

# The death and resurrection of the twofold admissibility of exceptional appeals in the new CPC

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**Abstract:** This article evaluates the use of evidence, in the legislative procedure, regarding the extinction and comeback of the twofold admissibility in exceptional appeals in the Civil Procedure Code of 2015. The evaluation employs as the parameter the good practices for using empirical data presented in the specialized literature on legislative processes, as well as jurists' comments on the theme. Based on this literature, the article confronts legislative documents (bills, amendments, explanatory statements, opinions) with the good practices and critique, concluding that the extinction of the twofold admissibility fell short of them and that its comeback, albeit flawed, observed them partially.

**Keywords:** Evidence. Legislative procedure. Twofold admissibility. Appeal.

## Morte e ressurreição do duplo juízo de admissibilidade dos recursos extraordinários no novo CPC

**Resumo:** O artigo avalia o uso de evidências, durante o processo legislativo, referente à extinção e retorno do duplo juízo de admissibilidade dos recursos extraordinários no Código de Processo Civil de 2015. A avaliação emprega como parâmetro boas técnicas para a utilização de dados empíricos apresentada pela literatura especializada em processo legislativo, assim como o comentário de juristas que se debruçaram sobre o tema. Com base nessa literatura, o artigo confronta documentos legislativos (propostas, emendas, exposições de motivos, pareceres) com as boas práticas e as críticas, concluindo que a extinção do duplo juízo esteve aquém delas e que seu retorno, embora com falhas, cumpriu-as parcialmente.

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**Palavras-chave:** Evidência. Processo legislativo. Duplo juízo de admissibilidade. Recurso.

# 1 Introduction

Parties litigate in courts with antagonistic interests, but they can agree on something: Brazilian judicial system is extremely slow. Since the 1960's parties, lawyers and jurists attribute this slowness to the appellation system, as Aragão (2006, p. 18) registers. Appeals, it was said, were numerous, bureaucratic and complicated, with their different names, deadlines, and formalistic prerequisites. Responding to this discontent, the new Civil Procedure Code (CPC) (BRASIL, [2019])<sup>1</sup> published in 2015 and in force since March 2016 reformulated this procedural phase.

To simplify the appellation system, the CPC suppressed the twofold admissibility of appeals. Under the 1973 code (BRASIL, [2013]), for a party appeal of a ruling, she had to present her appeal first to whom uttered the decision (*a quo* instance) for this authority to verify the formal requirements. Then, the appeal would be referred to the superior instance (*ad quem*), which would re-evaluate those same formalities and, afterward, examine its merits. If the *a quo* instance barred the appeal, the party could appeal from this decision via *agravo*<sup>2</sup> to the superior instance. During the legislative process that led to the CPC, this two-tier arrangement was abolished so only the *ad quem* court would appraise the admissibility requirements, both regarding the appeal from the judge's decision to the state or federal courts (art. 984) and from these to the superior courts (art. 1.030).

During the *vacatio legis* of the CPC, the law 13.256/2016 (BRASIL, 2016a) reformed some parts of the code, including the provision on art. 1.030, restoring the twofold admissibility

exam of exceptional appeals. They encompass the special appeal to the Superior Court of Justice (STJ) and the extraordinary appeal to the Federal Supreme Court (STF) and aim at protecting the federal legislation and the Constitution, respectively, from incorrect interpretation (JORGE, 2017). Their primary goal is to verify if the legal order was applied correctly considering the circumstances of the case. Without the misapplication of the law, the appeal is inadmissible. Thus, to an extent, their admissibility requirements tangentialize the merits, entailing many discussions about how far the *a quo* instance can go (JORGE, 2017).

