executadas,

(g) a quantidade de área útil em relação à área total, (h) a relação entre arrecadação e despesa total da justiça e (i) o total de pessoas do quadro efetivo.

O alto índice de magistrados afastados implica maior carga de trabalho para os magistrados em exercício. Essa sobrecarga de trabalho prejudica a tramitação eficaz dos processos judiciários dentro do tribunal de justiça, ou seja, atraso nos processos judiciais e, consequentemente, nos processos administrativos, uma vez que o magistrado atua também como gestor. O *score* do *ranking* do CNJ classifica os tribunais de maneira a evidenciar os mais «eficazes» dentro dos parâmetros do CNJ. Assim, a atribuição de posição para os tribunais de justiça pode acarretar comodismo e inércia na busca pela mudança de *status*, pois não há recompensa direta associada a essa mudança. Dessa forma, um tribunal bem classificado vai inovar pouco na busca por melhorias e melhor aproveitamento dos recursos a ele disponibilizados.

Quantidade não significa qualidade, assim revela a relação entre quantidade de cargos de magistratura existentes e a eficácia alcançada pelos tribunais de justiça. Essa inversão de relação destoa dos estudos de Beer (2006), que evidenciaram que a quantidade de magistrados por número de habitantes atua como fator positivo para o desempenho no poder judiciário. Assim, a conclusão do autor não se aplica à realidade dos tribunais brasileiros aqui estudada. No mesmo seio encontram-se as despesas realizadas com pessoal e encargos, percebendo-se então um antigo problema da administração pública, principalmente no tocante ao executivo, agora também evidenciado junto ao poder judiciário: o inchaço da máquina pública, ligado aos gastos excessivos com a mesma, que acabam influenciando de forma negativa o desempenho no poder judiciário.

A existência de cargos comissionados abre premissa para a contratação sem critério de tecnicidade ou conhecimento, fator identificado também no estudo de Schneider (2005), que concluiu ser a formação acadêmica fator determinante no desempenho judicial, corroborando com a perspectiva de que um corpo gestor com formação acadêmica diferenciada colabora para uma melhor gestão dos recursos. Além disso, cargos comissionados criam premissas para a contratação com objetivos políticos. Em relação às despesas totais executadas, percebe-se o que foi evidenciado no estudo de Rosales-López (2008), que apontou que os tribunais estão aptos a produzirem mais fazendo uso dos mesmos recursos disponíveis atualmente, o que reitera a conclusão desta autora.

A relação entre área útil e área total dos tribunais tem implicações na relação de conforto para a realização do trabalho. Um edifício que não proporciona fácil locomoção e deslocamento dos seus funcionários prejudica a execução do mesmo, assim também verificou Rosales-López (2008) em seu estudo, no qual o tamanho físico do tribunal foi fator relevante no seu desempenho.

Quanto ao aspecto financeiro, o quociente entre arrecadação e despesa da justiça revela-se como fator perturbador da eficácia. Essa relação desenvolve-se de maneira linear, e traz para a equação a percepção de que quanto mais se arrecada e mais se despende com a justiça, menos justiça (em termo de metas) é feita.

E, por fim, o total de pessoas no quadro efetivo. A estabilidade do funcionalismo público agrava a condicionante eficácia. Essa certeza que não é percebida no mercado de trabalho privado acaba por resultar em letargio profissional de desempenho. Esse cenário não é percebido quanto à força de trabalho auxiliar, no tocante aos trabalhadores terceirizados no poder judiciário, pois esses contribuem de maneira direta e positiva para o alcance das metas, corroborando com o estudo de Rosales-López (2008), que concluiu que o apoio extra de pessoal contribui positivamente para o desempenho do tribunal.

4.2 Relação positiva das métricas administrativas com a eficácia

Dentre as condições que auxiliam no alcance das metas pelos tribunais de justiça evidencia-se a relação com o PIB *per capita*, que permite perceber a relação direta entre a produção de riquezas e o desempenho do poder judiciário, ou seja, a eficácia não alcança o cidadão em situação de risco social. Kahan (2006) corrobora com esse resultado ao revelar que as empresas possuem predisposição em se alocar em regiões nas quais o poder judiciário é mais eficiente, criando um círculo vicioso, no qual as empresas vão para onde há eficácia judicial. Consequentemente, há melhoria no PIB *per capita* de onde empresa se instalou e, como revelado pelo modelo, o PIB *per capita* influencia positivamente a eficácia. Assim, pode-se inferir que a eficácia do judiciário é mais frequentemente observada em regiões que produzem mais riqueza, resultados consoantes com os de Beer (2006), que identificou a pobreza como variável explicativa do desempenho do judiciário.

No aspecto econômico-financeiro, a relação positiva encontrada entre receitas repassadas, PIB *per capita*, despesas com capital, despesas com pessoas e encargos do quadro efetivo e gastos totais do tribunal em relação ao PIB demonstra a relação dos recursos financeiros com a eficácia no poder judiciário. Uma vez que esse órgão público não é um órgão arrecadador, o mesmo vê-se dependente de repasses por parte dos demais órgãos do poder público. Portanto, a comunicação e alinhamento entre os três poderes é de grande importância na busca pela integração, de maneira a garantir que o interesse público seja observado enquanto prioridade que configura. A relação estabelecida entre recursos financeiros e desempenho no judiciário também foi evidenciada nos estudos de Beer (2006) e Akutsu e Guimarães (2012), que consideraram a pobreza e a quantidade de recursos orçamentários alocados como fatores importantes.

No tocante aos recursos humanos, as ações administrativas são realizadas por pessoas, assim o número total de servidores implica de forma positiva na eficácia dos tribunais, juntamente com a taxa de servidores auxiliares. Tal fato revela a importância do planejamento em recursos humanos dentro do quadro geral para alcançar a eficácia, investindo-se em formação e seleção de pessoas capacitadas para o desempenho do cargo. Como observado, a quantidade de magistrados, o apoio extra de pessoal, a capacitação jurídica dos servidores e a formação acadêmica dos servidores foram variáveis explicativas nos estudos de Schneider (2005), Beer (2006), Ribeiro (2008), Rosales-López (2008) e Akutsu e Guimarães (2012). Destaca-se ainda as conclusões do estudo de Van Montfort, Jong, Herweijer e Marseille (2005) que perceberam que as características gerenciais do tribunal influenciam diretamente no tempo gasto no julgamento dos casos. Logo, o controle das atividades administrativas no poder judiciário é de grande relevância para garantir o acesso à justiça por parte do cidadão de maneira eficaz.

4.3 As implicações do trabalho

Em relação aos pontos fortes, o trabalho conta com revisão bibliográfica abrangente, que buscou levantar os trabalhos correlatos que tratavam da avaliação do desempenho do poder judiciário. A existência e disponibilidade de um banco de dados abundante por parte do CNJ configuram-se um fator relevante que atribui credibilidade ao estudo e permite evidenciar e perceber características inerentes ao poder público no Brasil. Ao corroborar os estudos referidos na revisão bibliográfica e trazer variáveis novas para a academia, contribui-se para a ampliação do entendimento acerca do desempenho no poder judiciário no Brasil, evidenciando que esse poder se assemelha em desafios e limitações nos mais diferentes países. E, ao refutar algumas das conclusões, o estudo se fortalece, percebendo que o poder judiciário brasileiro apresenta particularidades dentro do seu escopo de ações administrativas que buscam garantir um melhor desempenho.

A metodologia empregada na avaliação do desempenho caracteriza-se como um ponto importante, uma vez que a maioria dos estudos avaliados são de caráter qualitativo. Assim, a contribuição com um estudo de caráter quantitativo oferece nova perspectiva quanto ao desempenho no judiciário, além de conferir credibilidade estatística aos resultados encontrados, suportando as conclusões. Os pontos de atenção do estudo estão relacionados com a não completude dos dados do relatório do CNJ nas suas primeiras versões, apesar de haver inúmeros e extensos dados e relatórios nos últimos dois anos analisados (2015 e 2016).

A construção de um modelo estimado que evidencie o desempenho dos Tribunais de Justiça dos Estados e do Distrito Federal frente as variáveis administrativas auxilia na resolução de problemas ao evidenciar quais são as variáveis explicativas

e como afetam a variável resposta (desempenho/eficácia), provendo o gestor de informações para tomar decisões e estabelecer programas que vislumbrem esse aspecto revelado pelo modelo estimado, por meio da explicação fornecida pelo coeficiente de regressão estimado. Além disso, é possível a antecipação de cenários, uma vez que o comportamento da variável dependente está condicionado às variações nas variáveis independentes, de maneira a prever o comportamento do fenômeno desempenho. Diante dessas possibilidades de predição e resolução de situações, a definição de um modelo contribui para a identificação de pontos focais para ações de cunhos administrativos, para mitigar a morosidade e ineficácia do poder judiciário. Assim, o modelo estimado atua como mecanismo otimizador por meio da relação entre as variáveis explicativas que têm implicações no alcance das metas traçadas pelo CNJ, colaborando para um poder judiciário mais eficaz, cumprindo um de seus papéis: garantir a justiça com celeridade.

Para trabalhos futuros, a continuação do processo de avaliação do desempenho do poder judiciário deve ser estendida aos demais tribunais, com o objetivo de verificar se as mesmas variáveis explicativas são reproduzidas nos modelos estimados para cada tribunal. Além disso, o levantamento e identificação de ações administrativas que surtiram efeitos positivos no desempenho do poder judiciário devem ser pontualmente analisados sob a ótica administrativa, comparando com os resultados aqui encontrados e percebendo pontos e ações focais para desenvolver e buscar por melhorias para o desempenho no poder judiciário. O campo a ser explorado ainda é vasto, e dentro dele inúmeras possibilidades vão surgindo à medida que se aprofunda o assunto, a academia apenas está apenas tocando a superfície no que se refere ao estudo do desempenho no poder judiciário.

5. Conclusões

Considerando a razoável duração processual no âmbito judicial juntamente com o princípio da eficiência dentro da administração pública, o presente estudo buscou identificar quais fatores contribuem para o alcance da eficácia por parte do poder judiciário. A adesão do planejamento e o estabelecimento de metas para o judiciário brasileiro contribuem para que se possa mensurar a execução e a divulgação desses dados, permitindo o acompanhamento das atividades judiciais no país.

As metas traçadas anualmente no ENPJ fornecem parâmetros a serem atingidos, e métricas para que as ações sejam mensuradas e controladas, de maneira a evidenciar anomalias passíveis de investigação. Essas anomalias ficam evidentes quando se torna possível mensurar e prever o comportamento diante dos diferentes cenários possíveis. Assim, o modelo estimado auxilia na previsão desses diferentes cenários considerando diferentes variáveis. Por meio do modelo de regressão linear múltipla pode-se chegar a uma estimativa estatística representativa

e que correspondesse a cerca de 39 por cento das variações na eficácia junto ao cumprimento das metas estabelecidas pelo CNJ.

Na busca pela governança judicial, o gestor do tribunal apropria-se dos resultados aqui evidenciados de maneira a planejar e nortear as suas ações administrativas para aumentar a eficácia do seu tribunal. A implementação de medidas de controle e auxílio administrativo, no sentido de auxiliar os magistrados e servidores na gestão administrativa do tribunal, é importante para que os órgãos responsáveis e os gestores dos tribunais estejam cientes dessa dimensão, que consiste na relação entre um tribunal com um sistema administrativo competente e a eficácia no tocante aos processos legais ali baixados.

A falta de ações de cunho administrativo prejudica a exequibilidade da garantia constitucional de razoável durabilidade processual. Desse modo, é necessária uma estratégia de implementação de cultura organizacional de planejamento e gestão nos tribunais nacionais, que, a partir das metas fixadas pelo CNJ, estabeleça ações e principalmente indicadores nos tribunais de maneira a proporcionar o acompanhamento da evolução dos resultados. Assim, é importante fazer o mapeamento das competências essenciais e procurar explorá-las de maneira a oferecer vantagem na execução dos processos administrativos, melhorando a eficácia dos mesmos.

No Brasil, a eficácia judicial está ligada à produção de riquezas, o que revela a grande influência que o setor privado ainda exerce no setor público, indicando então relação muito próxima entre o poder do capital e o poder do Estado. Essa análise permitiu demonstrar que o poder judiciário apresenta características semelhantes aos demais poderes do Estado, e que essas semelhanças também representam no poder judiciário uma má gestão da máquina pública.

Deve-se observar que os recursos existem, são utilizados e sob o ponto de vista econômico sempre serão escassos. Portanto, são necessárias ações que busquem a eficácia da aplicação desses recursos, que devem perpassar a toda e qualquer estrutura da administração pública. Essa ação reflete as diretrizes da nova administração pública, que busca fazer mais utilizando menos recursos, onde a economia e/ou uso racional dos recursos se transfigura como parte da responsabilidade que é intrínseca ao Estado.

Os resultados sugerem que a observação, por parte do gestor do poder judiciário, de quesitos como o número total de trabalhadores de força auxiliar (terceirizados) e o número total de servidores podem aumentar a eficácia nos Tribunais de Justiça dos Estados e do Distrito Federal, independente da região do IBGE. Assim, ao CNJ como órgão responsável pelo aprimoramento do trabalho do sistema judiciário brasileiro cabe desenvolver políticas administrativas para consolidar a governança judicial.

Ao poder executivo cabem ações de incentivo fiscal à alocação de empresas em lugares menos favorecidos, com o intuito de quebrar o círculo vicioso relacionado com a eficácia judicial e a produção de riquezas, democratizando o acesso à justiça no país. E cabe ao poder legislativo aprovar o orçamento para o poder judiciário, no sentido de contribuir para a maior eficácia do mesmo, uma vez que a receita apresenta relação positiva com a eficácia e o mesmo não se caracteriza como um órgão gerador de receitas.

A proposição e estimação de um modelo que busque eficácia fornece indicadores para estabelecer ações por parte do CNJ e dos gestores dos tribunais. Estas ações podem proporcionar meios para uma melhor gestão e diminuição das lacunas de ações administrativas dentro do poder judiciário, no sentido de melhorar o desempenho do tribunal e oferecer ao cidadão o seu direito constitucional da celeridade processual.

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Enforcement by Courts of Auditors Post-LAI: The Role of Translation and Closeness to Citizens

Enforcement pelos Tribunais de Contas Pós-LAI: Papel de Tradução e Aproximação Cidadã *(PT: 167-188)*

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DOI: 10.33167/2184-0644.CPP2019.VVN1/pp.147-165

ABSTRACT
This theoretical-empirical study investigates what has been the role of the Courts of Accounts (TCEs) facing the changes imposed by the Law on Access to Information (LAI) in Brazil, given the scenario of a gradual reduction of the distance between governor and governed. Conciliating Sociolegal approach and Organizational Institutionalism, the research employed interpretative discourse analysis in primary and secondary data of 13 TCEs. It contends that the TCEs have rethought their acting posture, in addition to their constitutional spectrum, because: (a) through a discourse of approximation with social control, they seek to establish partnership with society; (b) aiming at instrumentalizing the citizen for the exercise of social control, they act in the compilation and processing of public data, translating them into the social landscape; and (c) because of the accountability and penalty difficulties outlined by LAI, the regulatory apparatus has adopted alternative – including pedagogical – ways to support enforcement and compliance

Keywords: Law on Access to Information, transparency, enforcement, compliance, discourse

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RESUMO
Este estudo teórico-empírico investiga qual tem sido o papel dos tribunais de contas (TCE) frente às mudanças impostas pela Lei de Acesso à Informação (LAI) no Brasil, ante o cenário de exigência da paulatina redução da distância entre governante e governado. Conciliando abordagem sociolegal e institucionalismo organizacional, a pesquisa empregou análise interpretativa do discurso em dados primários e secundários de 13 TCE. Conclui-se que os TCE têm repensado sua postura de atuação, além de seu espectro constitucional, pois: (a) mediante discurso de aproximação com o controle social, eles procuram angariar parceria com a sociedade; (b) visando instrumentalizar o cidadão para o exercício do controle social, eles atuam na compilação e tratamento de dados públicos, traduzindo-os para o *social landscape*; e, (c) em razão das dificuldades de responsabilização e penalização delineadas pela LAI, o aparato regulatório tem adotado maneiras alternativas – inclusive pedagógicas – para apoiar *enforcement* e *compliance*.

Palavras-chave: Lei de Acesso à Informação, transparência, *enforcement*, *compliance*, discurso

1. Introduction: Regulatory Landmarks, the Culture of Secrecy and Enforcement/Compliance Relations

The constitutional role of the courts of auditors is situated, fundamentally, in the independent oversight of the economy, legality and legitimacy of acts carried out using public funds. Their powers of oversight extend to the legal structure established by the Federal Constitution, supporting the legislative authorities; this is called "external oversight". In essence, the courts of auditors are collegiate administrative bodies, responsible for judging the accounts of directors and other persons responsible for public assets, moneys and funds.

Three regulatory landmarks have had a significant impact on how the courts of auditors operate: the Fiscal Accountability Law (Complementary Law no. 101, 2000), the Transparency Law (Complementary Law no. 131, 2009), and the Law on Access to Information (Law no. 12.527, 2011). We can see the importance of these three legal landmarks from their effect in disciplining and lending transparency to acts of public management, subject to the oversight of the courts of auditors.

In this study, we have given special prominence to the last of these three legislative developments: the Law on Access to Information (LAI). From our standpoint, we see this law not as an isolated act, but as the "outcome of a historical process, which started with the Constitution of 1988". Above all, we wish to draw attention to the ability of the LAI to "shed light on the main problems in the organization of the Brazilian public administrative authorities" (Abrucio, 2012), requiring the reformulation of long-established guidelines and public policies.

Whilst regulation and transparency are tools for improving external oversight, the visibility now afforded now exposes more clearer the actual performance of the courts of auditors and other external oversight organizations. In the wake of

scandals concerning embezzlement of funds, corruption or misuse of public resources, the regulatory bodies will not be held to account for their actions, and for any omissions or gaps in their knowledge. We may therefore ask: what has been the role of the courts of auditors in the face of the paradigm shifts imposed by the Law on Access to Information?

It is evident that the paradigm shifts to which we refer do not extend only to oversight activities, but rather come from a wider context, of a progressive break away from the culture of secrecy (Martins, 2010). There has been a gradual reduction in the distance between governors and the governed, founded on the emergence of the ideals of impartiality and neutrality in public management (Abrucio, 2012). Concomitantly, the legal and social demand for transparency has driven the disclosure of a vast quantity of public data for which criteria, terms of comparison and indicators still need to be developed into to be broadly understood.

These transformations have therefore influenced not only the management of public funds and the accountability of their administrators, but they have also had an impact on the dynamics of the public administrative authorities, especially as regards the relationship between enforcement and compliance. These terms and practices, under study here, are now beginning to be marked out, allowing them to be understood in different ways and from different theoretical standpoints.

Enforcement is understood as the broad range of supervisory mechanisms able to ensure compliance with the law. From a textual point of view, enforcement can therefore be seen as the ability of certain regulatory bodies to transform legislative language into practice rules (Funk & Hirschman, 2014), which are then applied and, effectively, bring about changes in behavior in those subject to their jurisdiction.

In keeping with the spirit of textual negotiation identified in the preceding concept, compliance can be seen as the whole "social process that evolves over time as organizations seek to adapt the law to fit their own interests" (Edelman, 1992:1534-1535). It should be noted that, in adopting this definition, the arithmetic idea is extracted that compliance is only the act of strict compliance with the law. It is also possible to see the relationship between enforcement and compliance as a process of dialogue, negotiations, adjustments and concessions over time. Likewise set aside is the understanding that the "law is formulated and defined outside of organizations and... [their] domains" (Edelman & Talesh, 2011:103).

Empirically ratifying this concept, we may see, for example, how far what are called "declarations of adjustment" have been used in relations between regulatory and external supervisory bodies and those subject to their jurisdiction. It may be observed that the latter, when not complying with the law, are not immediately subject to penalties, in view of their express willingness to resolve the disagree-

ments. See Resolution no. 59 (2017) of the Court of Auditors of the State of Paraná (TCE-PR), Brazil, which defines declarations of adjustment as follows:

> Article 2. A Declaration of Management Adjustment is considered to be the oversight instrument designed to achieve voluntary regularization of administrative acts and procedures subject to the Court's oversight, by setting a reasonable period for the person responsible to take steps to comply strictly with the law, the principles governing public administration and the non-definitive rulings of this Court (Resolution no. 59, 2017).

What emerges from this initial discussion, provided by way of example, is the break with the old dichotomy of compliance and non-compliance (Edelman & Talesh, 2011), requiring in turn a repositioning of the role of enforcement. The challenge is to make an adjustment between a cold reading of the powers of external oversight conferred in the constitution, and the heat of legal and social changes that have occurred since the 1980s, pointing to a demand for transparency and to the vast scale of the public data which it is now mandatory to disclose.

In this study, the question raised is answered through analysis of discourse, using both primary and secondary empirical data, in order to arrive at an understanding of: (a) efforts towards coordination in the regulatory apparatus; (b) changes brought about in enforcement as a result of the transparency of public data; and, (c) the condition of closeness between citizens and the public administrative authorities. At the same time, we take as our starting point acknowledgement of the challenge of "effectively modernizing and extending the model of compliance oversight to the auditing of outcomes, as happens in the major developed nations (Court of Auditors of the State of São Paulo, 2014:3).

In mapping out this relationship between transparency and social development, a contribution is made to research focusing on relations between the law, society and organizations: Organizational Institutionalism combined with a Socio-legal approach offers a theoretical understanding of that dynamic, including on issues that involve enforcement and compliance. Above all, the institutionalist literature also offers us multiple viewpoints on this issue, including on issues of compliance models, and organizational choices of this or that model of legal compliance (Greenwood, Oliver, Suddaby, & Sahlin-Andersson, 2017).

We accordingly start off from a less orthodox structuring of the theoretical content and guiding concepts for this study – as well as those described here, in this introductory section – to go on to apply them to the interpretation of the empirical matter collected, abductively, whilst the analyses advance, thus proceeding as we see fit during the presentation, culminating in final conclusions that return to and form a dialogue with them. Our aim is therefore to present a discussion

with multiple focuses on the changes, taking a recursive view of the relations between organizations, regulators and society, against a backdrop of the law and language.

2. Methodological Procedures

In this study, which takes a qualitative approach, primary and secondary empirical materials have been used, both submitted to the discourse analysis method. We present the procedures adopted for the stages of apprehending and analyzing the empirical material.

Collecting the Empirical Material

The secondary empirical materials used was obtained from the websites of Brazilian courts of auditors (state and municipal), and also from that of the Brazilian Association of Courts of Auditors (ATRICON), during the months of October and November 2017. On the basis of the information provided on the "Good Practice in Courts of Auditors" website[1], drawn up by ATRICON, 13 courts were selected to make up the sample of empirical material to be researched. Attention was focused primarily on the organizational initiatives and projects of courts in various states which have gained recognition from ATRICON. Of these projects, we chose those which had a connection with the topics of "social control", "Law on Access to Information" or "citizen".

Having chosen the courts of auditors for study, fragments of the respective websites were collected dealing with the topics in question, providing a total of 32 webpages. These fragments then underwent classification and analysis, as will be detailed in the next subsection.

For our primary empirical material, we opted to use selected passages from 8 (eight) semi-structured interviews conducted by one of the authors in a one-shot form, which dealt with the actions of regulatory bodies in relation to the LAI. Conducted between August and December 2016[2], the interviews provided a total of 7h25min of recordings which were then transcribed, resulting in 217 (two hundred and seventeen) pages drawn up in word processing software[3]. Table 1 summarizes the group of interviews and shows that they were dominated by representatives of the regulatory sector, in particular the TCE-PR, and social control organizations in the State of Paraná.

1. Accessed at <https://boaspraticas.atricon.org.br/>.
2. These interviews comprise the fieldwork stage of an MA dissertation in Administration concluded in 2017 which is neither cited nor referenced here in keeping with the double blind peer review process used by this scientific periodical.
3. This study made use only of passages from transcriptions that related to enforcement issues.

TABLE 1. Actors Interviewed

SOCIAL SEGMENT	FUNCTION ASSIGNED TO SOCIAL SEGMENT	BODY IN WHICH ACTOR WORKS/ REPRESENTS	INTERVIEWEE	POSITION/DUTIES PERFORMED	OTHER INFORMATION ON INTERVIEWEE
Public Manager (PM)	Law enforcement segment	Londrina Municipal Authority	GP1	Londrina Municipal Ombudsman	Career municipal employee, works in the Ombudsman's Office, department responsible for passive transparency in the municipality. Sits on Municipal Transparency Board and on internal committees for regulations to implement the law and classification of information.
			GP2	Londrina Municipality Controller	Head of the Control Office, department responsible for active transparency in the municipality. First employee to hold the post of Municipal Controller-General as the result of a selection process conducted by the Municipal Transparency and Social Control Board.
			GP3	Former Londrina Municipality Controller	Municipal controller in the period 2011 to 2015, when the LAI was approved Career public servant, still on the staff of the Municipal Controller-General's Office.
External Control Bodies (EC)	Legal oversight segment	Paraná State Public Prosecution Service	CE1	Former Attorney-General of Justice for Institutional Planning Affairs (SUBPLAN)	Attorney responsible for conducting "Transparency in Municipalities" Project, an initiative viewed as strategic at SUBPLAN and intended to standardize the websites of all municipalities and city halls in Paraná, by providing a single standard portal, developed by Companhia de Tecnologia de Informação e Comunicação do Paraná (CELEPAR), on the basis of the Public Management Control Network.
		Union Controller-General's Office (CGU)	CE2	Head of Paraná subsection of CGU	Most senior CGU representative in the State, with a PhD in Public Policy from UFPR. The CGU runs local programs such as "Keeping an eye on Public Funds" and "Stronger Management"
		Union Court of Auditors (TCU)	CE3	Former TCU Secretary for External Control in Paraná	Career TCU auditor, it was under his management that the TCU analyzed the transparency websites of the municipalities, developing an assessment methodology.
		Paraná State Court of Auditors	CE4	Coordinator of LAI Social project	Member of team that worked on the social audit methodology, in partnership with universities in the State of Paraná, this public servant coordinated the LAI Social project that assessed 72 municipalities using specific methodology developed in the course of the project
		Paraná State Court of Auditors	CE5	Member of committee that developed regulations for LAI at TCE-PR	TCE-PR employee who took part in developing regulations for implementing Law in organization. Author of book on access to information. Representative of TCE-PR on topic working party between courts of auditors, for discussion of case law.
Organized Civil Society (CS)	Segment benefiting from law and exercising social control.	Londrina Social Observatory	SC1	Chairman of Londrina Social Observatory	Journalist, political reported for Folha de Londrina newspaper He was one of the founders of the observatory, and a member since its inception. Has also chaired the Municipal Transparency and Social Control Board
		Londrina Municipal Transparency and Social Control Board	SC2	Chair of Londrina Municipal Transparency and Social Control Board	Lecturer (PhD) at Londrina State University (UEL), participant in LAI Social Project, public policy is one of her research interests. Was previously involved with the workings of a social observatory at UEL, called the Interdisciplinary Public Policies Observatory

3. Processing and Analysis of Empirical Material

The empirical material underwent the concomitant methodological procedures of classification and analysis. In view of its capacity to highlight discourse as an element able to construct organizational reality, priority was given to analysis of discourse on an interpretive basis (Heracleous & Hendry, 2000). Because of the visceral relationship between discourse and reality, language is not seen only as an analytical tool (Putnam & Fairhurst, 2001), but as the essence and matter of meaning (Phillips & Hardy, 2002).

The discourse analysis undertaken centers on questions of intertextuality. The text is seen here as a web which, in turn, is the constitutive component of the formation of the discourse (Phillips & Malhotra, 2017). The method used centers on questions of text and intertext, in staged detailed below:

Primary and secondary materials underwent classification, generating categories based on text and intertext relations (Putnam & Fairhurst, 2001). Each fragment was placed manually in analytical categories which were delineated *a priori* on the basis of a prior reading, namely: (a) organizational programs for proximity to citizens; (b) conversion of public data to open data format; (c) provision of indicators and interactive tables; (d) relaxation of enforcement; (e) lack of coordination in oversight actions; and, (f) joint action by controlling bodies.

The next stage addressed lexis and consisted of drawing up a list of terms and possible synonyms found in the transcriptions and fragments, which made it possible to characterize mentions/references that indicate the presence of elements that argue, speak and deliberate about matters addressed by the five analytical categories identified. As well as helping to provide evidence of intertextualities, these groups of words resulted in italics in the tables contained in section 3 of this study.

Following through the question of intertextuality, and considering that the interweaving and coherence between the texts allows for the formation of discourse (Maguire & Hardy, 2009), the group of research findings was structured, in other words, the convergence between (a) speak/speak, and between (b) speak/text, presenting itself as a research finding, and altering the previous categories for the findings which will be presented in section 3.

Lastly, a semantic analysis was conducted with a view to reciprocal influences between text and context. This is a condition in which the "act of referring to the reality depends on a context, its effects are practical, as they are the discursive effect that they produce" (Araújo, 2004:10). In this, at the same as the text reflect a given socio-political context, the context is the result of the discursive action. This means that particular importance can be ascribed not only to the context in which a given utterance occurs, but also to the way that this utterance has an impact on the context.

The result of applying these methodological procedures is described in the following section, which presents the three research findings that shape our understanding of changes in the role played by the courts of auditors.

4. Empirical Evidence and Results

The Function of Compiling and Translating Public Data

This section is based on three central arguments to which we will address ourselves: (a) the difficulty of understanding and handling public data and the desire for open data; (b) the process of translation which data must undergo for effective exercise of external control and social control; and, (c) recognition, by courts of auditors, of their capacity to organize and compile data.

With the advent of the LAI (Law no. 12.527, 2011), the bodies of the executive, legislative and judicial branch are not required to provide data on their management, in the format established in law. The roll call of legal requirements is not limited to the non-exhaustive listing of expenses, payments and contracts, but also applies to the terms facilitating the handling of these data, such as:

> § 3. The websites referred to in § 2 must meet the following requirements, in the form established in the regulations:
> I - they must contain a content search tool allowing access to the information in an objective, transparent and clear way, in language which is easy to understand;
> II - they must allow reports to be downloaded in various digital formats, including open and non-proprietary formats, such as spreadsheets and text, in order to facilitate analysis of the information;
> III - they must allow for automated access by external systems in open, structured and machine-readable formats;
> IV - they must disclose in detail the formats used to structure the information;
> V - they must guarantee the authenticity and integrity of the information available for access;
> VI - they must keep up to date the information available for access; (Law no. 12.527, 2011).

The recognition that public data must not only be accessible, but must also be organized and easy to access and handle places a high value on the concept and eagerness for what is called 'open data', which was defined by the Ministry for Transparency, Oversight and the Union Controller-General's Office (2016:33) as follows:

> Open data: data freely available for use and redistribution by any interested party, without any restriction in the form of licenses, patents or controlling mechanisms. In practice, the open data philosophy entails a number of technological restrictions son that the data are machine-readable. The openness of all public data is an "aspiration".

It may be observed that the concept considered involves an underlying assumption that public data are not, at present, fully ready to be offered as 'open'. The word "vocation" clarifies the ideal pursued by transparency, but which is not yet materialized in the standard structuring of the websites currently available.

We may see that the structuring of open data is one of the roads to permitting the setting of criteria, benchmarks and indicators, broadening the critical sense of external control and social control. According to the Federal Government, the need to work on the data is crucial for progress on the idea of open data, as it has stated:

> Open Data means the publication and dissemination of public data and information on the internet, in accordance with certain criteria which allow it to be reused and for applications to be developed for society as a whole... Provision of online data is not a recent government practice, but with the open data policy, the government has given a sign that it wishes to standardize and leverage the dissemination of public data by all authorities. The open data paradigm is based on the observation that data, when shared openly, is of greater value and can be put to wider use. With this measure, the government wishes to develop an ecosystem of data and information to benefit society (Office of Logistics and Information Technology [SLTI]; Ministry of Budgetary Planning and Management [MP], n.d., emphasis added).

In Table 2 below, a number of fragments from the leaflets and websites of Brazilian courts of auditors are used as examples to show how these regulatory bodies acknowledge the need to organize, handle and compile data so as to allow external and social control to be exercised.

