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THE IMPLEMENTATION OF ARTICLE 4 OF THE CIVIL PROCEDURE CODE BY THE DISPUTE SYSTEM DESIGN

A IMPLEMENTAÇÃO DO ARTIGO 4º DO CÓDIGO DE PROCESSO CIVIL PELO DESIGN DE SISTEMAS DE GESTÃO DE CONFLITOS

LA IMPLEMENTACIÓN DEL ARTÍCULO 4 DEL CÓDIGO DE PROCEDIMIENTO CIVIL MEDIANTE EL DISEÑO DE SISTEMAS DE GESTIÓN DE CONFLICTOS

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ABSTRACT: This work aims to present the theme of Conflict Management Systems Design and demonstrate how this methodology is able to stimulate a review of Brazilian Justice Systems from a more inclusive and functional perspective. In addition, an attempt was made to explain how the design of the conflict management system is capable of guaranteeing the implementation of the reasonable duration of the process, enshrined in article 4 of the Code of Civil Procedure and in article 5, LXXVIII of the Federal Constitution, without prejudice to the quality of judicial provision, thus contributing to the construction of a dynamic and participatory adversary system. For that, the inductive method and national and foreign bibliographical research were used.

KEYWORDS: Reasonable duration. Systems design. Conflict management. Dynamic contradictory. Inclusion.

RESUMO: *O presente trabalho tem por objetivo apresentar a temática do Design de Sistemas de Gestão de Conflitos e demonstrar como esta metodologia é capaz estimular uma revisão dos Sistemas de Justiça brasileiros sob uma ótica mais inclusiva e funcional. Além disso, procurou-se explicar como o design de sistema de gestão de conflitos é capaz de garantir a implementação da razoável duração do processo, consagrada no artigo 4º do Código de Processo Civil e no artigo 5º, LXXVIII da Constituição Federal, sem prejuízo da qualidade da prestação jurisdicional, contribuindo, assim, para a construção de um contraditório dinâmico e participativo. Para tanto, utilizou-se o método indutivo e pesquisa bibliográfica nacional e estrangeira.*

PALAVRAS-CHAVE: *Razoável duração. Design de sistemas. Gestão de conflitos. Contraditório dinâmico. Inclusão.*

RESUMEN: *Este trabajo tiene como objetivo presentar el tema del Diseño de Sistemas de Gestión de Conflictos y demostrar como esta metodología puede estimular una revisión de los Sistemas de Justicia brasileños desde una perspectiva más inclusiva y funcional. Además, se trató de explicar como el diseño del sistema de manejo de conflictos es capaz de garantizar la implementación de la duración razonable del proceso, consagrado en el artículo 4 del Código de Procedimiento Civil y en el artículo 5, LXXVIII de la Ley Federal. Constitución, sin perjuicio de la calidad de la provisión judicial, contribuyendo así a la construcción de un sistema acusatorio dinámico y participativo. Para ello se utilizó el método inductivo y la investigación bibliográfica nacional y extranjera.*

PALABRAS CLAVE: *Duración razonable. Diseño de sistemas. Manejo de conflictos. Dinámica contradictoria. Inclusión.*

Introduction

In this work, the theme of the Design of Conflict Management Systems will be unveiled, in order to demonstrate how this methodology is able to stimulate a review of Brazilian Justice Systems from a more inclusive and functional perspective.

The final objective is to demonstrate how the design of the conflict management system is able to guarantee the implementation of the reasonable duration of the process, enshrined in article 4 of the Code of Civil Procedure and in article 5, LXXVIII of the Federal Constitution, without prejudice to the quality of the judicial provision, thus contributing to the construction of a dynamic and participatory adversary. For that, the inductive method and the national and foreign bibliographical research were used.

Regarding article 4 of the Code of Civil Procedure, it is a consensus in the doctrine that it enshrined the guarantee of the reasonable duration of the process, with support in item LXXVIII of article 5 of the Federal Constitution, inserted by Constitutional Amendment nº 45/2004 (BRASIL, 1988).

When analyzing the Brazilian judiciary context, obstacles to the implementation of the said guarantee are identified, which are hampered, above all, by the high number of cases that are submitted to the Judiciary on a daily basis, without a corresponding increase in the body of judges, which leads to an overcrowding of offices and, therefore, a greater procedural delay.