Many academics engaged in the debate about this provision<sup>3</sup>. A common worry was that the reformed art. 1.030 allowed the second instance to invade the competence of the superior courts, hindering them from distinguishing cases and evaluating whether the *a quo* court referred only to the admissibility (MEDINA, 2017; MACÊDO, 2016; WAMBIER, 2016; NERY JUNIOR; ABOUD, 2016). In view of this supposed extension of powers of the *a quo* courts, some authors propose a reading of art. 1.030 to make it compatible with the constitution, allowing the STJ and STF to evaluate blurry admissibility requirements (MACÊDO, 2016; CÂMARA, 2017; NERY JUNIOR; ABOUD, 2016; WAMBIER, 2016). Similarly, many scholars claim that the new art. 1.030 could hamper the superior courts from overruling or improving precedents (WAMBIER, 2016; NUNES, 2017; MARINONI; ARENHART; MITIDIERO, 2017,

<sup>1</sup> For acronyms and original expressions, see appendix 1.

<sup>2</sup> There were different types of *agravo* under the CPC/1973, as well as in the CPC. Here, I shall use the word *agravo* solely to refer to the remedies against the decision denying admissibility to exceptional appeals.

<sup>3</sup> For this literature review, I searched from 2011 onwards (see section 4.1) on: a) journals rated A1 to B3 in Qualis; b) online databases (Google Scholar, WorldCat, Magister, Revista dos Tribunais, and Biblioteca Digital Fórum); c) books of renown authors according to my previous experience; d) snowball sampling. Inclusion criteria: the author added his analysis and interpretation. Exclusion criteria: mere description of the new or the old procedure.

p. 416; CÂMARA, 2017; NERY JUNIOR; NERY, 2016; MACÊDO, 2016; MIRANDA, 2016).

Another type of commentary related to formalistic aspects. A few authors emphasized the complicatedness of the new *agravo* system, which counters the simplifying spirit of the CPC (MEDINA, 2017; NERY JUNIOR; ABOUD, 2016). Since parties could have difficulties in reaching the STJ and STF via *agravo*, some scholars proposed wielding other instruments, such as the *reclamação* (MARINONI; ARENHART; MITIDIERO, 2017, p. 416; CÂMARA, 2017; GARCIA, 2016). In other authors' opinion, the wording of the new art. 1.030 is not in accordance with the terminologies used in the rest of code (BUENO, 2017, p. 1.173; MACÊDO, 2016; NERY JUNIOR; ABOUD, 2016). It was also noted that, notwithstanding these defects, the functioning of the STJ and STF would be prejudiced without the return of the twofold admissibility because they would receive all exceptional appeals (BUENO, 2017, p. 1.171; JORGE, 2017; MACÊDO, 2016; MENDES; FUCK, 2016; WOLKART, 2016).

The main concern in the doctrine relates to the fitness and implications of the new art. 1.030 CPC in face of the legal order. Shortcomings in the legislative process were mentioned only marginally to signalize the lack of statistical support in the extinction of the twofold admissibility (JORGE, 2017; MACÊDO, 2016; MENDES; FUCK, 2016). None of the authors centered in examining the drafts, bills, and amendments that dismissed and brought back the twofold admissibility of exceptional appeals. This absence is remarkable since the law-making is in the root of the whole controversy, as the hurry in altering the code before it came into force demonstrates.

Filling this gap, this article aims at evaluating the use of empirical evidence in the legislative documents that sought to regulate

the admissibility of exceptional appeals in the CPC/2015. After this presentation of the problem, there will be an explanation of the methods and criteria employed in this paper (section 2), followed by an exposition of the parameter for the evaluation (section 3). Then, the legislative documents will be gauged against the theoretical parameters (section 4), leading to a discussion about their compliance with the standards (section 5), and finally to a conclusion.

## 2 Methodology

To reach the objective described above, this article seeks to answer the following question: to what extent did the suppression and return of the twofold admissibility of exceptional appeals observe theoretical parameters for the enactment of evidence-based law? Based on Aragão's (2006, p. 31) critique that the Brazilian legislature disregards empirical data, the hypothesis is that both the abolition and restoration of the twofold admissibility of exceptional appeals lacked a systematic gathering of evidence and thorough exam upon them. To test this hypothesis, the legislative documents are assessed against the criteria presented in the following section. The method of assessment consists of analyzing the amendment 825/2011; the bills 414/2015, 2.384/2015, and 2.468/2015; and opinions about these legislative documents (*pareceres*). This exam will be complemented by the critique made by legal scholars in journals and books. Where necessary, articles published in two well-known legal websites (*Conjur* and *Jota*) were added because they displayed important information that was not published in the traditional academic media.

