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How legal indicators influence a justice system and judicial behavior: the Brazilian National Council of Justice and ‘justice in numbers’

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This article explores how the rise of legal indicators influences the administration of justice and judicial behavior. The incorporation of mathematical formulas, complex equations, and statistical data into the administration of justice has a strong influence on judges, particularly on internal competition for promotion and professional disciplinary control, as judicial activity is now monitored, measured, and regulated by numbers. As a case study, I examine how the ‘mathematical turn’ has transformed the internal administration of the Brazilian justice system, analyzing how sanctions and rewards are not based on substance or ideology, but rather on numbers of sentences, trial length and amount of procedures in a court’s dockets. Assessment of the quality of adjudication is primarily based on quantitative evaluations based on statistical numerical data. Based on the Luhmannian concept of ‘legal irritants,’ on the Foucauldian notion of bio-power and on Llewellyn’s, realist insight about judicial behavior, I analyze how judges have to manage their own statistical records. In this sense, the Brazilian National Council of Justice and its project ‘justice in numbers’ provide a rich case study of the internalization of legal indicators into the justice system. As the Brazilian judiciary is now governed by statistics, innovative indicators emerged, such as the comparative analysis of performance, ‘procedural traffic jams,’ and level of litigiosity in different tribunals. In this context, managerial efficiency has become very important and judges must digest their statistical data to get promoted and avoid disciplinary sanctions as evidenced by concrete examples.

Keywords: law; socio-legal studies and administration of justice; mathematical turn; legal indicators; judicial statistics; and judicial behavior; national council of justice and justice in numbers; legal irritants; bio-power; and legal realism; procedural traffic jams; level of litigiosity; and comparative analysis of performance

Introduction

This article explores how the rise of legal indicators influences the administration of justice and judicial behavior. As David Restrepo Amariles demonstrated, contemporary societies experience justice through numerical indicators. The rise of these legal indicators characterizes the ‘mathematical turn’ and our conceptions of justice, rule of law, and legal enforcement are now represented by mathematical formulas, complex equations, and statistical data (Restrepo-Amariles 2014, 2014-A, 2014-B). These legal indicators are not formal sources of law and should not be expected to influence judicial decision-making.
However, their incorporation into the administration of justice has a strong influence on judicial behavior, internal competition for promotion, and professional disciplinary control. Due to the necessity of collecting statistical data for index production, judicial activity is now monitored, measured, and regulated by numbers.

As a case study, this article will examine how the ‘mathematical turn’ has transformed the internal administration of the Brazilian justice system in the past decade. In contemporary Brazil, judges are not punished or rewarded according to the substantive content of their sentences, as sanctions or rewards based on substantive judgment or ideological perspectives would be considered an offence to judicial independence. On the other hand, low or high number of sentences, speedy or delayed trials, and a small or a large amount of procedures without a final judgment in a court’s dockets are deemed good reasons for punishing an inefficient judge or promoting an efficient one. This phenomenon is directly connected with the rise of legal indicators, as the relevant criteria for assessing the quality of adjudication are no longer exclusively qualitative evaluations based on ethical assessment and collegial reputation, but primarily quantitative evaluations based on statistical numerical data.

This article will explain how the external legal indicators may function as ‘irritants’ of the legal system (Luhmann 2004; Teubner 2003). As they are not part of the internal fabric of the legal system, these indicators are not supposed to influence directly judicial behavior. For instance, a low number in terms of a ‘rule of law index’ would not have an immediate direct impact on the legal system, but it could generate political pressure for stronger control of judicial efficiency and, through a structural transformation of the legal system and its internal program, lead to a rearrangement of the system. In this sense, the new Brazilian statistical justice offers an interesting case study. By means of a constitutional amendment, the National Council of Justice was established in 2004. In addition to disciplinary power over judges, this mechanism of judicial control also exercises bio-power (Foucault 2009) by compiling judicial statistics, establishing numerical targets for judges, and producing reports on ‘justice in numbers.’ If Llewellyn’s legal realist insight about judicial behavior is sound (Twining 2012), the rise of legal indicators, the establishment of the National Council of Justice, and the internalization of the ‘mathematical turn’ within the Brazilian legal system have a significant impact on how Brazilian judges decide cases. Not only do judges have to digest their breakfasts, but they also have to deal with indigestion produced by the statistical analysis of their numbers.

In addition to this brief introduction, this article comprises four sections. First, the Brazilian National Council of Justice will be presented as a case study with explanations regarding its historical foundation, political disputes, administrative implementation, legitimating strategies, and constitutional mission. The historical analysis of a very recent episode will be based on material collected for the oral history of this unique administrative body within the judiciary branch, whose creation sparked political controversy and also motivated its strategy for gaining institutional legitimacy. The council’s decision to explore mathematical formulas and managerial efficiency will be explored in the second section, in which the project ‘justice in numbers’ is analyzed with emphasis on the traditional lack of IT integration within the justice system, on the innovative exercise of power through statistical knowledge by the Brazilian National Council of Justice, on the comparative analysis of performance, ‘procedural traffic jams,’ and litigiosity in different tribunals, and on the strategic planning of the judiciary branch. The third section presents theoretical discussions on how the mathematical turn may ‘irritate’ the judicial system,
how the judiciary may be governed by statistics, and how magistrates may have to digest their numbers. The fourth section presents final remarks.

