

Forum: Practical Perspectives

Factors increasing case disposition time in Brazil

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Judicial delay in Brazil is a severe and persistent problem. This work helps to understand the causes of this issue, by identifying and discussing 12 factors that increase the length of the judicial process in the country. These factors were identified through content analysis of interviews with 15 key players in the Brazilian justice system, including judges, prosecutors, and lawyers. Each factor was discussed based on academic literature, official reports, and performance indicators. The research findings show that factors such as the low cost of filing, the absence of punishment for repetitive litigants, and tax foreclosures promote an overload of processes in the courts. The Judiciary also seems to be burdened with attributions beyond the jurisdictional function, such as collecting evidence and locating debtors and assets. The excess of disputes and assignments has made the Brazilian judicial machine large, slow, and expensive. Public policies to reduce judicial delays in the country are suggested.

Keywords: administration of justice; judicial performance; case disposition time; court delay; dejudicialization.

Fatores que aumentam o tempo do processo judicial no Brasil

A morosidade judicial no Brasil é um problema grave e persistente. Este trabalho ajuda a compreender as causas desse problema, na medida em que identifica e discute 12 fatores que aumentam o tempo do processo judicial no país, os quais foram identificados com base na análise de conteúdo de entrevistas com 15 atores-chave do sistema brasileiro de Justiça, entre juízes, promotores e advogados. Cada um dos fatores foi discutido segundo a literatura acadêmica, relatórios oficiais e indicadores de desempenho. Os achados da pesquisa mostram que fatores como o baixo custo do ajuizamento, a ausência de punição a litigantes repetitivos e o ajuizamento de execuções fiscais promovem uma sobrecarga de processos nos tribunais. O Judiciário também parece sobrecarregado por atribuições que extrapolam a função jurisdicional, como coletar evidências e localizar devedores e bens. O excesso de disputas e atribuições teria tornado a máquina judiciária brasileira grande e lenta, além de cara. Políticas públicas de redução da morosidade judicial no país são sugeridas.

Palavras-chave: administração da justiça; desempenho judicial; tempo do processo judicial; morosidade judicial; desjudicialização.

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Factores que aumentan el tiempo del proceso judicial en Brasil

Las demoras judiciales en Brasil son un problema grave y persistente. Este trabajo ayuda a comprender las causas de este problema, ya que identifica y discute 12 factores que aumentan la duración del proceso judicial en el país. Los factores fueron identificados a partir del análisis de contenido de entrevistas con 15 actores clave del sistema de justicia brasileño, entre jueces, fiscales y abogados. Cada factor fue discutido con base en la literatura académica, informes oficiales e indicadores de desempeño. Los hallazgos de la investigación muestran que factores como el bajo costo de presentación, la ausencia de sanción para los litigantes reincidentes y la presentación de ejecuciones fiscales promueven una sobrecarga de procesos en los tribunales. El Poder Judicial también parece estar cargado de atribuciones que van más allá de la función jurisdiccional, como reunir pruebas y localizar deudores y bienes. El exceso de disputas y asignaciones habría hecho grande y lenta la máquina judicial brasileña, además de costosa. Se sugieren políticas públicas para reducir las demoras judiciales en el país.

Palabras clave: administración de justicia; actuación judicial; duración del proceso judicial; lentitud judicial; desjudicialización.

1. INTRODUCTION

Court delay is a frequent complaint made by Brazilian society at the National Council of Justice (CNJ, 2019) and the factor that most negatively affects the public's trust in the courts (Fundação Getulio Vargas [FGV], 2017). In the specific case of civil cases, their disposition times are significantly longer than those in Europe, being three times longer in the first instance – 600 days in Brazil versus 232 days in Europe – and 50% longer in the second – 320 days in Brazil versus 215 days in Europe (Castelliano & Guimaraes, 2023).

A series of initiatives have been taken to increase the speed of cases in Brazil. Various bills have been approved expecting rationalize the appeals system (Roque, 2016). There was a budgetary effort to fund the functioning of the legal system, with the Brazilian Judiciary being one of the most expensive in the world, consuming roughly 1.3% of the country's GDP (Da Ros, 2015). There has also been a strong investment in technology (Gomes et al., 2018), and in setting performance indicators for courts and judges (Fortes, 2015). However, the slow pace of Brazilian justice is a fact.

Despite the severity and persistence of this problem, evidence-based works presenting a systemic view of its causes have not been found. Several studies have investigated specific factors such as the gratuity of legal costs (Arake & Gico, 2014) or decisions regarding the same cases by various instances (Da Ros & Taylor, 2019). To fill in this gap, this article identifies and discusses, based on experts' opinions, a group of factors that increases case disposition times in this country. This study is relevant because it increases our knowledge regarding an important problem from the point of view of society and the economy, and offers ideas to mitigate its perverse effects.

