

Unclogging Courts by Targeting Litigant Incentives: The Case of the Brazilian Labor Justice Reform

Inovação e desempenho em organizações de justiça

**Caio Castelliano (University of Brasilia) Peter Grajzl (Washington and Lee University),
Eduardo Watanabe (University of Brasilia)**

ABSTRACT

Overburdened courts are a major obstacle to effective administration of justice in many countries, with corresponding adverse consequences for the impacted societies and economies. Conventional reform efforts that aim to reduce court backlogs and delays by increasing judicial staffing are costly and generally ineffective. When new judges are hired, the pressure over incumbent judges decreases, judicial productivity decreases, and court total output remains roughly the same (Beenstock and Haitovsky, 2004; Dimitrova-Grajzl et. al. 2012; Grajzl 2016). The question of what constitutes a viable and effective court reform thus is a highly topical one.

Drawing on the Brazilian experience, we provide an empirical account of one feasible and demonstrably productive policy strategy for unclogging courts of law and enhancing judicial efficacy. In an attempt to decrease the immense litigation of labor relations, the Brazilian policymakers chose to target litigant incentives. In 2017, the preexisting (American) rule, under which each disputing party bears its own litigation expenses, was replaced by the alternative (English) rule under which all litigation costs are borne by the losing party.

The demand for labor justice in Brazil has been substantial both in absolute and comparative terms. In 2019, almost two million new cases were filed in Brazilian first-instance labor courts, a ratio of 0.86 new cases per 100 inhabitants (CNJ, 2020). This rate of filings is considerably higher than the comparable rate for European countries, where the mean number of new filings per 100 inhabitants in 2018 was equal to 0.05 (CEPEJ, 2020).

Economic literature on litigation states that changing litigation incentives would have an impact on court demand. The English rule of awarding legal costs (litigation costs borne by losing party) is an effective deterrent of frivolous suits (P'ng, 1983). In frivolous suits, plaintiff knows that his chances of winning the case are low. Under British rule, he expected to pay not

just his own costs, but also the defendant's costs. So, the adverse consequences of optimism are more severe under this rule. As a result, the British rule reduces the level of optimism and increases the chances of private settlement (Bar-Gill, 2005). However, the variation in the number of new cases is responsible for almost all variation in court total output (Beenstock and Haitovsky, 2004, Bezdowski et al., 2020). Moreover, "the positive association between productivity and caseload holds both when the system is expanding and when it is contracting." (Beenstock and Haitovsky, 2004, p. 360). So, what would be the consequences of court reform for court total output? Following the above mentioned literature, court demand reduction would reduce pressure over judges, judicial productivity would decrease and court total output would remain roughly the same.

Labor court reform in Brazil offers a unique empirical research opportunity to test if changes in litigations incentives would have an impact on judicial litigation and on judicial productivity. The research is focused on the Brazilian labor courts, one of the five segments of Brazilian judicial system (other segments are state courts, federal courts, electoral courts and military courts). Labor courts are responsible for deciding all cases involving labor relations, including cases filed against private persons, business, and governments. Usually labor cases are filed by employees demanding payments from their former employers.

We possess annual data from 2015 to 2019 for two distinct groups of courts: labor courts and federal courts. Observing data both on labor courts (affected by the 2017 reform), and on federal courts (not affected by the reform) is critical for the implementation of our empirical strategy, because federal courts work as a control group.

Utilizing a difference-in-differences approach, we study the effects of the reform on the demand for labor-court services and on judicial efficacy in labor-court adjudication and enforcement. Our estimates reveal that the 2017 reform indeed drastically reduced the demand for labor-court adjudication. At the same time, the reform exerted a temporary positive direct effect on judicial productivity, notably decreased the stock of unresolved adjudication cases, and shortened the expected disposition times. Finally, the reform exhibited a lagged but noteworthy impact on enforcement, eventually causing a drop in new enforcement filings and a rise in judicial efficacy at resolution of enforcement cases. Our evidence-based insights from Brazil provide lessons about the design of viable court reforms for other developing countries and beyond.

Keywords: Courts; fee-shifting; court demand; judicial productivity; Brazil

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