**The Brazilian national council of justice**

A prodigious case study of how the rise of legal indicators influences the administration of justice and judicial behavior arises from the establishment of the Brazilian National Council of Justice (hereafter, NCJ) in 2004. Since the Constitutional Assembly in 1986, the BAR Association supported this mechanism of judicial control. However, the Brazilian Association of Magistrates lobbied against any form of external control and maintained that judicial independence should be a cornerstone of the new Brazilian democratic regime. Likewise, law and development literature pointed to independence of the judiciary as an essential guarantee of market economies, as independent judges would be capable of preventing inadequate state intervention, protecting private property rights, and judicially enforcing contracts even against state interests, if necessary (Trubek and Santos 2006; Jensen and Heller 2003; Dam 2006). Therefore, the constitution of Brazil 1988 did not establish any form of external or internal control of the judiciary. Nonetheless, as early as 1991, the then Chief Justice criticized the enhanced autonomy of the judiciary and called for the creation of the NCJ, ‘which would ensure the prevalence of administrative and financial autonomy of the judicial branch’ (Faro de Castro 1997). This proposal of judiciary control was strongly rejected by the National Association of Magistrates, whose members wrote a manifesto in 1995 against the NCJ known as ‘carta de Fortaleza.’ Yet, in May 1995 the new Chief Justice insisted that speedy judicial trials and a NCJ were necessary measures that had to be taken by the legislature (Castro 1997).

Scholars argued that the Brazilian judiciary was excessively independent and, in contrast with other Latin American countries, the challenge was not strengthening judicial independence, but rather to establish accountability of the judiciary vis-à-vis society and polity (Rios-Figueiroa 2006; Santiso 2003). In Santiso’s opinion, democratic governance was compromised by the strict interpretation of separation of powers in the constitutional text that led to excessive judicial independence and he foresaw that president Luiz Inacio Lula da Silva (‘Lula’) and then Minister of Justice Thomaz Bastos would make another attempt to establish the NCJ (Santiso 2003). In point of fact, by means of a constitutional amendment, the NCJ was finally established in 2004 after a long and controversial legislative process. Mariana Prado offers an interesting explanation for such long judicial reform, emphasizing how the judicial strength resulting from constitutional change in 1988 created obstacles for the future establishment of accountability mechanisms and a cautionary message against piecemeal reforms (Prado 2010).

In this section, I will explain this process of NCJ’s establishment. This analytical narrative is based on 15 interviews conducted in 2009 and 2010 by researchers from FGV Law School and CPDOC/FGV (Center for Research and Documentation of Contemporary History) for their project on the Oral History of the NCJ. The interviewees were the following authorities: the Chief Justice of the Brazilian Supreme Court who became also the first President of the NCJ; the framer of the Brazilian constitution responsible for the commission on the judiciary during the constitutional assembly; the Minister of Justice; the Secretary for Reform of the Judiciary; the legal expert of the Government Leadership in the Senate; the proponent and the rapporteur of the constitutional amendment that established the NCJ; the presidents of the Brazilian Association of Magistrates, of the Association of Federal Judges, and of the BAR Association; counselors from the original council members of the NCJ; the first General-Secretary of the NCJ. From these
interviews we learn that the NCJ was established with the support of the federal executive government, the BAR Association, and the National Congress.

As recorded in the oral history of the NCJ, congressman Helio Bicudo proposed a reform of the judiciary branch in 1992. A former public prosecutor, Bicudo’s main goal was the geographical decentralization of the justice system. His proposal did not take the NCJ into account and he was personally against any mechanism of external judicial control. Yet, during the very long legislative process, his proposal was altered to include the establishment of the NCJ as part of the reform of judiciary. Political leaders of the Brazilian Labor Party (Partido dos Trabalhadores) insisted that the NCJ should be exclusively composed of people outside the legal profession (representatives of civil society in general), as laymen would not protect corporative interests of magistrates and would infuse social values throughout the justice system (Santiso 2003). In contrast to this position, liberals and social democrats were concerned that this external control could culminate with court packing by the executive, the collapse of the institutional independence of the judiciary branch, and the dominance of a powerful presidency over courts. Therefore, during the Cardoso Government (1995–2002), the Brazilian House of Representatives approved a legislative project that consisted of a compromise between the two extreme positions. According to the proposed constitutional amendment, the NCJ would be composed of 9 magistrates and 6 non-magistrates with legal expertise. The magistrates would come from all different hierarchical levels of the judiciary branch (a Supreme Court Justice, a Superior Tribunal Justice, a Labor Tribunal Justice, 3 higher court judges, and 3 lower court judges). The other 6 counselors would comprise 2 lawyers appointed by the BAR Association, 2 public prosecutors from different levels (one from the federal office and one from the state Attorney General’s Office), and 2 citizens appointed by the House of Representatives and the Senate.

This amendment proposal was in the Senate when former president Lula, the leader of Labor Party, was inaugurated in office and appointed Marcio Thomaz Bastos his Minister of Justice. A former President of the BAR Association, Mr Bastos had been very active during the constitutional assembly with proposals to reform the judiciary. At the time he had defended external judicial control through an NCJ mainly composed of ordinary citizens. One of his first initiatives when in office as the Minister of Justice was the creation of a Secretariat for the Reform of the Judiciary, whose main objective was the establishment of the NCJ. This initiative faced strong resistance from the National Association of Magistrates, whose members, in political retaliation, suggested that the judiciary should then create a Secretariat for the Reform of the Executive. This association was dominated by state courts judges, who were concerned about restriction to their professional prerogatives and judicial independence.

The position of federal court judges was not so critical and the Association of Federal Judges and the Association of Labor Judges were more sympathetic to the NCJ. Interestingly, the then Chief Justice of the Supreme Court, Justice Nelson Jobim, decided to enter into the political scene and to negotiate the approval of the aforementioned constitutional amendment with the Minister of Justice, the Senate, and the judiciary. A former constitutional framer himself, Chief Justice Jobim defended the establishment of the NCJ not as an external mechanism of control, but as an internal administrative body within the judiciary branch and subject to judicial review by the Brazilian Supreme Court. Chief Justice Jobim persuaded the government that they should not attempt to change the composition of the NCJ and that it would be possible to reach political consensus and a compromise between government and opposition only without doing so.
The rapporteur of this legislative project in the senate, senator Jose Jorge, was a member of the liberal party and also an important participant in the political articulation between executive, judiciary, and legislative powers. Immune from state court lobbies and the national association of magistrates, the senator defended the enactment of the NCJ as being in line with the political commitment established between the Minister of Justice, the Chief Justice of the Supreme Court, and the absolute majority of the senate. Only one senator voted against this constitutional amendment for reform of the judiciary, which came into force in 2004.