At the same time, the current social configuration, marked by hyperconnectivity and the growing role of social media in the routine of human beings, entails a desire for increasingly faster and less bureaucratic conflict solutions.

In view of this, a movement began on the part of the national doctrine to study alternatives that have been applied in the private sector and abroad in favor of a resizing of justice systems, in order to ensure a more effective jurisdictional provision and a reduction of costs. Then, the notions of Conflict Management Systems Design (*Dispute System Design* – DSD), *Online Dispute Resolutions* – ODR`s and *Online* Courts were imported.

The proposal of these institutes is to act in a mostly preventive way on the conflict, understanding it structurally and adapting the rite to the demand. In the end, what is intended is to avoid the need for a decision by a third party outside the conflict, by reducing the informational asymmetry between the parties and expanding the area of potential agreement.

To this end, technology is strategically inserted as a tool to inform the parties about the right in question and, if necessary, it acts as an enabler of direct contact between them, reducing the need for a human workforce in the first moments of conflict management.

The structure that has been devised by the Design of Conflict Management Systems places the parties as the main actors in the resolution of the dispute, so that this is only taken to court if it is not possible to resolve it in the initial phases of the system, which ensures, in addition to a considerable reduction in the duration of the demand, a participatory and dynamic adversary, in which the parties are actively involved in the construction of the solution to the dispute.

Principled considerations about article 4 of the Code of Civil Procedure

Article 4 of the Code of Civil Procedure has a legislative correspondence with item LXXVIII of article 5 of the Federal Constitution, which ensures to all citizens, in the judicial and administrative scope, the reasonable duration of the process and the means that guarantee the speed of its processing, with the referred normative being fully and immediately effective, as determined in paragraph §1 of the same device, not requiring any additional regulation to be applied (BRASIL, 1988; 2015).

The device therefore ensures the fundamental right of citizens to obtain satisfaction of their right within a reasonable time. According to Nelson Nery Junior and Rosa Maria de Andrade Nery:

> the concept of satisfaction involves the guardianship of urgency, knowledge and execution, so that the precept contained in the commented norm will only be fulfilled if the sentence, the appeals, the fulfillment of the sentence and the satisfaction of the claim are completed within a reasonable period (NERY JUNIOR; NERY, 2016, p. 208, our translation).

It is inferred, therefore, that the regulations contained in art. 4 of the CPC and 5, LXXVIII of the CRFB guarantee the Brazilian citizen the right to a satisfactory judicial provision, that is, one that covers all stages of the procedural interstice, including the enforceable one, within a reasonable period. In view of this, it is necessary to unravel what would be understood by the doctrine as a *reasonable term* (BRASIL, 1988).

Hitters (2010) understands that it is necessary to evaluate four elements to assess the reasonableness of the procedural duration, namely, (i) the complexity of the subject; (ii) the procedural activity of the interested party; (iii) the conduct of judicial authorities; (iv) the effect generated by the duration of the procedure on the legal situation of the person involved (HITTERS, 2010). Thus, it is not possible to standardize a reasonable length of time for all

cases without distinction, as the particularities of each demand directly influence the procedural duration.

However, it is common ground in Brazilian doctrine that the slowness of justice rarely results from the structuring of the process itself, but is mainly linked to "resources employed to ensure a reasonable intensity of work by all those related to the process (judge, lawyers and, fundamentally, servants)" (NUNES; BAHIA; PEDRON, 2020, p. 552, our translation).

Thus, it is argued that in order to ensure a process with a reasonable duration, without undue delays, it is first necessary to eliminate "dead" procedural times, which constitute procedural inactivity times, in which the records are paralyzed in the notary, waiting for official impulses or decision-making to be carried out (DIAS, 2018). Then, it is necessary to look for alternatives to

> implementing managerial mechanisms for meeting deadlines, organization by subject, specialization of servers, as well as the implementation of ethical and cooperative behaviors, committed to good faith by lawyers, defenders, public prosecutors and judges are fundamental foundations for the implementation of that principle (NUNES; BAHIA; PEDRON, 2020, p. 451, our translation).