2. RESEARCH METHODS AND TECHNIQUES

Data was collected through semi-structured interviews, which combine predefined questions with others elaborated during the interviews (Boni & Quaresma, 2005). Fifteen interviews took place during 2019 and 2020. The selection of the interviewees mixed professions, levels of Justice, trial, and appellate courts, as well as geographic regions. We interviewed eight judges (four federal and four state), five lawyers (three public and two private) and two prosecutors (one federal and one state), seeking diversity in terms of point of view. Of the eight judges, three work in appellate courts, with two of them being state, and one federal. We interviewed at least two professionals from each region of the country: North, Northeast, Midwest, Southeast, and South.

The interviewees have a privileged view of the problem based on experience (varying from 10 to 37 years and averaging 21 years), academic profile (Ph.D. or researcher) and/or professional position (judge, justice of the National Council of Justice, etc.). Their ages reflect the diversity of the interviewees, with the youngest being 34 years old and the oldest 60, with an average age of 47 years. Despite the diversity of points of view heard, it is important to emphasize that the results of studies based on interviews, such as this one, cannot be generalized (Lima, 2016).

The interviews, preceded by clarifications and requests for recording, lasted an average of 55 minutes. As the interviews were conducted, the responses began to repeat themselves, with a saturation point being reached in the 12th interview, which is in keeping with the standard suggested by Thiry-Cherques (2009). The data was analyzed through content analysis (Bardin, 2011) in two steps: a) the identification of the factors reported in each interview, and b) the selection of cross-reference issues, from which we selected factors reported by at least three interviewees (20% of the total), a criterion which sought to guarantee a relevant portion of shared opinions.

3. RESULTS AND DISCUSSION

The factors that increase the disposition time of cases in Brazil, divided into those related to the filing of lawsuits and those related to the resolution of lawsuits, and the proportion of mentions are displayed in Table 1.

TABLE 1 FACTORS WHICH INCREASE THE DISPOSITION TIME OF CASES IN BRAZIL

| Influence | Factor | Mentions |
|--|--|----------|
| Filing of lawsuits (more lawsuits) | 1. Low cost of filing a lawsuit | 53% |
| | 2. Judicialization culture | 47% |
| | 3. Absence of punishment for repeated players | 40% |
| | 4. Inadequate setting of precedents and the uncertainty of jurisprudence | 33% |
| | 5. Judicialization of the production of evidence | 27% |
| | 6. Large number of lawyers in Brazil | 20% |
| | 7. Judicialization of tax foreclosures | 20% |
| Resolution of lawsuits (less resolution) | 8. The excess, nature, and effect of appeals | 73% |
| | 9. Difficulty in locating people and their assets | 73% |
| | 10. Little delegation of activities to justice officials | 33% |
| | 11. Decision-making procrastination | 27% |
| | 12. Accumulation of courts, types of courts, and functions | 20% |

Source: Research data.

Factor 1 – Low cost of filing a lawsuit

Of the factors that drive the filing of lawsuits, the most cited one among our interviewees (53%) was their low cost. This finding resonates with the literature which suggests that a lawsuit is filed when its benefits outweigh its costs (Shavell, 1982). In Brazil, many lawsuits are free of charge, independent of the litigant's income, which is the case for lawsuits filed with special civil courts. In January and February 2023, approximately 27% of new lawsuits in the State Justice System and 63% of new lawsuits in the Federal Justice System began in special courts, according to data made available in the Datajud panel maintained by the National Council of Justice.¹ Free legal assistance is another mechanism which exempts the litigant from costs and fees, even though there is no objective criterion for the concession of these rights. Arake and Gico (2014) suggest that an almost universal policy of free legal assistance would lead to an excessive use of the courts.

Factor 2 – Judicialization culture

In the opinion of 47% of the interviewees, there is a “judicialization culture” in Brazil, or in other words, a practice of taking small misunderstandings to the courts, such as arguments with neighbors and disputes in the work environment and social networks. It is an institutional factor, and institutions are understood as formal and informal rules which govern life in society (North, 2018). Informal institutions, including cultural ones, also need to be taken into consideration to understand the causes which lead to the inefficiency of the Brazilian justice system (Ribeiro & Rudiniki, 2016). Judicialization culture, cited by the interviewees, is one of the cultural factors that retard the resolution of lawsuits in Brazil. However, the impact of this and other cultural factors on the performance of the judicial system still lacks specific research.