Following the enactment of this constitutional amendment, the National Association of Magistrates filed an Action of Direct Unconstitutionality (Ação Direta de Inconstitucionalidade n. 3367/DF) in the Supreme Court to challenge the constitutionality of the NCJ. In a nutshell, they argued that the establishment of the NCJ violated the federalist system (as a federal body would be responsible for the overview and disciplinary power over state judges), separation of powers (as two members indicated by the House of Representatives and the Senate would become active participants of the judiciary), and judicial independence (as the internal affairs division of each tribunal was sufficient for exercising control over judges). By a majority of 7 to 4 votes, the Supreme Court upheld the constitutionality of the NCJ on 13 April 2005, deeming the justice system to be national just like the NCJ (and, thus, both federal and state courts may be subjected to national control), that the presence of non-magistrates did not violate the separation of powers, and that this administrative body of internal judicial control was simply another mechanism of reciprocal checks and balances that would maximize the efficiency of courts without threatening judicial independence. Immediately after this decision, the tribunals, BAR, Attorney General’s Office, the House and the Senate nominated their representatives at the NCJ, which was installed on 14 June 2005.

As part of the politics of implementing the NCJ, the Chief Justice, the Minister of Justice, and the rapporteur of the Constitutional Amendment explored various possibilities and negotiated the selection of counselors for this inaugural assemblage of the NCJ. First, the Chief Justice guaranteed inside the Supreme Court that he would be the representative of the court at the NCJ and the other Justices approved his nomination unanimously. In addition, Justice Jobim suggested potential candidates for some of the tribunals, but his proactive attitude did not prevent one tribunal from sending a magistrate who had opposed the constitutional amendment. The rapporteur secured the nomination of the Dean of FGV Law School, Joaquim Falcão whose academic work had inspired the reform of the judiciary and whose indication was unanimously approved in the senate. The Minister of Justice also hoped to include his Secretary for Reform of the Judiciary in the first assemblage of the NCJ, but the House of Representatives preferred to elect a constitutional law scholar supported by the opposition parties instead of the member of government who had promoted the constitutional reform on behalf of the executive power. After all these judges, prosecutors, lawyers and legal experts were confirmed by the senate, the NCJ was implemented inside the Supreme Court’s building in Brasilia.

In their first session, the counselors decided that the president of the Supreme Court would also be the President of the NCJ and that representative of the Superior Tribunal of Justice would function as the ombudsman’s office of the NCJ. There was an internal political dispute regarding the appointment of a vice president of the NCJ, a position to which the representative of the Superior Tribunal of Labor aspired. However, the representative of the Superior Tribunal of Justice considered that his tribunal was more prestigious and the role of ombudsman should be combined with the vice presidency. This dispute was solved by the decision that there would be no vice president and that the Chief Justice of
the Supreme Court would decide who to appoint as a substitute. Eventually, this dispute led to the decision that the vice president of the Supreme Court should also be the substitute for the Chief Justice in the NCJ.

Interestingly, once the NCJ was implemented in June 2005, the National Association of Magistrates altered its earlier attitude. From the original position of a strong opponent that lobbied against the NCJ in congress and challenged its constitutionality in the Supreme Court, the National Association of Magistrates played an active role in supporting the NCJ when the counselors challenged unethical practices within Brazilian tribunals. For instance, one of the first resolutions of the NCJ prohibited nepotism inside tribunals and decided that judges could not employ their relatives. As dozens of magistrates’ relatives filed individual judicial actions against this resolution of the NCJ across the country and obtained injunctions to preserve their jobs inside local tribunals, the National Association of Magistrates filed an Action of Declaration of Constitutionality (Ação Declaratória de Constitucionalidade n. 12) to uphold this resolution. Less than one year since challenging the existence of the NCJ, the National Association of Magistrates was defending their resolution against nepotism in the Supreme Court. By a majority opinion of 9 votes to 1, the Supreme Court validated the resolution against nepotism and nullified all decisions granted in favor of magistrates’ relatives across Brazil.

As the oral history of the NCJ reveals, the counselors strategically chose this subject. By fighting against nepotism, the NCJ gained support from the media, public opinion and the majority of magistrates and immediately justified its existence in the public eye. It was very difficult for the adversaries of the resolution to protest against the counselors in defense of nepotism. Brazilian public opinion is generally critical of patrimonialism and the use of public resources for private interests. Consequently, this resolution was a strategic move that both legitimated the NCJ and reduced the resistance of the National Association of Magistrates against it. Furthermore, the counselors rejected the temptation to discuss judicial ideology or the normative substance of particular sentences and refused to interfere with judicial independence. One explanation for the self-constraint of the counselors comes from the fact that the same constitutional amendment that created the NCJ also established a system of binding precedent within the Brazilian justice system. Therefore, decisions of the Supreme Court may have the status of binding precedent and have a direct impact on the judicial ideology of lower court judges. In this sense, on one hand, the counselors do not even have to impose their legal opinion across the judicial system, as the Supreme Court now has a powerful tool for influencing judicial decision-making throughout the Brazilian judiciary. On the other hand, magistrates perceive the NCJ differently exactly because of their respect for judicial independence.