Due to peculiarities of procedural law, this paper relies on some assumptions that exclude some issues problematized by scholars

specialized in legislation and regulation. Unlike material laws, procedural law refers *mainly* to the legal world. Therefore, it concerns legal professionals and scholars, all with somewhat the same level of education and interested in the functioning of the judicial system. Considering this cohesive group, consulting the legal community is not only possible, but necessary because a workable code must rely on sound legal knowledge and address problems faced by practitioners. Thereby, the compromises entailed by public participation, the lack of interest in partaking and the rare usefulness of the public's propositions discussed by Lodge and Wegrich (2015) are not applicable in this field. Another discussion left out of this article concerns whether the extinction and return of the twofold admissibility were symbolic, i.e., enacted so that the legislator appears to be solving the slowness in the procedure instead of really addressing the problem (NEVES, 2011). First, it is necessary to evaluate the quality of the legislative process, then (and elsewhere) assess if and to what extent it was symbolic.

### 3 Parameters for evaluation

This section presents basic standards for how to use evidence in issuing legislation. To facilitate the assessment, the parameter is divided into two parts, one related to the problem to be addressed (subsection 3.1) and the other related to the projected outcomes (subsection 3.2), even though they are intertwined.

#### 3.1 Evidence-based law

As Rachlinski (2011) and Hahn and Dudley (2003) problematized, there are several difficulties in using evidence in legislative drafting. According to these authors, more

often than not the conclusion of research is contradictory or unclear, thus not indicating to the legislator the best path to follow. Furthermore, anecdotal evidence and availability bias cloud statistically significant results, pushing the norms in their direction. Sometimes even, facts are simply not important because legislators want to act independently from them, using the law to make a statement (symbolic law).

Notwithstanding these complications, the law can be used as an instrument for solving real-life problems, as Seidman and Seidman (2011, p. 103) highlight. To do so, it must rely on evidence that indicates the causes of the behaviors that need changing (SEIDMAN; SEIDMAN, 2011, p. 114). According to their ROCCIPI methodology for gathering data, evidence must encompass the existing rules, the opportunities, capacities, and incentives for obeying the law, how the rule communicates with the actors, the actors' decision-making process and how their ideology shapes their behavior (SEIDMAN; SEIDMAN, 2009). Based on this information, the legislator can identify which behaviors he needs to address, so the law reaches its goals.

The use of evidence has also been addressed by Bardach and Patashnik (2016), who suggest ways for the legislator to gather and apply data. They state that the evidence directed to informing the law does not need to meet academic standards of rigor since time pressure and costs constraints are limitations legislators face. Therefore, if the difference between what can be guessed and the information provided by the data is not likely to be much, it is possible not to collect any data and proceed on an educated guess (BARDACH; PATASHNIK, 2016). When the guesstimate is unjustified, the legislator should gather data *i)* about the problem the legislator is trying to solve, *ii)* concrete situations related to the policy (*e.g.*, budgetary issues and

agency workloads), and *iii*) previous experiences that worked well to address a similar situation (BARDACH; PATASHNIK, 2016).

### **3.2 Impact assessment**

Another aspect legislators must consider is the expected effects the law will produce. The idea behind this assessment is to quantify the costs, benefits and risks involved in the changes envisioned by the law, applying economic and risk analyses (TORRITI, 2010, p. 1.069). According to Torriti (2010, p. 1.077), in practice, many sorts of interests influence the legal provision in a certain direction, even when the outcome of the impact assessment recommends otherwise. Moreover, it is hard to master the technicalities (*e.g.*, specific knowledge about the area to be regulated) and to possess the time and money to conduct the assessment. Hence, Torriti (2010, p. 1.077) concludes that impact assessments are only useful when there are few time, resources, expertise and political constraints. Similarly, Bardach and Patashnik (2016) claim that the projection of the outcome is the most challenging step in elaborating a law. They advise legislators to choose a reference mark for comparison, usually what will happen in the future compared with what happens today, using numeric estimates.