Despite the fact that the Federal Constitution provides for full and immediate effectiveness, the scenario of the Brazilian Judiciary Power lacks mechanisms that enable this effectiveness, since it is marked by a culture of excessive litigation and, therefore, there is an overcrowding of offices.

Challenges faced in the current Brazilian judiciary for the effectiveness of the reasonable duration of the process

Item LXXVIII was added to article 5 of the Federal Constitution by Constitutional Amendment nº 45/2004, whose context of its publication was marked by social dissatisfaction with the quality of the Brazilian judicial service, much of this discontent arising from the chronic delay with which the service was provided (DIAS, 2018).

Two decades ago, therefore, dissatisfaction on the part of the jurisdictional with the perceived slowness in the provision of jurisdictional services was already perceived. Not least, the context of the Information Age still brings external aggravating factors related to the dynamics in which society is structured, which is closely related to the growth of the role of the internet in the daily lives of individuals.

The Network Society awakened in human beings a preference for services provided in an immediate and personalized way, a phenomenon that experienced an exponential growth

with the advent of social media, marked by an instantaneous transmission of information and interpersonal communication (CASTELLS, 1996).

Such facts had repercussions in the context of the Judiciary, especially after procedural virtualization, generating the need to rethink the way legal services are provided, in order to better adapt them to the dynamics of the hyperconnected society.

In this context, the teachings of Nelson Nery Junior and Rosa Maria de Andrade Nery are relevant in the sense that

> time in the process is of vital importance these days, as the acceleration of communications via the web (internet, e-mail), fax, cell phones, together with social, cultural and economic globalization has meant that there is greater demand from the jurisdictional and administered bodies for a quick solution of judicial and administrative proceedings (NERY JUNIOR; NERY, 2016, p. 211, our translation).

In this way, there is a desire on the part of those under jurisdiction and by all the actors involved in the judicial area (magistrates, lawyers, civil servants), inserted in the Age of Technology and in the context of social media, that the legal service is provided quickly and efficiently, with less bureaucracy and with more dynamism.

Nevertheless, there is still a fear related to the loss of legal certainty, in parallel with a neophobia (phobia of the new, fear of the unknown), which, to some extent, still confer a certain reticence on reducing bureaucracy and the use of innovative techniques in the provision of jurisdiction. After all, legal activity has observed the same traditionalist and essentially bureaucratic dynamics for decades.

Another obstacle to the reasonable duration of the process is the increase in the number of lawsuits that are filed on a daily basis. According to the 2021 Justice in Numbers report, in 2020, 25.8 million new actions were filed, and in 2019, the number had reached 30.2 million, the highest value since 2009 (CNJ, 2021).

Parallel to the growth in the number of lawsuits filed, a proportional increase in the number of judges is not foreseen, even due to the lack of public funds for the creation of new positions. The logical consequence is an overcrowding of offices and an inability to deliver satisfactory adjudication within a reasonable time.

In this regard, Nery Junior and Rosa Maria understand that

> In order to give effect to the constitutional guarantee of speed and reasonable duration of the judicial process, it is necessary to equip the Judiciary with the logistical apparatus it needs to comply with the constitutional command, consisting of improving the technical training of judges and the material

> elements necessary for the proper performance of the functions of magistrates and justice assistants (NERY JUNIOR; NERY, 2016, p. 214, our translation).

Thus, the authors understand that it is up to the Executive Branch to provide such mechanisms, as it is incumbent upon it to ensure the implementation of constitutional norms.

In this sense, the present work addresses a mechanism, which can be a source of investment by the government, capable of promoting an effective guarantee of the reasonable duration of the process: The Design of Conflict Management Systems, which will be analyzed in detail in the following topic.

It is important to remember that efficiency and reasonable procedural duration should not be pursued to the detriment of the quality of judicial provision, since

> the technical reduction of spaces for the formation of the provision, when seeking speed, through some summary and differentiated guardianship structuring or, even, changes in the common procedure, end up tainting one or more procedural principles, such as, for example, the contradictory (NUNES; BAHIA; PEDRON, 2020, p. 450-451, our translation).