According to its constitutional design, the NCJ exercises financial and administrative control over the judiciary and the professional responsibilities of magistrates. The constitutional text enables the NCJ to enact normative resolutions and to make administrative recommendations. In addition, counselors may examine the legality of any administrative act. Likewise, the ombudsman may receive and investigate complaints against any member of the judicial branch (not only magistrates, but also all members of the civil service within the judiciary). Furthermore, the NCJ may exercise disciplinary power and also request criminal investigation and prosecution from the Attorney General’s Office whenever the administrative wrongdoing also constitutes a criminal offence.

At last but not least, the NCJ has to produce an annual report on the state of the judiciary branch, which is delivered at every inaugural session of the national congress. It has also to produce statistical reports on judicial procedures and sentences for every state,
type of tribunal, and hierarchical level. These statistical reports originated the project ‘justice in numbers,’ which will be discussed in the next section.

Justice in numbers

In 1989, the IT department of the State Tribunal of Sao Paulo estimated that civil cases lasted 677 days on average (Beneti 1995). At that time, this calculation of the length of procedures was uncommon in the Brazilian justice system, but the necessity of producing legal indicators for the ‘rule of law index’ and ‘Doing business’ radically transformed the panorama of justice administration. Nowadays, with the widespread belief that judicial delay generates negative externalities and profound social costs to plaintiffs (Ferraz 2009), all tribunals are expected to produce regular statistical measurements of various aspects of the justice system. Until 2004, however, technology was used only to provide information about individual cases, and most tribunals did not have a department of statistical analysis (Cunha et al. 2005). Data were only rarely compiled in an integrated way and tribunals could neither properly monitor their performance, nor define future plans of action (Cunha et al. 2005).

Since its establishment, the NCJ has produced annual statistical reports of ‘justice in numbers’ as part of its strategy for developing a comprehensive public policy for the judiciary branch. Former Chief Justice Nelson Jobim refers to these numbers as his major achievement in terms of judicial management (Frydman 2010, 2011). Exploring the analogy that procedural avenues function like the road traffic, Jobim conceived a specific ‘index of procedural traffic jam’ (in Portuguese, taxa de congestionamento), which compared the number of new cases with the number of closed cases in a given year. He also created an ‘index of appealability’ (in Portuguese, taxa de recorribilidade), which measured the proportional percentage of appeals within a given justice sphere. In addition, ‘justice in numbers’ also provides information on the numbers of open cases, active judges, physical space, budgetary expenses of salaries and courtrooms, recovered money, etcetera. These numbers inform decisions related to creation of new courts and positions for magistrates. Immediately after the creation of the NCJ, the State Tribunal of Sao Paulo refused to share its internal data with the counselors. As a result, there was no data available for analyzing the eventual necessity of creating more judicial posts and courts. This refusal to share quantitative data with the counselors demonstrates Foucault’s point about the close relationship between information and power (Foucault 2009).

In his study of governmentality, Foucault traced the historical origins of statistics as the ‘science of the state’ and characterized bio-power as governmental control over populations (Foucault 2009). In addition to the disciplinary power typical of prisons (Foucault 1995) and psychiatric clinics (Foucault 2004, 2008), Foucault also examined political control exercised over wider demographical groups. In this context of bio-power, governmental decisions regulate the conduct of certain populations through regimes of incentives and sanctions that affect their behavior. Interestingly, Foucault associated the exercise of this bio-power within the modern regulatory state with the pastoral responsibilities of shepherds (Foucault 2009). The counselors have pastoral responsibilities over magistrates in terms of planning, guiding, and protecting their activities. They may also discipline individual judges.

Examining the NCJ, both types of Foucauldian power are present in its exercise of control over judges. On one hand, the ombudsman is entitled to investigate allegations of abuses, wrongdoings, and inertia of magistrates and to accuse them of functional faults
that could lead to their removal, suspension, or forced retirement. Similar to all other internal affairs divisions, the NCJ may also punish judges and civil servants of the judiciary. As a matter of fact, the internal affairs divisions of various tribunals were considered to be inoperative and the NCJ was created to deliver discipline to magistrates in a more efficient way. In this sense, the NCJ could be classified as an institutional bypass (Prado 2014; Prado and Chasin 2011), as a new organization was created inside the political structure of the judiciary to compete with the inoperative divisions of internal affairs that were not abolished, but rather were forced to respond to the existence of the NCJ. Actually, in certain situations, the NCJ sends cases to the internal affairs division of tribunals and monitors their exercise of disciplinary power. If a local ombudsman adequately punishes a magistrate for functional violations, there is no reason for the NCJ to further persecute the already punished judge.

On the other hand, the compiled information on individual judges enabled the NCJ to exercise bio-power as well. For instance, access to all this information empowered the NCJ in regulating judges. In the case of nepotism discussed above, the counselors could check whether a given regulated magistrate hired a relative to work with him. In addition, the NCJ also decided to check if tribunals were enforcing constitutional rules that limit salaries in the judiciary. According to Brazilian constitutional law, no magistrate is entitled to earn more than the Chief Justice of the Supreme Court, but before the establishment of the NCJ some tribunals would circumvent these caps on salaries and pay additional benefits to a few selected judges. Having access to all the statistical data, the NCJ decided to check the actual payments made to thousands of Brazilian magistrates. The counselors discovered that many tribunals had developed certain techniques of creative compliance (McBarnet 2003) to pay salaries above the constitutional limits. As a consequence of this overview, the NCJ prohibited the payment of these unconstitutional salaries to magistrates. The fight against nepotism and the prohibition of higher salaries are two examples of the exercise of bio-power, as the counselors regulated the lives of magistrates and limited their income, based on data analysis of this demographical group and without disciplinary punishment.

