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Sistema Financeiro, Regulação e Concorrência

1. Law and development. The role of the judiciary in Brazil

Direito e desenvolvimento. O papel do Judiciário no Brasil

(Autor)

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Sumário:

Área do Direito: Processual

Abstract:

The present article addresses the relation between justice and the process and the advances regarding economic values in law within the scope of the Brazilian New Code of Civil Procedure. The Brazilian legal system has aimed to provide prompt and adequate access of all to justice. In this sense, the present article provides punctual aspects of the New Code of Civil Procedure and of jurisprudence that demonstrate the role of the judiciary in moral and economic spheres.

Resumo:

O presente artigo trata da relação existente entre justiça e processo e os avanços no que

tange a relação entre economia e direito presentes no novo Código de Processo Civil. O sistema legal brasileiro tem buscado o acesso célere e adequado de todos à justiça. Nesse sentido, o artigo aborda aspectos do novo Código de Processo Civil e julgados recentes que demonstram o papel do judiciário no âmbito moral e econômico que tange o direito.

Keywords: Process - Judicial activism - Justice - Constitutional - Code
Palavra Chave: Processo - Ativismo judicial - Justiça - Constitucional - Código

The Brazilian judge, as well as the entire magistrate's Roman-Germanic system, in the exercise of jurisdiction, acts in two ways; namely:

a) applying a legal rule to the case, which is categorized as a “subsumption activity”; or b) pondering values or public reasons in cases where the solution submitted to the judicial issue requires the choice of law principles which are levied upon the case and “collide” with each other.

Thus, the Supreme Federal Court, for example, considers the eligibility of certain candidates from the standpoint of the “clean record Law”, that was published in the same year of the election, and that prevented the candidacy of citizens with a background of criminal or administrative convictions. Then the Supreme Court applies the rule of annuity, in the sense that the “game rules” could not be changed in the own election year and concludes that, thanks to the salutary new diploma, it could only be applied in the next election under the explicit constitutional rule.

In a second case, the Supreme Court, considering the principles of isonomy, non-discrimination, the right to pursuit happiness as a development of the essential core of human dignity, approved the legitimacy of the union of persons of the same sex with the purpose of building a family protected by the legal system.

1. Justice and process

Justice, in the procedural sense, is exactly the activity of solving disputes and carrying out what is in the court ruling.

The process is the instrument whereby the citizen calls for justice and the State accomplishes it. It was surnamed long ago as a dialectical method of debate, which was intermediated by the neutral participation of the judge.

One of the most recurrent claims in relation to this method of debate (the process) was based on the binomial cost-duration, as warned by professors Vicenzo Vigoriti, in the text “Law and Process”, and Mauro Cappelletti and Bryan Garth in the so-called “Project Florence “, also known as” Justice for all “.

The Brazilian legal system solved, in a significant way, the issue of costs, by creating a constitutional rule that stated that no one should be deprived of the access to justice, because of the lack of economic resources. Thus, it was instituted in the constitutional office, the “free legal assistance to those in need,” a rule which now extends even to companies that can not pay all court costs. However, the duration of the proceedings became recurrent and reached unacceptable levels. It was calculated that it took a decade to obtain the last judicial response to the formation of res judicata, in Brazil and elsewhere.

This problem, which is found in all procedural systems of the civil law family (Roman-Germanic), led Brazilian legislators to rethink the process and the causes that prevented the judiciary from providing a prompt and expeditious justice, complying with the similar

American clause “speed tryal clause”.

In 2009, the National Congress created a commission to draft Brazil’s New Civil Procedure Code, whose Presidency I was appointed, given that the approved law entered into force on March 18th, 2016.

This new code, in short, reconnected the systems of civil law and common law, constitutionalized the Brazilian civil procedure (contemplating the new moral values and public reasons inserted in the Federal Constitution) and most importantly, showed remarkable influence in the strategies launched by the so-called “Economic Analysis of Law”, which is a theme so dear to the scholars of this prestigious house: the University Harvard.

2. The economic analysis of Law in Brazil’s new Civil Procedure Code

The economic analysis of the process calls for a form of effective judicial remedy, in which we can preferably obtain payoffs that satisfy both parties, and which are appropriate and specific.

This means that every citizen has the right to obtain judicial resolution of their case within a reasonable time, and acquire from the State a response to the very thing that they are entitled to, so as not to feel that their rights are being harmed.

Professor Simeon Djankov, in the Courts In Quarterly Journal of Economics, states that the procedural system's efficiency influences the “rank Doing Business”, which is elaborated by the World Bank with respect to the countries that attract investments.

The focus of the economic analysis of law is multiple, which allows us to highlight some aspects that correspond to Brazil’s New Civil Procedure Code, namely:

A) The process’ contractualism, as advocated by Professor Loic Cadiet from the University of Sourbone, uses techniques that transform the parties in active subjects of the case management. In this sense, the New Code allows the parties to establish procedural business, by choosing the rite, in addition to the power to elect a timetable so that the process can have a beginning, a middle and an end.

Thus, they can stablish, for example, that after the action and the defense, the judge renders its decision within the legal deadline, which will be unappealable.

B) Encouraging reconciliation – Professor Mitchel Polynsky, from the University of Stanford, in his magnificent work “Introduction to law and economics”, points out that this reconciliation depends on the strategies used by the parties according to game theory and the Nash equilibrium. He states that the preview of the chances of success and risks of defeat can greatly influence the achievement of self-mediation, which was designed long ago as the best way to solve disputes, since it optimizes social relationship.

The New Procedure Code, in this sense, includes institutes that allow the parties to produce evidence in court in order to analyze the chances of a victory in a future action.