This time, when seeking alternative solutions to enforce the reasonable duration of the process, care must be taken not to tarnish the full exercise of the contradictory, as well as to ensure the protagonism of the parties in the formation of the final provision.

Having solidified the aforementioned notions, we move on to discuss the recent studies on the Design of Conflict Management Systems as an alternative to improve the Brazilian jurisdictional provision, especially with regard to the resolution of disputes in a reduced time, in a less bureaucratic way, with greater satisfaction of the parties involved and at a lower cost, due to the reduction of human involvement by the use of qualified technology.

The Design of Conflict Management Systems as a tool to enforce reasonable procedural duration

The Design of Conflict Management Systems is an alternative way of thinking and structuring mechanisms for conflict resolution with a focus on improving the user experience (MALONE; NUNES, 2022).

In this regard, Hugo Malone and Dierle Nunes contextualize:

> Developed in the 1980s at the Harvard Business School, the *Dispute System Design* (DSD), or Design of Conflict Management Systems, is dedicated to identifying the causes of conflict and the existence of patterns in its occurrence, with the objective of designing customized systems for its

> solution and adequate treatment (MALONE; NUNES, 2022, p. 35, emphasis added, our translation).

It is inferred that the scope of the DSD is to ensure a different look at conflict resolution methods, both judicial and extrajudicial, as it focuses on the interaction of users with the system, with the final objective of anticipating the conflict, thus avoiding that the controversy acquires a litigious character and the need for a decision by a third party unrelated to the conflict. The action, therefore, is mostly preventive, aiming to avoid litigation, through understanding the conflict and the search for ways to deal with it (prevent, manage and resolve) (MALONE; NUNES, 2022).

It is at this point that one can think about the intersection of the DSD with art. 4 of the CPC, insofar as this provision enshrined the principle of reasonable duration of proceedings as a guarantee to be pursued by the jurisdiction. However, the current Brazilian configuration, marked by a culture of excessive litigiousness, makes the implementation of that principle unfeasible, in view of the very high number of demands that are brought to court on a daily basis and, on the other hand, the lack of proportional growth of the judiciary body, which generates a mismatch in productivity and an impossibility of obtaining agility in the delivery of decisions.

In this way, the proposal of the DSD to anticipate the conflict and create prevention mechanisms, aiming to avoid the need for a decision by a magistrate, contributes to the effectiveness of the reasonable duration of the process, in view of the search for the resolution of the conflict even before being taken to the judicial sphere, which, as a consequence, leads to a faster outcome and a reduction in the number of demands that are brought to court.

Originally, the DSD can be applied within any kind of organization, whether public or private, after all, every sector in which there are transactions and interpersonal relationships is subject to the outbreak of conflicts.

In a culture of excessive litigation, the tendency is for a significant number of claims to be taken to the judiciary even before an alternative, extrajudicial solution is attempted. It is this pattern that Conflict Management Systems Design intends to break.

Among the mechanisms proposed by the DSD is the study of the most appropriate method to be applied in each situation, making it possible to adapt the rite to the vindicated right (*Case Management*) (FERRARI, 2021). Hence the importance of the perception of the plaintiffs and the structural understanding of the conflict, considering the reasons that originated it. For this reason, "stakeholder participation in the design phase of a conflict management

system cannot be merely rhetorical. It is necessary to guarantee the effective participation of all those who can be reached by the system" (MALONE; NUNES, 2022, p. 40, our translation).

By ensuring the active participation of all system users in concatenating the conflict resolution method, as well as in the phases of prevention, management and treatment of the controversy, compliance with the effective and dynamic adversary system is guaranteed, as well as enabling the parties to play a leading role in the construction of the final decision (if any).

In this context,

> conflict is accepted as something natural and, when better understood, allows us to know its triggers and deal with them in order to prevent tension points from arising, for changes that meet the interests of those affected. Conflicts are also prevented from becoming problems that will require more traumatic approaches and, in the phase in which the conflict has already erupted, feedback is allowed to ensure that the debate is limited to interests related to the object (MALONE; NUNES, 2022, p. 39-40, our translation).