The NCJ also expounds ‘justice in numbers’ annual reports, comparing and contrasting the efficiency of all the different tribunals. According to Yeung and Azevedo, there is evidence that court management impacts judicial efficiency. Examining these reports, Yeung and Azevedo concluded that the state tribunals of Rio de Janeiro and Rio Grande do Sul ‘are relatively the most efficient units in the country’ and, as a World Bank Report identified these two tribunals as the best cases of court organization in Brazil, they concluded that good management impacts judicial performance (Yeung and Azevedo 2011). On the other hand, an efficient court management should not lead to the erosion of important judicial values (Frydman 2010, 2011).

Immediately after becoming president in 2003, Lula declared that the judiciary was a ‘black box’ and should be opened. Since the reform of the judiciary, managerial deficiencies have become evident due to the impact of transparency and statistical analysis. One of the fundamental problems is highlighted by Mathew Taylor: ‘judges decisions are to a certain extent less important to the overall functioning of the courts than the management of huge caseloads that enter at all levels of the court systems’ (Taylor 2005). In addition, tribunal staff in Brazilian courts comprises tens of thousands of civil servants, but none of them exercises the role of court administrator, which is reserved for a senior magistrate without the necessary professional training (Taylor 2005). Likewise, the formalism of legal education and practice brings policy implications to courts, as Brazilian judges focus more on principles rather than consequences, having a highly theoretical focus that...
is often divorced from experience and real life circumstance (Taylor 2005). Historically, Brazilian tribunals are also unrepresentative of the general population and are perceived as elitist institutions (Taylor 2005).

Statistical reports translate all these problems into numbers. In addition to providing the number of sentences per judge for the evaluation of the individual efficiency of magistrates, these statistical reports also provide quantitative data for the comparison of the judicial performances of different tribunals, thus engendering institutional competition. There are different numbers and indexes for budgets and overall costs, civil service personnel, court space, information technology, litigation fees, tax collection, and the value of estimated damages paid to parties.

‘Justice in numbers’ reveals that tens of millions of cases are brought to Brazilian courts every year and that there are higher levels of ‘procedural traffic jam’ and ‘appealability’ in some state tribunals than in others. For instance, in 2012, in the efficient state tribunals of Rio de Janeiro and Rio Grande do Sul, magistrates produced on average, 2882.3 and 2503.98 sentences per judge over a period of 12 months, respectively. On the other hand, the state tribunals of Piauí and Roraima produced 464.72 and 668.47 sentences per judge over the same period of time. These reports also reveal detailed information on ‘procedural traffic jams.’ For instance, the state tribunals of Rio de Janeiro and Rio Grande do Sul closed large numbers of cases in 2012, by producing 2335,881 and 1697,944 judgments, respectively. However, both state tribunals received even larger numbers of new judicial cases, 2624,415 and 1796,697, respectively. Furthermore, both tribunals already had a large number of open cases awaiting definitive judgment on their dockets (8062,108 and 2442,682, respectively). Therefore, based on this difference between closed and newly opened cases, together with the passive pile of procedures in court dockets, the ‘procedural traffic jam’ index of Rio de Janeiro is 78.0% and 59.9% for Rio Grande do Sul. Regarding the total litigiosity, the numbers reveal that 19,268,625 cases were closed in 2012, while 20,040,039 new ones were opened in the same year and a total of 52,018,720 were pending definitive trial. Every year the NCJ elaborates on 9 statistical reports on ‘justice in numbers’ and in 2012 they produced a total of 1647 report pages with numerical information on state tribunals, federal tribunals, and superior tribunals.

Statistical data are also essential for the strategic planning of the judiciary. Nowadays, decisions about hiring more magistrates, creating new judicial positions, and defining the subject matter of their professional roles in a given county are always informed by statistical data. Likewise, the NCJ reports on ‘justice and numbers’ combined with consultations with magistrates in different states are decisive in the definition of the judiciary’s strategic planning. As Andrade explains,

a Balanced Scorecard (BSC) Map, the ‘Strategic Map of the Judiciary Power’, was constructed by the team of the Strategic Management and Projects Centre of the NCJ picturing 15 goals. This technically elaborated BSC, based on impressions forged at the regional meetings, was then presented to the presidents of courts, counselors of the NCJ and representatives of judges associations gathered at the Second Judiciary Encounter at 16 February, 2009. (Andrade 2009)

In this same event, the national targets of the judiciary branch were defined and the most well known would be target number 2, which determined that all tribunals would identify and judge old cases in their dockets (distributed before 31 December 2005). All these oldest procedures received a special label identifying them as part of the ‘target number 2’ effort and every magistrate monitored the speed of their progress and their
readiness for a final judgment, as they were in turn being monitored and judged by their own internal administration. Since 2009, the NCJ and magistrates have established new annual operational targets for the judiciary branch at these national judicial meetings. Most of the targets are numerical and they do not refer to the substantive content of sentences or to judicial ideology. Any recommendation on how judges should decide specific cases would be deemed an abusive violation of judicial independence and would provoke a strong reaction from the magistrates against the NCJ. On the other hand, because the counselors proposed numerical targets, aimed at increasing judicial performance and the efficiency of courts, and negotiated with judges at these national meetings, there is a relatively high level of engagement with this strategic planning and magistrates are not so isolationist or resistant to the NCJ. The next section will examine the exact influence of the NCJ on the judiciary’s structure and judicial behavior.