This shows some of the textual characteristics that we will demarcate. The first, which is grammatical and syntactical in nature, refers to construction of subordinate clauses in which the court of auditors shows that it is doing a particular thing with a given aim, in a causal relationship. The second has to do with lexical congruence, which is highlighted in bold in the column headed 'Transcription" in Table 1.

This process of data conversion shall be seen, at that moment, from a translation perspective. Firstly, it must be understood that the concept of translation resides in the observation that information and ideas are produced in a context. There is only translation when consideration is given to social usage, considering institutions, ideals, models, rules and pattern of a given environment – social landscape (Wedlin & Sahlin, 2017). Accordingly, public data make a transition from the organizational environment, which is restricted, to citizens' homes, news desks, academic panel discussions and other destinations. Consequently, in mak-

ing this journey, there are changes in the patterns, models, institutions and ideas surrounding them.

TABLE 2. The Role of Data Compilation

COURT	TRANSCRIPTION	BREAKDOWN
TCE-SP	Creating end indicators for analyses of the processes used by those subject to the authorities' jurisdiction is a task that has called on the efforts of political agents and staff at the São Paulo Court of Auditors in order to contribute to a fairer society	ACTION: create end indicators AIM: to contribute to a fairer society
TCE-RS	The TCE-RS has produced interactive tables for presenting a set of municipal indicators in graphic form. The aim is to show clearly the situation of each municipality, as well as to permit comparisons.	ACTION: produce interactive tables and set of indicators AIM: show clearly and permit comparisons
TCE-PB	As part of its institutional mission and also with educational aims, the Court of Auditors of the State of Paraíba has developed and distributed this leaflet in order to provide citizens in the state with guidance on the end indicators to be used in the Municipal Management Effectiveness Index.	ACTION: develop and distribute leaflet and provide guidance on end indicators. AIM: exercise of institutional missions and educational function
TCE-PE	The data shares can be freely used by citizens in developing applications, executing automated searches or any other technological resource promoting social control.	ACTION: freely execute automated searches AIM: to promote social control
TCE-ES	Disclosure of open data means making it possible for any citizen to access, understand and use them as he or she may wish, fostering active transparency and social control.	ACTION: disclose open data, with free access AIM: foster active transparency and social control

For this reason, translation is centered on "creating something that is appropriate and desired in a given time and place" (Wedlin & Sahlin, 2017:106-107). It is therefore necessary to ascertain and "define which processes require local solutions and to shape plans to be complied with" (Wedlin & Sahlin, 2017:107). The definition of that social landscape is fundamental for us to observe, in conclusion, that malleability in data use is crucial to translation, as this is what makes it possible to adapt data to local issues and interests, in different states, municipalities and social segments. This malleability is in turn favored by the structuring of data in an open format, which is the intention expressed in the legislative text.

In short, we can sum up our conclusions at this stage as follows: the use of indicators and tables and easy data access and handling is what permits the applied

use of public information – hence the importance of, and desire for, the use of open data. Courts of auditors, which hold the data from various municipal and state organizations, are aware of their position, and have moved to process and compile those data, seeking to allow public data to generate real social control and educational progress; in this, they have taken on a new role in enforcement. By acting in this way, the courts have set about translating public data so that they can serve as open data and thereby be put to social use, in other words, by being flexibly adapted to different places, interests and purposes.

5. The Ideal of Closeness to Citizens

At this stage, the ideal of closeness will be visible in the process (under way) of transition from secrecy to transparency, assessing the effects of the LAI on the *modus operandi* of courts of auditors, seen here as representatives of enforcement.

Firstly, it is important to turn back to the socio-cultural dimension that characterizes what we have called the transition from secrecy to transparency. It should once again be stressed that the theoretical discussion presented here does not set out to consider this process as finite or completed, but rather to understand how this transition is evinced by the law, texts and practices. We accordingly focus our efforts on the secondary dimension of the law (Ross, 2001), particularly on aspects that depend on its "recognition, interpretation, change and adjudication" (Ross, 2001:61).

According to Martins (2010:155), what Brazilian society has been experiencing is the "conflict between openness and secrecy". This conflict has grown out of the gradual erosion of the closed-doors model of public administration. Starting with the landmark Citizen's Constitution of 1988, the Brazilian legal system has defended access to information, the accountability of public officials, mandatory publication of acts and governance on the basis of the principles of impartiality, morality, efficiency, etc. The approval of laws enshrining these values has received international backing. When the LAI was being drafted, pressure was brought to bear – especially by organizations such as the UN and UNESCO – for the process to come before the National Senate, revealing a relationship between the desire for social development and transparency in public management (United Nations Brazil, 2010).

The international pressure cited, for example, the experience of several developed nations which had experienced progress through access to information. Unlike in other countries[4], where these rules had existed for centuries and are well

4. In Sweden, for example, where public access has the longest tradition, mentions of access to information can be found in legal rules dating from 1766.

established in the social fabric, the task in Brazil was more arduous, especially in the practical advances that the law would bring. In this regard, the challenge facing Brazil was to "understand the webs of meaning behind each of these words (in the law)", making it possible to "decipher the new cultural paradigm" (Alves, 2012:120).

This prognosis is particularly interesting for this study because the idea of words and meaning overlaps with discourse analysis and allows us to delve into the socio-cultural process through words, texts and interpretations. We accordingly return to our aim of demonstrating how the courts of auditors give meaning to the LAI, looking directly at the discourse and social elements that frame enforcement actions. We will now analyze the fragments transcribed in Table 3.

Our initial focus in analyzing the discourse is on the temporal question in the textual constructions that serve to support perception of the transition process from a perspective of continuity. Attention should be drawn to the implicit presence of two moments, which are: (a) a moment in the past, when enforcement concentrates on "assessing compliance with budget execution and spending rules"; and, (b) a subsequent moment, which is taking shape, in which "dialogue and the possibilities of interaction with citizens" is broadened. We may see that moment (b) is still seen by the courts of auditors as a projection, as evinced in the text by the recurrent use of clauses in the future tense, such as "will measure" or "will serve".

In contrast to the temporal idea - perception of which is latent -, the ideal of closeness to citizens is declared and manifest, and points to the sense of collectivity and society, highlighting the secondary facet of the law (Ross, 2001). In view of this, the courts of auditors take up a firmer position in the social relations between the law and society, by proposing the joint pursuit of the "common good", claiming for themselves the role of fostering and stimulating social control In so doing, the courts recognize the relationship between the LAI and social development.

It should be noted that several courts of auditors have set up citizen-oriented programs, such as, "Citizen's space" (TCE-MT), "Information for all portal" (TCE-PR), "Citizen's Portal" (TCE SP e TCE-TO) "Citizen-centered TCE" (TCE-PA and TCE-SE) and "Citizen Control" (TCE-CE). There is clear lexical convergence between the names chosen for these programs and portals, in keeping with the lexical intertextuality that we proposed in our methodological approach. In general, the titles seek to highlight the term "citizen", inflected so as to offer tools for the citizen (such as "oversee" or "control") or with a stress on the *locus* created for the claims of citizens (such as "Citizen's Space", "Citizen-centered TCE"). Intertextuality also exists in relation the actual text of the law, to the effect of promoting unrestricted access, such as in "Information for all portal".

TABLE 3. The role of Closeness to Citizens

TCE-SP	Oversight of governments requires the supervisory bodies to do much more that gauge compliance with rules on budget execution and spending procedures. Citizens today demand - legitimately - access to information that enables them to assess the results of the work of public managers and how far they fulfil the commitments made to society.	Time 1: assessment of rules of compliance with budget execution and spending rules. Time 2: citizens demands access to access public actions and this demand highlights the duty of State courts of auditors to strengthen their commitment to society.
TCE-RJ	The outcome achieved through its application will serve society, through transparent disclosure of the standard of municipal management assessed from the standpoint of the organizational structure, systems and processes in place, in comparison with practices that would ensure delivery of services and efficient, effective and efficacious solutions for Brazilian society.	Time 1: the outcome achieved did not always have a direct application to society. Time 2: Practices that ensure efficient, effective and efficacious solutions and services for Brazilian society.
TCE-PE	The Court of Auditors of Pernambuco will not spare any effort to foster and contribute to creating a society which is increasingly citizen-centered, fair and committed to the public good.	Time 1: the commitment to a citizen-centered society was not prioritized. Time 2: no effort is spared to form a fairer and more citizen-centered society.
TCE-PB	The importance of the issue derives from the requirement imposed by society demanding access to information that allows it to assess the results of the work of public managers and how far they fulfil the commitments made, as effectively as possible.	Time 1: there was no social requirement of access to the information needed to assess public management. Time 2: a demand arises for the court to return to its commitments more effectively.
TCE-SC	The aim is to broaden dialogue and create new opportunities for interaction with citizens, in order to promote higher standards of performance in the services provided by TCE/SC and by the bodies subject to its oversight, to the common good. This is a contribution to [enabling] society to exercise social control of public management.	Time 1: interaction and dialogue with citizens is more limited. Time 2: broadening of this dialogue is the State court of auditors' contribution to the exercise of social control.

In short, the ideal of closeness to citizens is supported by the regulatory landmarks that exert a recursive influence on the process of social transition from secrecy to transparency. In their projects and communications, the courts of auditors manifest, through meanings and lexis, a discourse of closeness to citizens, from a temporal perspective. We have therefore observed a stance of adaptation and projection of enforcement, as well as a path towards social integration which is to be broadened with the declaration of the common purpose of social development.

6. Recognition of the Need to Coordinate Enforcement Efforts

We shall start with some theoretical questions concerning enforcement and its relations with the law and society, in order to strengthen the collective and social understanding of the oversight authorities.

(a) Recognition that the law does not always reflect social habits, and that nations are not always ready for a given piece of legislation, the idea of control and oversight gains strength. The law should therefore not be seen as self-enforcing (Edelman, Uggen, & Erlanger, 1999:407);

(b) When there is uncertainty concerning the power of enforcement (Hawkins, 1984 as cited in Edelman, 1992), the level of social construction of the law is affected;

(c) Consequently, it is possible assume a relationship of counterweights (balance) between enforcement and compliance, in which the more incisive the enforcement, the less amplitude exists for compliance (Edelman, 1992). In other words, weakened enforcement may multiply the forms, models and periods of time for compliance with the law.

(d) For Hart, in primary law (text), enforcement derives from the force of penalties and the power of the enforcement system (Ross, 2001);

(e) In the secondary phase of the law (social recognition), on which we focus here, the pressure to exert enforcement is on the authority itself, in the face of growing social claims for justice or for enforcement of the law (Ross, 2001).

In posing these theoretical questions, the need arises to verify three things: (a) the degree of incisiveness of enforcement; (b) the relative high standing of enforcement agents [considering the assertions contained in items (d) and €]; and, (c) how far the oversight authorities, in particular the courts of auditors, recognize or coordinate their oversight actions, in the light of the new LAI rules. In this sector, we will argue that certain factors in the enforcement/compliance dynamic are fundamental to an understanding of these points, illustrated with empirical evidence in Table 4:

(a) The pressure for compliance comes fundamentally from organized civil society, in view of the reactive nature of oversight authorities;

(b) The activities of the regulatory system are not aligned, resulting in a lack of coordination in efforts;

(c) Some oversight and audit activities require monitoring and continuity, requiring supervisory authorities to adopt a different stance in view of the ongoing process proposed by the legal system;

(d) Delays in and the lack of effectiveness in judicial proceedings, as well as over-judicialization, undermine the penalties that can be applied;

(e) These factors are recognized by the interviewees, who understand the lack of coordination in enforcement, as revealed by discourse analysis.

Moving on to language analysis, the use of the first person plural points to the perception of the need for supervisory authorities and organized civil society to combine forces; phrases begin with the personal pronoun "we". On the question of the lack of coordination, the word "standard" was uttered recurrently. Whilst the need for combined action is recognized, a degree of frustration (subtle, but present) can be noted at the lack of integration, causing interviewees to express doubt about the effectiveness and validity of the law.

According to La Torre (2010), legal validity is often interpreted on the same terms as its effectiveness, especially in analyses that connect linguistic questions to legal causes or effects. We can therefore see that uncertainty emerges as to the actual effectiveness of the law, as well as disappointment at the difficulties of holding offenders accountable and punishing them. In particular, the State Public Prosecution Service reveals the breadth of this sentiment, as it points to the bankruptcy of the current model (as a whole, not exclusively the service in that state), and is looking for alternatives to enforcement of the LAI. The example given of these alternatives was the model of the signing of Adjustment Declarations with municipal officials, which reflects a more collaborative, and not merely punitive, approach.

The underlying reality that can be observed is the overthrow of the punitive model, and the rise of an educational and consensus-based approach. In view of the difficulties of punishing and holding offenders to account, the interviewees highlight alternative forms of action (such as adjustment declarations), regarded as more effective, indicating that controlling actions are being repositioned and recognition of the urgent need for coordination.

The convergence between the content of the utterance points to the perception that oversight bodies do not talk to each other or act with the necessary effectiveness, which has undermined the validity of the law and, consequently, its effectiveness and compliance. This leads to the observation that enforcement measures are not sufficiently articulated and coordinated, and need to be repositioned.

TABLE 4. The Role of Enforcement Coordination

INTERVIEWEE	UTTERANCE
	CIVIL SOCIETY PRESSURE FOR COMPLIANCE AND REACTIVITY
SC2	"The Public Prosecution Service only picks up when they have a claim represented"
	"I think it all comes down to someone being provocative "
GP1	"He (the public manager) is held to account, to a small extent, but by the Observatory."
CE1	"Until now, the Public Prosecution Service took action in the administrative field when driven to do so by whistle-blowing in the press or online"
CE1	"The model of waiting for the Court of Auditors to close the account, rule whether they are correct or incorrect, and then, years later, for it to be reported to the Public Prosecution Service has been more than proven to be bankrupt"
GP1	"I can't recall ever having received an oversight body (in the Londrina Municipal Authority)"
SC2	"They (oversight bodies) are very remote"
	"Things will only really improve when the Control Office does its job, the Public Prosecution Service plays its part, when public servants do their job and society also plays its role"
GP1	"And we (regulatory system) get nowhere. So we're investing in social control, so that [...] society itself demands change"
	LACK OF ALIGNMENT AND COORDINATION IN THE REGULATORY SYSTEM
CE1	"Each body was making demands, some more than others, but then we determined that it was necessary to have a minimum standard (for the collaborative Transparency in Municipalities project)"
GP2	"I'm sure it's not fixed [...] there's no standard"
GP2	"There are demands here [...] we had a first Public Prosecution Service audit, then there was another audit and now, not long afterwards, providing new reports"
	"There's no standard, no convergence"
CE3	"There's no coordination between us, the supervisory bodies, to deal adequately with this"
CE3	"If we had done this better (coordination between supervisory bodies) we would be at a different level"
CE4	"So, as we don't talk properly, it doesn't happen: municipality, TCE, TCU, etc. We should be better coordinated"
SC1	"The only supervisory body that existed was the Public Prosecution Service"
	LACK OF MONITORING AND CONTINUITY
CE5	"Another thing that didn't happen was the monitoring of this project (Social LAI, TCE-PR), for reasons of continuity this ended up by not happening"
CE3	"I think the municipalities suffer a lot from this (problems of continuity in oversight and public management)"
	DELAYS AND INEFFECTIVENESS IN JUDICIAL PROCEEDINGS
CE1	"The TAC[5] is a way of resolving this without going to court". Justice "is extremely ineffective, except for punishing the public official for wrongdoing, but rather than being punished, the public would rather have corrected the problem ascribed to him"
CE1	"Let them bring proceedings, then I'll correct it, because I'm an administrator"
SC1	"It's hard to hold the manager to account for the information"
SC1	"TAC is the Public Prosecution Service's way of realizing we have to go one step at a time and perhaps the outcome will be better than if it just brings prosecution after prosecution"
SC2	"It takes a really long time for the (judicial) process to get going"
CE3	"Everything is judicialized [...] everything, anything, impeachment is judicialized, health [...] often the law gets distorted on the way"

Source: Prepared by the authors.

5. Conduct Adjustment Declaration.

7. Conclusion

We started from the premise that the set of rules subsequent to the Federal Constitution of 1988 has brought about a challenging stance of turning away from secrecy and towards transparency (Abrucio, 2012; Martins, 2010), making the citizen the protagonist in public management. But this challenge is not faced by municipal authorities, State departments and other executive bodies. The regulatory system is also searching for a new position, on pain of being "the last to know". The scenario of accountability and flexibility, shared oversight and different forms of compliance, such as adjustment declarations, require changes to the merely punitive approach and adopting a broader educational and social approach, combined with a strict requirement of celerity.

Our analysis has therefore demonstrated that Brazilian courts of accounts have rethought their approach to their work. In the first place, we have noted that the State courts of auditors have published texts on their websites which preach the ideals of closeness to citizens and public engagement. From the intertextuality between these fragments and organizational practices (in this case, projects and programs), the discourse that emerges is of closeness to social control, calling for a partnership with society, with a view to promoting transparency.

The second point we noted was the recruitment of citizens to exercise social control. Aware of the scarcity of public data, the courts have provided indicators, interactive tables and other data compilation models, moving towards what is called the "aspiration to open data". In compiling and processing data, these organizations have set about translating public data, finding ways of adjusting them for use in the social landscape (Wedlin & Sahlin, 2017). This concept is important, because it highlights the contextualized social use of data and points to the widely felt need to adapt them to the purposes of the public administrative authorities.

The third and last point we have noted is the recognition that enforcement activities need to be coordinated. In a deeper analysis, we saw that the law imposes difficulties in holding public officials to account and applying penalties, which has prompted the regulatory system to adopt alternative ways of supporting different compliance models. So in proposing other forms of enforcement, other forms of compliance come to light, and the role of immediate enforcement is converted into a situation of monitoring of transparency actions.

In short, these findings combined to show that the courts of auditors have a new role in the scenario of greater demand for transparency. The study of the organization of institutions points to how these practices and discourses can be analyzed, in particular from the standpoint that focuses on the legal environment. The study of negotiations and bargaining in the enforcement/compliance relationship that has served as a reference for use is not a new field in the institutionalist

perspective, and was central in the writings of Hawkins (1983; 1984, as cited in Edelman, 1992). However, what has been increasingly noticeable in recent decades is the broadening of the concept of compliance, which is increasingly plural, but also more tenuous and controversial (Edelman & Talesh, 2011).

Above all, we may note a change in the timing of the attainment of the purposes of legal provisions: compliance is not defined on publication of the law, but rather in the interactive relations between the law, society and organizations. Research has therefore retreated from literal analysis of the text of the law and turned instead to the requirements for social sanctioning of the law, and to its secondary aspects (Ross, 2001), where the content of the law and the extent of its changes are revealed only in practical application of the law in society, and not in the mere promulgation of the legal text.

At the core of these relationships, we find that language is a protagonist, which is because some of these bonds – agreements and disagreements – arise in discursive form. For this reason, this study has presented declarations, fragments and transcriptions that evince an inclination towards a new role of the Courts of Auditors, that points to the potential change in direction away from merely punitive and strictly constitutional action.

In conclusion, it must be considered that this change in discourse does not occur in isolation and therefore that it involves multiple organizations and environmental dimensions. Further research could accordingly address internal and organizational viewpoints, such as possibility of decoupling by taking on new enforcement roles (Boxenbaum & Jonsson, 2017), prioritizing the satisfaction of institutional expectations (Deephouse, 1996) rather than measures geared to efficiency. Other studies could shed light on the impacts and motivations behind these changes, in a theoretical perspective that attaches value to innovation and to the central and peripheral actors which are the driving force in this process (Compagni, Mele, & Ravassi, 2015). It is also possible to envisage that subsequent research which addresses the natural contexts of oversight bodies such as the courts of auditors considered here could also be fruitful by looking deep into their experiences in order to learn about the actual practices, processes and mechanisms whereby the new (social and institutional) roles indicated as the conclusions of this research have been exercised, in those public organizations (Smets, Aristidou, & Whittington, 2017).

Because we chose to focus on the discourse emitted by the courts of auditors under study, especially with regard to their potential for promoting and strengthening educational enforcement, we have disregarded, at this stage, studies based on their effectiveness, in terms of budget vs. revenues from fines applied, However, considering that fines can also play an educational role, in parallel to other

approaches, insofar as the amounts involved are sometimes small, future research could be centered on the issue of traditional/constitutional/punitive enforcement and its relationship with measures of an instructive nature, indicating how they are synchronized and used in combination with each other.

Environmental viewpoints could break down the (supposedly) hermetic boundaries between organizational fields and legal environments, attaching value to multiple aspects of socio-legal interactions. There is also room for socio-legal and institutionalist research with a linguistic focus on the how legal authorities, case law, rulings and compendia continue the process of interpreting and reassigning meanings to legal contents. These interpretations and meanings may be uncovered by looking carefully at social control and the power exerted by social segments over the regulatory system. Lastly, it is our hope that effective mechanisms will be developed through a critical approach that will allow us to enjoy the benefits of open data, and the progress this will bring.

Enforcement pelos Tribunais de Contas Pós-LAI: Papel de Tradução e Aproximação Cidadã

Enforcement by Courts of Auditors Post-LAI: The Role of Translation and Closeness to Citizens

(EN: 147-165)

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DOI: 10.33167/2184-0644.CPP2019.VVN1/pp.167-188

ABSTRACT
This theoretical-empirical study investigates what has been the role of the Courts of Accounts (TCEs) facing the changes imposed by the Law on Access to Information (LAI) in Brazil, given the scenario of a gradual reduction of the distance between governor and governed. Conciliating Sociolegal approach and Organizational Institutionalism, the research employed interpretative discourse analysis in primary and secondary data of 13 TCEs. It contends that the TCEs have rethought their acting posture, in addition to their constitutional spectrum, because: (a) through a discourse of approximation with social control, they seek to establish partnership with society; (b) aiming at instrumentalizing the citizen for the exercise of social control, they act in the compilation and processing of public data, translating them into the social landscape; and (c) because of the accountability and penalty difficulties outlined by LAI, the regulatory apparatus has adopted alternative — including pedagogical — ways to support enforcement and compliance

Keywords: Law on Access to Information, transparency, enforcement, compliance, discourse

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RESUMO
Este estudo teórico-empírico investiga qual tem sido o papel dos tribunais de contas (TCE) frente às mudanças impostas pela Lei de Acesso à Informação (LAI) no Brasil, ante o cenário de exigência da paulatina redução da distância entre governante e governado. Conciliando abordagem sociolegal e institucionalismo organizacional, a pesquisa empregou análise interpretativa do discurso em dados primários e secundários de 13 TCE. Conclui-se que os TCE têm repensado sua postura de atuação, além de seu espectro constitucional, pois: (a) mediante discurso de aproximação com o controle social, eles procuram angariar parceria com a sociedade; (b) visando instrumentalizar o cidadão para o exercício do controle social, eles atuam na compilação e tratamento de dados públicos, traduzindo-os para o *social landscape*; e, (c) em razão das dificuldades de responsabilização e penalização delineadas pela LAI, o aparato regulatório tem adotado maneiras alternativas — inclusive pedagógicas — para apoiar *enforcement* e *compliance*.

Palavras-chave: Lei de Acesso à Informação, transparência, *enforcement*, *compliance*, discurso

1. Introdução: Marcos Regulatórios, a Cultura de Sigilo e as Relações *Enforcement/Compliance*

O papel constitucional dos tribunais de contas situa-se, fundamentalmente, na fiscalização independente da economicidade, legalidade e legitimidade dos atos praticados com os recursos públicos. Sua ação fiscalizatória atende à estrutura legal estabelecida pela Constituição Federal, de apoio ao poder legislativo, e nominada de «controle externo». Em sua essência, os tribunais de contas são órgãos administrativos e colegiados, encarregados de julgar as contas de administradores e demais responsáveis por bens, dinheiro ou valores públicos.

Três marcos regulatórios foram bastante expressivos para a forma de atuação dos tribunais de contas: a Lei de Responsabilidade Fiscal (Lei Complementar n.º 101, 2000), a Lei de Transparência (Lei Complementar n.º 131, 2009), e a Lei de Acesso à Informação (Lei n.º 12.527, 2011). Entendemos a importância desses três marcos legais pelo seu efeito de disciplinar e dar transparência aos atos da gestão pública, estes sob a égide de fiscalização dos tribunais de contas.

Nesse estudo, concedemos uma posição especial ao último dos três regulamentos que citamos: a Lei de Acesso à Informação (LAI). Pela nossa ótica, entendemos que essa normativa não é um ato isolado, mas o «resultado de um processo histórico, cujo marco inicial foi a Constituição de 1988». Destacamos sobretudo a capacidade da LAI de «iluminar os principais problemas de organização da administração pública brasileira» (Abrucio, 2012), que faz repensar diretrizes e políticas públicas há muito tempo consolidadas.

Se por um lado a regulamentação e a transparência são ferramentas para aprimoramento do controle externo, por outro, a visibilidade que passa a ser oferecida torna mais exposto também o próprio desempenho dos tribunais de contas

e de outras organizações de controle externo. No eclodir de escândalos de desvio de dinheiro, corrupção ou mau uso dos recursos públicos, os órgãos regulatórios passam a ser cobrados pela sua atuação, eventual omissão ou desconhecimento. Assim, questionamos: qual tem sido o papel dos tribunais de contas frente às mudanças de paradigma impostas pela Lei de Acesso à Informação?

É notório que as mudanças de paradigma a que nos referimos não se direcionam tão somente à atividade fiscalizatória, mas advêm de um contexto maior, de progressivo rompimento da cultura de sigilo (Martins, 2010). Há uma paulatina redução da distância entre governante e governado, calcada pela emergência dos ideais de impessoalidade e neutralidade na gestão pública (Abrucio, 2012). Concomitantemente, a demanda legal e social por transparência impulsiona a divulgação de uma infinidade de dados públicos que ainda carecem de critérios, de comparativos, e de indicadores para que possam ser amplamente compreendidos.

Tais transformações influenciam, portanto, não somente a gestão do dinheiro público e a responsabilidade de seus administradores, mas também abalam a dinâmica da administração pública, em especial na relação entre *enforcement* e *compliance*. Esses termos e práticas, agora problematizados, passam a ser delimitados tenuamente, permitindo que sejam entendidos de variadas formas e por diversas lentes teóricas.

No que se refere ao *enforcement*, entendemos como o conjunto amplo de mecanismos fiscalizatórios capazes de suscitar a obediência à lei. Valorizando o aspecto textual, o *enforcement* pode ser então visto como a capacidade de determinados órgãos regulativos de transformar linguagem legislativa em regras práticas (Funk & Hirschman, 2014), que passam a ser aplicadas e, efetivamente, ensejam mudanças de comportamento nos jurisdicionados.

Tendo em vista o tom de negociação textual impresso ao conceito acima, é possível considerar a *compliance* como todo o «processo social que envolve, ao longo do tempo, as organizações procurando adaptar a lei para que ela se molde (*fit*) a seus próprios interesses» (Edelman, 1992:1534-1535, tradução nossa). Note-se que, ao adotar essa definição, extrapola-se a ideia aritmética de que a *compliance* é tão somente o ato de cumprir estritamente a lei. Abre-se a possibilidade de se enxergar a relação entre *enforcement* e *compliance* sob o prisma do diálogo, das negociações, dos ajustes e das concessões de prazo. Igualmente, é vencido o entendimento de que a «lei é formulada e definida fora das organizações e… de seus domínios» (Edelman & Talesh, 2011:103).

Ratificando empiricamente essa noção, vejamos, por exemplo, o quanto os chamados termos de ajustamento têm sido empregados nas relações entre órgãos regulativos e de controle externo com seus jurisdicionados. Observe-se que esses jurisdicionados — que se encontram em situação de desobediência legal — não

são imediatamente alvos de penalidades, frente à sua manifestação expressa de sua vontade de solucionar os desacordos. Vide a Resolução n.º 59 (2017) do Tribunal de Contas do Estado do Paraná (TCE-PR), Brasil, que define os termos de ajustamento da seguinte maneira:

> Art.º 2.º Considera-se Termo de Ajustamento de Gestão o instrumento de controle vocacionado à adequação e regularização voluntária de atos e procedimentos administrativos sujeitos à fiscalização do Tribunal, mediante a fixação de prazo razoável para que o responsável adote providências ao exato cumprimento da lei, dos princípios que regem a administração pública e das decisões não definitivas emanadas deste Tribunal (Resolução n.º 59, 2017).

O que se depreende dessa discussão inicial e exemplificativa é a premissa de rompimento da dicotomia *compliance* e não-*compliance* (Edelman & Talesh, 2011), exigindo, por sua vez, reposicionamento do papel do *enforcement*. Trata-se de um desafio de ajustamento entre a leitura fria das atribuições do controle externo atribuídas na Carta Magna, e o calor de mudanças legais e sociais que se deram desde a década de 1980 até ao presente momento, desenhando um cenário de exigência por transparência e de vastidão dos dados públicos submetidos à obrigatoriedade de divulgação.

Nesse estudo, a questão de pesquisa posta é respondida mediante análise do discurso, utilizando-se material empírico tanto de ordem primária quanto secundária, com o objetivo de compreender: (a) os esforços de coordenação entre o aparato regulatório; (b) as alterações promovidas no *enforcement* em decorrência da transparência nos dados públicos; e, (c) a condição de aproximação do cidadão à administração pública. Ao mesmo tempo, utiliza-se como ponto de partida o reconhecimento do desafio de «efetivar a modernização e a ampliação do modelo de fiscalização de conformidade para o de auditoria de resultado, nos moldes do que ocorre nas grandes nações desenvolvidas» (Tribunal de Contas do Estado de São Paulo, 2014:3).

Ao tecer essa relação entre transparência e desenvolvimento social, resta fortalecida a vertente de estudos que destacam as relações entre lei sociedade e organizações; o institucionalismo organizacional combinado com uma abordagem sociolegal, oferta a compreensão teórica dessa dinâmica, inclusive nas questões que perpassam *enforcement* e *compliance*. Sobretudo, a literatura institucionalista ainda nos oferece a visão plural desejada sobre o tema, inclusive em questões de modelos de *compliance*, e as escolhas organizacionais por esse ou aquele modelo de conformidade legal (Greenwood, Oliver, Suddaby, & Sahlin-Andersson, 2017).

Dessa feita, partimos de uma estruturação menos ortodoxa dos conteúdos teóricos e conceituais norteadores deste estudo — além dos já expostos aqui, nesta

seção introdutória — para irmos versando estes à interpretação do material empírico angariado, de forma abdutiva, ao passo que as análises transcorrem, assim procedendo conforme julgamos pertinente durante tal apresentação, e culminando com considerações finais que os resgatam, e que com eles dialogam. Almeja-se, portanto, uma discussão múltipla das mudanças assumindo uma ótica recursiva nas relações entre organizações, reguladores e sociedade, tendo como pano de fundo a lei e a linguagem.

2. Procedimentos Metodológicos

Neste estudo, de abordagem qualitativa, foram utilizados materiais empíricos de ordem primária e secundária, ambos submetidos ao método da análise do discurso. Apresentamos os procedimentos adotados para as etapas de apreensão e análise do material empírico.

Angariando Material Empírico

Foram utilizados materiais empíricos de ordem secundária oriundos dos portais de *web* dos tribunais de contas brasileiros (estaduais e municipais), bem como do *website* da Associação Brasileira dos Tribunais de Contas (ATRICON), durante os meses de outubro e novembro de 2017. Com base nas informações disponíveis no portal Boas Práticas dos Tribunais de Contas[1], desenvolvido pela ATRICON, foram selecionados 13 tribunais, compondo a amostra de material empírico a ser pesquisado. A apreensão priorizou inciativas e projetos organizacionais de tribunais de diversos estados que já houvessem obtido reconhecimento por parte da Associação Nacional. Dentre esses projetos, foram escolhidos aqueles que possuíssem ligação com os temas «controle social», «Lei de Acesso à Informação» ou «cidadão».

Escolhidos os tribunais de contas para estudo, foram coletados fragmentos das respectivas páginas da *web* que versassem sobre a temática em apreço, e que totalizaram 32 páginas de registros. Esses fragmentos foram posteriormente submetidos a classificação e análise, conforme será detalhado na próxima subseção.