Factor 3 – Absence of punishment for repeated players

Several interviewees explained that litigation represents an economic advantage to “repeated players”, who are involved in many lawsuits simultaneously over time (Galanter, 1974). This would occur because only a few injured parties file a lawsuit, and the value of the judgment is legally limited to compensating for the damage caused, with no possibility of punishing the behavior of repeated players. From the point of view of game theory, repeated players learn from the strategies that their opponents, employ and consider the effect that their current behavior will have on the future behavior of other players (Osborne & Rubinstein, 1994). Thus, there is support for the interviewee statements that repeat players learn that a large portion of victims do not file lawsuits and that the indemnification is limited to individual damages.

¹ Information retrieved from <https://painel-estatistica.stg.cloud.cnj.jus.br/estatisticas.html>.

Factor 4 – Inadequate setting of precedents and the uncertainty of jurisprudence

Another factor repeatedly mentioned in the interviews has to do with the setting and following of legal precedents. On one hand, the interviewees point out that judges do not always follow established precedents, and on the other, they say that in establishing a precedent, superior courts do not address all the dissenting arguments in a case, which opens up space for the litigants to question and delay lawsuits that have already been settled. The legal uncertainty caused by a lack of judicial standardization may explain, at least partially, the clogging of Brazilian courts (Gico, 2014). A precedent based system still is going through a process of institutionalization in Brazil. The institution of binding precedents, for example, has not yet been totally consolidated in this country, because binding precedents require a knowledge of decision-making techniques and concepts that most Brazilian judges are not familiar with (Mello & Barroso, 2016).

Factor 5 – Judicialization of the production of evidence

Several interviewees explained that in Brazil the production of evidence is done in court, and one party is not obliged to share information with the other side before the trial. While in some countries the sharing of evidence does not go much beyond facilitating voluntary exchanges, in others there are laws which require litigants to provide information when the other side requests it (Spier, 2007). The procedural laws of the United States, for example, allow each side to present questions to the opposite party which need to be answered before the trial, to interview witnesses under oath, to require documents and to inspect physical objects in dispute (Cooter & Rubinfeld, 1994).

Factor 6 – Large number of lawyers in Brazil

Several interviewees alluded to the number of lawyers. To them, Brazil has an excess of lawyers, which ends up increasing the number of lawsuits that go to trial. The number of lawyers per capita appears to be one of the highest indices in the world: there are 616 per 100 thousand inhabitants (Ordem dos Advogados do Brasil [OAB], 2022), which is much higher than the 393 per 100 thousand inhabitants that exist in the United States (American Bar Association [ABA], 2022) and higher still than the number of lawyers in Europe, which has an average of 164 lawyers per 100 thousand inhabitants (European Commission for the Efficiency of Justice [CEPEJ], 2020). An increase in the number of lawyers has been associated with a greater number of lawsuits in Italy (Buonanno & Galizzi, 2014) and Spain (Mora-Sanguinetti & Garoupa, 2015). To Da Ros and Taylor (2019), the large number of lawyers in Brazil is a variable that would increase supply, and therefore, the number of lawsuits.

Factor 7 – Judicialization of tax foreclosures

According to a few of the interviewees, the judgement of tax foreclosures clogs the courts, to the extent that Brazilian tax authorities do not have the authority to impose their demands directly on debtors, with it being necessary to have a legal judgement to collect these debts. The interviewees clarified that other authorities such as tax auditors can confiscate properties, and they have the power to seize

merchandise during import procedures. Environmental inspectors can seize and burn tractors in the forest, and sanitary inspectors can close restaurants. Indicators provided by the National Council of Justice support the thesis that tax lawsuits overload the courts, because they represented 15% of all new lawsuits in 2021 and almost 35% of the pending lawsuits that year (CNJ, 2022).

Factor 8 – Excess, nature, and effect of appeals

Of the factors that delay the resolution of lawsuits, problems involving procedural appeals were the most cited by the interviewees (73%), as well as the difficulty in locating people and their assets (Factor 9). A series of initiatives have been taken to change Brazil's appellate system as described by Roque (2016). However, as of the end of February 2023, of the 78 million lawsuits pending in this country, 91% were concentrated in trial courts, with just 8% being appeals, and 1% being contested in appellate courts, according to Datajud data². These numbers show that appeals have a limited effect on the overall delay in resolving lawsuits and that the focus of improvement should concentrate on the trial courts.