The definition of *Dispute System Design* was developed in a context in which the so-called alternative means of dispute resolution already existed (*Alternative Dispute Resolution* – ADR), such as conciliation, mediation and arbitration, which, in the last decades of the 20th century, inspired the emergence of the so-called ODR`s (*Online Dispute Resolution*), whose definition essentially goes back to the use of technology and the virtual environment to develop innovative and effective ways of resolving disputes, therefore, resort to the approaches brought by ADR`s (FERRARI, 2021).

The ODR`s constitute a practical application of the Design of Conflict Management Systems, since their primary scope is to prevent the conflict from erupting and, if it is not possible to avoid it, they employ a management and differentiated treatment, seeking the best satisfaction of the needs of the parties.

One of the most significant and successful examples of ODR is implemented by the e-commerce site *eBay*. The *Modria* platform, developed by Colin Rue in 2011, is intended for the resolution of conflicts arising from transactions carried out within the *eBay* sales website : "This system connects buyers and sellers, allowing the resolution of more than 60 million disputes per year, with a satisfaction rate of over 90%" (FERRARI, 2021, p. 30, our translation).

This user satisfaction is directly related to the speed with which demands are resolved. The feeling is not necessarily linked to success on the part of the buyer, but to a quick and duly informed solution.

In this sense, the first moment of dealing with the conflict is to provide the consumer with as much information as possible related to his demand, so that, if he decides to proceed

with the complaint, the user is already aware of the possible final result. This initial moment is of paramount importance, especially considering that many conflicts are taken to the judiciary because the parties believe they have a right that, in fact, they do not have (FERRARI, 2021).

In this way, informing the jurisdiction appropriately constitutes a mechanism capable of avoiding the outbreak of the conflict. In addition, the smaller the informational asymmetry between the parties, the greater the so-called potential agreement zone, given the prior alignment of expectations (FERRARI, 2021). Therefore, it is important that information about the right in question is transmitted in a didactic and easy-to-understand manner for laypeople.

The second moment consists of trying an *online mediation*, "connecting the two parties involved and asking in the most natural language possible, what the conflict consists of" (FERRARI, 2021, p. 30). At that moment, the parties are connected through communication guiding software, through which it is possible to present conciliation proposals. Afterwards, the system itself begins to identify points of agreement and suggest possible solutions.

In the third stage, there is a transformation of frustrated mediation into arbitration, whose final decision, drawn up by an arbitrator, considers all the information brought by the parties in the previous stages.

The system's intelligence allows parameterizing the percentage of success in dispute resolution, through the platform's database, so that the algorithm used in the second phase can constantly improve, reducing the number of demands that need to be decided by an arbitrator.

Furthermore,

> the effectiveness of decisions and agreements made in the *eBay environment* is guaranteed through direct debit from credit card; after all, the site holds the litigants' financial data from the first transaction. If the discount is not possible, the user's reputation is damaged in the *eBay* user community, making new transactions difficult, and may even lead to their definitive exclusion from the platform (FERRARI, 2021, p. 31-32, our translation).

It is inferred that the intention of the platform is to work "in blocks" that are activated according to the need of the case, always aiming at the solution in the earliest phase of the conflict.

This *eBay structure* inspired the development of other ODR platforms such as those used by *Amazon* and *PayPal*, and essentially constitutes an object of study for the Design of Conflict Management Systems.

Therefore, ODR is an alternative form of conflict prevention, management and resolution that is consistent with the DSD proposal to rethink the way in which disputes are currently resolved.

Despite the fact that the ODR structure is mostly being applied in the private sphere, it should serve as an inspiration for the resizing of conflicts in the public sphere, above all aiming at the effectiveness of art. 4 of the Code of Civil Procedure. This is because, as stated, the aforementioned device aims to ensure the reasonable duration of the process linked to a satisfactory activity, which, as can be inferred from the experiences with the use of ODR`s, is routinely related to the speedy and informed resolution of the conflict.

In this sense, when observing the human need related to the way of resolving disputes today, it is clear that there is a desire for a quick resolution that sometimes overlaps with the success of the demand. That is why, the use of alternative mechanisms, with less need for human labor, in view of the use of qualified technology, is capable of, in addition to unburdening the judiciary, providing greater satisfaction to citizens.