No que se refere ao material empírico de ordem primária, optamos pela utilização de trechos selecionados de oito entrevistas semiestruturadas realizadas por um dos autores em formato *one-shot*, e cujo escopo se referiu à atuação dos entes fiscalizatórios em relação à LAI. As entrevistas, realizadas entre os meses agosto e dezembro de 2016[2], totalizaram 7h25min de gravação que foram posteriormente

1. Recuperado de <https://boaspraticas.atricon.org.br/>.

2. Essas entrevistas compõem etapa de pesquisa de campo de uma dissertação de mestrado em Administração concluída em 2017 que não está sendo citada nem referenciada aqui por respeito ao processo de *double blind peer review* deste periódico científico.

transcritas, resultando em 217 páginas redigidas em *software* editor de texto[3]. O Quadro 1 resume o grupo de entrevistados e evidencia a proeminência de representantes do aparato regulatório, principalmente do TCE-PR, e de organizações de controle social do Estado do Paraná.

3. Tratamento e Análise do Material Empírico

O material empírico foi submetido, de forma concomitante, a procedimentos metodológicos de classificação e análise. Por sua capacidade de destacar o discurso como elemento capaz de construir a realidade organizacional, priorizou-se a análise do discurso em vertente interpretativista (Heracleous & Hendry, 2000). Pela relação visceral entre discurso e realidade, a linguagem não é vista somente como ferramenta analítica (Putnam & Fairhurst, 2001), mas como a essência e a matéria do significado (Phillips & Hardy, 2002).

A análise do discurso empreendida centra-se nas questões de intertextualidade. O texto é então visto como uma teia, que, por sua vez, é componente constitutivo da formação do discurso (Phillips & Malhotra, 2017). É nas questões de texto e intertexto que está centrado o método empregado, cujas etapas são detalhadas de seguida.

Os materiais de ordem primária e secundária foram submetidos à classificação, gerando categorias com base nas relações texto e intertexto (Putnam & Fairhurst, 2001). Cada fragmento foi disposto manualmente em categorias analíticas que foram delineadas *a priori* com base em leitura prévia, a saber: (a) programas organizacionais de aproximação com o cidadão; (b) conversão de dados públicos no formato dados abertos; (c) disponibilização de indicadores e mapas interativos; (d) afrouxamento do *enforcement*; (e) descoordenação das ações de fiscalização; e, (f) atuação conjugada de órgãos de controle.

Partiu-se para uma etapa de cunho léxico em que foi elencado um rol de termos e possíveis sinônimos presentes nas transcrições e fragmentos, que tornou possível caracterizar menções/remissões que indicam a presença de elementos que argumentam, discorrem e deliberam sobre assuntos abarcados pelas cinco categorias analíticas destacadas. Além de contribuir para evidenciar intertextualidades, esses grupos de vocábulos resultaram em grifos nos quadros dispostos na seção 3 deste estudo.

3. Para esse trabalho foram utilizados tão somente trechos das transcrições que se referiram a questões de *enforcement*.

QUADRO 1. Atores Entrevistados

SEGMENTO SOCIAL	FUNÇÃO ATRIBUÍDA AO SEGMENTO SOCIAL	ÓRGÃO EM QUE TRABALHA/ REPRESENTA	ENTREVISTADO	CARGO/FUNÇÃO QUE EXERCE	OUTRAS INFORMAÇÕES SOBRE ENTREVISTADO
Gestor Público (GP)	Segmento executor da Lei	Prefeitura Municipal de Londrina	GP1	Ouvidor-Geral do Município de Londrina	Servidor de carreira do município, atua na Ouvidoria, departamento responsável pela transparência passiva do município. Atua no Conselho Municipal de Transparência e participou de comissões internas para regulamentação da Lei e classificação de informações.
			GP2	Controlador do Município de Londrina	Chefe da Controladoria, departamento responsável pela transparência ativa do município. Primeiro servidor a ocupar o cargo de Cotnrolador-Geral do Município através de um processo de seleção conduzido pelo Conselho Municipal de Transparência e Controle Social.
			GP3	Ex-Controlador do Município de Londrina	Controlador do município no período de 2011 a 2015, quando se deu a aprovação da LAI. Servidor de carreira, permanece no quadro da Controladoria-Geral do Município.
Orgãos de Controle Externo (CE)	Segmento fiscalizador da Lei	Ministério Público Estadual do Paraná	CE1	Ex-Procurador Geral de Justiça para Assuntos do Planejamento Institucional (SUBPLAN)	Procurador responsável pela condução do projeto 'Transparência nos Municípios', ação vista como estratégica na SUBPLAN e que tem por objetivo a regularização dos portais de todos os municípios e câmaras do Paraná, mediante a disponibilização de um portal único e padrão, desenvolvido pela Companhia de Tecnologia de Informação e Comunicação do Paraná (CELEPAR), a partir da Rede de Controle da Gestão Pública.
		Controladoria-Geral da União	CE2	Chefe da CGU sub-seção Paraná	Representante máximo da CGU no Estado, doutorando em Políticas Públicas pela UFPR. A CGU conduz localmente programas como 'Olho vivo no dinheiro público' e 'Fortalecimento da Gestão'.
		Tribunal de Contas da União	CE3	Ex-Secretário de Controle Externo do TCU no Paraná	Auditor de carreira do TCU, foi durante sua gestão que o TCU analisou os portais de transparência dos municípios, desenvolvendo metodologia de avaliação.
		Tribunal de Contas do Estado do Paraná	CE4	Coordenador do projeto LAI Social	Integrante de equipe que trabalhou com a metodologia de auditoria social, em parceria com universidades estaduais paranaenses, o servidor coordenou o projeto LAI Social que avaliou 72 municípios com metodologia própria desenvolvida no âmbito do projeto.
		Tribunal de Contas do Estado do Paraná	CE5	Integrante da comissão que regulamentou a LAI no TCE-PR	Servidora do TCE-PR que participou da regulamentação da Lei na organização. Autora de livro sobre acesso à informação. Representante do TCE-PR em grupo temático entre tribunais de contas que discute jurisprudência.
Sociedade Civil Organizada (SC)	Segmento beneficiário da lei e que exerce controlo social	Observatório Social de Londrina	SC1	Presidente do Observatório Social de Londrina	Jornalista, repórter político do jornal Folha de Londrina. Foi um dos fundadores do observatório, sendo membro desde sua fundação. Já presidiu também o Conselho Municipal de Transparência e Controle Social.
		Conselho Municipal de Transparência e Controle Social de Londrina	SC2	Presidente do Conselho Municipal de Transparência e Controle Social de Londrina	Professora doutora da Universidade Estadual de Londrina, participante do projeto LAI Social, tem as políticas públicas como um de seus interesses de pesquisa. Já esteve envolvida com a função de um observatório social dentro da UEL, nominado Observatório Interdisciplinar de Políticas Públicas.

Seguindo pela questão da intertextualidade, e considerando que o entrelaçamento e a coerência entre textos possibilita a formação do discurso (Maguire & Hardy, 2009), foi estruturado o grupo de achados da pesquisa, ou seja, a convergência entre (a) fala/fala, e entre (b) fala/texto, se configurando como resultado da pesquisa, e alterando as categorias prévias para os achados que serão apresentados na seção 3.

Por fim, operou-se análise semântica tendo em vista as mútuas influências entre texto e contexto. Trata-se de uma condição em que o «ato de referir à realidade depende de um contexto, seus efeitos são práticos, pois são os efeitos discursivos que os produzem» (Araújo, 2004:10). Nisso, ao mesmo tempo em que os textos refletem determinado contexto sociopolítico, o contexto é resultado da ação discursiva. Desse modo, importa particularmente não só o contexto em que se dá determinada fala, mas, ao mesmo tempo, de que forma tal fala impacta no contexto.

O resultado da aplicação desses procedimentos metodológicos é disposto na seção seguinte, a qual apresenta os três achados da pesquisa que configuram nosso entendimento sobre as mudanças no papel desempenhado pelos tribunais de contas.

4. Evidências Empíricas e Resultados

A Função de Compilar e Traduzir Dados Públicos

Esta seção se baseia em três argumentos centrais sobre os quais discorremos, a saber: (a) a dificuldade de compreensão e manejo dos dados públicos e o anseio pelos dados abertos; (b) o processo de tradução a que se deve submeter os dados para efetivo exercício de controle externo e controle social; e (c) o reconhecimento, por parte dos tribunais de contas, de sua capacidade de organizar e compilar dados.

Por advento da LAI (Lei n.º 12.527, 2011), os órgãos do poder executivo, legislativo e judiciário passaram a ser obrigados a disponibilizar, no formato estabelecido por lei, os dados referentes à sua gestão. O rol de exigência legal não se restringe ao elenco não exaustivo de despesas, pagamentos, contratos, mas perpassa por condições que facilitem o manejo desses dados, tais como:

> § 3.° Os sítios de que trata o § 2.° deverão, na forma de regulamento, atender, entre outros, aos seguintes requisitos:
> I – conter ferramenta de pesquisa de conteúdo que permita o acesso à informação de forma objetiva, transparente, clara e em linguagem de fácil compreensão;
> II – possibilitar a gravação de relatórios em diversos formatos eletrônicos, inclusive abertos e não proprietários, tais como planilhas e texto, de modo a facilitar a análise das informações;
> III – possibilitar o acesso automatizado por sistemas externos em formatos abertos, estruturados e legíveis por máquina;

> IV – divulgar em detalhes os formatos utilizados para estruturação da informação;
> V – garantir a autenticidade e a integridade das informações disponíveis para acesso;
> VI – manter atualizadas as informações disponíveis para acesso; (Lei n. 12.527, 2011).

O reconhecimento de que os dados públicos não devem somente estar acessíveis, mas também organizados e de fácil acesso e manejo exalta o conceito e o anseio pelo que se chamam dados abertos, cuja definição proferida pelo Ministério da Transparência, Fiscalização e Controladoria-Geral da União (2016:33) é a seguinte:

> Dados abertos: dados livremente disponíveis para utilização e redistribuição por qualquer interessado, sem restrição de licenças, patentes ou mecanismos de controle. Na prática, a filosofia de dados abertos estipula algumas restrições tecnológicas para que os dados sejam legíveis por máquina. Todo dado público tem «vocação» para ser aberto.

Observe-se que o conceito abordado traz, subliminarmente, a assunção de que os dados públicos não se encontram, nesse momento, completamente aptos a serem ofertados como «abertos». O vocábulo «vocação» clarifica o ideal almejado de transparência, mas que ainda não se faz presente na estruturação padrão dos portais da *web* atualmente disponíveis.

Vejamos que a estruturação em dados abertos é um dos caminhos para permitir o estabelecimento de critérios, comparativos e indicadores, ampliando o senso crítico do controle externo e do controle social. Segundo o Governo Federal, a necessidade de trabalhar os dados é impositiva para os avanços na ideia de dados abertos, conforme cartilha:

> Dados Abertos constituem a publicação e disseminação de dados e informações públicas na Web, seguindo alguns critérios que possibilitam sua reutilização e o desenvolvimento de aplicativos por toda a sociedade [...]. Disponibilizar dados na Web não é uma prática recente no governo, porém com uma política de dados abertos, o governo sinaliza que pretende padronizar e alavancar a disseminação de dados públicos por todos os órgãos. O paradigma de dados abertos está fundamentado na constatação de que o dado, quando compartilhado abertamente, tem seu valor e seu uso potencializados. Com isso o governo pretende desenvolver um ecossistema de dados e informações que beneficia a sociedade (Secretaria de Logística e Tecnologia da Informação [SLTI]; Ministério do Planejamento Orçamento e Gestão [MP], n.d., grifo nosso).

No Quadro 2, a seguir, utilizou-se exemplificativamente alguns fragmentos de cartilhas e portais de tribunais de contas nacionais, que refletem de que forma esses órgãos regulativos reconhecem a necessidade de organizar, manusear e compilar dados em favor do exercício do controle externo e social.

QUADRO 2. O Papel de Compilação de Dados

TRIBUNAL	TRANSCRIÇÃO	DESDOBRAMENTO
TCE-SP	Criar indicadores finalísticos para análises dos processos utilizados pelos jurisdicionados é uma tarefa que vem reunindo esforços dos agentes políticos e técnicos da Corte de Contas Paulista com o fim de contribuir para uma sociedade mais justa	AÇÃO: criar indicadores finalísticas OBJETIVO: contribuir para uma sociedade mais justa
TCE-RS	O TCE-RS produziu mapas interativos com a finalidade de apresentar graficamente um conjunto de indicadores dos municípios. O objetivo é mostrar de maneira clara a situação de cada município, além de permitir comparações.	AÇÃO: produzir mapas interativos e conjunto de indicadores OBJETIVO: mostrar de maneira clara e permitir comparações
TCE-PB	O Tribunal de Contas do Estado da Paraíba, no exercício de sua missão institucional, bem como de sua função pedagógica, tem por finalidade, com a elaboração e disseminação desta cartilha, orientar os jurisdicionados sobre os indicadores finalísticos destinados a compor o Índice de Efetividade da Gestão Municipal.	AÇÃO: elaborar e disseminar cartilha e orientar sobre indicadores finalísticos OBJETIVO: exercício da missão institucional e função pedagógica
TCE-PE	Os dados compartilhados podem ser livremente utilizados pelos cidadãos no desenvolvimento de aplicativos, execução de pesquisas automatizadas ou qualquer outro meio tecnológico que promova o controle social.	AÇÃO: executar pesquisas automatizadas de forma livre OBJETIVO: promover o controle social
TCE-ES	A divulgação de dados abertos significa possibilitar que qualquer cidadão possa acessá-los, compreendê-los e utilizá-los da maneira que melhor desejar, fomentando a transparência ativa e o controle social.	AÇÃO: divulgar dados abertos, de livre acesso. OBJETIVO: fomentar a transparência ativa e o controle social

Evidenciam-se algumas características textuais que demarcaremos. A primeira, de cunho gramatical e sintático, refere-se à construção de orações subordinativas em que o tribunal de contas demonstra desempenhar determinada ação com certo objetivo, de natureza causal. O segundo ponto versa sobre a congruência léxica, que se destaca em negrito na coluna intitulada Transcrição do Quadro 2.

Esse processo de conversão de dados será visto, nesse momento, pelo prisma da tradução. Primeiramente, é necessário entender que o conceito de tradução reside

na constatação de que informações e ideias se dão de forma contextualizada. Só há tradução quando se considera o uso social, considerando as instituições, as ideias, os modelos, as diretrizes e o padrão de determinado ambiente — *social landscape* (Wedlin & Sahlin, 2017). Sendo assim, os dados públicos vêm sofrendo uma transição do ambiente organizacional, de forma restrita, à residência de cidadãos, mesas de redação jornalística, painéis de discussão acadêmica, entre outros. E, nesse caminho, por consequência, há mudanças nos padrões, modelos, instituições e ideias que os envolvem.

Por isso, a tradução está centrada em «criar algo que é apropriado e desejado em determinado tempo e lugar» (Wedlin & Sahlin, 2017:106-107, tradução nossa). Assim, é necessário averiguar e «definir quais processos demandam soluções locais e moldar planos a serem cumpridos» (Wedlin & Sahlin, 2017:107, tradução nossa). A definição dessa *social landscape* é fundamental para constarmos, em conclusão, que a maleabilidade do uso de dados é crucial para a tradução, pois é ela que então permite a adaptação aos problemas e interesses locais, de diferentes estados, municípios e segmentos sociais. Por sua vez, essa maleabilidade é favorecida pela estruturação dos dados no formato aberto, intenção presente no texto de legislatura.

Em arremate, podemos sintetizar da seguinte forma as nossas conclusões nessa etapa: o uso de indicadores, mapas e a facilidade de acesso e manejo dos dados é o que permite o uso aplicado das informações públicas — daí a importância e o anseio do uso de dados abertos. Os tribunais de contas, que possuem os dados de diversas organizações municipais e estaduais, sabedores dessa condição, avançam para o tratamento e compilação desses dados, em busca de que os dados públicos possam, efetivamente, gerar controle social e ganhos pedagógicos, assumindo um novo papel de *enforcement*. Ao atuar dessa maneira, os tribunais empreendem a tradução dos dados públicos em direção à sua vocação de dados abertos, permitindo alcançar seu uso social, ou seja, sua flexão a diferentes locais, interesses e finalidades.

5. O Ideal de Aproximação do Cidadão

Nessa etapa, o ideal de aproximação será evidenciado pelo friso ao processo (em curso) de transição do sigilo para a transparência, aferindo efeitos da LAI sobre o modo de atuar dos tribunais de contas, vistos aqui como representantes do *enforcement*.

Primeiramente, é importante remontar a dimensão sociocultural que caracteriza o que se nominou transição do sigilo para a transparência. Saliente-se, mais uma vez, que a discussão teórica aqui abordada não pretende considerar esse processo como finito ou concluído, mas sim perceber de que forma a lei, os textos e as práticas evidenciam essa transição. Trata-se, portanto, de focar nossos esforços

na dimensão faceta secundária da lei (Ross, 2001), particularmente, aspectos que dependem «do seu reconhecimento, de sua interpretação, da mudança, da adjudicação» (Ross, 2001:61, tradução nossa).

Para Martins (2010:155), o que a sociedade brasileira vem experimentando é o «conflito entre a publicidade e o sigilo». Esse conflito advém do gradual desgaste do modelo de administração pública a portas fechadas. Assim, o conjunto legal brasileiro, com marco inicial na Constituição Cidadã de 1988, passa a defender o acesso à informação, a responsabilidade dos agentes públicos, a necessidade de dar publicidade aos atos, e de governar com base nos princípios de impessoalidade, moralidade, eficiência, etc. A aprovação de leis que consagram esses valores encontra respaldo internacional. A LAI, em sua fase de projeto, foi alvo de pressões para tramitação do projeto no Senado Nacional, especialmente de órgãos como ONU e UNESCO, expondo uma relação entre os anseios de desenvolvimento social com a transparência na gestão pública (Nações Unidas do Brasil, 2010).

Sendo assim, a pressão internacional tomava, por exemplo, a experiência de diversas nações desenvolvidas que vivenciavam avanços pelo acesso à informação. Entretanto, a despeito de outros países[4], em que esses preceitos já eram centenários e já estão consolidados no seio social, a tarefa em solo nacional é mais árdua, especialmente no avanço prático que traria a lei. Nesse ponto, o Brasil passa então a ser desafiado a «compreender as teias de significado por trás de cada um desses vocábulos (da lei)» permitindo «decifrar o novo paradigma cultural» (Alves, 2012:120).

Esse prognóstico se faz particularmente interessante a esse estudo, pois, a ideia de vocábulos e significados encontra-se convergente com a análise de discurso e autoriza a imersão no processo sociocultural por meio das palavras, dos textos e das interpretações. Desse modo, retomamos nosso objetivo de demonstrar de que forma os tribunais de contas significam a LAI, agora mostrando o discurso e os elementos sociais que balizam as ações de *enforcement*. Passemos à análise dos fragmentos transcritos no Quadro 3.

Nosso foco inicial da análise do discurso está na questão temporal das construções textuais que servem como endosso para enxergar o processo de transição em perspectiva de continuidade. Atente-se pela presença implícita de dois momentos: (a) um momento passado, em que o *enforcement* se concentra na «aferição da conformidade com as normas da execução orçamentária e de regularidade das despesas»; e (b) um momento subsequente, que vem tomando corpo, em que se amplia «o diálogo e as possibilidades de interação com o cidadão». Vejamos que

4. Por exemplo, na Suécia, país berço da Lei de Acesso, já se encontravam menções ao acesso à informação em normativas datadas do ano de 1766.

esse momento (b) é ainda visto pelos tribunais de contas de maneira projetiva, o que se evidencia textualmente pelo uso recorrente de verbos em tempo futuro, como «medirá» ou «servirá».

QUADRO 3. O papel de Aproximação do Cidadão

TCE-SP	A atividade de fiscalização dos governos exige dos órgãos de controle bem mais que a aferição da conformidade com as normas de execução orçamentária e de regularidade das despesas. O cidadão hoje reivindica – com legitimidade – o acesso à informação que lhe permita avaliar os resultados das ações dos gestores públicos e sua adequação aos compromissos assumidos com a sociedade	Tempo 1: aferição de normas da conformidade com normas de execução orçamentária e regularidade de despesas. Tempo 2: cidadão reivindica seu acesso para avaliar as ações públicas e essa demanda salienta o dever dos TCE em reforçar seus compromissos com a sociedade.
TCE-RJ	O resultado auferido com sua aplicação servirá à sociedade, mediante a divulgação transparente do nível de gestão municipal apurado sob a ótica da estrutura, dos sistemas e dos processos organizacionais existentes, em comparação com as práticas que assegurem a entrega de serviços e soluções de forma eficiente, eficaz e efetiva à sociedade brasileira.	Tempo 1: nem sempre o resultado auferido tinha aplicação direta à sociedade. Tempo 2: práticas que assegurem soluções e serviços eficientes, eficazes e efetivas à sociedade brasileira.
TCE-PE	O Tribunal de Contas de Pernambuco não medirá esforços no sentido de fomentar e contribuir para formação de uma sociedade cada vez mais cidadã, justa e comprometida com a coisa pública.	Tempo 1: o compromisso da sociedade cidadã não estava em situação de prioridade. Tempo 2: não se medem esforços para formar uma sociedade mais justa e cidadã.
TCE-PB	A importância da temática decorre do imperativo proposto pela sociedade em exigir o acesso a elementos de informação que lhe permitam avaliar os resultados das ações dos gestores públicos e sua adequação aos compromissos assumidos com maior grau possível de efetividade.	Tempo 1: não havia o imperativo proposto pela sociedade de exigir o acesso a informações que permitam avaliar a gestão pública. Tempo 2: emerge a demanda para que o tribunal se volte aos compromissos assumidos com maior efetividade.
TCE-SC	Ampliar o diálogo e as possibilidades de interação com o cidadão, para promover a melhora do desempenho e dos serviços prestados pelo TCE/SC e pelos órgãos fiscalizados em favor do bem comum é a meta. Trata-se de uma contribuição para a sociedade exercer o controle social da gestão pública.	Tempo 1: a interação e o diálogo com o cidadão se dá de forma mais restrita. Tempo 2: a apliação desse diálogo é a contribuição do TCE para o exercício do controle social.

Em contraponto à noção temporal — cuja percepção é latente —, o ideal de aproximação do cidadão é declarado e manifesto, e vem a destacar o senso de coletividade e sociedade, ressaltando a faceta secundária da lei (Ross, 2001). Sendo assim, os tribunais de contas reforçam sua posição nas relações sociais entre lei e sociedade, pela proposição de buscar conjuntamente o «bem-comum», revogando para si o papel de fomentar e estimular o controle social. Por essa condição, os tribunais reconhecem a relação entre LAI e desenvolvimento social.

Note-se que diversos tribunais de contas implantaram programas voltados ao cidadão, como por exemplo, Espaço cidadão (TCE-MT), Portal informação para todos (TCE-PR), Portal do Cidadão (TCE SP e TCE-TO), TCE Cidadão (TCE-PA e TCE-SE) e Controle Cidadão (TCE-CE). É notória a convergência léxica entre os nomes escolhidos para os programas e portais, nos termos da intertextualidade vocabular que propusemos em nosso proceder metodológico. Em geral, os títulos procuram ressaltar o termo «cidadão», flexionados com o propósito de oferecer ferramentas ao cidadão (como «fiscalize» ou «controle») ou com saliência no *locus* criado para as demandas do cidadão (como «Espaço Cidadão», «TCE cidadão»). A intertextualidade se apresenta ainda com o próprio texto legal, no sentido da promoção de acesso irrestrito, como o «Portal informação para todos».

Em suma, o ideal de aproximação do cidadão encontra respaldo nos marcos regulatórios que influenciam, recursivamente, o processo de transição social de sigilo para transparência. Em seus projetos e comunicados, os tribunais de contas manifestam, por significados e vocábulos, o discurso de aproximação com o cidadão, em uma visão de temporalidade. Observa-se assim, uma postura adaptativa e projetiva do *enforcement*, bem como um caminho de inserção social a ser ampliado com a declaração do propósito comum de desenvolvimento social.

6. O Reconhecimento da Necessidade de Coordenar Esforços de *Enforcement*

Inicialmente, faremos algumas inflexões teóricas sobre o *enforcement* e suas relações com a lei e a sociedade, com a finalidade de fortalecer o entendimento coletivo e social das forças de fiscalização.

(a) Ao reconhecer que as leis nem sempre são espelhos de hábitos sociais, e que as nações nem sempre estão prontas para determinada legislatura, fica fortalecida a ideia de controle e fiscalização. Portanto, a lei não deve ser vista como *self-enforcing* (Edelman, Uggen, & Erlanger, 1999:407);

(b) Em havendo a incerteza sobre o poder do *enforcement* (Hawkins, 1984, como citado em Edelman, 1992), afeta-se o nível de construção social da lei;

(c) Por conseguinte, é possível assumir uma relação de contrapesos (balança) entre *enforcement* e *compliance*, em que, quanto mais incisivo é o *enforcement*, menor é a amplitude de *compliance* (Edelman, 1992). Ou seja, o enfraquecimento do *enforcement* pode multiplicar as formas, os modelos e os prazos de cumprimento legal.

(d) Para Hart, na face primária da lei (texto), o *enforcement* advém da força das sanções e do poder da autoridade do aparato coercivo (Ross, 2001);

(e) Já em sua face secundária (reconhecimento social), cerne do nosso estudo, quem sofre pressão para exercer o *enforcement* é a própria autoridade, na medida em que se amplia uma cobrança social por justiça ou para se fazer cumprir a lei (Ross, 2001).

Ao posicionar essas questões teóricas, emerge o objetivo de verificar conjuntamente: (a) o quão incisivo é o *enforcement*; (b) qual a proeminência dos agentes que atuam no *enforcement* [considerando as assertivas constantes nos itens (d) e (e)]; e (c) de que forma os órgãos de controle, em especial os tribunais de contas, reconhecem ou articulam suas ações de fiscalização, em razão do advento da LAI. Nessa seção, defenderemos que alguns fatores sobre a dinâmica *enforcement/compliance* são fundamentais para o entendimento desses pontos, ilustrados com evidências empíricas no Quadro 4:

(a) A pressão por *compliance* parte fundamentalmente da sociedade civil organizada, frente à reatividade dos órgãos de controle;

(b) A atuação do aparato regulador não está alinhada, gerando descoordenação de esforços;

(c) Ações pontuais de controle e fiscalização carecem de monitoramento e continuidade, exigindo uma nova postura dos órgãos de controle frente ao dinamismo proposto pelo aparato legal;

(d) Morosidade e falta de efetividade dos processos judiciais, além do excesso de judicialização, enfraquecem as sanções e penalizações;

(e) Essas condições são reconhecidas pelos entrevistados; que entendem a descoordenação do *enforcement*, o que se desvela pela análise do discurso.

QUADRO 4. O Papel de Coordenação do *Enforcement*

ENTREVISTADO	FALA
	PRESSÃO POR COMPLIANCE DA SOCIEDADE CIVIL ORGANIZADA E REATIVIDADE
SC2	«O MP só atende quanto tem uma demanda representada»
	«Tudo, me parece, fica a cargo de alguém provocar»
GP1	«Ele (o gestor público) é cobrado, pouco cobrado, mas é pelo Observatório»
CE1	«Até hoje, o MP atuava na área administrativa, de controle administrativo, em função de provocações ou denúncias de jornal ou internet»
CE1	«O modelo de aguardar o Tribunal de Contas fechar as contas, julgar se elas estão corretas ou incorretas para depois, anos depois, aqui ser comunicado ao MP está mais do que provado que está falido»
GP1	«Não me lembro de ter recebido órgão de controle (na Prefeitura de Londrina)»
SC2	«Há um distanciamento muito grande (dos órgãos de controle)»
	«As coisas só vão de fato melhorar quando a Controladoria fizer seu papel, o Ministério Público o seu, o Tribunal de Contas o seu, o servidor, o seu, a sociedade o seu»
GP1	«E nós (aparato regulatório) não chegamos a lugar nenhum. Por isso, nós estamos investindo no controle social, de tal forma que [...] a própria sociedade exige as mudanças»
	FALTA DE ALINHAMENTO E COORDENAÇÃO DO APARATO REGULADOR
CE1	«Cada órgão estava exigindo, uns mais, outros menos, mas então nós estabelecemos que era necessário ter um padrão mínimo (pelo projeto colaborativo Transparência nos Municípios)»
GP2	«Eu tenho a convicção de que não está amarrado [...] não existe padrão»
GP2	«Tem demandas aqui [...] nós atendemos uma primeira auditoria do MP, já chegou outra auditoria e agora, pouco depois, disponibilizar novos relatórios»
	«Não há padrão, não há convergência»
CE3	«Não houve articulação entre nós, os órgãos de controle, para se cobrar adequadamente isso»
CE3	«Se a gente tivesse feito isso melhor (articulação entre os órgãos de controle) estaríamos num outro patamar»
CE4	«Então, ou seja, como a gente se fala mal não é: assim, município, TCE, TCU, etc. A gente deveria ser mais bem articulado»
SC1	«O único órgão de controle que existia era o MP»
	CARÊNCIA DE MONITORAMENTO E CONTINUIDADE
CE5	«Outra coisa que não aconteceu foi o monitoramento deste projeto (LAI Social do TCE-PR), por questões de continuidade isso acabou não acontecendo»
CE3	«Acho que os municípios sofrem muito com isso (com os problemas de continuidade na fiscalização e na gestão pública)»
	MOROSIDADE E FALTA DE EFETIVIDADE NOS PROCESSOS JUDICIAIS
CE1	«O TAC[5] é uma forma de resolver sem judicializar». A justiça «teria pouquíssima efetividade, a não ser punir o agente público por improbidade, mas antes de punir, com certeza, o agente público já teria corrigido o problema que foi imputado a ele»
CE1	«Deixa entrar com ação, depois eu corrijo, porque eu sou administrador»
SC1	«É difícil responsabilizar o gestor pela informação»
SC1	«O TAC (é) a forma do MP compreender que as coisas têm que ser aos passos e talvez o resultado seja melhor do que ele ficar só processando, processando»
SC2	«Existe uma demora muito grande do processo (judicial) ser desencadeado»
CE3	«Tudo está judicializado [...] tudo, qualquer coisa, impeachment está judicializado, a saúde [...] muitas vezes a lei se desvirtua no meio do caminho»

Fonte: Elaborada pelos autores.

5. Termo de Ajustamento de Conduta.

Passando às análises da linguagem, o uso pronominal da primeira pessoa do plural indica a percepção da necessidade de união de forças entre os órgãos de controle e a sociedade civil organizada, sendo cunhadas colocações iniciadas por pronomes pessoais como «nós» ou «a gente». Na questão de descoordenação, a palavra «padrão» foi proferida com recorrência. Ao passo que se reconhece a necessidade de atuação conjunta, percebe-se, de forma sutil (mas presente), a frustração com a falta de integração, ensejando dúvidas nos entrevistados sobre a efetividade e validade legal.

Segundo La Torre (2010), a validade legal é, muitas vezes, interpretada exatamente nos termos de sua efetividade, em particular em análises que conectam questões linguísticas às causas ou efeitos legais. Por essa trilha, transparecem incertezas sobre a própria efetividade legal, bem como o desapontamento pelas dificuldades de responsabilização e penalização. O Ministério Público Estadual, em especial, revela a amplitude desse sentimento, pois aponta a falência do modelo atual de fiscalização (como um todo, e não exclusivamente do MP-PR), e busca alternativas ao cumprimento da LAI. Essas alternativas foram exemplificadas pelo modelo de assinatura de termos de ajustamento com agentes públicos municipais, fortalecendo a perspectiva colaborativa, e não somente a punitiva.

Por esse espectro, o que se observa, subliminarmente, é a derrocada desse modelo punitivo, com a ascensão de um viés de atuação pedagógica e consensual. Frente à dificuldade de penalizar e responsabilizar, os entrevistados destacam ações alternativas (como os termos de ajustamento), vistas como mais efetivas, indicando um reposicionamento das ações de controle e um reconhecimento da urgência em coordenar.