Impact assessment also involves listening to stakeholders and the general public (TORRITI, 2010, p. 1.067). According to Voermans, Napel and Passchier (2015), the consultation of the public enhances the legitimacy of the law, enabling the presentation of new solutions and ways of seeing the problem. They highlight that making a law without “informing and consulting experts, citizens or stakeholders may result in overlooking elements and interests as well as missing out on necessary support of the addressees and actors who will have to implement the law” (VOERMANS; NAPEL; PASSCHIER, 2015, p. 287).

## **4 Results: Evaluating the demise and resurrection of the twofold admissibility of exceptional appeals in the CPC**

### **4.1 Overview of the legislative process<sup>4</sup>**

This section traces a brief history of the extinction of the twofold admissibility in the CPC. The events here narrated were drawn from the writings of Beneti (2011), Camargo (2011), and Silva (2015). Their

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<sup>4</sup>See appendix 2.

information was double-checked against the original documents, retrieved from the websites of the Senate and Lower House.

In October 2009, the president of the Senate installed a commission of jurists in charge of drafting a new civil procedure code. The ten jurists worked under the presidency of Luiz Fux, then a justice of the STJ and later of the STF. This commission held public hearings throughout the country and kept an open communication channel via website, which resulted in many suggestions from academics, lawyers, judges. According to the *anteprojeto* (BRASIL, 2010b, p. 364-365), the suppression of the twofold admissibility was proposed in a public hearing held on 15/4/2010. However, this proposal was not accepted, and the draft kept the two-tier scheme.

In 2010, the draft was turned into the bill 166/2010 (BRASIL, 2010c). For its processing, a special commission of senators issued a working plan that established new public hearings, a contact channel via telephone and e-mail, and sending a communication to all justices of the superior courts. On 19/12/2010, the Senate approved the final wording of the bill, which kept the twofold admissibility, sending it to the Lower House, where it received the number 8.046/2010 (BRASIL, [2010a]).

In the Lower House, a deputy presented the amendment 825/2011 (BRASIL, 2011) aiming at extinguishing the twofold admissibility of exceptional appeals. In the justification, the deputy stated<sup>5</sup> that “around 90%” of the exceptional appeals are not admitted by the *a quo* instance “in the majority of times” due to reasons that invade the competence of the STJ and STF. Moreover, the parties must wait “at least one year” for the *a quo* decision that “certainly” will deny the admission. Then, he proceeded, “85% of the decisions denying admissibility” are subjected to *agravo*, showing the inefficacy of the filter. In 2013, the Lower House special commission handed an opinion (*parecer*) for rejection of this amendment. According to the *parecer*, the “great volume of work” of the superior courts is one of the reasons why procedures take so long; consequently, transferring the exam of admissibility requirement to them would make the judiciary even slower. Despite this contrary opinion, the amendment was accepted, as one can see in the final text of the bill sent to the Senate on 26/3/2014. There is no document on the Lower House website explaining neither why nor when the opinion was rejected.

In the Senate, the bill was processed as SCD 166/2010. In all refinements made by this House, the extinction of the admissibility of exceptional appeals was sustained without any further justification. In 2015, the explicit suppression of the twofold admissibility became positive law in the original text of article 1.030 in the CPC.

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<sup>5</sup> All quotes in this article are my translations.