The influence of legal indicators on a justice system and judicial behavior

The rise of legal indicators and the so-called ‘mathematical turn’ are an important aspect of contemporary discourse on justice, rule of law, and democracy (Restrepo-Amariles 2014, 2014-A, 2014-B). This article demonstrates that the influence of these indicators is not only a matter of semantics, but also that the internalization of this mathematical perspective within a legal order may alter its internal structure. One possible analytical interpretation comes from Luhmann’s systems theory. According to him, the legal system is normatively closed and open only in cognitive terms (Luhmann 2004). In this sense, the legal system produces its own internal logic and transforms any external influence from the environment into discussions on legal/illegal (Luhmann 2004). Therefore, these legal indicators on the rule of law and external pressure for efficient courts could not be internalized into the legal system in their own external terms, but have to be translated into legality’s own code and program. As the legal system is normatively closed, Luhmann denies that external influences may transform its internal coherence and change the binary code that analyses facts according only to the logic of their legality/illegality (Luhmann 2004). In his autopoietic theory of the legal system, these external factors may only ‘irritate’ the internal structure of the system, but do not radically alter its code or program (Luhmann 2004; Teubner 2003).

Interpreting the establishment of the NCJ and the project ‘justice in numbers’ through Luhmann’s theoretical lenses, political pressure was put on over the Brazilian legal order and resulted in a constitutional amendment that reorganized its internal structure. Luhmann acknowledges this external influence of politics over the legal order through constitutional changes, as he identifies the constitution as a structural coupling between politics and law that opens both the political and the legal systems to external influences (Luhmann 2004). However, Luhmann argues that the internalization of this external influence will happen in accordance with the system’s code and will reproduce its own internal terms. Therefore, the mathematical perspective should be translated into a legal perspective that codifies all data in terms of legal/illegal.

Likewise, the economic concept of efficiency is coded, so that some efficient acts may be labeled ‘legal’ and some inefficient ones labelled ‘illegal.’ In Luhmann’s terms, even if the NCJ was conceived as an administrative body within the legal system, its internal logic would reproduce the code, program, and the system’s internal structure. Observing the historical implementation of the NCJ, the first secretary-general admitted that, as the NCJ members were all legal actors within the legal system, they created legal routines that reproduce the procedural routines of a justice system. Every complaint to the NCJ is
processed in accordance with a procedural code, is distributed to a counselor who will perform the role of rapporteur, and the NCJ will ultimately decide whether a given judicial act was legal or illegal. This translation of the mathematical perspective and analysis of efficiency into a legal code and a judicial program may suggest that the legal system eliminated a pluralistic perspective and that everything is reduced to an analysis of lawful/unlawful. Nonetheless, there is an alternative perspective of the autopoietic law that acknowledges a higher degree of normative openness of the legal system.

According to this version of systems theory, structural transformations of the legal system may establish a binding institution from a different system — for instance, political, economic, or scientific systems — that will channel its influence throughout the organization (Paterson 2006). This seems to be a common case in regulatory systems that require extensive use of both law and technology and, therefore, establish a combination of scientific and legal codes, programs, and institutions in their structure (Paterson 2006). As critics note, Luhmann would not approve of this built-in structural coupling that internalizes the logic, code, and program of two different systems, channeling external influences permanently inside the legal system (King 2006).

On the other hand, it seems clear that the NCJ was conceived as a permanent hybrid organism within the Brazilian judicial system, which combines and channels political, economical, technological, and legal discourses, codes, programs, and influences. After only one decade since its creation, it seems premature to affirm that the legal system reformulated the NCJ and all its operations are exclusively legal. Discursive practices and strategic decisions are based not only on a mathematical perspective, but also produce and reproduce concepts from economics, politics, and technology. Therefore, future empirical research should examine if the NCJ was simply an ‘irritant’ to the legal system — in Luhmann’s terminology (Luhmann 2004; Teubner 2003), an external influence that does not fundamentally transform the system — or if it was this built-in structural organ that infused permanently external influences within the judicial branch and radically changed its internal structure, code, and program. This concern is connected with Benoit Frydman’s point that the internalization of management into a justice system may very well function like a Trojan horse (Frydman 2011).

Another important line of inquiry comes from the incorporation of statistical analysis into the administration of justice. In addition to its function in disciplinary power, the NCJ analyzes statistical data on the judiciary in order to exercise control and to implement the strategic planning of the judicial branch. As mentioned earlier, Foucault extensively discussed these technologies of control as a basic characteristic of bio-power (Foucault 2009). Foucault critically assessed the connection between knowledge and power and examined how the technologies of scientific truth were exercised to control populations. In his studies of governmentality, Foucault reformulated Hans Kelsen’s legal theory and proposed that positive law should be conceptualized not simply as a system of norms, but rather as a system of normality (Foucault 2009). In this sense, legal regulation appears as a technology of control that imposes normal behavioral patterns over different demographic groups (Foucault 2009).

Having studied abnormal behavior and the disciplining of it in the earlier years of his career (Foucault 1995, 2004, 2008), in later years, Foucault focused more on the exercise of this regulatory power through the construction and imposition of patterns of normal behavior (Foucault 2009). In his genealogical investigation of statistical analysis as the science of the state, he demonstrated this fascinating historical connection between the emergence of the modern state and the establishment of statistical analysis as a technological instrument for demographical control (Foucault 2009). As a critical thinker, Foucault
also speculated on forms of resistance to power from subjects who opposed domination (Foucault 2009). Therefore, the mobilization of the national association of magistrates may be observed through this perspective of resistance against *bio-power* and the establishment of a new technological instrument of demographic control. After all, managerial techniques may very well reinforce the internal hierarchies within professional bodies (Frydman 2010).

This line of interpretation would focus on magistrates as being subject to a technology of domination and would classify their counter-conduct as resistance to political domination. However, an additional line of interpretation would focus on citizens as being subject to exercise of political power by the judiciary branch and, in this case, the establishment of the NCJ should be classified as a popular counter-conduct of resistance to judicial power. According to Foucault’s micro-physics of power, focus of observation is essential in order to define the particular kind of power analysis that emanates from this perspective of, in Foucauldian terminology, an optics of domination or panopticism (Foucault 1995). According to these different lines of interpretation, the NCJ may be classified as an instrument of domination and as an instrument of popular resistance to domination. Our focus should not only be on who the NCJ controls, but also on who controls the NCJ. Interestingly, exercise of *bio-power* is not a privilege of governing elites; both governors and the governed are often subject to processes of governance (Davis, Benedict, and Sally Engle 2010).