A convergência entre o conteúdo das falas indica a percepção de que os órgãos de controle não se falam e não atuam com a efetividade necessária, vindo a comprometer a validade legal e, consequentemente, a efetividade da lei e sua *compliance*. Dessa forma, emerge a constatação de que as ações de *enforcement* não estão suficientemente articuladas e coordenadas, e carecem de reposicionamento.

7. Conclusão

Partimos da premissa de que o conjunto normativo que sucede à Constituição Federal de 1988 implementa uma desafiadora postura de inversão da cultura de sigilo pela transparência (Abrucio, 2012; Martins, 2010), tornando o cidadão o protagonista da gestão pública. Esse desafio não está, porém, apenas atrás das portas de prefeituras, secretarias de estado ou outros órgãos executivos. O aparato regulatório também procura sua nova posição, sob pena de ser «o último a saber». O cenário de cobrança e agilidade, o compartilhamento da fiscalização e as diferentes formas de *compliance*, como os termos de ajustamento, exigem mudanças

na forma meramente punitiva e a ampliação de seu viés pedagógico e social, imprimindo uma severa demanda por celeridade.

Nossa análise vem, então, demonstrar que os tribunais de contas brasileiros têm repensado sua postura de atuação. Como primeiro ponto, notamos que os TCE têm divulgado, em suas páginas na internet, textos que pregam a aproximação e a instrumentalização do cidadão. Ao notar a intertextualidade entre esses fragmentos e as práticas organizacionais (no caso, seus projetos e programas), constitui-se discurso de aproximação com o controle social, pleiteando parceria com a sociedade, em prol da transparência.

A parte da instrumentalização do cidadão para o exercício de controle social é o segundo ponto destacado. Ciente da austeridade dos dados públicos, os tribunais têm ofertado indicadores, mapas interativos e outros modelos de compilação de dados, remando em direção da chamada «vocação de dados abertos». Ao atuar na compilação e tratamento de dados, essas organizações voltaram-se à tradução de dados públicos, fazendo as pontes necessárias de acomodação ao *social landscape* (Wedlin & Sahlin, 2017). Esse conceito é importante, pois, frisa o uso social contextualizado dos dados, colocando em voga a necessidade de adaptá-los aos propósitos da administração pública.

O terceiro e último ponto que salientamos é o reconhecimento de que as ações de *enforcement* carecem de coordenação. E, em uma análise mais aprofundada, percebemos que a lei impõe dificuldades de responsabilização e penalização de agentes públicos, o que impulsiona o aparato regulatório a adotar maneiras alternativas para apoiar diferentes modelos de *compliance*. Ao propor outras formas de *enforcement*, portanto, tornam-se reconhecidas outras formas de *compliance*, e o papel de execução imediata se converte em uma condição de monitoramento das ações de transparência.

Em síntese, esses achados demonstram conjuntamente que os tribunais de contas compreendem um novo papel frente ao cenário de exigência por transparência. O institucionalismo organizacional oferta elementos para análise dessas práticas e discursos, particularmente pela ótica que enfoca o ambiente legal. O estudo das negociações e barganhas na relação *enforcement/compliance* que nos serviu de referência não é campo novo na perspectiva institucionalista, e encontra fulcro já nos ensinamentos de Hawkins (1983; 1984, como citado em Edelman, 1992). Porém, o que avança ao longo das últimas décadas é a ampliação do conceito de *compliance*, cada vez mais plural, mas também mais tênue e controverso (Edelman & Talesh, 2011).

Sobretudo, nota-se uma mudança no aspecto temporal de consecução do dispositivo legal: a *compliance* não se define na edição da lei, mas sim nas relações interativas entre lei, sociedade e organizações. Assim, o olhar de pesquisa se afasta

da análise literal do texto da lei e se volta aos requisitos de sancionamento social da lei, para sua face secundária (Ross, 2001), em que o conteúdo legal e a extensão de suas mudanças se desvelam tão somente na imersão prática da lei na sociedade, e não na promulgação do texto da lei por si só.

No âmago dessas relações encontra-se o protagonismo da linguagem, isso porque parte desses laços — de acordos e desacordos — dá-se de forma discursiva. Por isso, esse estudo apresentou declarações, fragmentos e transcrições, que evidenciam a inclinação para um novo papel dos tribunais de contas, que indica o potencial redirecionamento das ações meramente punitivas e estritamente constitucionais.

Em conclusão, há de se considerar que essa mudança de discurso não ocorre de forma isolada e, portanto, envolve múltiplas organizações e facetas ambientais. Por isso, novos trabalhos podem abordar visões internas e organizacionais, como a possibilidade de ocorrência de *decoupling* ao assumir novos papéis de *enforcement* (Boxenbaum & Jonsson, 2017) que priorizam o atendimento de expectativas institucionais (Deephouse, 1996) em detrimento de ações voltadas à eficiência. Outros estudos podem lançar luz sobre os impactos e as motivações por trás dessas mudanças, em uma perspectiva teórica que valorize a inovação e os atores centrais e periféricos que servem de forças motrizes a esse processo (Compagni, Mele, & Ravassi, 2015). Vislumbramos ainda que estudos subsequentes que se aproximem dos contextos naturais de órgãos fiscalizadores e de controle como os tribunais de contas aqui tratados podem ser, igualmente, frutíferos, no que tange a apreenderem — de forma imersa e vivencial — as efetivas práticas, processos e mecanismos mediante os quais os novos papéis (sociais e institucionais) apontados como conclusões desta investigação têm sido realizados, em tais organizações públicas (Smets, Aristidou, & Whittington, 2017).

Por termos adotado um olhar concentrado nos discursos sustentados pelos tribunais de contas estudados, especialmente no que se refere ao seu potencial de promover e fortalecer o *enforcement* pedagógico, desconsideramos, por ora, estudos baseados na sua efetividade, em termos de orçamento *versus* arrecadação por multas aplicadas. Porém, entendendo que as multas também podem desempenhar — paralelamente — papel educativo, visto que os valores são por vezes módicos, estudos futuros podem atuar centralmente na questão *enforcement* tradicional/constitucional/punitivo e sua relação com as medidas de cunho instrutivo, indicando sua sincronia e coatuação.

Visões ambientais podem romper o delineamento (supostamente) impermeável de campos organizacionais e ambientes legais, valorizando aspectos múltiplos das interações sociolegais. Há espaço ainda para pesquisas sociolegais e institucionalistas com enfoque linguístico sobre as formas pelas quais instâncias jurídi-

cas, jurisprudências, decisões e súmulas seguem interpretando e ressignificando conteúdos legais. Essas interpretações e significados podem ser alcançados ao se lançar um olhar cuidadoso acerca do controle social e das forças que são exercidas por segmentos sociais sobre o aparato regulatório. Resta, por fim, o anseio pelo desenvolvimento crítico dos mecanismos efetivos que nos permitirão usufruir dos dados abertos, e de seus avanços.

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Negotiated Legality and Political Work – The Social Constructions of the Legal Environment around Breastfeeding in Brazil

Legalidade Negociada e *Political Work* – A Construção Social do Ambiente Legal em Torno da Amamentação no Brasil *(PT: 209-229)*

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DOI: 10.33167/2184-0644.CPP2019.VVN1/pp.189-208

ABSTRACT
This research discusses how the legal environment around breastfeeding had been constructed in Brazil starting at the XX century: from the time Europeans arrived in the country, the breastfeeding was being abandoned, as it started to be seen as a practice of small nutritional and affective value, going through moments when the food industry was seen as the one able to solve more effectively the nutritional needs of babies and also of convenience for mothers. However, in the decade of 1970, a strong social movement started proposing the rescue of (natural) breastfeeding. This movement decisively marks the country history around breastfeeding, with impacts in the social and regulation aspects. In this sense, the paper discusses how interested social actors played the political work process, articulating and using their social skills in order to influence the social construction of the legal environment around breastfeeding and how the negotiated legality is set, the process where actors interpret and signify the laws in force, giving them (or not) social validity.

Keywords: legal environment, legality, social construction, meaning

RESUMO
Essa pesquisa discute como se construiu o ambiente legal em torno da amamentação no Brasil a partir do século XX: com a vinda dos europeus para cá, o aleitamento materno foi

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sendo deixado para trás, como uma prática de pouco valor nutricional e afetivo, passando por momentos em que a indústria alimentícia era tida como capaz de resolver de forma mais eficaz as necessidades nutricionais dos bebês e de comodidade de suas mães. Na década de 1970, no entanto, um forte movimento social procurou resgatar a importância da amamentação natural. Essa movimentação marca de forma decisiva a história do país em relação à amamentação, com impactos sociais e na legislação. Assim, discute-se de que forma atores sociais interessados desempenharam o processo de *political work*, articulando-se por meio de suas habilidades sociais no sentido de influenciar a construção do ambiente legal em torno da amamentação, e como se dá a legalidade negociada, processo pelo qual os atores interpretam e dão significado às leis vigentes legalmente, conferindo-lhes (ou não) vigência social.

Palavras-chave: ambiente legal, legalidade, construção social, significado

1. Introduction

It is traditionally understood that laws determine the possibilities of social activity and penalize actions in breach of the letter of the law. In the study of organizations, the sociological dimension of institutional theory made progress as from the 1970s by looking at how legal instruments compel organizational actors to act in given ways and can contribute to organizations in the field taking on similar characteristics, insofar as they are all subject to the same pressure and tend to respond in similar ways. Discussions such as this are organized under what Scott (2008) called the regulative pillar, which has a characteristically coercive effect on the field.

Although those studies have understood that the social structure is not solely defined by its coercive powers, and have started, in a certain way, to discuss normative and cultural elements, priority has been given to top-down movements, where the structure constrains action. However, more recent research efforts have returned to the notion of the duality of structure and action, seeking to show that whilst the structure does indeed constrain action, it also empowers action. At the same time, action maintains, creates or deconstructs institutions. Along these lines, many studies have been undertaken using concepts such as those of institutional entrepreneurship (DiMaggio, 1988) and institutional work (Lawrence & Suddaby, 2006).

Even though that duality is very clear for the majority of studies that operate under the understanding that reality is socially constructed, little research has been done into the relations of construction and negotiation of meaning in the legal environment.

Starting out from organizational studies of institutions based on sociology and the sociological traditions of law, we have therefore sought to instigate debate on

the idea that legality is negotiated and that there is also a social construction in that which is understood as the legal environment.

Legality is associated with meanings assigned by organizations to legal prescriptions (Ewick & Silbey, 2002; Talesh, 2009) whilst the legal environment encompasses (a) legal spaces, as arenas that facilitate organizational interaction; (b) legal provisions, in the form of codes that regulate organizational conduct; (c) legal definitions, as typologies that constitute organizational experience (Edelman, 2004; Edelman & Suchman, 1997).

This theoretical corpus provides parameters for discussing the social construction of the legal environment surrounding breastfeeding in Brazil. In this study we look at how that legal environment — which can most objectively be delineated by the legislation in force — was constructed, whilst considering that there has been negotiation of meaning, which influences legality in the field and the way in which regulative institutions remain current, or not, as well as one further issue: how and whether they correspond to social practice.

2. Legal Environment, Legality and Political Work

An order exists. This is the framework for transactions to be concluded, and agreements to be reached. An expectation in relation to the attitude of the other, agreements whereby people 'gain' a degree of security for living their daily lives. We generally call this a structure, a set of rules and/or laws that govern the field (Giddens, 2003). However, this structure is not a given. At certain times it appears to us as certain, taken for granted, immutable, "that's how things are", "it's always been that way". But it acquires this status of permanence precisely because it is being maintained socially: the actors are reproducing it and, in a way, maintaining those settlements. Accordingly, both for permanent and for change, action needs to be recognized.

Scott (2008) discusses the institutional pillars of this structure as the regulative, normative and cultural-cognitive pillars. He also defines the regulative pillars as "regulatory processes that involve the capacity to establish rules, inspect others' compliance with them and, if necessary, to exert sanctions — rewards or punishments — in order to influence future behaviors" (Scott, 2008, p. 52). For this author, the indicators in that pillar are rules, laws and penalties and the mechanism related to it is coercive.

Scott (2008) argues that it is possible to identify institutions under the regulative pillar when objects are in compliance with ordered specifications, at the same time as it is observed that these specifications are promulgated in the form of rules and law and are able to impose penalties in the event of non-compliance.

Taking a broader view and recognizing the duality of structure and action (Giddens, 2003), it is understood that a legal environment exists, a space where the legal field and the organizational field overlap (Edelman, 2016) and where organizations, collectively, construct the meaning of that which structures the field, in other words, when we speak of the regulative pillar we are also speaking of normative and cultural settlements. The legal environment is constituted not only by laws and the associated penalties, but also by the cultural rules and schemas associated with those laws (Edelman & Suchman, 1997).

This means that the rationality of the legal environment is not entirely the product of the law, but also of its resonance in organizational practices (Edelman, 2004; Ewick & Silbey, 2002), and so there is an endogenous and subjective character in this process (Edelman, 2004; Ewick & Silbey, 2002; Talesh, 2009).

This endogeneity indicates that organizations are not mere receptors, but also active producers of the legal environment. Organizational responses and institutionalized standards express this endogeneity that arises out of collective sensemaking and interpretation of the legal environment (Edelman, Uggen, & Erlanger, 1999; Scott, 2008). Edelman et al. assert that "the law is not a fixed set of commandments but rather a continuous process of institutional evolution that is being formed and receives meaning through interaction with organizations" (Edelman, Gwendolyn, & McAdam, 2010, p. 656).

In this way we reclaim the concept of legality. It "refers to the meanings associated with the law, even if the formal law or law enforcement agents do not approve of or accept those associations [of meaning]" (Ewick & Silbey, 2002, p. 155). This is the sense that in this study we have preferred to use the term "negotiated legality", precisely to indicate and insist that it is (i) a process, (ii) that involves negotiation of meanings and (iii) it is a social construct that recognizes that there are interests, but does not subjugate meaning only to the interested actors.

Accordingly, in order to understand the normative patterns of organizational practices when these are interpreting the legal environment and constructing meanings concerning the legal prescriptions that define the meaning assigned to legality, it is essential at the same time that it makes sense to discuss the mechanisms whereby the legal environment is institutionalized.

Although it is acknowledged that social constructs are not solely and exclusively the result of interested action, it is considered important to study and understand how processes where there are interested actors take place, working in the field in order to influence the construction of meanings, whether to maintain something of interest to them, or else to dissolve or create it.

Research into institutional entrepreneurship (DiMaggio, 1988) and institutional work (Lawrence, Suddaby, & Leca, 2009) has made progress in this direc-

tion, discussing the mechanisms whereby interested social actors seek to create frames (Campbell, 2005), look for support and use their social skills (Fligstein & McAdam, 2012) to do this. Following the same reasoning, we prefer to use here the term *political work*, because it evinces more clearly the political movement of negotiation of meanings around specific ideas which are on the agenda, something very relevant to the study we here seek to carry out.

3. Methodological Procedures

The construction and negotiation of meanings around the phenomenon proposed in this research requires us to trace the intersubjective aspects present in those relationships. There are several actors, constructing and negotiating the legal environment in which they find themselves and, for this reason, we opted to conduct qualitative research (Miles, Huberman, & Saldaña, 2014).

Given that the construction (and maintenance) of the legal environment is something that happens in a given time and space, the research will be conducted on a longitudinal basis. The data are essentially secondary, meaning that this study can be more aptly characterized as documentary research. Even so, a number of interviews were conducted to triangulate information and clarify a number of points raised in the documents consulted.

Care was taken for the documents used for analysis to be characterized as the product of different periods of time and places. This is because our interest was in understanding what happened and how in the process of negotiation of meanings, creation, maintenance and fall of Brazilian legislation around the subject of breastfeeding.

From a prior selection of 475 documents, it was considered that 51 (fifty-one) were the most relevant for our proposed discussion. These were: two MA dissertations, one thesis, one monograph, three books, nine academic articles, one procedures handbook, twenty-six legal documents (15 *portarias* – administrative orders), one convention, three laws, three resolutions, one international agreement, one statute and two 'Brasilia Charters') and eight videos with a total of 288 (two hundred and eighty-eight) minutes) consisting of documentaries, conferences, TV shows and recorded talks. In addition, we also consulted the websites of a number of Brazilian human milk banks and that of the Ibero-American Network of Human Milk Banks, from which we took news items, administrative and other reports (65 pages).

The primary data included five interviews conducted with three individuals. Two interviews were conducted with a director of the Fundação Oswaldo Cruz – Instituto Carlos Chagas, with a duration of 53 and 46 minutes, respectively, of exploratory interest, in order to understand something about the public health

scenario in Brazil and the question of breastfeeding, closely associated with one of the foundation's activities, through its human milk banks.

Another two interviews were conducted with the current director of the Iberian-American Network of Human Milk Banks, identified as a key-actor, due to having taken an active part in the process of this research since the outset. The first interview was unstructured and exploratory, conducted at the start of the research, with a duration of 30 minutes. The first was semi-structured and confirmatory, and conducted at the end of the research, with a duration of 32 minutes. The research findings were presented to the interviewee, who helped in putting together our understanding of the phenomenon.

Another semi-structured interview, which was exploratory in some regards, and confirmatory in others, was conducted with a State coordinator of the Human Milk Bank Network, with a duration of 190 minutes.

The data were analyzed through thematic content analysis, as suggested by Gioia et al. (2013), where in the first phase the content is reviewed allowing categories to emerge more freely, and then in the second stage those categories are grouped by themes and given labels. The process concludes by relating those groups to theoretical explanations.

Another relevant aspect of the analysis is that it was conducted on an abductive basis, with a rationale that uses the powerful inductive characteristic, which is such an important part of qualitative methods, but also with moments of deduction. This means that the analysis does not occur only when the data has all been collected; the researchers come and go between analysis and the field, one influencing the other, as suggested by Czarniawska (2014).

4. Presentation and Discussion of Findings

It is clear that the meaning of breastfeeding in Brazil has changed over time. A contextualization is accordingly provided that takes into account the social standards prevailing at the time, including the relationship between society and what people understood by breastfeeding and its consequences, legislation and pressure brought to bear both at home and internationally.

Almeida (1999) discusses the relationship between Brazilian people and breastfeeding since the pre-colonial period. The relationship that the indigenous peoples of Brazil had with breastfeeding was alien to the behavior of recently-arrived Portuguese women. He states that indigenous women breastfed on demand, combined the role of women-worker with that of breastfeeding mother, and often breastfed their children beyond the age of two years, at the same time as incorporating solid food in the child's diet.

For European women from the dominant classes at the time, breastfeeding was regarded as below their dignity, insofar as maternal love had no social or moral value. Accordingly, when they arrived in Brazil, they imported the culture of using wet nurses (then known as *saloias* in Portugal) and the culture of weaning (Almeida, 1999; Pontes, Lira, & Marques, 2005).

However, the use of slaves as wet nurses in place of the mother later became regarded as harmful to health and was severely condemned by the State, through family hygienists (profession linked to the State). As a result, breastfeeding was then seen as a merely biological act, and one related to the expectations of the State (Almeida, 1999; Souza & Almeida, 2005). However, not all mothers were able to nourish their own children, which brought a new problem: it was no longer possible to use slaves, and a solution had to be found.

Looking towards European countries, in the mid-nineteenth century, Brazil imported a number of practices related to breastfeeding, especially from France and Germany, such as: regulated times, setting the interval between feeds and the duration of each, feeding from both breasts, the lateral decubitus practice, use of dummies, breastfeeding after birth, condemnation of water with sugar for babies and dietary restrictions for breastfeeding mothers. These imports were accepted so readily that some of these practices are still observed by health professionals, although some of them are regarded as outdated. Almeida (1999) then observes that, with the new rules, new exceptions arose. "Weak milk then became the 'rule for exception'" (Almeida, 1999, p. 36). In other words, weak milk became the accepted excuse for not being able to breastfeed. Weak milk is referred to as a milk unable to sustain the infant, or only a small quantity of milk produced by the mother, or else the fact of the milk drying (Almeida, 1999; Souza & Almeida, 2005).

Because it admitted the 'weak milk' argument, medicine then had to deal with the problem of mothers unable to breastfeed, and so once again accepted a socially justifiable need: the wet nurse. Without slavery, however, wet nurses were then women from lower social classes, who used this as a way of supplementing their income. The Institute for the Protection and Assistance of Infants was founded in order to conduct strict examinations of the health of the mercenary wet nurses (Almeida, 1999).

In the early twentieth century, imports started of feeding bottles, condensed milk and powdered milk (1912), offering an alternative for those unable to breastfeed. Production started of the Ninho and Lactogeno milks in Brazil in 1921. The medical community moved from a discourse of condemnation of weaning to one of encouraging artificial feeding, albeit without renouncing the superiority of the mother's milk (Almeida, 1999; Pontes et al., 2005).

Manufacturers conducted advertising campaigns for processed milk and physicians took on board the idea that the mother's milk needed to be complemented, even then hypogalactia (insufficient milk supply from the mother) was not diagnosed (Almeida, 1999; Souza & Almeida, 2005).

From the nineteen forties to the seventies, artificial feeding came to be seen as the answer to all needs: it allowed mothers to return to work without worry, it provided an option for mothers with "weak milk", whilst marketing campaigns educated the population and the medical class that powdered milks were even more satisfactory in nutritional terms than breastfeeding. The government started to distribute industrialized milk to needy sectors of the population (Almeida, 1999; Souza & Almeida, 2005).

However, with the publication of *The Baby Killer* by Mike Muller (1974), a controversy broke out between the milk manufacturers and certain social groups. In that text, the author brought to light the high rate of infant morbi-mortality in poor populations due to malnutrition and diarrhea, associated especially with the use of formula milk, as the result of what was called commerciogenic weaning. Alarmed, UNICEF (*United Nations Children's Fund*) and the WHO (World Health Organization) joined forces to reassert the value of natural breastfeeding (Almeida, 1999).

These organizations put pressure on the Brazilian government to make pronouncements and take action to reduce infant mortality, especially among newborns. The scientific community also took sides, stating that indiscriminate use of formula milk appeared to be facilitating these deaths.

Brazil appeared to be swimming against the tide of the findings concerning formula milk. At this time, on the basis of previous studies that argued that formulas were the most appropriate response to infant nutrition, pediatricians throughout the country prescribed powdered milk, whilst the government maintained programs for distributing these milks to needy sectors of the population (Almeida, 1999).

However, as the international pressure grew, the Brazilian government began to think of programs which might reverse the situation, as official documents shown that Brazil was in fact one of the countries with the worst rates of infant mortality. On the basis of a report from INAN (National Institute for Diet and Nutrition) (1991), Almeida paints a picture of the grievous situation in the country:

> An official document from the Brazilian Ministry of Health stated that infant mortality stood at 88 in every 1,000 in Brazil, 124 in per 1,000 in the north-east and that 48% of the population suffered from chronic malnutrition. 54% of infants were weaned in the first month in the city of São Paulo, and 80% in Recife. 50% of pediatricians pres-

> cribed feeding bottles and 90% advised the use of water between feeds (Almeida, 1999).

The Ministry of Health held meetings with international health and child welfare organizations to assess the question and to design action plans to resolve the problem. It was fundamental to turn around this situation and the main strategy was to encourage breastfeeding. Acting through INAN, and with support from UNICEF and OPS, the Ministry of Health organized two major events on the issue in 1979. In Brasilia, specialists discussed the situation regarding breastfeeding in the country, whilst in Curitiba a nationwide plan was drawn up with targets and overall strategies for action (Almeida, 1999).

This gave rise to PNIAM (National Program for Encouraging Breastfeeding). In response to renewed international pressure and targets, the Ministry of Health made use of its legislative powers to issue orders that would help in combating infant mortality. Almeida (1999) cites the words of Monson (1991), when he recalled the activities of the federal government in favor of breastfeeding:

> Early weaning is now a State concern and is included on the public health agenda. In 1981, this concern gave rise to a State policy in favor of breastfeeding, implemented through PNIAM (Almeida, 1999).

Set up in 1981, PNIAM comprised representatives from the following bodies and institutions: INAN, UNICEF, OPS, National Department for Maternal and Infant Health, National Department for Education and Health, Brazilian Assistance Legion (LBA), National Institute for Healthcare and Social Welfare (INAMPS), Brazilian Movement for Literacy Foundation (MOBRAL), Rondon Project Foundation, Department for Labor Relations, Brazilian Nutrition Society, Brazilian Society of Pediatricians and the Brazilian Gynecological and Obstetrics Federation.

This integrated program (PNIAM) marked out the 1980s as a period of social mobilization in favor of breastfeeding. The superiority of breast milk became incontestable in the scientific community and was widely publicized. The nutritional and immunological benefits were the central topic in the marketing messages in favor of breastfeeding.

This highly social process therefore involved not only mothers and their babies; also present were the federal government, organizations with an interest or some form of involvement, such as human milk banks, hospitals and maternity units, the medical profession and the health sector in general, international organizations such as the UN and UNICEF, the food industry and even organizations with an influence on employment regulations such as trade unions,

So although it can be said that there is interested action by certain actors at specific moments in order to influence the creation, maintenance and/or fall of institutions and shared agreements on meanings surrounding breastfeeding in Brazil, we acknowledge that there is also the action of subsidiary actors who provide support and assistance in the process of constructing meaning.

We will now discuss the social construction of the legal environment from two standpoints: from that of what we here call *political work*, without losing sight of the absolutely fundamental concept of intersubjectivity manifest in the articulation between actors in the field, and from that of negotiated legality.

5. Negotiated Legality

We contend that legality is negotiated indeterminately in time and space. The interpretation of legal instruments and the manifestation of this in practice in the field are constant. Of course, in certain periods this is more intense and controversial and in others it is more discreet, to the extent that, to less observant eyes, legality appears a given and totally accepted, in a process very similar to that which Berger e Luckmann (2003) called objectified reality.

Here we discuss the process whereby the body of legislation relating to breastfeeding underwent change and how its meanings and the practice of what lies in the letter of these legal documents was manifested in the field.

In summary form, Table 1 presents the main legal documents published as from 1953 in Brazil which refer, in some way or other, to breastfeeding,

It can be noted that, in the fifties, sixties and seventies of the last century, only one legal document is included in the timeline, and before this there was no State pronouncement on breastfeeding. Convention 103/1953 discusses the question of maternity leave, thinking especially of mothers who are breastfeeding. However, the social context in which this instrument took effect did not view breastfeeding as a preferable option. Although women who had recently given birth were awarded the right to absent themselves from work in order to breastfeed, artificial breeding was held to be preferable, and recommended by the medical profession as more complete in nutritional terms as well as by the food industry, through advertising campaigns and lobbying of health professionals with a view to reinforcing this preference (Almeida, 1999; Souza & Almeida, 2005). This meant that one of the objectives of the legislation was not reflected in social practice.

TABLE 1. Legislation relating to the topic of breastfeeding

YEAR	LEGISLATION
1953	▪ Convention 103 of the International Labor Organization - Protection of Breastfeeding
1981	▪ MH Orders (portarias) 42 and 198 – Institution of the technical-executive working party for PNIAM
1982	▪ MH Order (portaria) 298 – Institution of the PNIAM working party
1988	▪ MH Order (portaria) 322 – 1st federal legislation standardizing HMBs ▪ Resolution 05 – International Code of Marketing of Breastmilk Substitutes
1990	▪ Consumer Protection Code – Rules on marketing of breastmilk substitutes ▪ Order (portaria) 1.390 – Creation of Central HMB Board
1992	▪ Resolution 31 – provisions on baby bottles and nipples ▪ UNICEF and World Health Organization Agreement: ends supply of formula milks to maternity units
1999	▪ MH Order (portaria) 812 – HMB network ▪ MH Order (portaria) 50 – National HMB Board
2001	▪ MH Order (portaria) 2051 – Marketing of infant foods
2002	▪ MO/MS Order (portaria) 698 – Functional structure of HMBs
2003	▪ MO/MS Order (portaria) – National breastmilk donation day
2005	▪ Brasilia Charter
2006	▪ CBR Resolution 171 – technical functioning of a HMB ▪ MO/MS (portaria) 2.193 – Structure and functioning of HMBs ▪ Law 11.265 – Sale of infant foods ▪ Ministry of Health Order (portaria) 618 – institutes the national committee for breastfeeding
2007	▪ Law 11474 – amends Law 11.265 ▪ MH Order (portaria) 2.160 – alters the national committee for breastfeeding
2008	▪ MO/MS Order (portaria) 2.799 – institutes the Brazilian Breastfeeding Network ▪ Law 11770 – Maternity Leave
2009	▪ MH Order (portaria) 2.394 – institutes world breastfeeding week and the partnership with the Brazilian Society of Pediatricians
2010	▪ NHI Order (portaria) 193 (jointly with Ministry of Health) – provides guidance on setting up breastfeeding support rooms and oversight of health checks ▪ Brasilia Charter

Note: PNIAM: National Program for Encouragement of Breastfeeding; HMB: Human Milk Bank; MO: The Minister's Office: MH: Ministry of Health; NHI: National Health Inspectorate; CBR: Collegiate Board Resolution.
Source: the authors.

In the early eighties, two ministerial orders were issued on basically the same subject: PNIAM (the National Program for the Encouragement of Breastfeeding). This was a response to international pressures warning of the dangers of mothers not breastfeeding and the need to show real movement towards reducing the infant mortality figures. The orders issued in 1981 established working parties comprising various professionals who were appointed as legitimate representatives to take action in proposing activities to encourage breastfeeding. In 1982, this group realized that a further ministerial order was needed, in order to make the arrangements needed for them to act as a working party. A strong grassroots movement allowed other groups and movements to gain strength and so, although legally PNIAM remained in force until 1997, when it was officially closed down, the space was created for new forms of action.

With the work undertaken by PNIAM, a new understanding gradually took shape around breastfeeding and certain needs began to rise to the surface: insofar as breast milk was essential for babies' development, support needed to be offered to those whose mothers were unable to feed them or who, for special reasons, such as being born prematurely, could not be directly breastfed. Attention therefore turned to human milk banks, and the need to set up new units around the country (Almeida, 1999).

However, the situation of the HMBs in operation was not favorable, insofar as the way they worked entailed a margin of risk to the health of the baby, through contaminated milk. This led the Ministry of Health to mobilize efforts, coordinated by PNIAM, to change this situation. Almeida (1999) reports that, at a meeting in March 1984 with the directors of the main HMBs operating in Brazil and professionals from related areas, it was concluded that: the operational structure of existing HMBs posed a threat to the health of the babies being fed, they served to discourage breastfeeding, they lacked a legislative framework that set rules and procedures for this sector and a pilot project was needed to seek alternatives.

> In July 1986, in the light of the results achieved by the IFF (Instituto Fernandes Figueira) HMB in reformulating its operational model, an agreement was signed between INAN (National Institute for Diet and Nutrition) and FIOCRUZ, for a National Reference Centre for Human Milk Banks to be set up at IFF. The aim of this initiative was to lay the foundations for a sub-program run by PNIAM, to achieve technical progress and advance the cause of milk banks in Brazil. With this in view, work proceeded on laying the foundation for drafting the first legislation regulating the establishment and workings of Human Milk Banks throughout Brazil, making it possible to standardize procedures in this area (Almeida & Novak, 2004).

So the human milk bank movement can be observed as from the early eighties, with trials, cooperation agreements and creation of a framework for action, but only in 1986 were the lessons learned from this "practical work" incorporated into legislation, in a bottom-up process of institutionalization.

As a result, there has been a legal framework for the operation of human milk banks since 1986, containing clearly defined rules and protocols, indicating what a human milk bank can and cannot do. It is known that, since the start of that decade, and more significantly from 1984 onwards, there were actors working to produce these protocols, and that these were implemented in the country's first human milk bank. The content of the law, which thereafter regulated the field and all subsequent milk banks, is a reflection of the ideas and organization that grew up at the first bank, in Rio de Janeiro.

As we have argued, that process of influence is always recursive and non-static. What later became the governing structure, in the form of legislation, stripped of its personal points of reference, was then practiced in the field and — what is more — interpreted. As the number of banks grew and these rules were manifested in everyday practices, we can see the reverse occur again: In 2002 and 2006, new legislation was published on how human milk banks should function, revising the rules to as to better reflect the actual practice in the field, itself an interpretation of the original legislation.

The work of actors in the field continues to be impacted by and to have an impact on the legal system relating to breastfeeding. The legal system gradually changes, renews itself, in line with this movement, and at the same time the movement itself is sometimes constrained and sometimes empowered by the legal structure in place.