After the criticism this provision received as soon as the code was published, three bills intended to reestablish the twofold admissibility of exceptional appeals. In the explanatory *memorandum* of the bill 414/2015 (BRASIL, 2015d), the senator stated that, without the *a quo* filter, all appeals would be sent to the STJ and STF. He exemplified with the situation of the federal court of the 4<sup>th</sup> region (TRF-4), where, between 2014 and 2015, 9.000 appeals had their admissibility denied and no *agravo* was presented against this ruling, thus not sent to those courts. The justification of the bill 2.468/2015 (BRASIL, 2015b) emphasized that the inferior instance already had the personnel and expertise to evaluate the admissibility requirements; consequently, they would not be impacted by the return of the twofold admissibility. Different would be the situation of the superior courts, which would need to hire more civil servants, as the deputy argued. The third bill, 2.384/2015 (BRASIL, 2015a), relied on information provided by the STJ. According to its justification, 48% of all special appeals (146,8 thousand) throughout the country were not sent to the STJ due to the exam carried by the inferior instance. The two former bills were later unified and sent to the Senate as PLC 168/2015 (BRASIL, 2015c), which was annexed to the bill 414/2015.

The senator who issued the opinion about the PLC 168/2015 argued that the twofold admissibility had to return to prevent the “vertiginous amount” of cases that would go to the STJ and STF without it. One of the documents that compose the processing of the PLC 168/2015 is a letter sent by three STJ justices on 14/12/2015. In this document, they showed the increasing number of cases since 1989, so currently, every justice receives around 10.000 cases each year. The justices added that “this picture will be worsened” if the 27 state courts and 5 federal courts do not evaluate admissibility

requirements because all the special appeals will end up in the STJ, amounting to 500.000 yearly cases, including other competences of the court (BRASIL, [2016b]). After the processing, the bill 168/2015 became the law 13.256/2016, modifying art. 1.030 of the new CPC before it entered in force.

## 4.2 Evidence-based law

According to the criteria presented in subsection 3.1, the amendment 825/2011 should have presented numerical information and described the behaviors that caused the problems it sought to overcome. Neither was achieved. The amendment’s author did not provide any basic information: the source of the percentages mentioned in the justification; the sheer numbers they represented (total of exceptional appeals and *agravos*); to which state and federal courts he referred to; through which method he measured these percentages and the alleged time cases wait for a decision in the *a quo* instance. According to Jorge (2017), Macêdo (2016) and Mendes and Fuck (2016), the suppression of the twofold admissibility was carried out without the support of any empirical data. Considering the absolute lack of information about sources and the methodology in the amendment 825/2011, it seems they were right. Moreover, the amendment did not describe which behaviors it had to change to prevent the unduly invading the superior court’s competence and the slowness in this phase of the procedure. Thus, the amendment 825/2011 did not conform to any theoretical standard for evidence-based law.

Differently, the opinion about the amendment (*parecer*) was in accordance with Bardach’s and Patashnik’s (2016) suggestion of an educated guess due to two reasons: *i*) the little difference between the data and what could be guessed and *ii*) the time and resource constraints. The

assertion that the great volume of work of the superior courts would increase without the *a quo* assessment relies on the well-known and widely debated fact that the STF and STJ have a workload incompatible with their personnel. Consequently, gathering numbers and percentages would not change this conclusion, even though it would consume time and resources of the reporters. Considering that they had to analyze 900 amendments, it would be counterproductive to collect and analyze data to measure the claims of each of them even when the amendment's author did not bother to do so. Therefore, the guesstimate was suited.

Unlike the suppression of the twofold admissibility, its restoration presented concrete numbers and their source, but the use of empirical evidence had many flaws. For one thing, the main source of the PLC 168/2015 was the information provided by the STJ, a deeply-involved party, which could bias the information towards the justices' preconceived perception that they were over-working. Furthermore, the representatives used the data in their bills without any critical assessment. In the bill 414/2015, it is not explained why the situation of the TRF-4 could be extrapolated to all the other 31 courts in the country, especially because state courts have different competences from federal courts. In the bill 2.384/2015, there is no information about the methods the STJ used for collecting and analyzing data, which resulted in gaps. For instance, the bill 2.384/2015 claims that 48% of special appeals are not sent to the STJ, but it does not even say the year(s) this percentage refers to. Furthermore, as Alves and Alfredo (2016) highlighted, the STJ estimate did not differentiate how many of the *agravos* concerned exclusively to denying admissibility of special appeals and how many referred to other unrelated situations, such as those established in the art. 541, § 3º, and art. 543-C, both of

CPC/1973. Finally, it is not clear why and how the STJ numbers could be extrapolated to the STF. Except for the bill 2.468/2015 – whose content was the incapacity of the STF and STJ staff to handle more work, thus appropriate for guesstimate –, the other bills did not observe the theoretical standards for the use of evidence.