The incorporation of ODR tools in the Judiciary has already witnessed some specific movements in Brazil (such as the Consumidor.gov), but, above all, abroad, leading to the phenomenon known as Online Courts, originating from the search for an improvement in the judicial provision, through increased efficiency and cost reduction (FERRARI, 2021).

The phenomenon is characterized by the use of technological tools in the context of judicial provision, with manifestations ranging from the use of *e-mail* and *WhatsApp* as communication resources between the judiciary and the parties, to the creation of procedural phases that do not require human labor, in a dynamic similar to that applied by the system *Modria.*

In this context, the idea is that a magistrate only decides on those procedures in which, after passing the initial stages of (i) informing the court about the possibilities involving the right in question and (ii) attempting a friendly settlement mediated by software, it is still not possible to resolve the dispute, demanding a decision by a third party.

By the way, the Canadian experience deserves to be highlighted, embodied in the creation of the *Civil Resolution Tribunal* – CRT, an entirely virtual court, destined to the resolution of small claims and condominium disputes. The court adopts dynamics similar to those described above and has a dispute resolution time, considering the three phases, which varies between 60 and 90 days (FERRARI, 2021), a period considerably shorter than the

duration of a lawsuit in the Brazilian context, whose average time for delivery of the first decision is 2 (two) years (CNJ, 2021).

It is inferred, therefore, the potential that the resizing of the dynamics with which the jurisdictional activity is provided has to put into effect the guarantee enshrined in art. 4 of the Code of Civil Procedure, the reasonable duration of the process. For that, it is valid to resort to the Design of Conflict Management Systems (DSD) and seek inspiration in the phenomenon of *Online Courts*.

In addition, the DSD also contributes to the reduction of the mentioned *dead stages* of the process (periods of procedural inactivity), given the possibility of using technology to automate repetitive activities, such as subpoenas and communications, in addition to intending to restructure the procedure in favor of the elimination of merely bureaucratic activities, thus contributing to the speed of judicial provision, without prejudice to quality and legal certainty.

It appears, therefore, the valuable contributions that the Design of Conflict Management Systems is able to provide in favor of the effectiveness of the reasonable duration of the process, but with the protection of a participatory and dynamic contradictory, through the inclusion of all those involved in the conflict in the structuring of the method to be applied for the resolution of the controversy.

Final remarks

The reasonable duration of the process, despite enshrined in Articles 4 of the CPC and 5, LXXVIII of the CRFB as a rule of full and immediate effectiveness, encounters obstacles to its effectiveness in the configuration of the current Brazilian Judiciary Power and in the culture of excessive litigation that, ultimately, leads to overcrowding of offices and slowness in the provision of jurisdiction.

Add to this the growth of the role of the internet in the daily lives of human beings, which generates a desire for ever faster and less bureaucratic dispute solutions, much as a result of the dynamics of the functioning of social media, marked by instantaneous communication.

Then, the need arose to rethink the legal provision in order to better adapt it to the current social configuration. Therefore, the notions of Conflict Management Systems Design (*Dispute System Design* – DSD), *Online Dispute Resolutions* – ODR`s and *Online* Courts were imported.

Such institutes propose an alternative way of thinking about the provision of legal services that privileges prevention, through the structural understanding of the conflict and the adequacy of the rite to the concrete case.

The proposal, in general, is to act in the prevention, management and treatment of controversy, subdividing them into three moments: (i) diagnosis of the problem, in parallel with the instruction of the parties about the right in question, in order to reduce information asymmetry and expand the area of potential agreement; if the conflict still exists, (ii) an attempt at self-composition mediated by software and, if it is still not possible to resolve the controversy, it is submitted to (iii) decision by a third party (magistrate, in the public sphere and arbitrator in the private sphere).

Thus, the dynamics structured by the DSD ensures the reasonable duration of the process, in view of the reduction of 'dead time' by the strategic use of technology in the performance of automatable activities and due to the preventive action with the scope of avoiding the outbreak of the conflict, which reduces the number of demands that are submitted to court.

Furthermore, by allowing the parties to actively participate in the construction of the rite to be applied for the resolution of the controversy, as well as in the elaboration of the final solution, the Design of Conflict Management Systems avoids a loss in the quality of the jurisdictional provision, enabling the effectiveness of the participative and dynamic adversary.

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