In any event, the NCJ clearly operates as a new source of knowledge and power within the Brazilian justice system and the Foucauldian perspective is essential in order to analyze it in terms of power relations, technology of control, and exercise of *bio-power*. Empirical research should investigate if the NCJ functions as a source of emancipation for Brazilian citizens or as a source of the concentration of hierarchical administrative power on the apex of the judicial system. The oral history of the NCJ indicates that both hypotheses deserve further investigation. On one hand, the fight against nepotism and the prohibition of higher salaries suggests an emancipative posture, as the counselors protected the interests of Brazilian citizens from the corporate interests of a few magistrates who abused their position. On the other hand, the dispute between the Chief Justice of the Supreme Court, the ombudsman, and the justice from the Superior Labor Tribunal, for political power within this body reveals that the NCJ is also perceived as an important source of administrative power at the apex of the Brazilian judicial system. Multiple narratives are possible and, as it is still premature to make any categorical conclusion, future research will have to analyze the NCJ from the perspective of power analysis. In any case, it is already clear that numerical indicators are used as a technology of governance, following a global trend (Davis, Benedict, and Sally Engle 2010).

Finally, another extremely important line of investigation would be to assess the impact of the NCJ, these legal indicators, and the ‘mathematical turn’ on judicial behavior. Anecdotal evidence suggests that magistrates must manage their numbers in order to be promoted. According to a statement by the former Chief Justice in his interview to the Oral History, judicial careers depend on an evaluation of the number of judicial acts produced by a magistrate. Strategic behavior towards these legal indicators has shaped institutional reform (Arruñada 2009) and our case study indicates that these numbers affect also judge’s conduct. Interestingly, before the establishment of the NCJ, any kind of judicial act would give the impression that a magistrate was a hard worker, as even meaningless judicial acts would be registered in her personal statistical account. ‘Justice in numbers’ reports focus strongly on judicial sentences and closure of judicial cases. Therefore, meaningless judicial acts are no longer evidence of efficiency. In any event, it seems
clear that judges must manage their numbers as part of their career path, as statistical data related to case management is an important aspect regarding professional promotion.

Conversely, inefficient judges may be punished due to their poor or abnormal numbers. Two recent examples from the internal affairs of the state tribunal of Rio de Janeiro provide interesting topics for discussion. First, one state judge was disciplined because of his low numbers. After an inspection from the internal affairs revealed that 600 cases on his dockets were awaiting a judicial sentence, this magistrate failed to respond to an ultimatum from the internal ombudsman, did not deliver the expected quantity of judicial acts and faced disciplinary charges.

Second, one state judge was suspended partially due to the abnormal number of criminal wiretapping authorized by him in a small county in the suburbs of Rio de Janeiro (2147 wiretapped telephone lines in a county with 103,515 residents). The judge explained that a huge port is located in his county and the federal police decided to concentrate operations against drug trafficking in his criminal jurisdiction. Therefore, according to him, most of the wiretapped lines were outside his county and, sometimes, in other states, as the police were following the chain of distribution from the production sites of marijuana and cocaine to the slums of Rio de Janeiro where they were sold. His arguments were insufficient to justify his abnormal numbers and the press nicknamed him the ‘wiretapping record-holder.’ The internal affairs of the state tribunal of Rio de Janeiro were strongly criticized in the media for not disciplining him, and this magistrate was suspended on the first inspection by the NCJ’s ombudsman in Rio de Janeiro.

Both cases were processed in secrecy and probably contained many more important analytical elements beside those highlighted by the press. However, numerical evidence and statistical data were major elements in both disciplinary procedures against these judges. These two examples provide only anecdotal evidence of the internalization of the ‘mathematical turn’ and how these numerical elements influence judicial behavior. However, it is clear that magistrates must now pay close attention to their numbers to facilitate their promotion and avoid punishment.

In 2004, just before the establishment of the NCJ and his appointment to become a counselor, Joaquim Falcão referred to the possible phenomenon of the ‘syndrome of ombudsman.’ According to him, there was a risk that magistrates would manage their caseload and judge their cases under the shadow of a possible inspection or disciplinary action from the NCJ’s ombudsman (Cunha 2006). This anxious state resembles what the conservative party in the UK expressed as the ‘shadow of a judge behind each member of the civil service’ (Leyland 2012). Interestingly, the roles are reversed and Brazilian judges have concerns with the bureaucratic management of their workload, as inefficiency may lead to disciplinary action.

Legal realists famously investigated the factors that influence judicial behavior. Particularly, Llewellyn referred to the ‘Law-Job’ and the ‘institutional machinery of justice,’ emphasizing organizational aspects of the justice system as important factors of judicial influence, as they provide direction and incentives for magistrates (Llewellyn 1940). If the legal realist insight into the impact of administration of justice over judicial behavior is sound (Twining 2012), Brazilian magistrates are influenced by their numbers and by the so-called ‘mathematical turn’ (Restrepo-Amariles 2014, 2014-A, 2014-B). As complex as the process of the diffusion of legal ideas is (Twining 2006, 2009), these international legal indicators were internalized in the Brazilian legal order as ‘justice in numbers’ by the NCJ.

If numbers can really influence judicial decision-making, we could even speculate if mathematics could be considered another source of law-making and adjudication. These
juridical numbers could eventually be considered to be a ‘legaloid,’ an external element from the general culture that becomes partially legal through a process of fusion (Llewellyn 1940). Or should we create an analogous neologism and term any of these numbers with normative weight that indicate the quality of rule of law, efficiency of law enforcement, and substantive justice through mathematical formulas and indexes, as a ‘numeroid’? These combinations of numbers and written law could also be classified as a new form of normative pluralism (Twining 2010), in which numerical formulas would integrate the legal system as part of the normative expectations on how judicial performance is and how judicial efficiency ought to be. In this case, numerical formulas would appear as additional sources for descriptive and normative legal analysis.