### 4.3 Impact assessment

Once numbers are presented about the current situation, the representatives must discuss how things are likely to be once their proposal is in force (subsection 3.2). In this sense, the amendment 825/2011 should have demonstrated how the workload of the STJ and STF would (not) be affected as a result of the suppression it sought to promote. It should have shown if the change would impact the court's budget, and if their staff would be able to cope with the extra-work or if more civil servants would have to be hired. There is no such information in the explanatory *memorandum*, leading to the conclusion that it overlooked the impacts it would generate.

Another aspect disregarded by the amendment 825/2011 was the consultancy to stakeholders, especially the STJ and STF. In the beginning of the legislative process, while the twofold admissibility was intact, a communication was sent to every justice (section 4.1). Checking the Lower House and Senate websites, no register about communication to justices and jurists about the suppression of the twofold admissibility was found, suggesting there was no formal consultancy. Two events confirm this suspicion: Justice Mendes' statement that the STF did not take part in the drafting of the code whether due to inertia or lack of consultation (MENDES; FUCK, 2016) and the STJ justices' initiative to ask the Senate for the return of the twofold admissibility. The lack

of communication with the courts demonstrates that the amendment 825/2011 did not comply with the standards posed in subsection 3.2.

On the other hand, the bills that sought the return of the twofold admissibility and the *parecer* about amendment 825/2011 did not need to meet the same criteria. Because they intended to keep the already existing scheme, they would not affect the current structure. Their efforts concentrated on demonstrating the problems the extinction of the twofold admissibility would cause. Given this goal, relying on the known numbers to explain that it would be impossible to cope with the new appeals is plausible, thus complying with the parameters (subsection 3.2), especially considering that the legislator would not have time to gather much more data before the CPC entered in force.

Different is the situation of consulting stakeholders. These bills did not take into account the opinion of jurists as the rest of the code. The data was exclusively provided by courts, chiefly the STJ, without any consultation with other members of the legal community, such as lawyers and scholars. There is no information whether they were given the opportunity to express their opinion and present counter-arguments. Therefore, these bills did not comply with the standard for public consultation.

## 5 Discussion

The extinction of the twofold admissibility fosters an important reflection about the use of empirical data by legislators. During the processing of the CPC, jurists were actively consulted. On the other hand, there is no register that statisticians were invited to organize numerical information. The author of the amendment 825/2011 is a lawyer, so it is likely that he did not know how to collect and examine data to support his claims, confusing anecdotal evidence from his previous experience with the required systematicity necessary to portray an overall general picture, incurring in the pitfalls mentioned in subsection 3.1.

By the same token, the bills about the return of the twofold admissibility indicate that legislators and lawyers are not capable of judging the quality of data. For instance, the numbers they refer to do not discriminate the motives for presenting *agravo* and denying admissibility, which is crucial to the matter of the twofold admissibility. Besides this, there is no indication about possible outliers among the *a quo* courts, interfering in the total result. In this sense, perhaps the TRF-4 is not a good representative of the national picture because it is too different from other courts. The reliance solely on information provided by the STJ is a facet of the same problem since thinking about sampling bias is elementary when dealing

with empirical data. These faults show that, despite the necessity of relying on legal knowledge for drafting procedural law (section 2), when the efficiency of a procedure is to be evaluated, it is essential to count on the assistance of other professionals.

Despite the notorious lack of evidence in the amendment 825/2011, most of the criticism it received related to the absence of impact assessment since the critics argued that the courts could not handle the extra cases. It is possible that the bearing on the work of the courts would be minimal, but the complete disregard for projecting the impact ended up in the repeal of the original wording of art. 1.030. This neglect regarding evidence and impact assessment made it impossible to respond to the criticism directed towards the amendment 825/2011, even though its arguments might have been right.