This attempt at organization around a well-established aimed can be observed since the nineteen nineties. Up to this time, PNIAM was all that existed, but this program brought together organizations which, in fact, had little to contribute when the question was one of breastfeeding, such as MOBRAL and INAMPS (neither of these is mentioned at any time as organizations that effectively played a significant part in disseminating the new social settlements concerning the meaning of breastfeeding). This opened the way for committees that brought together different organizations doing similar work (Souza, 1996). A specific board was set up for human milk banks in 1990, the Central Human Milk Bank Board, as indicated in the summary of Ministry of Health Order 1390/1990:

> [this order] Institutes at INAN the central human milk bank board (CCBLH), to provide technical advice and define powers for exercising control and oversight of human milk banks (Brazil, 1990)

As regards the use of formula milk, the legal environment around breastfeeding also underwent changes and its meanings were redefined over time. As discussed in the background to the case, the Brazilian food industry started to produce powdered milk for babies in the 1920s. It was introduced to the country as a highly scientific and technological product, and was found on market stalls, indicated in medical prescriptions and even freely stocked by human milk banks and maternity units until 1988, when Brazil became the seventh country in the world to adopt rules on the marketing of formula milks. In 1990, the Consumer Protection Code established new rules on the marketing of formula milk, in 1992 a resolution regulated the sale and use of baby bottles and nipples and then in 2001 a ministerial order also dealt with the marketing of infant foods.

The impact of these regulations was felt not only by mothers and babies. The market was also affected: today, food manufacturers that sell products for infants are required to comply with very clear prohibitions:

> The following are prohibited (...) I – use of photographs, drawings or other graphical representations other than those required to illustrate methods for preparing or using the product, except for the use of trademarks or logos, provided these do not use an image of an infant, small child or other humanized figures; II – use of names or sentences intended to suggest that the product is highly similar to breast milk, as established in regulations; III – use of sentences or expressions that serve to raise doubts as to the ability of mothers to breastfeed their children ; IV – use of expressions or names that identify the product as the most appropriate form of food for infants, as established in regulations; V – use of information that might induce the use of products out of a misconception of their advantages or safety; VI – use of sentences or expressions that indicate the health conditions for which the product is appropriate; VII – promotion of the products of the manufacturer or other establishments (Brazil, 2006)

We do not have data to discuss how these rules are interpreted and practiced in the infant food market, but it is possible to assert that these rules have been institutionalized through vigorous work by interested actors and advocates of breastfeeding, and here again we draw attention to the bottom-up process and will organize our discussion of this in the next section, where we call it political work.

5.1 Political Work

In this section we discuss the actors and their interested action with a view to creating, maintaining and bringing down institutions in what is called the regu-

lative pillar (Scott, 2008). As we are dealing specifically with this pillar, we have opted to use the expression *political work* and not *institutional work*, as these are arrangements where political articulation can be observed, in the sense of persuasive negotiation between actors.

Speaking about the successes that pro-breastfeeding actors rapidly achieved, Monson wrote:

> from then on [mid-1980s], what was achieved? I think that... the great causes, that depended on legislation, that depended on larger struggles, it was possible to win (...) Brazil became the first country with rules for the establishment and functioning of milk banks and the seventh to have rules on the marketing of infant food. I will repeat again: none of this came from a single endeavor. We always had very effective fellow campaigners, at the right time, to achieve this type of success (Monson, 1991)

We will here draw attention to two important issues: the first is the awareness among the interested actors that political coordination was needed, bringing together the micro- and macro-levels in order to regulate, restrict and empower practice in the field. The second was the need for different actors, with social skills (Fligstein & McAdam, 2012) specifically geared to carrying out the *political work*.

Concerning this perception of the need for integration, interviewee 2 says at a given point that this process of standardization and creating protocols would be necessary if the aim was for the idea of human milk banks to be adopted in that field:

> as we got to work, we saw that it was necessary to design a protocol, and to draw up technical rules for each little piece of this story because if I wanted to do this, if I wanted to replicate this, that would have to be the way, you see? (Interviewee 2)

The movement of actors in the field, seeking to coordinate relations, influence the content of the law and seeking federal investment, continued to constitute this process that we here call political work. Maia et al. (2006) and ANVISA (2007) recall that, at the first National Meeting of Human Milk Banks, in 1992, the participants thought of creating an integrated management system, along the lines of what today is the Brazilian Human Milk Bank Network. At the second National Meeting of Human Milk Banks in 1995, this idea was again widely shared, but it waned as a result of the failure to secure funding form the Ministry of Health. But in 1998, the meetings were restyled as conferences and were instrumental in making the ideas of a HMB Network a reality: one year later, the Ministry of Health

allocated funds for this purpose. Maia et al. (2004) also recall that, one year before the legislation was created, the IFF was already gearing up to create a network:

> In 1998 the Oswaldo Cruz Foundation, acting through the IFF Human Milk Bank, took on the role of coordinating work to plan and establish the National Human Milk Bank Network, the aim of which was to guide the formulation, implementation and follow-up of State policy on the work of human milk banks throughout Brazil. In coordination with the Ministry of Health, the project pointed to gradual extension of the network in order for all the units involved to interact and take joint action. From then on it is possible to observe significant qualitative and quantitative growth in HMBs, combined with an increasingly distinctive line of action. The first steps to set up the network were successful (MAIA et al., 2004, p.298)

In 1999, another ministerial order approved funding for extending the work of the milk banks, as follows:

> Approves the action plan allocating funding from the ministry of health budget (...) in order to support health work, with the aim of establishing and disseminating the process of standardization in human milk banks in the country (Brazil, 1999)

It may therefore be seen that the publication of these ministerial orders, one creating the HMB Network and the other allocating funds for setting up human milk banks around the country, can be traced back to the ability of the interested actors to create frames and mobilize resources to achieve cooperation (Fligstein & McAdam, 2012).

Another important aspect to be discussed is the centrality of the actors as the process unfolded. Certain actors are key (Edelman et al., 1999) at given moments, precisely because of their social skills and ability to mobilize resources (Fligstein & McAdam, 2012). The impact of these actors made a significantly effective contribution at a given time. This centrality may have subsequently diminished, but this made room for the action of another or other key-actor(s). In 1992, for instance, an agreement between the government and UNICEF and the WHO put an end to supplies of breastmilk substitutes to hospitals and maternity units (Ministério da Saúde, 2011). The political work was here centered on international organizations, that brought pressure to bear on countries to deliver better outcomes in human development and proposed measures which had an impact in some way on achieving those goals.

Legislation on breastfeeding continued to be approved over subsequent decades. The Brazilian Network of Human Milk Banks had a crucial influence on the

content of these laws, ministerial orders and resolutions and because a central actor in this process.

The Network does not operate only in its own name, but as a body bringing together the ideas and needs of all the milk banks being set up. The legislation that followed concerning the structure and technical functioning of HMBs was based on the experiences of the banks and shaped in accordance with the needs that arose. These ministerial orders are: MO/MH Order (*portaria*) 698/2002; CBR Resolution 171/2006; MO/MH Order (*portaria*) 2.193/2006.

Almeida (1999) demonstrates the tendency shown by IFF/FioCruz — the first human milk bank in Brazil and the unit taken as a model for other banks — to become a kind of hub and administrator for situations relating to breastfeeding and HMB procedures:

> BLH IFF took on the role of a center for production, absorption and dissemination of knowledge in its field of action, by generating actions, methodologies, technologies and alternative solutions, compatible with the different types of need of the units providing this type of service (Almeida, 1999)

In that analysis, attention may be drawn to what Edelman et al. (1999)the professions, and legal institutions. It suggests that organizations and the professions strive to construct rational responses to law, enabled by those actors.

Table 2 provides an overview of the history of breastfeeding in Brazil. Taking an analytical approach, we organized periods into eras that identify the focus at each moment in history, and then we present the main key-actors in each of these eras — actors that contributed decisively to constructing that focus on breastfeeding and, lastly, as summary of the rationale in each era.

TABLE 2. Eras: the history of breastfeeding in Brazil

ERAS	CENTRAL ACTORS	FIELD RATIONALE
Formula Milk Era – 1940 to mid-1970s	Food manufacturers producing formula milk, Government, science/medicine	Formula milk as response to nutritional needs and for mothers who needed to work
Pro-breastfeeding and Proliferation of HMBs Era – 1980 to 1997	Science/medicine, UN, UNICEF, PNIAM, Government, INAN, OPS, IFF.	Efforts for natural breastfeeding to be perceived again as essential, laws create programs to encourage breastfeeding and rules restricting sale of breastmilk substitutes
Consolidation Era – 1997 to 2002	Government, IFF, HMB Network, National and State Reference Centers	Natural breastfeeding once again accepted in society and by health professionals, human milk banks throughout the country and concern to produce science relating to breastfeeding
Internationalization and Regulation Era – 2002 to the present	Government, IFF, HMB Network, National and State Reference Centers	Era marked by quantity of legislation helping to shape the field. Contextual pressures (coercive, normative, mimetic) govern the structure.

6. Conclusions and Recommendations

This study has sought to instigate debate on the understanding that the legal environment is a social construct. This understanding holds that processes of signification and creation of interpretative frameworks are factors that explain the maintenance, alteration and downfall of systems in force.

Starting out from the concept of duality between structure and action (Giddens, 2003), we are arguing that there exists in the legal environment a process of negotiation and interpretation of meanings and that, sometimes, that process is influenced by interested social actors. We accordingly discuss negotiated legality, where it is considered that it is not enough for a law to be promulgated and legally in force: the actors who are affected by that legislation are not entirely passive in relation to it and, through social practice, interpret, reshape and transform — sometimes abruptly and sometimes incrementally — that which the letter of the law prescribes.

This process of interpretation may involve socially interested actors, working intentionally to give meaning to those laws, seeking to cause other actors in the field also to adopt that interpretation and/or coordinating their efforts to as to create, maintain or bring down legal institutions, in what we here call political work.

It should however be noted that we do not here adopt a voluntarist vision of social actors. Whilst admitting that interest exists, that such coordinated and socially interested movement exists, we also contend that (i) there is a structure, which not only constrains action, but also empowers it — and in this sense it is not detached from the prevailing social settlements and (ii) interested action will not necessarily find fertile ground and will not necessarily be understood and adopted in the way that is expected. The other actors who make up this field may therefore not care about the interest of these political workers and even so adopt and practice those frames, just as they may do as they see fit, because in our view actors are more than just objects of social pressure.

Following this line of reasoning, we present the process whereby the meaning of breastfeeding has changed in Brazil over the years. New laws have been created, with a structural impact on the field, and have been interpreted by social actors. However, those laws do not arise in a social vacuum: there is a context and a process of negotiation which allows them to be created and promulgated.

We argue that they do not take social effect as from the moment they enter into legal force; instead they govern and exert force over the field for which they were created, but their acceptance is manifested in social practice and this practice is not merely passive: the actors interpret and negotiate the meaning of those new institutions.

And in this dual process between structure and actions we may observe actors acting as political workers, seeking to influence the maintenance, downfall and creation of legal instruments that recognize and directly influence the way in which breastfeeding is understood in Brazil, at the same time as we identify the process whereby the actors gradually interpreted and assisted in change in the field, through practice.

Legalidade Negociada e *Political Work* – A Construção Social do Ambiente Legal em Torno da Amamentação no Brasil

Negotiated Legality and Political Work – The Social Constructions of the Legal Environment around Breastfeeding in Brazil *(EN: 189-208)*

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DOI: 10.33167/2184-0644.CPP2019.VVN1/pp.209-229

ABSTRACT
This research discusses how the legal environment around breastfeeding had been constructed in Brazil starting at the XX century: from the time Europeans arrived in the country, the breastfeeding was being abandoned, as it started to be seen as a practice of small nutritional and affective value, going through moments when the food industry was seen as the one able to solve more effectively the nutritional needs of babies and also of convenience for mothers. However, in the decade of 1970, a strong social movement started proposing the rescue of (natural) breastfeeding. This movement decisively marks the country history around breastfeeding, with impacts in the social and regulation aspects. In this sense, the paper discusses how interested social actors played the political work process, articulating and using their social skills in order to influence the social construction of the legal environment around breastfeeding and how the negotiated legality is set, the process where actors interpret and signify the laws in force, giving them (or not) social validity.

Keywords: legal environment, legality, social construction, meaning

RESUMO
Essa pesquisa discute como se construiu o ambiente legal em torno da amamentação no Brasil a partir do século XX: com a vinda dos europeus para cá, o aleitamento materno foi

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sendo deixado para trás, como uma prática de pouco valor nutricional e afetivo, passando por momentos em que a indústria alimentícia era tida como capaz de resolver de forma mais eficaz as necessidades nutricionais dos bebês e de comodidade de suas mães. Na década de 1970, no entanto, um forte movimento social procurou resgatar a importância da amamentação natural. Essa movimentação marca de forma decisiva a história do país em relação à amamentação, com impactos sociais e na legislação. Assim, discute-se de que forma atores sociais interessados desempenharam o processo de *political work*, articulando-se por meio de suas habilidades sociais no sentido de influenciar a construção do ambiente legal em torno da amamentação, e como se dá a legalidade negociada, processo pelo qual os atores interpretam e dão significado às leis vigentes legalmente, conferindo-lhes (ou não) vigência social.

Palavras-chave: ambiente legal, legalidade, construção social, significado

1. Introdução

Tradicionalmente entende-se que as leis determinam as possibilidades de atividade social e sancionam ações em desacordo com sua letra. Em estudos organizacionais, a vertente sociológica da teoria institucional deu passos ao discutir, a partir dos anos 1970, a forma como instrumentos legais coagem a ação dos atores organizacionais e podem colaborar para que as organizações do campo passem a se assemelhar entre si, visto que sofrem uma mesma pressão e tendem a responder de forma semelhante. Discussões como essa estão organizadas sob o que Scott (2008) chamou de pilar regulativo, pilar esse com característica de coerção sobre o campo.

Ainda que esses estudos já entendessem que a estrutura social não se resume à sua capacidade coercitiva e já discutissem, de alguma forma, elementos normativos e culturais, o privilégio foi dado ao movimento *top down*, onde a estrutura constrange a ação. No entanto, em um esforço mais recente, tem havido um resgate da noção de dualidade entre estrutura e ação, onde se procura discutir que, sim, há constrangimento da estrutura na ação, mas ela também habilita a ação. Ao mesmo tempo, a ação mantém, cria ou desconstrói instituições. Nessa tônica, muitos estudos foram construídos utilizando-se os conceitos de empreendedorismo institucional (DiMaggio, 1988) e *institutional work* (Lawrence & Suddaby, 2006), por exemplo.

Mesmo que essa dualidade esteja muito clara para a maioria dos estudos que se articulam sob o entendimento de que a realidade é socialmente construída, os estudos sobre essas relações de construção e negociação de significado ao tratar do ambiente legal não têm muita expressão.

Assim, apoiados no institucionalismo organizacional de base sociológica e em tradições de sociologia do direito, temos procurado trazer para o foco das discus-

sões a noção de que a legalidade é negociada e que há também uma construção social naquilo que se entende por ambiente legal.

A legalidade está associada aos significados atribuídos pelas organizações às prescrições legais (Ewick & Silbey, 2002; Talesh, 2009), ao passo que o ambiente legal compreende (a) espaços legais, enquanto arenas que facilitam a interação organizacional; (b) preceitos legais, na forma de códigos que regulam a conduta organizacional; (c) definições legais, enquanto tipologias que constituem a experiência organizacional (Edelman, 2004; Edelman & Suchman, 1997).

Esse corpo teórico dá parâmetros para discutir a construção social do ambiente legal em torno da amamentação no Brasil. Colocamos em pauta nessa pesquisa como se construiu esse ambiente legal que de forma mais objetiva pode ser delineado pela legislação vigente, mas considerando que houve e continua havendo negociação de significado, o que influencia a legalidade do campo e a forma como as instituições regulativas permanecem ou não em voga e ainda mais: como e se elas encontram a prática social.

2. Ambiente Legal, Legalidade e *Political Work*

Há uma ordem. Ela dá condições para que os negócios sejam realizados, que acordos sejam firmados. Uma expectativa em relação à atitude do outro, acordos pelos quais as pessoas ganham certa segurança para viver seu dia-a-dia. Comumente chamamos a isso de estrutura, um conjunto de normas e/ou leis que regem o campo (Giddens, 2003). Essa estrutura, no entanto, não está dada. Ela nos parece em alguns momentos como certa, *taken for granted*, imutável, «é assim», «sempre foi assim». No entanto, ela adquire esse *status* de permanência justamente porque está sendo mantida socialmente: os atores estão reproduzindo e, de certa forma, mantendo esses acordos. Assim, tanto para permanência quanto para mudança, a ação precisa ser reconhecida.

Scott (2008) discute os pilares institucionais dessa estrutura como sendo eles o pilar regulativo, normativo e cultural-cognitivo. Define ainda o pilar regulativo como «processos regulatórios que envolvem a capacidade de estabelecer regras, inspecionar a conformidade de outros com elas e, se necessário, manipular sanções — recompensas ou punições — com objetivo de influenciar comportamentos futuros» (Scott, 2008, p. 52, tradução livre). Para o mesmo autor, os indicadores desse pilar são regras, leis e sanções e o mecanismo relacionado a ele é coercitivo.

Scott (2008) alega ser possível identificar instituições sob o pilar regulativo quando objetos estão em conformidade com especificações ordenadas, ao mesmo tempo que se observa que estas especificações estão promulgadas em formato de regras, leis e que têm capacidade de impor sanção quando do seu não cumprimento.

De forma mais abrangente e reconhecendo a dualidade entre estrutura e ação (Giddens, 2003), entende-se que há um ambiente legal, um espaço onde o campo legal e o campo organizacional se tocam (Edelman, 2016) e nele as organizações, de forma coletiva, constroem o significado daquilo que estrutura o campo, ou seja, quando se fala em pilar regulativo também se está falando de acordos normativos e culturais. O ambiente legal é constituído não apenas pelas leis e as sanções ligadas a elas, mas também pelas normas e esquemas culturais associados a essas leis (Edelman & Suchman, 1997).

Desta forma, a racionalidade do ambiente legal não é inteiramente produto da lei, mas também de sua ressonância nas práticas organizacionais (Edelman, 2004; Ewick & Silbey, 2002), então há um caráter endógeno e subjetivo nesse processo (Edelman, 2004; Ewick & Silbey, 2002; Talesh, 2009).

Essa endogeneidade indica que as organizações não são meramente receptoras, mas produtoras ativas do ambiente legal. As respostas organizacionais e os padrões institucionalizados expressam essa endogeneidade que ocorre por meio do *sensemaking* e da interpretação coletiva do ambiente legal (Edelman, Uggen, & Erlanger, 1999; Scott, 2008). Edelman e colegas afirmam que «a lei não é um conjunto fixo de mandamentos mas sim um contínuo evoluir institucional que vai sendo formado e recebe significação por meio da interação com as organizações» (Edelman, Gwendolyn, & McAdam, 2010, p. 656, tradução livre).

Desta forma, resgatamos o conceito de legalidade. Ela «refere-se aos significados associados à lei, mesmo se a lei formal ou agentes legais oficiais não aprovarem ou aceitarem essas associações [de significado]» (Ewick & Silbey, 2002, p. 155, tradução livre). E é nesse sentido que nesse estudo temos preferido utilizar o termo «legalidade negociada», justamente para indicar e insistir que este é (i) um processo, (ii) que envolve negociação de significados e (iii) é uma construção social que reconhece haver interesses, mas não subjuga a significação apenas aos atores interessados.

Assim, torna-se imperativo compreender os padrões normativos das práticas organizacionais quando essas estão interpretando o ambiente legal e construindo significados acerca das prescrições legais que definem o sentido atribuído à legalidade, ao mesmo tempo que faz sentido discutir os mecanismos pelos quais o ambiente legal se institucionaliza.

Ainda que se reconheça que as construções sociais não são resultado única e exclusivamente de ação interessada, considera-se que importa estudar e entender como se dão os processos onde há atores com interesses particulares, trabalhando no campo no sentido de influenciar a construção de significados, seja para manter algo que lhes interessa, seja para dissolver ou criar.

Os trabalhos sobre empreendedorismo institucional (DiMaggio, 1988) e *institutional work* (Lawrence, Suddaby, & Leca, 2009) já avançaram nesse sentido, discutindo os mecanismos pelos quais atores sociais interessados tentam criar *frames* (Campbell, 2005), buscam apoio e utilizam-se de suas habilidades sociais (Fligstein & McAdam, 2012) para tanto. Seguindo a mesma lógica, preferimos usar aqui o termo *political work*, porque ele evidencia de forma mais clara esse movimento político, de negociação de significados em torno de ideias específicas que estão em pauta, algo tão pertinente para o estudo que aqui se presta a ser realizado.

3. Procedimentos Metodológicos

A construção e negociação de significados em torno desse fenômeno proposto nesta pesquisa exige que se rastreie os aspectos intersubjetivos presentes nessas relações. São vários atores, construindo e negociando o ambiente legal no qual estão imersos e, por conta disso, optou-se pela condução de uma pesquisa qualitativa (Miles, Huberman, & Saldaña, 2014).

Sendo que a construção (e manutenção) do ambiente legal vai ocorrendo vinculada a um tempo e espaço, a pesquisa se dá de forma longitudinal. Os dados são essencialmente secundários, caracterizando este estudo de forma mais contundente como uma pesquisa documental. Ainda assim, algumas entrevistas foram realizadas para triangular informações e esclarecer alguns pontos levantados por meio dos documentos.

Foi tomado o cuidado para que os documentos utilizados para análise fossem caracterizados como produções de diferentes períodos no tempo e espaço. Isso porque para esse estudo interessa entender como e o que ocorreu no processo de negociação de significados, criação, manutenção e queda de legislações brasileiras em torno da amamentação.

Partiu-se de uma seleção prévia de 475 documentos, de onde se considerou que 51 eram mais relevantes para compor a discussão que se propõe. São eles: duas dissertações de mestrado, uma tese, uma monografia, três livros, nove artigos científicos, um manual de procedimentos, vinte e seis documentos de conteúdo legal (15 portarias, uma convenção, três leis, três resoluções, um acordo internacional, um estatuto e duas Cartas de Brasília) e oito vídeos que totalizam 288 minutos, sendo eles documentários, congressos, programas de TV, palestras gravadas. Além destes, alguns *sites* de bancos de leite humano brasileiros e o *site* da Rede Iberoamericana de Bancos de Leite Humanos também foram consultados, de onde se extraíram notícias, relatórios de resultados e administrativos (65 páginas).

Os dados primários incluem cinco entrevistas realizadas com três pessoas. Duas entrevistas não-estruturadas foram feitas com um diretor da Fundação Oswaldo Cruz – Instituto Carlos Chagas, com duração de 53 e 46 minutos respecti-

vamente, e com interesse exploratório, a fim de entender um pouco o cenário da saúde pública no Brasil e a questão da amamentação, altamente ligada a uma das atividades dessa fundação por meio dos bancos de leite humano.

Outras duas entrevistas foram conduzidas com o atual diretor da Rede Iberoamericana de Bancos de Leite Humano, identificado como um ator-chave por ter participado ativamente do processo em estudo desde sua origem. A primeira, não-estruturada e de caráter exploratório, ocorreu no início do estudo e teve duração de 30 minutos. A segunda, semi-estruturada e de caráter confirmatório, ocorreu no final do estudo e teve duração de 32 minutos. Os achados do estudo foram levados para o entrevistado, que auxiliou na costura final do entendimento do fenômeno.

Mais uma entrevista semi-estruturada, de caráter exploratório (para alguns pontos) e confirmatório (de outros) foi realizada com uma coordenadora estadual da Rede de Bancos de Leite Humano e teve duração de 190 minutos.

A análise dos dados se deu por meio de análise de conteúdo temática, conforme sugerem Gioia et al. (2013), onde na primeira fase se revisa o conteúdo deixando-se que as categorias emerjam mais livremente e num segundo momento essas categorias são agrupadas por temas e recebem rótulos. Finalmente, esses agrupamentos são relacionados com explicações teóricas.

Outro aspecto relevante da análise é que ela se deu de forma abdutiva, numa lógica em que se utiliza a forte característica indutiva tão inerente aos métodos qualitativos, mas também de momentos dedutivos. Nesse sentido, a análise não ocorre apenas quando se finaliza a coleta; há um ir e vir entre análise e campo, um influenciando o outro, como sugere Czarniawska (2014).

4. Apresentação e Discussão dos Resultados

O significado da amamentação no Brasil mudou ao longo do tempo, isso é certo. Assim, apresenta-se uma contextualização que leva em conta padrões sociais vigentes à época, incluindo a relação da sociedade com aquilo que as pessoas entendiam por amamentação e suas consequências, as legislações e pressões tanto nacionais quanto internacionais.

Almeida (1999) discute a relação dos brasileiros com a amamentação desde o período pré-colonial. A relação que as índias brasileiras tinham com a amamentação era alheia ao comportamento das portuguesas recém-chegadas. Ele afirma que as índias amamentavam em livre demanda, integravam o papel de mulher-trabalhadora com o de mãe-lactante e, frequentemente, amamentavam seus filhos até além dos dois anos de idade, ao mesmo tempo que comidas sólidas eram inseridas na alimentação da criança.

Para as mulheres europeias das classes dominantes da época, amamentar não era uma tarefa digna a elas, uma vez que o amor materno não tinha valor social e moral. Assim, com sua vinda ao Brasil, há uma importação da cultura da utilização de amas de leite (tarefa confiada às chamadas saiolas em Portugal) e da cultura do desmame (Almeida, 1999; Pontes, Lira, & Marques, 2005).

No entanto, o uso de escravas como amas de leite para suprir este papel da amamentação logo passou a ser considerado uma ofensa à saúde e foi severamente condenado pelo Estado, por meio dos higienistas familiares (profissão ligada ao Estado). Assim, amamentar passa a ser visto como um ato meramente biológico e relacionado às expectativas do Estado (Almeida, 1999; Souza & Almeida, 2005). Porém, nem todas as mães conseguiam nutrir seus próprios filhos, assim um novo problema se instalou: recorrer às escravas não era mais possível, era necessária uma solução.

Voltando os olhos para países europeus, em meados do século XIX, o Brasil importou algumas práticas relacionadas com a amamentação, especialmente da França e Alemanha, como por exemplo: regulamentação de horários, determinando o intervalo entre mamadas e o tempo de cada uma, amamentação em ambos os seios, prática de decúbito lateral, uso de chupeta, amamentação após o parto, condenação de água com açúcar para o bebê e restrição alimentar para a mãe lactante. A aceitação dessa importação foi tão forte que ainda hoje alguns pontos são observados por profissionais de saúde, mesmo sendo parte deles considerada ultrapassada. Almeida (1999) observa que, com novas regras, surgem novas exceções. «O leite fraco passou a compor a 'regra para exceção'» (Almeida, 1999, p. 36). O leite fraco, portanto, passou a ser a desculpa aceita para a impossibilidade de amamentação. O leite fraco é referido como um leite incapaz de sustentar o bebê, ou a pequena produção de leite por parte da mãe ou ainda o fato de o leite secar (Almeida, 1999; Souza & Almeida, 2005).

Admitindo, portanto, o leite fraco, restou à medicina cuidar o problema das nutrizes que não eram capazes de lactar e assim volta-se a aceitar uma necessidade socialmente justificável: a ama de leite. Sem a escravidão, no entanto, as amas de leite passaram a ser mulheres de classes sociais mais baixas, que buscavam nessa atividade uma forma de ganhos extras. Assim, o Instituto de Proteção e Assistência à Infância foi fundado com objetivo de proceder a rigorosos exames na saúde das nutrizes mercenárias (Almeida, 1999).

No início do século XX surgiu também a importação da mamadeira, leite condensado e farinha láctea (1912), tornando-se uma alternativa para incapacidade de amamentar. Em 1921, se iniciou a fabricação no Brasil dos leites Ninho e Lactogeno. A comunidade médica passou do discurso da condenação ao desmame ao

estímulo do aleitamento artificial, ainda que não renunciando à superioridade do leite materno (Almeida, 1999; Pontes et al., 2005).

As indústrias fazem campanhas promocionais a favor do leite industrializado e os médicos absorvem a ideia de que o leite materno precisa ser complementado, mesmo quando não se diagnosticava hipogalactia (secreção láctea insuficiente por parte da mãe) (Almeida, 1999; Souza & Almeida, 2005).

Dos anos 1940 aos anos 1970, a amamentação artificial passou a ser vista como a resposta para todas as necessidades: permitia que as mães voltassem a trabalhar sem preocupações, garantia uma opção para as mães com o «leite fraco», enquanto campanhas de *marketing* ensinavam a população e a classe médica que os leites em pó atendiam de forma até mais satisfatória do que a amamentação materna em termos nutricionais. O governo passa a distribuir o leite industrializado à população carente (Almeida, 1999; Souza & Almeida, 2005).

No entanto, com a publicação de *The Baby Killer* por Mike Muller (1974), iniciou-se uma polêmica entre as indústrias de leite e diversos grupos sociais. Nesse texto, o autor trouxe à tona o elevado número de morbi-mortalidade infantil entre populações pobres por desnutrição e diarreia, vinculados especialmente ao uso de leite industrializado, resultado do que foi chamado de desmame comerciogênico. Alarmados, UNICEF (*United Nations Children's Fund* – Fundo das Nações Unidas para Infância) e OMS (Organização Mundial de Saúde) se unem em busca de retomar a valorização da amamentação natural (Almeida, 1999).

Estas organizações pressionaram o governo brasileiro a se pronunciar e agir para reduzir a mortalidade infantil, especialmente dos recém-nascidos. A ciência também se manifestou, informando que o uso indiscriminado do leite industrializado estaria facilitando estes óbitos.

O Brasil parecia estar indo na contramão dos achados sobre o leite industrial. Neste período, ainda baseados em estudos anteriores que alegavam serem as fórmulas a resposta mais adequada para nutrição infantil, pediatras de todo país prescreviam o leite em pó, enquanto o governo mantinha programas voltados à distribuição desses leites para a população carente (Almeida, 1999).

Contudo, com a pressão internacional ganhando corpo, o governo brasileiro começou a pensar em programas que pudessem reverter a situação, pois documentos oficiais apontavam que, de fato, o Brasil era um dos países com graves indícios de mortalidade infantil. Resgatando o parecer do INAN (Instituto Nacional de Alimentação e Nutrição) (1991), Almeida indicou a grave situação do país:

> Em documento oficial do Ministério da Saúde no Brasil tem-se que a mortalidade infantil era de 88 a cada 1.000 no Brasil, 124 por 1.000 no Nordeste e que a desnutrição crônica vitimava 48 por cento da população. O desmame no primeiro mês atingia 54 por cento dos

> lactantes na cidade de São Paulo, 80 por cento em Recife. 50 por cento dos pediatras prescreviam mamadeiras e 90 por cento aconselhava uso de água entre as mamadas (Almeida, 1999).

O Ministério da Saúde, então, se reuniu com organizações internacionais de defesa da saúde e da criança para avaliar a questão e definir planos de ação para a resolução do problema. Reverter esse quadro se tornou primordial e a principal estratégia estava em incentivar a amamentação com leite materno. O Ministério da Saúde, por meio do INAN com apoio do Unicef e OPS, realizou dois eventos importantes sobre o tema em 1979. Em Brasília, especialistas discutiram a situação do aleitamento materno no país, enquanto em Curitiba se definiu um plano de metas e estratégias globais de ação em âmbito nacional (Almeida, 1999).

Assim criou-se o PNIAM (Programa Nacional de Incentivo ao Aleitamento Materno). Por meio do Ministério da Saúde, com sua capacidade de legislar, começaram a se instituir portarias que dessem vazão para que se desenvolvessem as novas pressões e metas internacionais que auxiliassem no combate à mortalidade infantil. Almeida (1999) resgatou as palavras de Monson (1991), quando recordava das atividades do governo federal em favor da amamentação:

> O desmame precoce passa a ser preocupação do Estado e figura nas agendas de saúde pública. Assim, em 1981 esta preocupação dá origem a uma política estatal em favor da amamentação, materializada no PNIAM (Almeida, 1999).