Particularly in contemporary Brazil, these numeroids are taken extremely serious for everyone involved with the judiciary. Brazilian judges are concerned with the quantity of decisions they produce and are encouraged to prepare templates that may be easily adjusted to the particularities of the cases by their clerks. They are expected to deliver dozens of sentences per week. In addition, state systems developed electronic overview mechanisms capable of identifying cases awaiting a judicial decision for longer than 30 days, discouraging judges to retain processes in their offices. As a result, judicial decisions are faster and shorter than before. Therefore, internalization of legal indicators through the NCJ and the ‘justice in numbers’ influenced the justice system and judicial behavior. It disseminated an audit culture (Twining 2009) and performance measurement through benchmarking (Frydman 2010) that impacts everyone’s work and delivery of justice.

In this context, judges lack proper incentives to deal with complex litigation, class actions, and other high profile cases. Likewise, in numerical terms, preparing a lengthy, sophisticated, and innovative decision is equivalent to repeating a precedent. In this institutional scenario, class actions and complex litigation become radioactive. Unsurprisingly, these cases are sometimes quickly dismissed on procedural grounds, as denying a judicial order is usually faster, simpler, and less risky than granting one. Therefore, some judges may look efficient through statistical analyses, but actually produce a high number of poor quality decisions very fast. On the other hand, some judges may not be considered to be so efficient numerically, but actually deliver better quality decisions slower and in lower numbers. As Frydman puts it, managerial routines must respect the fundamentals of procedural economics (Frydman 2011). Judicial behavior is shaped by incentives and sanctions and this economic regime of adjudication must be properly calibrated (Frydman 2010). The establishment of this statistical mechanism of judicial accountability induces strategic behavior that may affect also judge’s perspectives. In the 1990’s, judicial attitudes toward the NCJ changed among younger judges, who wished to preserve their reputation at the expense of judicial independence (Prado 2010). If these transformations caused by the rise of legal indicators eventually affect judge’s social reputation, threatening their prestige and salaries, there will be political pressure for new institutional reforms. This new mathematical logic affects quality of decision-making, depth of legal analyses, and credence of judge-made law (Frydman 2010). Resistance to these managerial techniques may consist of counter-conduct by judges themselves (Frydman 2010), if they decide to rescue an absolute freedom of judgment — hardly compatible with this managerial rationale resulting from use of legal indicators and new public management in the judicial system (Frydman 2011).

This section brought three different lines of investigation that are relevant for the analysis of NCJ and the impact of legal indicators on judicial behavior. Luhmann’s ‘irritants,’ Foucault’s ‘bio-power,’ and Llewellyn’s ‘legaloid’ provided interesting ground for case study discussion. This combination of autopoietic systems theory, poststructuralist power
analysis, and American legal realism would sound theoretically inconsistent in a treatise of jurisprudence. However, case studies explore different approaches related to a research question and may examine multiple theoretical perspectives that clarify the problems brought by the case (Prado 2014-A). Therefore, the simultaneous use of different streams of legal and social theory is adequate to the analyses of the NCJ and its impact over the judiciary as an irritant, a bio-power, and a legaloid—or a numeroid.

Additionally, as David Restrepo Amariles explains, numerical indicators may be problematic due to eventual data manipulation and necessary conceptual simplification (Restrepo-Amariles 2014, 2014-A, 2014-B). On the other hand, the case study of the NCJ and ‘justice in numbers’ shows that numbers may also be quite revealing and illuminate the opacity of the justice system with the transparency of quantitative data. Likewise, there is no evidence of data manipulation so far, but empirical research should investigate these aspects and also address other aspects of this influence of numerical indicators on the judiciary branch and on judicial behavior. These considerations lead us to our final remarks.

**Final remarks**

This article examined the NCJ and ‘justice in numbers’ reports as a case study on the influence of legal indicators over the Brazilian justice system and judicial behavior. Drawing from extremely detailed interviews conducted by FGV Law School and CPDOC researchers for the oral history of the NCJ, the first section discussed the political stakes related to the foundation, implementation, and development of the NCJ. Subsequently, the project ‘justice in numbers’ was examined with notes on its challenges, scope, innovation, and strategic dimension. Finally, based on Luhmannian systems theory, Foucauldian power analysis, and Llewelyn’s legal realism, this essay discussed the influence of numerical formulas over the judiciary and judges themselves. Evidence indicates that the NCJ impacted the internal structure of the Brazilian justice system through the establishment of a new technology of control and assessment of judicial efficiency based on statistical analysis and quantitative data that influences judicial behavior and creates incentives and sanctions based on a ‘justice in numbers’ and judges’ personal statistical accounts.

Future research should investigate how judicial behavior is influenced by the rise of legal indicators elsewhere, exploring the possibilities opened by comparative law and economics studies (Michaels 2009). Not only in Brazil judges have incentives and sanctions associated with their statistical performance and mapping their strategies, reactions, and resistance in other jurisdictions seems an important task to understand better the ‘mathematical turn.’ Moreover, this case study is exploratory and further studies should pursue some of the big questions left opened: how significant was the impact of the NCJ over the Brazilian judicial system? In terms of political control, did the NCJ control the judiciary or was it captured by the judicial branch? What are all strategies, reactions, and modes of resistance adopted by judges as a result of this statistical mechanism of judicial accountability? Could the NCJ be considered to be an institutional bypass? This case study pointed in many directions, but future empirical research should provide more answers to these questions.

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