Nevertheless, the fate of the original art. 1.030 entails another reflection about the interpretation of data, namely, one's previous stance about the matter. Responding to a study published by the presidency of the STF, Justice Fux stated that "statistics show that, normally, when the appeal is not admitted down there<sup>6</sup>, the parties appeal [*agravo*]," hence the STF would not be flooded with new cases (ARABI, 2015; RECONDO, 2015). Although he does not inform what statistics these are, his statement shows that he was aware and in accordance with the suppression of the twofold admissibility. Justice Fux knows the workload of both courts and had access to the numbers they presented after the publication of the CPC, which did not change his position. Equally, some lawyers uphold the extinction of the twofold admissibility (LUCIANO; MARDEN, 2016). It suggests that one's stance about the productivity of the twofold admissibility and *agravo* system might influence how they think the appeal system should be regardless of any data, i.e., their previous ideas affect the interpretation of the data.

Similarly, it seems that the bills that reestablished the twofold admissibility also had a preconceived north: prevent the sending of more appeals. Although the guesstimate was suited in their case, other possible solutions than repealing the provision were kept out of the discussion. For instance, it was possible that the STJ and STF could have required civil servants from the state and federal courts or restructured their functioning during the *vacatio legis*, as Luciano and Marden (2016) suggested. However, no other possibility was debated, as if the only possible way to deal with the new provision was to revoke it.

Moreover, not listening to the rest of the legal community in the return of the twofold admissibility created a new set of problems. As discussed

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<sup>6</sup> Reference to state and federal courts.

in subsection 4.3, the new art. 1.030 reflected the point of view of the STJ solely, even though there are other interested parties in the subject (lawyers, scholars), who could have presented different solutions. The lack of consulting the legal community led to a new art. 1.030 that has been highly criticized in the doctrine (section 1).

This series of mistakes led to a weak law both regarding the suppression and the return of the twofold admissibility of exceptional appeals. The amendment 825/2011 fell short in all the standards, but had its *parecer* exhibited reliable numbers, it would be more difficult for that amendment to prevail, preventing the problems that followed. The ensuing bills that sought to restore the twofold admissibility also could have avoided the flaws that cause an unsettled discussion among scholars, justices, and legislators about the new art. 1.030. So, even when the legislative documents comply with theoretical parameters, an extra care could save efforts, money, and time. However, legislators are not liable for the faulty bills they propose, so there is no incentive for having the extra work a good bill requires or punishment for not complying with basic standards.

Finally, the problems and difficulties in measuring the efficiency of the twofold admissibility invite future reflections about the suitability of enacting an experimental legislation (RANCHORDÁS, 2013). Extinguishing the twofold admissibility for some courts during a period would enable the evaluation of the dynamics of the exceptional appeals and *agravos*. This would allow the gathering of more data, comparing the results in different courts, and then choosing one system.

## 6 Conclusion

As Aragão (2006) remarked, reforming the law without statistics is an old habit of the Brazilian legislators. The pattern was repeated in the CPC, resulting in a partial confirmation of the initial hypothesis. The suppression of the twofold admissibility of exceptional appeals did not comply with the theoretical parameters presented on section 3 since the amendment 825/2011 did not rely on any data about the current situation and did not evaluate the impacts it would create. On the other hand, the reinstatement of the twofold admissibility of exceptional appeals complied partially with the parameters since they used an informed guesstimate, although with defects. These deficiencies relate to an unjustified exclusion of other data, perspectives, and solutions.

Besides these flaws in the use of evidence, the situation here portrayed illustrates other sorts of problems. For one thing, the different positions of Justice Fux and his peers demonstrate that interpreting the data has a

strong component of personal inclination. Furthermore, this account shows that lawyers can provide legal insights, such as about constitutionality, but cannot measure the efficiency of procedures due to a lack of training in handling empirical data; nevertheless, other professionals are not consulted. As a result, the defective use of evidence leads to repeated reforms in procedural law (ARAGÃO, 2006), as the twofold admissibility saga demonstrates.