Criado em 1981, o PNIAM foi composto pela representação dos seguintes órgãos e instituições: INAN, Unicef, OPS, Divisão Nacional de Saúde Materno Infantil, Divisão Nacional de Educação e Saúde, Legião Brasileira de Assistência (LBA), Instituto Nacional de Assistência Médica e Previdência Social (INAMPS), Fundação Movimento Brasileiro de Alfabetização (MOBRAL), Fundação Projeto Rondon, Secretaria de Relações do Trabalho, Sociedade Brasileira de Nutrição, Sociedade Brasileira de Pediatria e Federação Brasileia de Ginecologia e Obstetrícia.

Essa ação integrada (PNIAM) marcou a década de 1980 como um período de mobilização social em favor da amamentação. A superioridade do leite materno se tornou incontestável no meio científico e foi amplamente divulgada. Os benefícios nutricionais e imunológicos foram o tema central dos instrumentos de *marketing* em favor da amamentação.

Esse processo, altamente social, envolve não apenas as mães e seus bebês; há presença do governo federal, organizações interessadas e de alguma forma envolvidas, como os bancos de leite humano, hospitais e maternidades, a classe médica e da saúde em geral, organizações internacionais como ONU e UNICEF, a indús-

tria alimentícia e até mesmo organizações que influenciam nos regulamentos do trabalho, como os sindicatos.

Assim, ainda que seja possível afirmar que há ação interessada por parte de alguns atores em momentos específicos a fim de influenciar a criação, manutenção e/ou a queda de instituições e acordos compartilhados dos significados em torno da amamentação no Brasil, reconhecemos que sempre há a ação de atores subsidiários que dão suporte e auxiliam no processo de significação.

Então discutiremos a construção social do ambiente legal sob dois eixos: o que está sendo chamado aqui de *political work*, sem perder de vista essa noção tão basal da intersubjetividade manifesta na articulação dos atores no campo, e o eixo da legalidade negociada.

5. Legalidade Negociada

Defendemos que a legalidade é negociada indeterminadamente no tempo e espaço. A interpretação dos instrumentos legais e sua manifestação na prática do campo são perenes. Claro que em certos períodos, de forma mais intensa e com mais desacordos, e em outros, de forma tão discreta que aos olhos menos atentos ela parece dada e totalmente aceita, num processo muito semelhante ao que Berger e Luckmann (2003) chamam de realidade objetivada.

Aqui discutimos o processo pelo qual o corpo legislativo em torno da amamentação foi se alterando e a forma como seus significados e a prática do que está na letra desses documentos legais se manifestaram no campo.

De forma sintética, apresenta-se no Quadro 1 os principais termos legais publicados à partir de 1953 no Brasil e que se referem, de alguma forma, à amamentação.

É possível notar que, nas décadas de 1950, 1960 e 1970, apenas um documento legal figura nessa linha do tempo e antes disso não se tem manifestação por parte do Estado com relação ao aleitamento materno. A Convenção 103/1953 discute a questão da licença de maternidade, especialmente pensada por conta da amamentação. No entanto, o contexto social onde esse instrumento passa a vigorar não vê o aleitamento materno como algo preferível então, ainda que as puérperas passem a gozar do benefício de serem afastadas do trabalho para amamentar, o aleitamento artificial vigorava como preferível, indicado pela classe médica como mais completo em termos nutricionais e indicado pela indústria alimentícia, por meio de campanhas publicitárias e atuando junto aos profissionais de saúde para reforçar essa preferência (Almeida, 1999; Souza & Almeida, 2005). Desta forma, um dos objetivos de tal legislação não encontra a prática social.

TABELA 1. Legislação em torno do tema amamentação.

ANO	LEGISLAÇÃO
1953	▪ Convenção 103 da Organização Internacional do Trabalho – Proteção ao aleitamento materno
1981	▪ Portaria MS 42 e 198 – Instituição do grupo técnico-executivo do PNIAM
1982	▪ Portaria MS 298 – Instituição do grupo de trabalho – PNIAM
1988	▪ Portaria MS 322 – 1.ª legislação federal padroniza BLH ▪ Resolução 05 – Código Internacional de Comercialização de substitutos do leite materno
1990	▪ Código de Defesa do Consumidor – Normas para comercialização de substitutos do leite materno ▪ Portaria 1.390 – Instituição da Comissão Central dos BLH
1992	▪ Resolução 31 – dispõe sobre bicos e mamadeiras ▪ Acordo UNICEF e Organização Mundial da Saúde: cessa fornecimento de leites artificiais em maternidades
1999	▪ Portaria MS 812 – Rede BLH ▪ Portaria MS 50 – Comissão Nacional BLH
2001	▪ Portaria MS 2051 – Comercialização de alimentos para lactentes
2002	▪ Portaria GM/MS 698 – Estrutura de funcionamento dos BLH
2003	▪ Portaria GM/MS – Dia nacional da doação de leite humano
2005	▪ Carta de Brasília
2006	▪ Resolução RDC 171 – funcionamento técnico de um BLH ▪ Portaria GM/MS 2.193 – Estrutura e funcionamento de BLH ▪ Lei 11.265 – Comércio de alimentos para lactentes ▪ Portaria MS 618 – institui o comitê nacional de aleitamento materno
2007	▪ Lei 11474 – altera Lei 11.265 ▪ Portaria GM/MS 2.160 – altera comitê nacional de aleitamento materno
2008	▪ Portaria GM/MS 2.799 – institui a Rede Amamenta Brasil ▪ Lei 11770 – Licença Maternidade
2009	▪ Portaria MS 2.394 – institui a semana mundial da amamentação e a parceria com a sociedade brasileira de pediatria
2010	▪ Portaria ANVISA 193 (conjunta com Ministério da Saúde) – orienta instalação de salas de apoio à amamentação e fiscalização da vigilância sanitária ▪ Carta de Brasília

Nota: PNIAM: Programa Nacional de Incentivo ao Aleitamento Materno; BLH: Banco de Leite Humano; GM: Gabinete do Ministro; MS: Ministério da Saúde; ANVISA: Agência Nacional da Vigilância Sanitária; RDC: Resolução de Diretoria Colegiada.
Fonte: os autores.

No início da década de 1980, por sua vez, foram instituídas duas portarias que tratam basicamente do mesmo assunto: o PNIAM (Programa Nacional de Incentivo ao Aleitamento Materno). Uma resposta às pressões internacionais sobre os perigos do não-aleitamento materno e a necessidade de apresentar movimentações efetivas para reduzir os números da mortalidade infantil. As portarias de 1981 instituem grupos que contam com diferentes profissionais e que são indicados como representantes legítimos para atuarem, propondo atividades que incentivem a amamentação. Em 1982, esse grupo percebe a necessidade de solicitar uma nova portaria, que regularize algo que precisava praticar na forma de um grupo de trabalho. Há uma movimentação de tal forma no campo que favorece que outros grupos e movimentos se fortaleçam e assim, ainda que legalmente o PNIAM tenha vigorado até 1997 — quando é oficialmente extinto, vai se abrindo espaço para novas formas de atuação.

Com as ações do PNIAM e um novo entendimento se formando em torno do aleitamento materno, algumas necessidades ficaram ainda mais latentes: sendo o leite humano essencial para a evolução dos bebês, algum suporte precisava ser oferecido àqueles que não podiam ser amamentados por suas mães ou que por motivos especiais, como por exemplo a pré-maturidade, não pudessem ser amamentados direto no peito. Os olhares, portanto, se voltam para os bancos de leite humano (BLH), sendo necessária a implementação de mais unidades no país (Almeida, 1999).

No entanto a situação dos BLH em operação não era favorável, visto que a forma como se conduzia suas atividades dava margem para riscos à saúde do bebê receptor por meio da contaminação do leite, o que levou o Ministério da Saúde, por meio da coordenação do PNIAM, a mobilizar esforços para mudar esse perfil. Almeida (1999) diz que numa reunião em março de 1984, com os responsáveis dos principais BLH em funcionamento no país e técnicos de áreas afins, concluiu-se que: a estrutura operacional dos BLH em funcionamento oferecia riscos à saúde dos receptores; serviam como desestímulo à prática da amamentação; não dispunham de legislação capaz de normalizar os procedimentos nesta área; era necessário realizar um projeto piloto em busca de alternativas.

> Em julho de 1986, face aos resultados alcançados pelo BLH-IFF na redefinição de seu modelo operacional, foi celebrado o convênio entre o Instituto Nacional de Alimentação e Nutrição – INAN e a FIOCRUZ, para implantação do Centro de Referência Nacional para Bancos de Leite Humano no Instituto Fernandes Figueira. Tal iniciativa teve o objetivo de estabelecer bases para o desenvolvimento de um subprograma vinculado ao PNIAM, para viabilizar o aprimoramento técnico e o fomento aos Bancos de Leite no Brasil. Com esta perspectiva foram construídas as bases que permitiram formu-

> lar a primeira legislação que regulamenta a implantação e funcionamento de Bancos de Leite Humano em todo o território nacional, possibilitando assim a normalização dos procedimentos nessa área. (Almeida & Novak, 2004)

Desde o início dos anos 1980 se observa a movimentação em torno dos bancos humanos de leite, com testes, criação de protocolos, e estruturando a atuação, mas é só em 1986 que aquilo que se aprendeu «na prática» é publicado em forma de legislação, no processo de institucionalização *bottom up.*

A partir de 1986, a operação de um banco de leite humano tem respaldo legal, sendo que há nesse documento regras e protocolos bem definidos, informando o que um banco de leite humano pode ou não fazer. Ora, sabe-se que, desde o começo dos anos 1980 e com ainda mais ênfase a partir de 1984, há atores se movimentando para criar os termos desses protocolos e que estes foram implementados no primeiro banco de leite humano do país. O conteúdo da lei, que depois passa a reger o campo e todos os bancos de leite subsequentes, é um reflexo daquilo que foi pensado e organizado dentro do primeiro banco, no Rio de Janeiro.

Como temos argumentado, esse processo de influência é sempre recursivo e não-estático. Aquilo que agora se tornou estrutura regente, em forma de legislação e perdendo a referência de pessoalidade, passa a ser praticado no campo e, mais do que isso, interpretado. Conforme o número de bancos vai aumentando e estas regras são manifestas em práticas do cotidiano, podemos assistir ao reverso a ocorrer de novo: em 2002 e em 2006 há promulgação de nova legislação sobre como deve ser o funcionamento de um banco de leite humano, com conteúdo remodelado e que reflete melhor aquilo que passou a ser a prática no campo, interpretação da primeira legislação.

A movimentação dos atores no campo continua sendo impactada e impactando o sistema legal em torno da amamentação. O sistema legal vai se transformando, se renovando, conforme essa movimentação ocorre, assim como a própria movimentação é por vezes constrangida e por vezes habilitada conforme a estrutura legal vigente.

Essa tentativa de organizar-se em torno de um objetivo bem estabelecido está presente desde a década de 1990. Até então existia o PNIAM, mas esse programa congregava organizações que, de fato, não tinham muito a colaborar quando o assunto era amamentação, como, por exemplo, MOBRAL e INAMPS (nenhum dos dois é mencionado em momento algum como organizações que efetivamente desempenharam algum papel significativo na difusão dos novos acordos sociais em torno do significado da amamentação). Dessa forma, abria-se espaço para comissões que congregassem organizações que desenvolvessem atividades semelhantes

(Souza, 1996). Assim, os bancos de leite humano passaram a ter uma comissão própria em 1990, a Comissão Central de Banco de Leite Humano, conforme a ementa da Portaria MS 1390/1990:

> [esta portaria] Institui no INAN a comissão central de banco de leite humano — CCBLH, com a finalidade de prestar assessoramento técnico e definir competências para o desempenho de ações de controle e fiscalização dos bancos de leite humano. (Brasil, 1990)

O ambiente legal em torno da amamentação quando se refere ao aleitamento industrializado também vai sofrendo alterações e sendo resignificado ao longo do tempo. Como discutido na contextualização do caso, a indústria alimentícia brasileira produz o leite em pó destinado para bebês desde a década de 1920. Sendo introduzido no país como algo embutido de muita ciência e tecnologia, percorreu as gôndolas dos mercados, prescrições médicas e até os estoques dos bancos de leite humano e maternidades livremente até 1988, quando o Brasil se torna o sétimo país do mundo a ter regras para comercialização de substitutos para o leite materno. Em 1990, o Código de Defesa do Consumidor passa a discutir as normas para comercialização de substitutos do leite materno, em 1992 uma resolução regula a venda e uso de bicos e mamadeiras e novamente em 2001 se discute, por meio de uma portaria, a comercialização de alimentos para lactentes.

Não só mães e bebês sentem o impacto de tais regulamentações. O mercado também é afetado: hoje a indústria alimentícia que comercializa produtos para lactentes é obrigada a conformar-se com vetos muito claros:

> É vedado (...) I – utilizar fotos, desenhos ou outras representações gráficas que não sejam aquelas necessárias para ilustrar métodos de preparação ou uso do produto, exceto o uso de marca ou logomarca desde que essa não utilize imagem de lactente, criança pequena ou outras figuras humanizadas; II – utilizar denominações ou frases com o intuito de sugerir forte semelhança do produto com o leite materno, conforme disposto em regulamento; III – utilizar frases ou expressões que induzam dúvida quanto à capacidade das mães de amamentarem seus filhos; IV – utilizar expressões ou denominações que identifiquem o produto como mais adequado à alimentação infantil, conforme disposto em regulamento; V – utilizar informações que possam induzir o uso dos produtos em virtude de falso conceito de vantagem ou segurança; VI – utilizar frases ou expressões que indiquem as condições de saúde para as quais o produto seja adequado; VII – promover os produtos da empresa fabricante ou de outros estabelecimentos. (Brasil, 2006)

Não temos dados para discutir como essas regras são interpretadas e praticadas no mercado para lactentes, mas há condições de afirmar que essas regras foram

institucionalizadas por meio de forte trabalho de atores interessados e defensores do aleitamento materno. Nesse sentido destacamos novamente o processo *bottom up* e organizamos essa discussão na seção seguinte, chamando-a de *political work*.

5.1 *Political work*

Nesta seção discute-se os atores e sua ação interessada no sentido de criar, manter e derrubar instituições do chamado pilar regulativo (Scott, 2008). Como estamos tratando especificamente deste pilar, optamos pelo uso da expressão *political work* e não *institutional work*, dado que são arranjos onde existe articulação política, no sentido da negociação persuasiva entre os atores.

Falando sobre as vitórias que os atores pró-amamentação foram galgando, Monson diz:

> a partir daí [meados dos anos 1980] o que se conseguiu? eu acho que... as grandes causas, que dependiam de leis, que dependiam de brigas maiores, foi possível conquistar (...) O Brasil passa a ser o primeiro país que tem normas para implantação e funcionamento de banco de leite e o Brasil e o sétimo a ter normas para comercialização para alimentos de lactentes. Agora torno a repetir: nada disso foi um esforço único. Sempre nós tivemos companheiros muito eficientes, no momento certo, para conseguir esse tipo de ganho. (Monson, 1991)

Destacamos aqui duas questões importantes: primeiro, a consciência dentre os atores interessados de que é necessária uma articulação política e integradora dos níveis micro e macro para regulamentar, restringir e habilitar a prática no campo. Segundo, a necessidade de diferentes atores, com habilidades sociais (Fligstein & McAdam, 2012) específicas para se realizar o *political work*.

Sobre essa percepção da necessidade de integração, o entrevistado 2 diz que em determinado momento entenderam que este processo de padronização, de criação de protocolos, seria necessário se quisessem que a ideia dos bancos de leite humano fosse adotada naquele campo:

> à medida que a gente começou a trabalhar, começou a surgir a necessidade de construir protocolo, necessidade de estar construindo normas técnicas para cada pedacinho desta história, porque se eu quisesse colocar isso, se eu quisesse replicar isso, teria que ser por essa via, né? (Entrevistado 2)

A movimentação dos atores no campo, tentando articular relações, influenciar o conteúdo legal e buscando investimento federal, continua compondo esse processo que estamos chamando de *political work*. Maia et al. (2006) e ANVISA (2007) recordam que no I Encontro Nacional dos Bancos de Leite Humano de 1992

os participantes cogitavam criar um sistema integrado de gestão, nos moldes do que é hoje a Rede Brasileira de Bancos de Leite Humano. No II Encontro Nacional dos Bancos de Leite Humano de 1995, essa ideia continua em voga, mas ela fica adormecida por conta da não-conquista de investimento por meio do Ministério da Saúde. Em 1998, contudo, os encontros passaram a ser congressos e neles o anseio pela criação da Rede BLH se concretizou: no ano seguinte o Ministério da Saúde destinou verba para sua criação. Maia e colegas (2004) ainda recordam que, um ano antes de a legislação ser criada, o IFF já se mobilizava para a criação da rede:

> Em 1998, a Fundação Oswaldo Cruz, por intermédio do Banco de Leite Humano do Instituto Fernandes Figueira, passou a coordenar a elaboração e a implantação do projeto Rede Nacional de Bancos de Leite Humano, cujo objetivo é nortear a formulação, a implementação e o acompanhamento da política estatal no âmbito de atuação dos bancos de leite humano em todo o território brasileiro. Em articulação com o Ministério da Saúde, o projeto apontava para a ampliação gradual da rede tendo como objetivo a atuação interativa e compartilhada de todas as unidades participantes. A partir de então é possível observar importante crescimento qualitativo/quantitativo dos BLHs associado a uma atuação cada vez mais diferenciada. A rede começou a ser criada com sucesso. (MAIA et al., 2004, p.298)

Em 1999, outra portaria aprovou a aplicação de recursos para ampliação dos trabalhos dos bancos de leite, conforme segue:

> Aprova plano de trabalho destinando recursos do orçamento do ministério da saúde (...) com a finalidade de apoiar as ações de saúde, objetivando a implantação e difusão do processo de normatização em banco de leite humano no país. (Brasil, 1999)

Desta forma, a promulgação dessas portarias, uma criando a Rede BLH e outra destinando recursos orçamentários para implantação de bancos de leite humano por todo o país, têm suas bases, mais uma vez, na capacidade de atores interessados em criarem *frames* e mobilizarem recursos para garantir cooperação (Fligstein & McAdam, 2012).

Outro aspecto importante a ser discutido é a centralidade dos atores conforme o processo vai se desdobrando. Determinados atores são chave (Edelman et al., 1999)em alguns momentos, justamente por suas habilidades sociais e capacidade de movimentação de recursos (Fligstein & McAdam, 2012). O impacto desses atores se faz presente de forma bastante efetiva num momento específico, enquanto num momento seguinte sua atuação pode perder centralidade, dando espaço para atuação de outro(s) ator(es)-chave. Em 1992, por exemplo, um acordo do governo

com Unicef e OMS cessou o fornecimento de substitutos do leite materno em hospitais e maternidades (Ministério da Saúde, 2011). Aqui, o *political work* tem centralidade em organizações internacionais, que pressionam os países a entregarem resultados mais adequados de desenvolvimento humano e propõem medidas que impactem de alguma forma para o alcance dessas métricas.

As décadas seguintes continuaram a ter legislação pertinente à amamentação sendo aprovadas. A Rede Brasileira de Bancos de Leite Humano é essencial na influência do conteúdo destas leis, portarias e resoluções, passando a atuar como um ator central.

A Rede não opera por si só, mas atua congregando as ideias e necessidades de todos os bancos de leite que vão surgindo. As legislações que seguem sobre estrutura e funcionamento técnico dos BLH são baseadas nas experiências dos bancos e moldadas de acordo com as necessidades que surgem. Essas portarias são: Portaria GM/MS 698/2002; Resolução RDC 171/2006; Portaria GM/MS 2.193/2006.

Almeida (1999) demonstra a tendência de o IFF/FioCruz — o primeiro banco de leite humano do país e a unidade definida como o modelo para os demais bancos, tornar-se uma espécie de receptor e administrador de situações a respeito de aleitamento materno e procedimentos em BLH:

> O BLH IFF passou a assumir o papel de polo de produção, absorção e difusão do conhecimento na sua área de atuação, mediante a geração de ações, metodologias, tecnologias e soluções alternativas, compatíveis com os diferentes tipos de necessidade das unidades que prestam este tipo de atendimento. (Almeida, 1999)

Nessa análise, pode-se observar então o que Edelman et al. (1999) dizem sobre o processo social na criação de leis, ou seja: a pressão de atores-chave na formulação de legislações específicas. Nesse caso, em especial, com conteúdo totalmente influenciado por esses atores.

De forma sintética, apresentamos o Quadro 2, que demonstra um pouco da história da amamentação no Brasil. Em um esforço analítico, organizamos os períodos em eras que identificam a tônica de cada momento na história, na sequência apresentamos os principais atores-chave em cada era dessas — atores que contribuíram decisivamente na construção dessas tônicas em torno do aleitamento materno — e, finalmente, um resumo da lógica vigente em cada era.

QUADRO 2. Eras: a história da amamentação no Brasil

ERAS	ATORES CENTRAIS	LÓGICA DE CAMPO
Era do Aleitamento Artificial – 1940 até meados de 1970	Indústrias alimentícias de substitutos do leite materno, Governo, ciência/medicina	O leite artificial como resposta para as necessidades nutricionais bem como para as mães que precisavam trabalhar
Era Pró-amamentação e da Propagação dos BLH – De 1980 a 1997	Ciência/medicina, ONU, Unicef, PNIAM, Governo, INAN, OPS, IFF.	Esforço para que o aleitamento natural volte a ser visto como essencial, leis criam programas de incentivo à amamentação e de regras restritivas para a venda de substitutos ao leite materno
Era da Sedimentação – De 1997 a 2002	Governo, IFF, RedeBLH, Centros de Referência Nacional e Estaduais	Amamentação natural volta a ser bem aceita na sociedade e junto aos profissionais de saúde, presença de bancos de leite humano em todo o país e preocupação de produção científica relacionada à amamentação
Era da Internacionalização e Regulamentação – De 2002 até atualmente	Governo, IFF, RedeBLH, Centros de Referência Nacional e Estaduais	Era marcada pela quantidade de legislações que auxiliam a moldar o campo. As pressões contextuais (coercitiva, normativa, mimética) regem a estrutura.

6. Conclusões e Recomendações

Esse estudo buscou trazer para a pauta da discussão o entendimento de que o ambiente legal é uma construção social. Nesse sentido, os processos de significação, de criação de esquemas interpretativos são fatores que explicam a manutenção, mudança e queda de sistemas vigentes.

Apoiados na noção de dualidade entre estrutura e ação (Giddens, 2003), estamos defendendo que há no ambiente legal um processo de negociação e interpretação dos significados e que, por vezes, esse processo tem influência de atores sociais interessados. Assim, discutimos a legalidade negociada, onde se considera que não basta que uma lei esteja promulgada e em vigor legal: os atores que são afetados por essa legislação não são totalmente passivos a ela e por meio da prática social interpretam, dão novos contornos e transformam — por vezes de forma abrupta e por vezes incrementalmente — aquilo que a letra da lei prescreve.

Nesse processo interpretativo pode haver atores socialmente interessados, trabalhando de forma intencional para significar essas leis, tentando fazer com que outros atores no campo também adotem essa interpretação e/ou se articulando no sentido de criar, manter ou derrubar instituições legais, o que estamos chamando aqui de *political work*.

É preciso notar, no entanto, que não se adota aqui uma visão voluntarista de atores sociais. Ainda que se admita que existe interesse, que existe essa movimentação articulada e socialmente interessada, defende-se também que (i) há uma estrutura, que não só constrange a ação, mas também a habilita — e nesse sentido, ela não está desvinculada de acordos sociais vigentes e (ii) a ação interessada não necessariamente encontrará um campo fértil e não necessariamente será entendida e adotada da forma que se esperava. Assim, os demais atores que compõem o campo podem não se importar com o interesse destes *political workers* e ainda assim adotar e praticar esses *frames*, do mesmo modo que podem praticar da forma que lhes convém melhor, pois estamos admitindo que os atores não são socialmente dopados.

Seguindo essa lógica de pensamento, apresentamos o processo pelo qual o significado da amamentação no Brasil se transformou ao longo dos anos. Novas leis foram criadas, impactando estruturalmente o campo e sendo interpretadas pelos atores sociais. No entanto, essas leis não surgem num vácuo social: há um contexto e uma negociação que lhes dá possibilidade de serem criadas e promulgadas.

Estamos negando que elas passam a ter vigor social a partir do momento que elas entram em vigor legal; é verdade que elas regem e coagem o campo para o qual foram criadas, mas a sua aceitação se manifesta na prática social e esta não é uma prática socialmente dopada: os atores interpretam e negoceiam o significado dessas novas instituições.

E nesse processo dual entre estrutura e ação, assistimos a atores atuando como *political workers*, procurando influenciar a manutenção, queda e criação de instrumentos legais que dessem conta e influenciassem diretamente a forma como se entende o aleitamento materno no Brasil, ao mesmo tempo que identificamos o processo pelo qual os atores foram interpretando e auxiliando, por meio da prática, a mudança no campo.

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The Impact of the Performance of Lawyers on Judicial Proceedings: A Literature Review

O Impacto da Atuação dos Advogados em Processos Judiciais: Uma Revisão da Literatura *(PT: 247-264)*

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DOI: 10.33167/2184-0644.CPP2019.VVN1/pp.231-245

ABSTRACT
This article analyzed 32 empirical studies on the impact of the lawyer's performance on the outcome of the judicial decision. The findings were: the concentration of research in the United States (81.25 percent), civil jurisdiction (62.5 percent), the year of publication in general in the 2010 decade (56.25 percent) and the predominant use of the observational method (75 percent). The great methodological difficulty of these researches is to identify with precision if the impact in the judicial decision stems from the lawyer's performance or if it is only a consequence of the characteristics of the processes that are being judged, which can be achieved through experiments with research design with distribution cases to balance hidden variables.

Keywords: justice administration, judicial decision, attorney, performance, outcome

RESUMO
Este artigo analisou 32 estudos empíricos sobre o impacto da atuação do advogado no resultado da decisão judicial. Foram identificados: concentração de pesquisas nos Estados

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Unidos (81,25 por cento), na jurisdição cível (62,5 por cento), com ano de publicação em geral na década de 2010 (56,25 por cento) e utilização predominante do método observacional (75 por cento). A grande dificuldade metodológica dessas pesquisas é identificar com precisão se o impacto na decisão judicial decorre da atuação do advogado ou se é apenas consequência das características dos processos que estão sendo julgados, o que pode ser alcançado por meio de experimentos com desenho de pesquisa com distribuição aleatória de casos para balancear variáveis ocultas.

Palavras-chave: administração da justiça, decisão judicial, advogados, desempenho, resultados

1. Introduction

This literature review sets out to analyze studies of the impact of the performance of lawyers on the administration of justice, through a review of the literature on trial outcomes.

In Brazil, the Federal Constitution of 1988 recognizes that "lawyers are indispensable to the administration of justice" (Article 133) and the law establishing the Legal Practice Statues expressly states that "by arguing their client's position, lawyers contribute to forming the conviction of judges" (Law 8.906/41, Article 2.2).

In ideal circumstances, judicial proceedings should be judged only on their merit, observing the evidence produced by the parties and the law applicable to the case. However, judicial disputes do not arise in a vacuum and isolated from the social context to which they belong. There are several external factors which can influence a judicial decision, such as the socio-economic advantages of the parties, the region where the case is being judged, preconceptions on the part of judges or juries and the quality of the lawyers involved in the case (Eisenberg, 1988).

We should stress the importance of not ignoring the protagonism of other actors in the judicial process: over the decades, empirical research has focused on differences in the outcomes of criminal cases depending on the role played by judges, and more recent studies have also addressed the influence of prosecutors in trials (Kim, Spohn and Hedberg, 2015).

The influence of the lawyer on the judicial decision has been studied since at least 1974, starting with Marc Galanter who looked at the power that better off parties have in obtaining more favorable decisions that parties with less resources, in which he explains that the advantage enjoyed by more powerful parties was precisely their ability to contract better and more specialized lawyers (1974).

The lawyer functions as a source of information for the court (McGuire, 1995), in that the arguments that he or she presents to the judge end up serving as a source for the final understanding on the case. However, that influence is not uniform in all situations. There are circumstances where the attorney may have a greater or lesser influence on the outcome of the dispute.

2. Comparative Studies on Possible Factors that Influence Judicial Decisions

This chapter reviews the literature on the possible factors that influence judicial decisions, which range from the degree of access by the judge to sources of neutral information, to the level of issue salience and also comparison of outcomes with or without the participation of lawyers.

Schwab and Eisenberg (1988) in compensation claims, Lederman e Hrung (2006) in tax cases and Norberg and Compo (2007) in judicial recovery cases concluded that representation meant better outcomes for clients.

For their part, Greiner and Pattanayak (2012) investigated whether the provision of legal aid influenced the outcome of applications for unemployment benefit. This service was provided free of charge by Harvard University law students who helped unemployed people in their administrative appeals to a government agency. It should be observed that the subject matter of this research was the offer of aid and not the actual use of the aid. The methodology used was fairly robust, insofar as the offer of aid was made randomly, from those applying for unemployment benefit.

The findings of this research were rather intriguing because there was no difference between the two groups (those who received the offer of aid and those who did not). The authors then decided to conduct an extensive, in-depth review of the literature on this topic. With the exception of a few studies, the conclusions was always that the assistance of a lawyer brought more advantageous outcomes than those achieved without that assistance.

However, after reviewing the methodological aspects of the research undertaken, Greiner and Pattanayak (2012) asserted emphatically that nearly all the previous studies into the effect of judicial assistance in civil claims presented findings which were not reliable (although they might be correct), insofar as they had not used randomization to establish a relationship of cause and effect, an issue that will be addressed specifically in the chapter on research methodology.

One of the studies that used randomization was that of Seron & Frankel (2001), which involved a treatment group of tenants eligible for legal aid which was guided to receiving legal advice under the Pro Bono Project and a control group that was not. The tenants who received the lawyers' services had much better outcomes than those who did not: eviction warrants were sent in 24.1 percent of cases where the lawyers acted, as against in 43.5 percent where they did not; and 31.8 percent of decisions were unfavorable, as compared to 52.0 percent for those without legal assistance.