Concerning reconciliation, in addition to providing a general rule for the State to encourage and promote reconciliation, it also includes a reconciliation hearing in the beginning of the process. It chooses this moment in which the parties have not yet spent emotional energy or financial expenses, thus, facilitating the deal.

Furthermore, the new Code considers the so-called hedonic psychology, advocated by Professor Jonathan Masur (In Happiness and the law) with the intention that this agreement

conveys the sense of justice and happiness from the beginning of negotiations.

C) The fight against frivolous lawsuits and groundless resources

In this regard, it is known that the most effective stimuli are those that reach the most sensitive part of the human body ... “The Pocket.”

Incorporating the doctrine of the professor from this exemplary teaching House, Professor Steven Shavell, the code provides financial costs and sanctions across in all the instances in which the party reaps the defeat of his thesis. There is condemnation in all instances in order to inhibit the “judicial adventures.” Professor Shavell refers to them as “Chilling effects”.

The previous force also inhibits groundless resources, which are inadmissible when they want to impose solutions contrary to the jurisprudence set by higher courts, in a still inconvenient opportunity for prospective *overruling*.

Finally, the voluntary breach of the court decision opens the opportunity to the “Contempt of Court”, which can be fixed as economic sanctions or criminalization of the ruling's disobedience.

D) Procedural management

This other strategy of the economic analysis of Law is also enshrined in Brazil's New Civil Procedure Code through the cooperation of the parties as a rule and the judge’s organization of the proceedings. In this way, when the first attempt of reconciliation fails and the judgment is extended because of the impossibility of a resolution before that final term, it establishes the controversial points and the production of evidence in the subsequent hearing

3. The protagonists of the Brazilian Judiciary

Currently the Brazilian judiciary is called upon to decide moral and economic issues that would be the responsibility of the Parliament.

The perception of the constitutional doctrine is that the phenomenon occurs because the elected officials do not wish to displease their constituents, especially in the field in which this social cost is great. On the other hand, judges are independent and not elected and therefore are the best players for these macro-judicial solutions.

This role has given rise to criticism ranging from the so-called rejection of “judicial activism” and the legalization of political and social issues to the so-called “supremocracy” which, in essence, means the hegemony of the judiciary and the ruling of judges, which is a critical movement by which the American Supreme Court has also experienced throughout its history.

However, the constitutional provision of the access to justice does not allow the Brazilian judge to pronounce a non liquet (do not judge), even if society is still unprepared to receive that verdictum, since the so - called reasonable moral disagreement predominates.

In accordance to this duty, it is worth to list some emblematic hard cases judged by Brazil's Supreme Court, which characterize this protagonism:

1- In 2011, it recognized the homo-affective union as conducive to the formation of a family worthy of legal protection, based on isonomy, freedom of privacy and the right to pursuit happiness.

2- Also in 2011, it released the so-called “marijuana march”, differentiating the criminal

figure of the “justification for crime”, based on freedom of expression, assembly and expression.

3- In 2012, it legitimized the therapeutic anticipation of childbirth in women pregnant with anencephalic fetuses. And so, the Supreme Court did it based on women's sexual freedom, in their reproductive freedom and their right to physical and mental health. In this decision, it assumed the relief of the ratio decidendi that was launched in the Roe vs Wade case (1973).

4- In 2016, the Supreme Court admitted the existence of multi-parenthood when legitimizing socio-affective paternity conjointly with biological paternity. It admitted that a person raised by the affection father has the right to also seek their biological identity. In this case, the emphasis was given to the principle of human dignity with the unfolding of their search for identity and the right to pursuit happiness.

5- From an economic perspective, the Supreme Court considered unconstitutional an amendment that allowed the government to pay its debts to the individuals and companies through a mechanism (judiciary bonds) that would greatly prolong the fulfillment of the obligation, since it violated the right to property and the access to a just legal order.

6- Finally, in the political field, the Supreme Court understood that a Legal Entity can not finance an election campaign. Indiscriminate donations insult the healthiness and morality of an electoral match, without ideology and are characterized as skilled instruments to the capture of political power by economic power, fact generated from the scourge of corruption.

Anyway, it is possible to say that Justice and the judiciary in Brazil live in a new time and this time is eclipsed in the word “restart”.

As for the new time, allow me to dwell on Fernando Pessoa, for whom “It is not possible to simultaneously serve our era and all the eras, and neither write the same poem for gods and men”.

The idea to restart makes me thank you for your attention, with excerpts from the poem Restart, which I allow myself to forward it, not only in my mother tongue, but as well as in the North American language:

> **Recomeçar**
>
> Não importa onde você parou...
>
> Em que momento da vida você se cansou...
>
> O que importa é que sempre é possível e necessário recomeçar.
>
> Recomeçar é dar uma nova chance a si mesmo...
>
> É renovar as esperanças na vida
>
> Sofreu muito nesse período? Foi aprendizado...
>
> Chorou muito? Foi limpeza da alma...
>
> É hora de recomeçar...
>
> Busque um lugar calmo e eleve a Deus uma prece.
>
> Mas comece agradecendo pela vida,
>
> escreva um novo capítulo da sua história.
>
> Recomeçar é só uma questão de querer.

Quer ir alto, sonhe alto!

Porque não somos do tamanho que nos enxergam;

Somos do tamanho dos nossos sonhos.

Restart

It does not matter where you stopped…

It does not matter at what point in your life got tired…

What matters is, it is always possible and necessary restart.

To restart is to give a new chance to yourself…

To restart is to renew your hope in life…

Have you suffered a lot during this period? You Gained knowledge

Did you cry a lot? You cleansed your soul.

It is time to restart…

Search a calm place and lift a prayer to God.

But begin by thanking for your life, write a new chapter in your story.

To restart is just a question of will.

If you want to go up high, dream big!

Because we are not the size we see ourselves, we are the size of our dreams.