Factor 9 – Difficulty in locating people and their assets

Most of those interviewed (73%) explained that there are difficulties related to locating people and their assets. They reported that many litigants do not know the location of the defendants and there is difficulty in finding assets that can be seized as security interests or mortgages, because there are defendants who are deep in debt, without possessions. Another reported difficulty is the use of delaying tactics by defendants, who flee summonses and hearings and hide their patrimony. The long time needed to locate people and summon them initially – which on average takes 1,315 days – was pointed out by Cunha et al. (2011) as one of the main reasons for the long delay in tax foreclosures in Brazil. The difficulty in finding assets seems to be reflected in the fact that, in civil cases, the enforcement phase takes much longer than the adjudication phase, both in the State Court and in the Labor Court (Castelliano & Guimaraes, 2023).

Factor 10 – Little delegation of activities to justice officials

Several interviewees mentioned that it is common for tasks to be performed mainly by a judge, with little delegation of routine tasks and communication to justice officials. The delegation of a judge's activities to justice officials would be a healthy and positive measure (Bacellar, 2013). However, we could not find any empirical studies which have analyzed this factor in greater depth, which appears to be an interesting research gap associated with this subject.

² Information retrieved from <https://painel-estatistica.stg.cloud.cnj.jus.br/estatisticas.html>.

Factor 11 – Decision-making procrastination

Decision-making procrastination, according to several interviewees, is another factor that contributes to the delay in resolving lawsuits. They reported that trial judges use various mechanisms to delay decisions, such as sending lawsuits to an administrative sector to fulfill bureaucratic formalities, unnecessarily sending them back to the parties involved, or the repeated convocation of conciliation hearings, even when they have no chance of success. Judges are rational beings in allocating their time (Posner, 1993). Since complex cases consume a lot of time, and deciding controversial cases can damage their image, judges have an incentive to avoid judging these cases. It is not by accident that the number of cases judged among those that have already been distributed has been a target defined by the National Council of Justice since 2009.³

Factor 12 – Accumulation of courts, types of courts, and functions

To some of the interviewees, the fact that judges divide their work between two or more courts; trial, special, or appellate courts; and other functions harms productivity and delays the resolution of lawsuits in the trial courts that they preside over. The accumulation of electoral activity would be especially harmful. The fact that judges preside over different courts was studied in Nepal, and showed a negative effect on turnover and therefore judicial productivity (Grajzl & Silwal, 2020). In Brazil, however, a judge's accumulation of courts only diminishes the productivity of trial courts when a judge also works in a special court, with there being no diminution of productivity noted in other types of accumulation (Castelliano et al., 2022).

4. CONCLUSION, RECOMMENDATIONS, AND RESEARCH AGENDA

This article helps provide an understanding of the causes of judicial delay in Brazil. On one hand, factors such as the low cost of lawsuits, the absence of punishment for repeated players, and the obligation to judge tax foreclosures appear to generate an overload of lawsuits in the judicial system. On the other hand, there also seems to be an overload in terms of the attributions performed by courts, many of which extend beyond their jurisdictional function, such as collecting evidence, locating debtors and assets, and executing judicial and extrajudicial tax enforcement. This overload of disputes and attributes generates a mastodon-like judicial machine, or in other words, one that is large and slow, as well as expensive.

It is therefore important to diminish the number of disputes and attributions that are currently the responsibility of the judicial system to let the courts concentrate solely on their classic judicial function, namely interpreting the law (*jus dicere*). Thus, we suggest three initiatives:

- 1) To permit the private production of evidence as well as conceding to lawyers the prerogatives of requesting information and interrogating parties and witnesses.

³ Information retrieved from <https://www.cnj.jus.br/gestao-estrategica-e-planejamento/metas/>

- 2) To define objective criteria for the concession of free services, encouraging direct resolution of conflicts, and avoiding injustices in terms of the concession of this benefit.
- 3) To outsource activities to extra-judicial registries, such as ratification of labor agreements or family cases involving the interests of incapacitated individuals.

Finally, the results of this study can generate hypotheses that could be explored in future studies, such as verifying whether the level of judicialization in Brazil is superior to that of other countries, given that many factors seem to be driving judicialization. Another suggestion for future studies is investigating whether the degree to which activities are delegated to judicial officers in courts is related to the performance of these courts. These studies could also include comparisons with other countries which would make them even more valuable.

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Tomas Aquino Guimaraes: Conceptualization (Equal); Data curation (Supporting); Formal Analysis (Lead); Investigation (Supporting); Methodology (Lead); Project administration (Equal); Validation (Lead); Writing - original draft (Supporting); Writing - review & editing (Supporting).

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AVAILABILITY OF THE DATA

The transcriptions of the interviews and the factor classification table are available upon request from author Caio Castelliano (caio.castelliano@hotmail.com).