TABLE 1. Comparative studies on possible factors that influence judicial decisions

TOPIC	TYPES OF PROCEEDINGS	CONCLUSIONS	REFERENCE	RESEARCH DESIGN
Access by judge to neutral information	Judicial decisions of district courts and federal circuit courts on product liability from 1995 to 2006 in the United States	The skills of a lawyer are fairly significant in district courts, where the judge does not have access to much neutral information, but not in the federal circuit courts, where he or she has access to more neutral information.	Hinkle (2007)	Observational
Issue salience	Oral arguments from 1977 to 1982 in the United States Supreme Court	The lawyers' experience has more influence on decisions on less salient issues	McAtee and McGuire (2007)	Observational
Presence or absence of lawyers	Civil compensation claims against public agents in 1980 and 1981 in the United States	Assistance from lawyers meant higher success rates, higher compensation and a higher rate of settlements.	Schwab and Eisenberg (1988)	Observational
	Decisions of the United States Tax Court from 1990 to 1994	Parties assisted by lawyers reduced payments by 17.9 percent in relation to those not assisted. There was no significant difference for settlements.	Lederman and Hrung (2006)	Observational
	Judicial recovery claims between 2000 and 2002 in the United States	Parties without lawyers had their claims rejected more often that those represented by a lawyer.	Norberg and Compo (2007)	Observational
	Administrative appeals for unemployment benefit from 2008 to 2010 in the United States	There was no significant difference between those who received an offer of free legal aid and those who did not.	Greiner and Pattanayak (2012)	Randomized
	Eviction cases due to non-payment at Manhattan Housing Court from 1993 to 1994 in the United States	The group of tenants that received legal aid had better outcomes in judicial decisions, sending of eviction warrants, non-appearance of tenant in court and rent deductions or repairs to building.	Seron and Frankel (2001)	Randomized
	Home eviction cases in 2010 in the United States	There were better results for the group that received full legal aid in comparison with the group that received limited legal aid.	Greiner, Pattanayak and Hennessy, 2013	Randomized
	Several studies of different matters in the United States	In the juvenile courts, there was no evidence of a benefit from representation by a lawyer.	Poppe and Rachlinski (2016)	Literature review
Court-appointed attorneys and public defenders	Criminal cases from 1997 to 2001 in the United States	Defendants represented by federal public defenders received less convictions and, when convicted, their sentences were shorter than defendants represented by court-appointed attorneys.	Iyengar (2007)	Randomized
	Criminal proceedings in the United States	Defendants represented by state public defenders had 19 percent less convictions, 62 percent less death sentences and sentences with 24 percent less time in jail than defendant represented by attorneys by the court.	Anderson and Heaton (2012)	Randomized
	Criminal cases from 1990 to 2004 in Ohio, United States	Public defenders obtain better outcomes than court-appointed attorneys.	Roach (2014)	Observational
	Criminal vases from 2004 to 2007 in Taiwan	Defendants represented by public defenders received more convictions but their sentences were shorter than defendants represented by court-appointed attorneys.	Huang, Chen and Lin (2010)	Randomized
	Criminal cases in 2000 and 2001 in the United States	The outcomes obtained by public defenders are very similar to those obtained by court-appointed attorneys.	Shinall (2010)	Randomized

TABLE 1. *(cont.)*

TOPIC	TYPES OF PROCEEDINGS	CONCLUSIONS	REFERENCE	RESEARCH DESIGN
Court-appointed attorneys, public defenders and hired counsel	Criminal cases from 2004 to 2006 in the United States	Court-appointed attorneys performed worse than the others on acquittals, non-custodial sentences and average duration of custodial sentences.	Cohen (2014)	Observational
	Criminal cases in 2012 and 2013 in Iowa, United States	The best outcomes are from hired counsel, followed by public defenders and court-appointed attorneys.	Buller (2015)	Observational
	Criminal cases from 1990 to 2006 in four Florida counties, United States	Defendants represented by public defenders are more likely to be detained awaiting trial and received more convictions than defendants with hired counsel.	Williams (2013)	Observational
	Criminal cases in 2010 in Texas, United States	Court-appointed attorneys had worse results than hired counsel.	Agan, Freedman and Owens (2016)	Observational
	Criminal cases from 2000 to 2015 in Ohio, United States	Public defenders obtain 11 percent less convictions for defendants in comparison with court-appointed attorneys.	Linzmeier (2017)	Observational
Political lawyers and private lawyers	Cases concerning demolition of Palestinians' houses from 1990 to 1995 at the Israel Supreme Court of Justice	The judicial outcomes secured by political lawyers were significant superior to those by private lawyers, which was explained as resulting mainly from the ability of political lawyers to reach better settlements for their clients, avoiding demolition of their houses.	Dotan (1999)	Observational
Hired counsel and law faculty clinics	Administrative appeals for unemployment insurance from 2011 to 2013 in the United States	There was no statistically significant difference between the outcomes obtained by employees represented by hired counsel and those by law faculty clinics.	Shanahan, Selbin, Mark and Carpenter (2018)	Observational
Lawyers rated by Chambers	Tax cases from 1996 to 2000 in the United Kingdom	Better rated lawyers obtained better outcomes, but only in cases which are substantially more difficult to win.	Hanretty (2016)	Observational
Lawyers from a single team	Civil judicial decisions in 2012 in Brazilian Federal Justice	A statistically significant different was found in the outcomes obtained by lawyers from a single team acting in judicial cases distributed randomly.	Vasconcelos (2014)	Randomized

In another study, Greiner, Pattanayak and Hennessy (2013) compared the judicial outcomes of two groups: one group received the offer of full legal aid and the other received an offer of limited legal aid. All the participants in both groups faced claims for eviction from their homes. The first group had access to the work traditionally done by a lawyer, whilst the second group had access to limited services (asking questions in offices, asking for help in filling in forms and on judicial procedures). The aid program researched was unable to offer full assistance to all those seeking it. The choice of what type of assistance was offered was made randomly.

The conclusion was that the offer of full assistance had substantially better impacts than the limited assistance in retaining possession of their homes (two thirds and one third, respectively) and in the time for which they received rent support (9.4 months and 1.9 months).

3. Comparative Studies of Factors that Influence the Performance of Lawyers

3.1 Lawyer experience or specialization factor

The significant differences in performance shown by individuals with more experience were to be attributed to the development of a certain *modus operandi* in discharging their tasks and responsibilities, and between those considered more as novices in the organization (Coelho Junior, 2009). Russel (2001) found that length of service in the position presented a positive and significant relationships with performance in work.

In principle, the longer people had been in the organization, the more they had learned and, consequently, the better their performance. Studies show that performance improves initially with the passage of time in a specific job and then stabilizes (Sonnentag and Frese, 2002).

For Hanretty (2013), the experience of working on ten previous cases makes a lawyer 24 percent more likely to win a case in comparison with one how has only had one case before the United Kingdom House of Lords (effectively the Supreme Court, connected to the British Parliament).

According to Priest and Klein (1984), if a company envisages the possibility of losing a case in which it is accused of poor services, the tendency is to seek a settlement, avoiding damage to its image or case law that can be invoked in other proceedings. This means that the cases that go to trial are those where the likelihood of losing is relatively low.

However, a study by Goodman-Delahunty et al. (2010) with lawyers in criminal proceedings identified that experience measured in years of work did not lead to better prognoses of the minimum outcome to be obtained in cases in which they acted. In general, attorneys were over-confident in their performance, making predictions that were more favorable than the outcomes actually obtained.

For McGuire (1995) the better outcomes of more experienced lawyers are explained by their added credibility in the eyes of the judiciary, in comparison to novices, due to their track record of acting before the American Supreme Court. Judges would tend to have more trust in those lawyers already known to them and these, in turn, would seek to foster this credibility, acting with propriety, in order to retain the trust they had acquired.

For Johnson, Wahlbeck and Spriggs (2006) more experienced lawyers exert a positive and statistically significant influence on the decisions of the United States Supreme Court because they have better developed their skill in making oral arguments. Using this same methodology, McAtee and McGuire (2007) again con-

firmed the impact of the lawyer's experience on decisions reached by the American Supreme Court.

Wright and Peeples (2013) found that more experienced lawyers could learn from the past and become more effective over time; on the other hand, after many years in the job, lawyers would devote less energy to each case, be less interested in keeping abreast of case law or be less disposed to try to change the understanding of local judges concerning given matters.

Lawyers can also grow complacent and suffer from a lack of stimulus when their case work is excessively repetitive, where a large number of cases dealing with the same issues can lead to repetitive practices and set routines, without paying attention to the particularities of each case (Norberg and Compo, 2007).

Abrams and Yoon (2007) concluded that there are significant differences even between lawyers who work on the same types of criminal proceedings, within the same legal unit, and defendants represented by more experienced defenders are less likely to be convicted and, if held in custody, will spend less time in jail. Vasconcelos (2014) identified differences in the outcomes obtained by lawyers in the same team who receive civil cases distributed randomly, but found no evidence that experience in the career is related to performance.

3.2 University attended and academic prizes won by lawyers

Some studies have sought to verify the possible existence of a relationship between the university attended and the outcomes achieved by lawyers. Iyengar (2007) detected differences in outcomes between lawyers in that lawyers who studied at more prestigious universities secured sentences 8 months shorter for their clients than others.

For Abrams and Yoon (2007) the university attended leads to better results, but they were not statistically significant. Hinkle (2007) opted to seek to identify a possible relationship between the performance of a lawyer at university and his or her performance as a lawyer, but found no relationship between the academic performance metrics and outcomes obtained as lawyers.

3.3 Sex, race and physical attractiveness of lawyer

Taken together, the research suggests that the lawyer's gender generally has no influence on the judicial decision. Szmer, Sarver and Kaheny (2010) identified no differences in trial outcomes, with men and women presenting the same performance.

Abrams and Yoon (2007) extracted from the data the conclusion that men and women achieved the same outcomes both in terms of conviction rates and in

terms of the duration of custodial sentences. At the same time, it was found that race had an influence on the conviction rate and the time that defendants would spend in jail: Hispanic lawyers did better than those of other racial origins.

A possible cause suggested was the effect of the labor market on Hispanic lawyers' choice of place of work, as they in general are paid less that white or Asian lawyers, so that the salary offered for a public defender in Clark district, Nevada, is more attractive to Hispanics than other groups.

Biddle and Hamermesh (1998) concluded that physical attractiveness makes a positive difference to the earnings of students who went on to work in both the private sector and the public sector, although the difference in the private sector is greater. The possible explanations were that people like to spend more time and feel better alongside more attractive people, and that they may think that good-looking employees could achieve better decisions because of more favorable attitudes on the part of judges or jurors.

3.4 Case load and pay structure

It is intuitive that a lawyer with a larger case load will have less time to spend on each case, and that this may prejudice the outcome of the cases in which he or she acts. It is also intuitive that low pay will lead to a lower quality of work.

Iyengar (2007) detected that case load has a negative effect on the outcomes of public defenders (it increases the likelihood of conviction by 6 percentage points and increase sentence duration by 3 months), but not for court-appointed attorneys (no increase in conviction rate and reduction of 6.75 months in sentence duration).

The explanation offered is that by acting in more cases, lawyers may have more contact and interaction with the criminal justice system, gain more experience of jury trials and develop greater institutional knowledge of the court, which appears to have more influence on court-appointed attorneys than on public defenders.

The desire to gain more experience of jury trials is precisely the cause investigated by Boylan and Long (2005) to explain the higher turnover in Assistant U.S. Attorneys in districts where private sector salaries are higher. The authors noted that the turnover in these professionals was higher in some districts than in others and identified that this occurred precisely in places where the private sector paid higher salaries. In these areas the dynamic can be explained as follows: lawyers would seek public employment as Assistant U.S. Attorneys as a way of gaining experience in jury trials with a view to be hired further down the road by one of the larger law firms in the area, for a higher salary.

This apparently inoffensive phenomenon actually causes a distortion in their work. Boylan and Long (2005) found that in areas where turnover was high, the

settlement rate is significantly lower. The Assistant U.S. Attorneys appeared to avoid reaching settlements and opted instead for a jury trial not just because this was a better strategy for the prosecution, but in order to gain more experience in jury trials, a phenomenon which was not observed in districts where private sector pay is lower. According to the research, when the salary differential between the public and private sectors rises from US$ 2,900 to US$ 12,000 the number of cases that go to a jury trial increases by 25 percent.

Research by Anderson e Heaton (2012) concluded that the pay structure for court-appointed defense attorneys in Philadelphia actually created perverse incentives to the detriment of the defendant.

Iyengar (2007) observed the same problem in his research, and was able to measure how far this fact affects outcomes in the justice system. The study identified that the hourly rate paid at the jury trial phase was higher than that for time spent prior to the trial, which had the effect of encouraging defense attorneys to put their cases to a jury, to the apparent detriment of the defendants.

3.5 Oral arguments by attorney

Oral arguments are one of the means used by lawyers to win over judges in the cases in which they act. Haire, Lindquist and Hartley (1999) state that, alongside legal briefs, oral arguments are important to the decisions taken by judges.

The judges Myron H. Bright and Richard S. Arnold (1984) have described how the oral arguments of attorneys influence their decisions. When the case load increased, the time devoted to each case was drastically reduced, meaning that oral arguments became highly important as a source of information for decision-making, especially in cases where an element of doubt remains as to which side should prevail.

Johnson, Wahlbeck and Spriggs (2006) confirmed that these is a positive and statistically significant correlation between the ratings assigned to lawyers by Justice Blackmun and the outcomes of judicial decisions.

TABLE 2. Comparative studies of factors that influence the performance of lawyers.

TOPIC	TYPES OF JUDICIAL PROCEEDINGS	CONCLUSIONS	REFERENCE	RESEARCH DESIGN
Lawyer's experience as time in job	Decisions on serious felonies in North Carolina, United States, in 2006	The experience of defense lawyers in criminal proceedings has a positive impact on the outcome of the proceedings in the first 8 years of their career, but then declines over the years.	Wright and Peeples (2013)	Observational
	Civil judicial decisions in 2012 in Brazilian Federal Justice	No statistical correlation was found between the lawyer's experience, measured in year in the institution, and the outcomes obtained.	Vasconcelos (2014)	Randomized
Experience as specialization in area	Judicial recovery of fines by government lawyers	The group of lawyers specialized in the field is able to recover greater amounts than the other group.	Ringquist and Emmert (1999)	Observational
Experience of public defender	Criminal cases from 1990 to 2005 in the United States	Defendants with more experienced defenders are less likely to be convicted and, if taken into custody, will spend less time in jail.	Abrams and Yoon (2007)	Observational
	Criminal cases from 1997 to 2001 in the United States		Iyengar (2007)	Randomized
Experience as previous work in court	Appeals to the House of Lords between 1969 and 2003 in the United Kingdom	An appellant with a lawyer who has already acted in ten cases is 24 percent more likely to succeed in comparison with a lawyer who has acted in only one case.	Hanretty (2013)	Observational
Experience and outcome	Court of Appeal Decisions from 1983 to 1992 in the United States	Experiences has only a moderate influence on the outcome of judicial decision-making in civil liability claims judged by the U.S. federal courts of appeal.	Haire, Lindquist and Hartley (1999)	Observational
	Decisions of the United States Tax Court from 1990 to 1994	Experience is identified as a cause for the better outcomes obtained by certain lawyers.	Lederman and Hrung (2006)	Observational
	Outcomes of U.S. Attorneys from 1969 to 1999 in the United States	Prosecutors with more experience were more likely to obtain a conviction and custodial sentence.	Boylan and Long (2005)	Observational
	Decisions of the U.S. Supreme Court from 1977 to 1982	More experienced lawyers enjoyed greater success at the United States Supreme Court	McGuire (1995)	Observational
	Decisions of the U.S. Supreme Court from 1970 to 1994		Johnson, Wahlbeck and Spriggs (2006)	Observational
	Oral arguments from 1977 to 1982 in the United States Supreme Court		McAtee and McGuire (2007)	Observational
	Judicial decisions of district courts and federal circuit courts on product liability from 1995 to 2006 in the United States	The lawyer's experience influences decisions taken by district courts in civil liability claims, but does not influence the U.S. federal courts of appeal.	Hinkle (2007)	Observational
	Judicial recovery claims between 2000 and 2002 in the United States	The lawyer's specialization has a negative effect on the outcome of judicial claims.	Norberg and Compo (2007)	Observational
	Lawyers in 44 U.S. states	No relation was found between experience and assertiveness in the outcomes of judicial cases.	Goodman-Delahunty et al. (2010)	Observational
	Criminal cases from 1990 to 2005 in the United States	Defendants with more experienced lawyers are less likely to be convicted and, if convicted, are subject to shorter sentences.	Abrams and Yoon (2007)	Observational

TABLE 2. *(cont.)*

TOPIC	TYPES OF JUDICIAL PROCEEDINGS	CONCLUSIONS	REFERENCE	RESEARCH DESIGN
University attended by lawyer	Criminal cases from 1997 to 2001 in the United States	Lawyers who studied at more prestigious universities secured shorter sentences for their clients in criminal cases.	Iyengar (2007)	Randomized
	Decisions of the U.S. Supreme Court from 1970 to 1994		Johnson, Wahlbeck and Spriggs (2006)	Observational
	Criminal cases from 1990 to 2005 in the United States	The classification of the university attended by the lawyer did not have a significant influence on the outcomes of criminal cases,	Abrams and Yoon (2007)	Observational
	Judicial decisions of district courts and federal circuit courts on product liability from 1995 to 2006 in the United States	The fact of graduating with honor or contributing to faculty law journal has no impact on outcomes achieved by the lawyer.	Hinkle (2007)	Observational
Sex of lawyer	Decisions of the Canadian Supreme Court from 1988 to 2000	The gender of the persons making oral arguments does not affect the decision of the Canadian Supreme Court, except in cases related to women's issues, where female lawyers have an advantage.	Szmer, Sarver and Kaheny (2010)	Observational
	Lawyers in 44 U.S. states	Women make more accurate predictions of case outcomes than men.	Goodman-Delahunty et al. (2010)	Observational
Race of lawyer	Criminal cases from 1990 to 2005 in the United States	Hispanic public defenders secure shorter sentences for defendants than white, black and Asian defenders	Abrams and Yoon (2007)	Observational
Physical attractiveness of lawyer	Assessment of the attractiveness of 4,000 trained lawyers	Physical attractiveness is associated in better pay for lawyers in both the private and public sectors.	Biddle and Hamermesh (1998)	Observational
Case load	Criminal cases from 1997 to 2001 in the United States	A larger case load has a negative effect on the work of public defenders, but has a positive effect on the outcomes of court-appointed attorneys in criminal cases.	Iyengar (2007)	Randomized
	Decisions on serious felonies in North Carolina, United States, in 2006	No relationship was detected between the size of case load and outcome of decisions in criminal cases.	Wright and Peeples (2013)	Observational
Lawyers' pay	Outcomes of U.S. Attorneys from 1969 to 1999 in the United States	Higher pay in the private sector results in higher turnover in public attorneys and a lower number of settlements in criminal proceedings.	Boylan and Long (2005)	Observational
	Criminal proceedings in the United States	The remuneration paid per case causes private court-appointed attorneys to accept more criminal cases than would be reasonable for providing a good defense,	Anderson and Heaton (2012)	Randomized
	Criminal proceedings in the United States	Higher rates of pay for appearances at jury trials than in the preceding procedural phase discourages settlements, which has the result of prejudicing the defendant.	Anderson and Heaton (2012)	Randomized
	Criminal cases from 1997 to 2001 in the United States		Iyengar (2007)	Randomized
Oral arguments presented by lawyer	Decisions of the U.S. Supreme Court from 1970 to 1994	Positively assessed oral arguments are correlated with better outcomes.	Johnson, Wahlbeck and Spriggs (2006)	Observational
	Oral arguments from 1977 to 1982 in the United States Supreme Court		McAtee and McGuire (2007)	Observational

4. Differences Between Studies using Observational or Randomized Research Models

As we have seen, the studies analyzed use the outcome of judicial decisions as a metric for the performance of lawyers. However, according to Clermont and Eisenberg (1997), there is an element of ambiguity is this type of datum, which can make it significantly misleading: the case-selection effect. The sets of cases selected for analysis are often not comparable with each other, as they entail a specific feature which stands in the way of making the intended comparison. For example, it is not possible to make a direct comparison between the outcomes of public defenders with those of private attorneys, because both the type of cause and the type of client fan vary significantly between the two groups, making it unfeasible to attribute the difference in outcomes to the type of defense.

In many situations, it is natural for clients and lawyers to choose each other reciprocally, and it is difficult to determine whether the outcome achieved by a given professional should be attributed to the lawyer or to the characteristics of the case that he or she chose (Anderson and Heaton, 2012). It may be that better lawyers only accept better cases, leaving precisely the more difficult cases to less well known lawyers; on the other hand, the opposite can also happen, in other words, clients may seek out lawyers known for their abilities only in cases where they know that their chances of success are small (Abrams and Yoon, 2007).

Because of this situation, an attorney's outcomes may sometimes bear no relation to his or her expertise, and reflect only the type of case in which they act (Shinall, 2010). This means that the main methodological issue in this type of research is to isolate the lawyer's influence from other factors that affect the judicial decision, principally the type of case.

In order to solve this, Ho and Rubin (2011) argue that the research design is more important than the analytical method. According to these authors, the design of empirical studies that seek causal inference should create mutually comparable groups, without any reference to outcomes, so that any difference in the outcomes of each group can be plausibly attributed to how it is handled.

The literature points to two possible research designs. One of these, described by Clermont and Eisenberg (1997), consists of gathering information on each judicial case and using these data as independent variables in a multivariate regression (statistical technique that quantifies the influence of each factor, or independent variable, on the phenomenon that is being studied, the dependent variable), in order to identify which groups of cases are similar to each other, allowing an adequate comparison of the success rates in each group.

Abramowicz, Ayres and Listokin (2011) criticize this option and posit that studies based only on the available information can fail to account for important

hidden variables. The authors state that the research design that would best assure similarity within groups is that which uses a random experiment, because randomization would ensure that all the variables were similar to each other. According to Greiner (2008), random experiments are the gold-standard for causal inference, as they are able to balance even the hidden variables, imperceptible to the analyst. Abrams and Yoon (2007, p. 1154) apply this reasoning to the performance of lawyers when they state that "when the case load is not distributed randomly, it is difficult, not to say impossible, to know whether we should attribute differences in outcomes to the skills of the lawyer or to the type of work distributed".

According to Greiner (2008), the first task to be done in a random experiment is to identify the basic items: which units will be treated, what treatment will be applied, what the period of treatment will be and what the output variable will be. In the case study conducted by Abrams and Yoon (2007), for example, the units that were treated were judicial cases (distributed randomly to the lawyers), the treatment applied was the performance of each lawyer, the period assessed was the duration of the research and the output variable used was the conviction rate and the jail sentence applied.

The next stage, proposed by Ho and Rubin (2011), is to verify the main assumption in this type of study: whether the randomization mechanism is actually working, i.e. whether the units (in this case, the judicial cases) were really distributed on a random basis between the treatments (in this case, the lawyers). According to these authors, the credibility of this steps depends on collecting a sufficient quantity of control variables (also called co-variables) and achieving homogeneity in the distribution of the variables between the groups. In order to verify the distribution whether the distribution of cases between public defenders and court-appointed attorneys was really done in a random way, so as to allow comparison of their outcomes, Iyengar (2007) tested whether the types of crime and also the race, age and sex of the defendants were evenly distributed between the two groups.

Greiner (2008) explains that the control variables are those prior to treatment, and it is important to distinguish between control variables (not affected by treatment) and output variables (affected by the treatment). The choice of variables to be used in verifying randomization requires detailed knowledge of the data generation process (Greiner, 2008) and substantive knowledge of the area of interest (Ho and Rubin, 2011).

In short, research that seeks to use the outcomes of judicial cases to measure performance must identify units where cases are really distributed on a random basis. However, this is no easy task, insofar as in many legal units the case load is not distributed in this way (Abrams and Yoon, 207; Iyengar, 2007), which is the first major hurdle faced by any research into lawyer performance.

Although it is possible to agree with the authors that randomization is essential in order to assert with certainty that a cause and effect relationship exists, the extent and diversity f research that has been conducted on the different in case outcomes with and without lawyers permits us to conclude that the presence of a professional generally has a significant influence on the outcome of judicial proceedings.

In those cases, the choice of lawyer by the party is not randomized, and the actual choice provides evidence that the consumer of legal is more sophisticated to the point of dispensing with legal ratings.

It is noted that, both in the research by Iyengar (2007), which compares federal public defenders with court-appointed attorneys, and in that of Anderson and Heaton (2012), which compares state public defenders with court-appointed attorneys, there was a difference in outcomes achieved by the different groups, and it is clear that public defenders had better outcomes in both studies. On the other hand, research conducted by Huang, Chen and Lin (2010), on the differences between public defenders and court-appointed attorneys, and Shinall (2010), who made a comparison between private lawyers and those appointed by the court, found differences in the outcomes of the groups researched.

The variation in research findings may be attributed to the fact that each jurisdiction has its own features, As explained by Huang, Chen and Lin (2010, p. 114): "The answer to the question of whether the type of defense affects the outcomes is by nature dependent on the jurisdiction". There are districts which may assign greater priority to public defense, in the form of institutional and material support (financial, human resources, etc.), for example, whilst in others priority is assigned elsewhere. The type of professional that each career path attracts will vary from place to place

5. Conclusions

Of the 32 empirical studies analyzed, we identified that most are concentrated in the United States (81.25 percent), in the civil jurisdiction (62.5 percent), with a publication year generally in the 2010s (56.25 percent) and they predominantly use the observational method (75 percent).

As demonstrated over the course of the literature review, the main methodological difficulty faced by this research is to identify precisely whether the impact on the judicial decision derives from the performance of the lawyer or whether it is merely a consequence of the characteristics of the cases being judged. In order to balance out possible hidden variables, Abrams and Yoon (2007), Greiner (2008), Ho and Rubin (2011), Abramowicz, Ayres and Listokin (2011) suggest the use of experiments with a research design entailing random case distribution in order to

balance out hidden variables, which is said to be the "gold-standard" for the use of causal inference.

However, only 25 percent of the studies reviewed used randomized case distribution, and we therefore consider it to be important that further studies should seek to use that research design more in future.

O Impacto da Atuação dos Advogados em Processos Judiciais: Uma Revisão da Literatura

The Impact of the Performance of Lawyers on Judicial Proceedings: A Literature Review

(EN: 231-245)

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DOI: 10.33167/2184-0644.CPP2019.VVN1/pp.247-264

ABSTRACT
This article analyzed 32 empirical studies on the impact of the lawyer's performance on the outcome of the judicial decision. The findings were: the concentration of research in the United States (81.25 percent), civil jurisdiction (62.5 percent), the year of publication in general in the 2010 decade (56.25 percent) and the predominant use of the observational method (75 percent). The great methodological difficulty of these researches is to identify with precision if the impact in the judicial decision stems from the lawyer's performance or if it is only a consequence of the characteristics of the processes that are being judged, which can be achieved through experiments with research design with distribution cases to balance hidden variables.

Keywords: justice administration, judicial decision, attorney, performance, outcome

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RESUMO
Este artigo analisou 32 estudos empíricos sobre o impacto da atuação do advogado no resultado da decisão judicial. Foram identificados: concentração de pesquisas nos Estados Unidos (81,25 por cento), na jurisdição cível (62,5 por cento), com ano de publicação em geral na década de 2010 (56,25 por cento) e utilização predominante do método observacional (75 por cento). A grande dificuldade metodológica dessas pesquisas é identificar com precisão se o impacto na decisão judicial decorre da atuação do advogado ou se é apenas consequência das características dos processos que estão sendo julgados, o que pode ser alcançado por meio de experimentos com desenho de pesquisa com distribuição aleatória de casos para balancear variáveis ocultas.

Palavras-chave: administração da justiça, decisão judicial, advogados, desempenho, resultados

1. Introdução

A presente revisão de literatura tem como objetivo analisar os estudos sobre o impacto da atuação dos advogados na administração da justiça por meio da revisão da literatura sobre resultados dos julgamentos.

No Brasil, a Constituição Federal de 1988 reconhece que «o advogado é indispensável à administração da justiça» (art.º 133) e a lei que estabelece o Estatuto da Advocacia é expressa ao afirmar que o advogado «contribui, na postulação de decisão favorável ao seu constituinte, ao convencimento do julgador» (Lei n.º 8.906/41, art.º 2.º, § 2.º).

Em circunstâncias ideais, os processos judiciais deveriam ser julgados com base apenas no seu mérito, observando-se as provas trazidas pelas partes e o direito aplicável ao caso. No entanto, o litígio judicial não ocorre de forma livre e isolada do contexto social em que está inserido. São vários os fatores externos que podem influenciar uma decisão judicial, como a vantagem socioeconômica das partes, a região onde o processo está sendo julgado, ideias preconcebidas por juízes ou juris e a qualidade dos advogados envolvidos no caso (Eisenberg, 1988).

Importa destacar que não podemos ignorar o protagonismo de outros atores do processo judicial: durante décadas, os estudos empíricos focaram em diferenças de resultados de casos criminais de acordo com o papel exercido pelos juízes, sendo que estudos mais recentes também abrangem a influência dos procuradores de acusação nos julgamentos (Kim, Spohn e Hedberg, 2015).

A influência do advogado na decisão judicial vem sendo estudada pelo menos desde 1974 por Marc Galanter, sobre o poder que as partes mais abastadas têm de obter decisões mais favoráveis que partes com menos recursos, na qual explica que a vantagem das partes mais poderosas foi justamente sua capacidade de contratar advogados melhores e mais especializados (1974).

O advogado funciona como uma fonte de informação para a corte (McGuire, 1995), os subsídios que ele apresenta ao juiz acabam servindo de fonte para o entendimento final sobre o caso. No entanto, essa influência não é uniforme em todas as situações. Há circunstâncias em que o advogado poderá influenciar mais ou menos o resultado do litígio.

2. Estudos Comparativos sobre Possíveis Fatores que Influenciam as Decisões Judiciais

O presente capítulo reúne a revisão da literatura sobre os possíveis fatores que influenciam as decisões judiciais, que vão desde o grau de acesso do magistrado a fontes de informação neutra, passando pelo nível de importância do assunto até à comparação de resultados com ou sem a participação de advogados.

Schwab e Eisenberg (1988) em ações indenizatórias, Lederman e Hrung (2006) em casos tributários e Norberg e Compo (2007) em ações de recuperação judicial concluíram que a representação significou melhores resultados para seus clientes.

Por sua vez, Greiner e Pattanayak (2012), pesquisaram se a oferta de auxílio jurídico estava influenciando o resultado da concessão de pedidos de auxílio por desemprego. Esse serviço era prestado gratuitamente por alunos de direito da Universidade Harvard que ajudavam desempregados na sua apelação administrativa perante uma agência governamental. Deve-se observar que o objeto da pesquisa foi a oferta de auxílio e não a utilização da assistência em si. A metodologia empregada foi bastante robusta, uma vez que a oferta de assistência foi feita de forma aleatória entre aqueles que fizeram pedido de auxílio por desemprego.

O resultado desta pesquisa foi bastante intrigante pelo fato de que não houve diferença nos dois grupos (os que receberam a oferta de auxílio e os que não receberam tal oferta). Os autores decidiram, então, fazer uma extensa e profunda revisão da literatura sobre o tema. Com exceção de alguns poucos estudos, a conclusão sempre era a de que a assistência de um advogado trazia resultados muito mais vantajosos do que aqueles alcançados sem tal assistência.

No entanto, após revisar os aspectos metodológicos das pesquisas já realizadas, Greiner e Pattanayak (2012) afirmaram enfaticamente que quase todos os estudos anteriores sobre o efeito da assistência judicial em ações civis não tinham resultados confiáveis (embora com possibilidade de serem corretos), uma vez que não haviam usado a aleatorização para estabelecer uma relação de causa e efeito, uma questão que será tratada de forma específica no capítulo referente à metodologia da pesquisa.

TABELA 1. Estudos comparativos sobre possíveis fatores que influenciam as decisões judiciais

TEMA	TIPOS DE PROCESSO	CONCLUSÕES	REFERÊNCIA	DESENHO DA PESQUISA
Acesso do magistrado a informações neutras	Decisões judiciais de district courts e federal circuit courts sobre responsabilidade civil por produto de 1995 a 2006 nos Estados Unidos	A habilidade de um advogado é bastante representativa em district courts, nas quais o magistrado não tem acesso a muitas informações neutras, mas não em federal circuit courts, em que tem acesso a mais informações neutras.	Hinkle (2007)	Observacional
Importância do assunto	Sustentações orais de 1977 a 1982 na Suprema Corte dos Estados Unidos	A experiência dos advogados influencia mais as decisões em assuntos menos importantes.	McAtee e McGuire (2007)	Observacional
Presença ou ausência de advogados	Ações civis indenizatórias contra agentes públicos em 1980 e 1981 nos Estados Unidos	O auxílio de advogados significou maiores taxa de sucesso, valores recuperados e taxa de acordos.	Schwab e Eisenberg (1988)	Observacional
	Decisões da Corte Tributária de 1990 a 1994 dos Estados Unidos	As partes assistidas por advogados reduziram em 17,9 por cento o pagamento em relação àquelas não assistidas. Não houve diferença significativa para os acordos.	Lederman e Hrung (2006)	Observacional
	Ações de recuperação judicial entre 200 e 2002 nos Estados Unidos	As partes sem advogado tiveram seus pedidos negados com maior frequência em comparação com as representadas por advogado.	Norberg e Compo (2007)	Observacional
	Apelação administrativa para auxílio ao desemprego de 2008 a 2010 nos Estados Unidos	Não houve diferença significativa entre os que receberam oferta de auxílio jurídico gratuito e os que não receberam.	Greiner e Pattanayak (2012)	Aleatorizado
	Processos de despejo por falta de pagamento da Manhattan Housing Court de 1993 a 1994 nos Estados Unidos	O grupo de inquilinos que recebeu assistência jurídica teve resultados melhores em decisões judiciais, expedição de mandados de despejo, falta de comparecimento do inquilino na corte e obtenção de abatimento por valores no aluguel ou reparos no imóvel.	Seron e Frankel (2001)	Aleatorizado
	Ações de despejo de residência em 2010 nos Estados Unidos	Houve resultados significativos melhores para o grupo dos que receberam auxílio jurídico completo em comparação ao grupo que recebeu assistência limitada.	Greiner, Pattanayak e Hennessy, 2013	Aleatorizado
	Diversos estudos em assuntos diferentes nos Estados Unidos	Nas junenile courts não ficou evidenciado o benefício da representação pelo advogado.	Poppe e Rachlinski (2016)	Revisão de literatura
Advogados indicados pela corte e defensores públicos	Processos criminais de 1997 a 2001 nos Estados Unidos	Os réus representados por defensores públicos federais receberam menos condenações e, quando condenados, suas condenações foram mais curtas que os réus defendidos por advogados indicados pela corte.	Iyengar (2007)	Aleatorizado
	Processos criminais nos Estados Unidos	Os réus defendidos por defensores públicos estaduais tiveram 19 por cento menos condenações, 62 por cento menos condenações à morte e condenações com 24 por cento menos tempo na prisão do que os réus defendidos por advogados indicados pela corte.	Anderson e Heaton (2012)	Aleatorizado
	Processos criminais de 1990 a 2004 em Ohio nos Estados Unidos	Os defensores públicos obtêm resultados melhores dos que os advogados indicados pela corte.	Roach (2014)	Observacional
	Processos criminais de 2004 a 2007 em Taiwan	Os réus defendidos por defensores públicos receberam mais condenações, porém as condenações foram mais curtas que os réus defendidos por advogados indicados pela corte.	Huang, Chen e Lin (2010)	Aleatorizado
	Processos criminais em 2000 e 2001 nos Estados Unidos	Os resultados obtidos por defensores públicos foram bastante parecidos com os obtidos por advogados indicados pela corte.	Shinall (2010)	Aleatorizado

TABELA 1. *(cont.)*

TEMA	TIPOS DE PROCESSO	CONCLUSÕES	REFERÊNCIA	DESENHO DA PESQUISA
Advogados indicados pela corte, defensores públicos e advogados contratados	Processos criminais de 2004 a 2006 nos Estados Unidos	Os advogados indicados pela corte tiveram pior desempenho do que os demais em sentença de absolvição, penas aplicadas sem restrição de liberdade e tempo médio de duração da sentença condenatória.	Cohen (2014)	Observacional
	Processos criminais em 2012 e 2013 em Iowa nos Estados Unidos	Os melhores resultados são de advogados contratados, seguidos dos defensores públicos e dos indicados pela corte.	Buller (2015)	Observacional
	Processos criminais de 1990 a 2006 em quatro condados da Flórida nos Estados Unidos	Os réus representados por defensores públicos são mais propensos a serem presos antes do julgamento e a receberem mais sentenças condenatórias em comparação com os réus com advogados contratados.	Williams (2013)	Observacional
	Processos criminais de 2010 no Texas nos Estados Unidos	Os advogados indicados pela corte tiveram resultados piores em relação aos advogados contratados.	Agan, Freedman e Owens (2016)	Observacional
	Processos criminais de 2000 a 2015 em Ohio nos Estados Unidos	Os defensores públicos obtêm menos 11 por cento de condenações para os réus em comparação com os advogados indicados pela corte.	Linzmeier (2017)	Observacional
Advogados políticos e advogados privados	Processos sobre demolição de casas de palestinos de 1990 a 1995 pela Suprema Corte de Justiça de Israel	Os resultados judiciais de advogados políticos foram significativamente superiores aos de advogados privados, o que foi explicado como decorrência principalmente da capacidade dos advogados políticos de fazerem melhores acordos para seus clientes, evitando a demolição de suas casas.	Dotan (1999)	Observacional
Advogados contratados e clínicas de faculdades de direito	Apelações administrativas de seguro desemprego de 2011 a 2013 nos Estados Unidos	Não houve diferença estatisticamente relevante entre os resultados obtidos por empregados representados por advogados contratados e os representados por clínicas de faculdades de direito.	Shanahan, Selbin, Mark e Carpenter (2018)	Observacional
Advogados classificados pela Chambers	Casos tributários de 1996 a 2000 no Reino Unido	Advogados mais bem classificados podem obter melhores resultados, porém apenas nos processos substancialmente mais difíceis de vencer.	Hanretty (2016)	Observacional
Advogados de uma mesma equipe	Sentenças judiciais cíveis de 2012 da Justiça Federal do Brasil	Foi constatada diferença estatisticamente significativa nos resultados obtidos por advogados de uma mesma equipe que atuam em processos judiciais distribuídos aleatoriamente.	Vasconcelos (2014)	Aleatorizado

Um dos estudos que utilizaram a aleatorização foi o de Seron e Frankel (2001), que envolveu um grupo de tratamento de inquilinos elegíveis para assistência jurídica que foi direcionado para receber aconselhamento jurídico através do Projeto Pro Bono e um grupo de controle que não era. Os inquilinos que contaram com o serviço dos advogados tiveram resultados muito melhores daqueles que não tiveram: foram expedidos mandados de despejo em 24,1 por cento dos casos com atuação dos advogados, contra 43,5 por cento dos casos em que não havia advogado; e foram respectivamente 31,8 por cento de decisões desfavoráveis, contra 52,0 por cento para os sem assistência jurídica.

Em outro estudo, Greiner, Pattanayak e Hennessy (2013) compararam os resultados judiciais de dois grupos: um grupo recebeu oferta de assistência jurídica

completa e o outro recebeu uma oferta de assistência jurídica limitada. Todos os participantes de ambos os grupos estavam enfrentando ações de despejo de suas residências. O primeiro grupo teve acesso ao trabalho tradicionalmente feito por um advogado, ao passo que o segundo tinha acesso a serviços limitados (tirar dúvidas nos escritórios, pedir ajuda para o preenchimento de formulários e sobre os procedimentos judiciais). O programa de assistência pesquisado não tinha capacidade de oferecer assistência completa a os todos que o procuravam. A escolha de qual tipo de assistência oferecer foi feita de forma aleatória.

A conclusão foi de que a oferta de assistência completa teve impactos substancialmente melhores do que a assistência limitada para a permanência na posse de suas residências (dois terços e um terço, respectivamente) e no tempo de recebimento de apoio para aluguel (9,4 meses e 1,9 meses).

3. Estudos Comparativos de Fatores que Influenciam o Desempenho dos Advogados

3.1 Fator de experiência ou especialização do advogado

As diferenças significativas no desempenho manifestado por indivíduos com maior experiência seriam atribuídas ao desenvolvimento de algum *modus operandi* próprio na consecução de suas tarefas e responsabilidades, e entre aqueles considerados mais novatos na organização (Coelho Junior, 2009). Russel (2001) verificou que o tempo de serviço no cargo apresenta relação positiva e significativa com o desempenho no trabalho.

Em princípio, quanto maior o tempo na organização, maior o aprendizado e, consequentemente, maior o desempenho. Estudos mostram que o desempenho cresce inicialmente com o passar do tempo em um trabalho específico e depois se estabiliza (Sonnentag e Frese, 2002).

Para Hanretty (2013), a experiência de atuação em dez casos anteriores agrega ao advogado 24 por cento mais probabilidade de obter a vitória em comparação com o que só teve um caso perante a *House of Lords* do Reino Unido (espécie de Tribunal Superior ligado ao parlamento britânico).

Segundo Priest e Klein (1984), se uma empresa vislumbra a possibilidade de perder um processo em que é acusada de maus serviços, a tendência é que procure fazer um acordo, evitando danos à sua imagem ou a existência de jurisprudência que possa ser alegada em outras ações. Desse modo, as ações que vão para julgamento são aquelas em que a probabilidade de perda é relativamente baixa.

Porém, um estudo de Goodman-Delahunty et al. (2010) com advogados em processos criminais identificou que a experiência medida em anos de atuação não levaram a melhores prognósticos sobre o resultado mínimo que alcançariam nos

casos em que estavam atuando. De modo geral, os advogados foram excessivamente confiantes em sua atuação, fazendo previsões mais favoráveis do que os resultados efetivamente alcançados.

Para McGuire (1995), os resultados melhores de advogados com maior experiência é que eles angariam mais credibilidade entre os magistrados do que os novatos devido ao histórico de atuação na Suprema Corte americana. Os juízes tenderiam a confiar mais naqueles advogados que já são conhecidos e estes, por sua vez, procurariam zelar por sua credibilidade, atuando com lisura, de forma a manter a confiança adquirida.

Para Johnson, Wahlbeck e Spriggs (2006), os advogados mais experientes exercem influência positiva e estatisticamente significativa nas decisões proferidas pela Suprema Corte dos Estados Unidos por desenvolverem melhor sua habilidade de fazer sustentações orais. Usando essa mesma metodologia, McAtee e McGuire (2007) confirmaram mais uma vez o impacto da experiência do advogado sobre as decisões tomadas pela Suprema Corte americana.

Wright e Peeples (2013) detectaram que os advogados mais experientes poderiam aprender com o passado e se tornarem mais efetivos com o passar do tempo; por outro, após muitos anos no trabalho, os advogados dedicariam menos energia a cada caso, estariam menos interessados em se atualizar em relação à jurisprudência ou teriam menos disposição para tentar mudar o entendimento dos juízes locais sobre determinados assuntos.

O desestímulo e a acomodação também podem decorrer da excessiva repetição de processos, de modo que a alta quantidade de processos sobre a mesma matéria poderia levar a práticas repetitivas, com rotinas padrão, sem dar atenção às particularidades de cada caso (Norberg e Compo, 2007).

Abrams e Yoon (2007) concluíram que há diferenças robustas mesmo entre advogados que trabalham com os mesmos tipos de processo criminal, dentro de uma mesma unidade jurídica, sendo que os réus com defensores mais experientes têm menor probabilidade de serem condenados e, se presos, passarão menos tempo na cadeia. Vasconcelos (2014) identificou diferenças nos resultados de advogados de uma mesma equipe que recebem processos cíveis distribuídos de forma aleatória, mas não encontrou evidências de que a experiência na carreira estaria relacionada com o desempenho.

3.2 Universidade cursada e premiação acadêmica do advogado

Alguns estudos procuraram verificar a possível existência de relação entre a universidade cursada e os resultados alcançados pelos advogados. Iyengar (2007) encontrou diferenças de resultados entre os advogados, sendo que os que cursaram

universidades mais renomadas conseguiram penas oito meses menores para seus clientes em relação aos demais.

Para Abrams e Yoon (2007), a universidade cursada leva a melhores resultados, mas eles não foram estatisticamente significativos. Hinkle (2007) optou por tentar identificar eventual relação entre o desempenho do advogado na faculdade e seu desempenho como advogado, mas não identificou nenhuma relação entre as medidas de desempenho acadêmico e os resultados como advogado.

3.3 Sexo, raça e atratividade física do advogado

Tomadas em conjunto, as pesquisas apontam que o gênero do advogado geralmente não influencia a decisão judicial. Szmer, Sarver e Kaheny (2010) não identificaram diferenças no resultado dos julgamentos, de modo que homens e mulheres apresentaram o mesmo desempenho.

Abrams e Yoon (2007) verificaram a partir de dados que homens e mulheres alcançaram os mesmos resultados tanto em termos de taxas de condenação quanto em termos de duração do tempo de encarceramento. Por outro lado, foi constatada a influência da raça sobre a taxa de condenação e sobre o tempo que o réu deveria permanecer na cadeia: os advogados hispânicos superaram os das demais raças.

Uma possível causa levantada foi o efeito do mercado de trabalho sobre a escolha do local de trabalho dos hispânicos, pois eles em geral recebem salários inferiores aos recebidos por advogados brancos ou asiáticos, de modo que o salário oferecido pela defensoria pública no distrito de Clark, estado de Nevada, exerce mais poder de atração sobre os hispânicos do que sobre os outros grupos.

Biddle e Hamermesh (1998) concluíram que a atratividade física fez diferença positiva nos ganhos de alunos que trabalharam tanto na iniciativa privada quanto na pública, embora a diferença no mercado privado seja maior. As explicações possíveis foram de que as pessoas gostam de passar mais tempo e sentem-se melhor ao lado de pessoas mais atraentes, e de que podem achar que advogados com boa aparência poderiam alcançar melhores decisões em virtude de atitudes mais favoráveis de juízes ou jurados.

3.4 Volume de trabalho e estrutura remuneratória

É intuitivo o fato de que um advogado com muito volume de trabalho terá pouco tempo para se dedicar a cada caso e que isso pode acabar prejudicando os resultados dos processos em que atua. Também é intuitivo que uma baixa remuneração levará a um serviço de menor qualidade.

Iyengar (2007) identificou que o volume de trabalho afeta negativamente os resultados de defensores públicos (aumentou as chances de condenação dos réus

em seis pontos percentuais e aumentou a duração da sentença em três meses), mas não para os advogados indicados pela corte (não aumentou o índice de condenações e diminuiu o tempo de condenação dos réus em 6,75 meses).

A explicação oferecida é que a atuação em mais casos poderia aumentar o contato e a interação com o sistema judicial penal, trazer maior experiência em tribunais de júri e desenvolver um maior conhecimento institucional sobre a corte, o que parece ter maior influência sobre os advogados indicados pela corte do que sobre os defensores públicos.

O desejo de ganhar maior experiência em tribunais de júri é justamente a causa investigada por Boylan e Long (2005) para explicar uma maior rotatividade dos *assistant U.S. attorneys* em procuradorias onde os salários do mercado privado são mais altos. Os autores notaram que a rotatividade desses profissionais era maior em alguns distritos do que em outros e identificaram que isso ocorria justamente nos locais onde o mercado privado pagava salários maiores. A lógica que funcionaria nesses lugares seria a seguinte: os advogados procurariam o emprego público de *assistant U.S. attorneys* como uma forma de ganhar experiência em tribunais de júri para, após algum tempo, serem contratados por um salário maior pelas grandes firmas de advocacia do local.

Esse fato, aparentemente inofensivo, acaba por causar uma distorção no trabalho. Boylan e Long (2005) verificaram que, nos mesmos locais onde há alta rotatividade, o índice de acordos feitos é significativamente menor. Os *assistant U.S. attorneys* deixariam de fazer acordos e acabariam optando pelo julgamento no tribunal de júri não pelo fato de isso ser uma melhor estratégia para a acusação, mas para ganharem mais experiência nos julgamentos feitos pelo júri, um fenômeno que não foi percebido nos locais em que a remuneração no mercado privado é mais baixa. Segundo a pesquisa, quando a diferença nos salários entre o mercado público e o privado passa de US$ 2.900 para US$ 12.000, o número de casos que vão para o tribunal de júri aumenta em 25 por cento.

A pesquisa de Anderson e Heaton (2012) conclui que a estrutura remuneratória dos advogados de defesa indicados pela corte de Filadélfia acaba criando incentivos perversos em prejuízo do réu defendido.

Além de notar o mesmo problema na sua pesquisa, Iyengar (2007) conseguiu mensurar o quanto esse fato afeta os resultados do processo judicial. O estudo identificou que o valor da hora paga na fase do tribunal de júri era maior que o valor destinado às horas gastas antes de tal procedimento, o que acabava por encorajar os advogados de defesa a submeter os casos ao júri, com aparente prejuízo para os réus.

TABELA 2. Estudos comparativos de fatores que influenciam o desempenho dos advogados

TEMA	TIPOS DE PROCESSO JUDICIAL	CONCLUSÕES	REFERÊNCIA	DESENHO DA PESQUISA
Experiência do advogado como tempo na atividade	Decisões de crimes graves na Carolina do Norte em 2006 nos Estados Unidos	A experiência de advogados de defesa em processos criminais tem impacto positivo sobre o resultado do processo nos oito primeiros anos de carreira, mas depois declina com o passar dos anos.	Wright e Peeples (2013)	Observacional
	Sentenças judiciais cíveis de 2012 da Justiça Federal do Brasil	Não foi identificada correlação estatística entre a experiência do advogado, medida em anos na instituição, e os resultados obtidos.	Vasconcelos (2014)	Aleatorizado
Experiência como especialização na matéria	Recuperação do valor de multas em juízo por advogados governamentais	O grupo de advogados especializado na matéria consegue recuperar valores mais altos do que o outro grupo.	Ringquist e Emmert (1999)	Observacional
Experiência do defensor público	Processos criminais de 1990 a 2005 nos Estados Unidos	Réus com defensores mais experientes têm menor chance de serem condenados e, se presos, passarão menos tempo na cadeia.	Abrams e Yoon (2007)	Observacional
	Processos criminais de 1997 a 2001 nos Estados Unidos		Iyengar (2007)	Aleatorizado
Experiência como atuação anterior na corte	Apelações na House of Lords entre 1969 e 2003 no Reino Unido	O apelante com advogado que já atuou em dez casos tem 24 por cento mais chances de obter a vitória em comparação com o que só teve uma.	Hanretty (2013)	Observacional
Experiência e resultado	Decisões da Corte de Apelações entre 1983 a 1992 nos Estados Unidos	A experiência tem influência apenas moderada no resultado da decisão judicial em processos sobre responsabilidade civil julgados pelas cortes de apelação da Justiça Federal americana.	Haire, Lindquist e Hartley (1999)	Observacional
	Decisões da Corte Tributária de 1990 a 1994 dos Estados Unidos	A experiência é apontada como uma causa para os melhores resultados obtidos por determinados advogados.	Lederman e Hrung (2006)	Observacional
	Resultados dos U.S. attorneys de 1969 a 1999 nos Estados Unidos	Promotores com mais experiência aumentam a probabilidade de condenação do réu e de penas de encarceramento.	Boylan e Long (2005)	Observacional
	Decisões da Suprema Corte Americana de 1977 a 1982	Advogados mais experientes têm mais vitórias na Suprema Corte dos Estados Unidos	McGuire (1995)	Observacional
	Decisões da Suprema Corte Americana de 1970 a 1994		Johnson, Wahlbeck e Spriggs (2006)	Observacional
	Sustentações orais de 1977 a 1982 na Suprema Corte dos Estados Unidos		McAtee e McGuire (2007)	Observacional
	Decisões judiciais de district courts e federal circuit courts sobre responsabilidade civil por produto de 1995 a 2006 nos Estados Unidos	A experiência do advogado influencia as decisões tomadas pelas cortes distritais em processos de responsabilidade civil, mas não influencia as cortes de apelação da Justiça Federal americana.	Hinkle (2007)	Observacional
	Ações de recuperação judicial entre 200 e 2002 nos Estados Unidos	A especialização do advogado afeta negativamente o resultado de pedidos de recuperação judicial.	Norberg e Compo (2007)	Observacional
	Advogados de 44 estados dos Estados Unidos	Não foi encontrada relação entre experiência e assertividade no resultado de processos judiciais.	Goodman-Delahunty et. al. (2010)	Observacional
	Processos criminais de 1990 a 2005 nos Estados Unidos	Réus com advogados mais experientes têm menor chance de serem condenados e, quando condenados, estão sujeitos a penas menores.	Abrams e Yoon (2007)	Observacional

TABELA 2. *(cont.)*

TEMA	TIPOS DE PROCESSO JUDICIAL	CONCLUSÕES	REFERÊNCIA	DESENHO DA PESQUISA
Universidade cursada pelo advogado	Processos criminais de 1997 a 2001 nos Estados Unidos	Advogados que estudaram em universidades mais conceituadas conseguiram penas mais reduzidas para os seus clientes em processos penais.	Iyengar (2007)	Aleatorizado
	Decisões da Suprema Corte Americana de 1970 a 1994		Johnson, Wahlbeck e Spriggs (2006)	Observacional
	Processos criminais de 1990 a 2005 nos Estados Unidos	A classificação da universidade cursada pelo advogado não teve influência significativa nos resultados dos processos judicias penais.	Abrams e Yoon (2007)	Observacional
	Decisões judiciais de district courts e federal circuit courts sobre responsabilidade civil por produto de 1995 a 2006 nos Estados Unidos	Ter-se formado com honras ou ter participado na revista de direito da faculdade não tem repercussão sobre os resultados alcançados pelo advogado.	Hinkle (2007)	Observacional
Sexo do advogado	Decisões da Suprema Corte do Canadá de 1988 a 2000	O sexo de quem faz sustentação oral não afeta a decisão da Suprema Corte do Canadá, exceto em casos relacionados com questões femininas, em que as advogadas levam vantagem.	Szmer, Sarver e Kaheny (2010)	Observacional
	Advogados de 44 estados dos Estados Unidos	Mulheres fazem previsões mais precisas sobre resultado de processos do que os homens.	Goodman-Delahunty et. al. (2010)	Observacional
Raça do advogado	Processos criminais de 1990 a 2005 nos Estados Unidos	Defensores públicos hispânicos conseguem penas menores para os réus que defensores brancos, negros e asiáticos.	Abrams e Yoon (2007)	Observacional
Atratividade física do advogado	Avaliação de atratividade de 4.000 advogados formados	A atratividade física está ligada a melhor remuneração de advogados tanto na iniciativa privada quanto na pública.	Biddle e Hamermesh (1998)	Observacional
Volume de trabalho	Processos criminais de 1997 a 2001 nos Estados Unidos	Um maior volume de trabalho afeta negativamente o trabalho da defensoria pública, mas afeta positivamente os resultados de advogados indicados pela corte em processos penais.	Iyengar (2007)	Aleatorizado
	Decisões de crimes graves na Carolina do Norte em 2006 nos Estados Unidos	Não foi detectada relação entre dimensão da carga de trabalho e resultado das decisões judiciais penais.	Wright e Peeples (2013)	Observacional
Remuneração do advogado	Resultados dos U.S. attorneys de 1969 a 1999 nos Estados Unidos	A maior remuneração no mercado privado faz com que a rotatividade de advogados públicos seja maior e o número de acordos feitos em processos penais seja menor.	Boylan e Long (2005)	Observacional
	Processos criminais nos Estados Unidos	A remuneração paga por caso faz com que advogados privados indicados pela corte aceitem mais processos penais do que seria razoável para realização de uma boa defesa.	Anderson e Heaton (2012)	Aleatorizado
	Processos criminais nos Estados Unidos	Um maior valor pago para participação no tribunal de júri do que na fase processual anterior desestimula a realização de acordos, o que acaba prejudicando o réu.	Anderson e Heaton (2012)	Aleatorizado
	Processos criminais de 1997 a 2001 nos Estados Unidos		Iyengar (2007)	Aleatorizado
Sustentação oral feita pelo advogado	Decisões da Suprema Corte Americana de 1970 a 1994	As sustentações orais bem avaliadas estão correlacionadas com melhores resultados.	Johnson, Wahlbeck e Spriggs (2006)	Observacional
	Sustentações orais de 1977 a 1982 na Suprema Corte dos Estados Unidos		McAtee e McGuire (2007)	Observacional

3.5 Sustentação oral feita pelo advogado

A argumentação oral é um dos recursos usados pelos advogados para convencer os magistrados quanto às causas em que atuam. Haire, Lindquist e Hartley (1999) afirmam que, a par dos memoriais, os argumentos orais são importantes para a tomada de decisão de juízes.

Os juízes Myron H. Bright e Richard S. Arnold (1984) descreveram como a argumentação oral dos advogados influencia suas decisões. Com o aumento da carga de trabalho, o tempo de dedicação a cada processo diminuiu drasticamente, fazendo com que a apresentação oral tenha ganhado grande importância como fonte de informação para decisão, especialmente naqueles casos sobre os quais ainda paira certa indecisão sobre qual das partes deve prevalecer.

Johnson, Wahlbeck e Spriggs (2006) confirmaram que existia correlação positiva e estatisticamente significativa entre as notas atribuídas aos advogados pelo *Justice* Blackmun e os resultados das decisões judiciais.

4. Diferenças entre os Estudos com Modelo de Pesquisa Observacional ou Aleatorizado

Como visto, os estudos analisados utilizam o resultado de decisões judiciais como medida de desempenho dos advogados. Para Clermont e Eisenberg (1997), no entanto, existe uma ambiguidade inerente a esse tipo de dado, o que torna seu uso bastante traiçoeiro: o *case-selection effect*. Muitas vezes, os conjuntos de casos selecionados para análise não são comparáveis entre si, pois contam com alguma especificidade que impede a comparação pretendida. Não se pode, por exemplo, comparar de forma direta os resultados de defensores públicos com o de advogados privados, pois tanto o tipo de causa quanto o tipo de cliente podem variar bastante entre os dois grupos, tornando inviável atribuir a diferença nos resultados ao tipo de defesa.

Em muitas situações é natural que clientes e advogados se escolham mutuamente, sendo difícil determinar se o resultado alcançado por um determinado profissional deve ser atribuído ao advogado ou às características do caso que escolheu (Anderson e Heaton, 2012). Pode ser que os melhores advogados aceitem apenas os melhores casos, deixando para advogados menos conhecidos justamente os processos mais difíceis; por outro lado, o contrário também pode ocorrer, ou seja, os clientes podem procurar advogados com reconhecida competência apenas nas causas em que sabem que sua chance de sucesso é pequena (Abrams e Yoon, 2007).

Por causa dessa situação, algumas vezes os resultados de um advogado podem não ter nenhuma relação com sua competência, refletindo apenas o tipo de processo em que atua (Shinall, 2010). Sendo assim, a principal questão metodológica

desse tipo de pesquisa é isolar a influência do advogado de outros fatores que afetam a decisão judicial, principalmente o tipo de processo.

Para solucionar essa questão, Ho e Rubin (2011) defendem que o desenho de pesquisa importa mais que o método de análise. Segundo os autores, o desenho de pesquisas empíricas em direito que buscam inferência causal deve criar, sem nenhuma referência aos resultados, grupos comparáveis entre si, de modo que qualquer diferença nos resultados de cada grupo possa ser plausivelmente atribuída à exposição ao tratamento.

A literatura aponta dois desenhos de pesquisa possíveis. Um deles, descrito por Clermont e Eisenberg (1997), consiste em reunir várias informações sobre cada processo judicial e usar tais dados como variáveis independentes em uma regressão multivariada (técnica estatística que quantifica a influência de cada fator, variável independente, sobre o fenômeno que está sendo estudado, variável dependente), de modo a identificar quais grupos de casos são semelhantes entre si, permitindo uma comparação adequada das taxas de sucesso de cada grupo.

Abramowicz, Ayres e Listokin (2011) criticam essa opção e consideram que os estudos que se baseiam apenas em informações disponíveis podem acabar sem levar em consideração variáveis ocultas importantes. Os autores indicam que o desenho de pesquisa que melhor asseguraria a similaridade entre grupos é o que utiliza um experimento aleatório, pois a aleatorização garantiria que todas as variáveis sejam semelhantes entre si. Para Greiner (2008), em se tratando de inferência causal, experimentos aleatórios são o «padrão-ouro», já que teriam o poder de balancear até mesmo variáveis ocultas, imperceptíveis ao analista. Abrams e Yoon (2007, p.1154) aplicam esse raciocínio ao desempenho de advogados ao afirmarem que «quando a distribuição de trabalho não é feita de forma aleatória, é difícil, para não dizer impossível, saber se devemos atribuir as diferenças nos resultados à competência do advogado ou ao tipo de trabalho distribuído».

De acordo com Greiner (2008), a primeira tarefa a ser feita em relação a um experimento aleatório é identificar seus itens básicos: quais unidades receberão o tratamento, qual o tratamento aplicado, qual o período de aplicação do tratamento e qual a variável de resultado. No caso do estudo desenvolvido por Abrams e Yoon (2007), por exemplo, as unidades que receberam o tratamento foram os processos judiciais (distribuídos de forma aleatória pelos advogados), o tratamento aplicado foi a atuação de cada advogado, o período avaliado foi o período de duração da pesquisa e a variável de resultado utilizada foi a taxa de condenação e o tempo de encarceramento dos condenados.

O passo seguinte, apontado por Ho e Rubin (2011), é verificar o pressuposto principal desse tipo de estudo: se o mecanismo de aleatorização está realmente funcionando, ou seja, se as unidades (no caso, os processos judiciais) foram real-

mente distribuídas de forma aleatória entre os tratamentos (no caso, os advogados). Segundo os autores, a credibilidade desse passo depende da coleta de variáveis de controle (também chamadas covariáveis) em quantidade suficiente e do alcance de homogeneidade de distribuição dessas variáveis entre os grupos. Para verificar se a distribuição de processos entre defensores públicos e advogados indicados pela corte foi realmente feita de forma aleatória, o que permitiria uma comparação dos resultados entre eles, Iyengar (2007) testou se os tipos de crime bem como a raça, a idade e o sexo dos réus estavam homogeneamente distribuídos entre os dois grupos.

Greiner (2008) explica que as variáveis de controle são aquelas anteriores ao tratamento, sendo importante distinguir as variáveis de controle (não afetadas pelo tratamento) das variáveis de resultado (afetadas pelo tratamento). A escolha das variáveis a serem usadas na verificação da aleatoriedade requer um conhecimento minucioso do processo de geração dos dados (Greiner, 2008) e um conhecimento substantivo da área de interesse (Ho e Rubin, 2011).

Em resumo, pesquisas que pretendam utilizar o resultado de processos judiciais como medida de desempenho devem identificar unidades em que a distribuição dos processos é feita de forma realmente aleatória. Esta, no entanto, não é uma tarefa fácil, uma vez que em muitas unidades jurídicas o trabalho não é distribuído dessa maneira (Abrams e Yoon, 207; Iyengar, 2007), o que se coloca como a primeira grande dificuldade para realização de estudos sobre desempenho de advogados.

Embora se possa concordar com os autores no sentido de que a aleatorização seja imprescindível para se afirmar, com segurança, que existe uma relação de causa e efeito, a extensão e a diversidade de pesquisas que foram feitas sobre a diferença de resultados de processos com e sem advogados autoriza a conclusão de que a presença de um profissional geralmente tem influência significativa no resultado do processo judicial.

Nesses casos, a seleção dos advogados pela parte não é aleatorizada, e a própria escolha evidencia que o consumidor da representação legal é mais sofisticado a ponto de dispensar as classificações legais.

Nota-se que, tanto no estudo de Iyengar (2007), que compara defensores públicos federais com advogados indicados pelo tribunal, quanto no de Anderson e Heaton (2012), que compara defensores públicos estaduais com advogados indicados pelo tribunal, houve diferença nos resultados alcançados pelos diferentes grupos, destacando-se que os defensores públicos tiveram melhor resultado em ambos os estudos. Por outro lado, os estudos de Huang, Chen e Lin (2010), sobre as diferenças entre defensores públicos e advogados indicados pela corte, e de Shinall

(2010), que fez uma comparação entre advogados privados e aqueles indicados pela corte, não encontraram diferenças nos resultados dos grupos pesquisados.

A variação de resultados nos estudos pode ser atribuída ao fato de que cada jurisdição tem suas próprias características. Como explicado por Huang, Chen e Lin (2010:114): «A resposta à pergunta sobre se o tipo de defesa afeta os resultados é, por natureza, dependente da jurisdição». Há distritos que podem dar mais prioridade à defensoria pública, na forma de apoio institucional e material (recursos financeiros, humanos, etc.) por exemplo, enquanto em outros a prioridade é dada a outras áreas. Qual tipo de profissional cada carreira atrai irá variar de local para local.

5. Conclusões

Dos 32 estudos empíricos analisados, identificamos que a maioria deles está concentrada nos Estados Unidos (81,25 por cento), na jurisdição cível (62,5 por cento), com ano de publicação em geral na década de 2010 (56,25 por cento) e utilização predominante do método observacional (75 por cento).

Conforme demonstrado ao longo da revisão de literatura, a grande dificuldade metodológica dessas pesquisas é identificar com precisão se o impacto na decisão judicial decorre da atuação do advogado ou se é apenas consequência das características dos processos que estão sendo julgados. Para balancear prováveis variáveis ocultas, Abrams e Yoon (2007), Greiner (2008), Ho e Rubin (2011), Abramowicz, Ayres e Listokin (2011) sugerem a utilização de experimentos com desenho de pesquisa com distribuição aleatória de casos para balancear variáveis ocultas, o que seria o «padrão-ouro» para a utilização de inferência causal.

Contudo, somente 25 por cento dos estudos pesquisados utilizaram a aleatoriedade de distribuição de casos, de modo que consideramos importante que novos estudos busquem utilizar mais esse desenho de pesquisa no futuro.

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