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## Appendix 1

| Original name                | Original acronym | Used in the article       | Brief description  |
|------------------------------|------------------|---------------------------|--|
| Código de Processo Civil     | CPC              | Civil Procedure Code      | The national legislation that regulates the civil procedure  |
| Superior Tribunal de Justiça | STJ              | Superior Court of Justice | The superior court whose competences are established on art. 105 of the Constitution; among them is maintaining the integrity of federal law |
| Supremo Tribunal Federal     | STF              | Federal Supreme Court     | The superior court whose competences are established on art. 102 of the Constitution; among them is the protection of the Constitution       |

| Original name          | Original acronym  | Used in the article  | Brief description  |
|------------------------|-------------------|----------------------|--|
| Recurso Especial       | -                 | Special appeal       | Appeal parties wield when they understand the federal law was not correctly applied in their case                              |
| Recurso Extraordinário | -                 | Extraordinary appeal | Appeal parties wield when they understand the Constitution was not correctly applied in their case                             |
| Agravo                 | -                 | Agravo               | Appeal to counter rulings that do not decide the merits; among them is the decision about admissibility requirement of appeals |
| Reclamação             | -                 | Reclamação           | Remedy to preserve the precedents and the competence of courts   |
| Senado                 | -                 | Senate               | The Legislative House that comprises the representatives of the states   |
| Câmara dos Deputados   | -                 | Lower House          | The Legislative House that comprises the representatives of the people in each state   |
| Anteprojeto            | -                 | Draft                | A preliminary work   |
| Projeto de Lei         | PL, PLS, SCD, PLC | Bill                 | Proposal for a new law. The acronyms vary in the Houses according to the author of the bill and where it came from             |
| Emenda                 | -                 | Amendment            | A proposal to modify a bill  |
| Parecer                | -                 | Opinion              | The opinion about bills and amendments   |
| Ofício                 | -                 | Letter               | The vehicle of formal communication between institutions   |

## Appendix 2

| Date          | Legislative document                                     | Content  | Organ                               |
|---------------|--|--|-------------------------------------|
| October/2009  | Act 379/2009   | Installs commission of jurists to draft a new CPC  | Senate                              |
| June/2010     | Jurists' Draft (Anteprojeto)                             | First draft of the new CPC – twofold admissibility kept                                  | Commission of Jurists to the Senate |
| June/2010     | Bill (Projeto de Lei do Senado – PLS) 166/2010           | Senate's CPC bill (same text of the anteprojeto – twofold admissibility kept)            | Senate                              |
| December/2010 | Bill (Projeto de Lei na Câmara dos Deputados) 8.046/2010 | CPC bill received from the Senate (twofold admissibility kept)                           | Senate to the Lower House           |
| December/2011 | Amendment 825/2011                                       | Sought to extinguish the twofold admissibility   | Lower House                         |
| May/2013      | Opinion about amendments presented (Parecer)             | Opined for rejecting the amendment 825/2011  | Lower House                         |
| March/2014    | Bill (Projeto de Lei SCD) 166/2010                       | Lower House's CPC bill 8.046/2010 send to the Senate (without the twofold admissibility) | Lower House to the Senate           |

| Date          | Legislative document                                  | Content  | Organ                     |
|---------------|---|--|---------------------------|
| March/2015    | Law 13.105/2015                                       | CPC (original wording – without the twofold admissibility)                               | -                         |
| July/2015     | Bill (Projeto de Lei do Senado – PLS) 414/2015        | Sought to return the twofold admissibility   | Senate                    |
| July/2015     | Bill (Projeto de Lei) 2.384/2015                      | Sought to return the twofold admissibility   | Lower House               |
| October/2015  | Bill (Projeto de Lei) 2.468/2015                      | Sought to return the twofold admissibility   | Lower House               |
| October/2015  | Bill (Projeto de Lei da Câmara) 168/2015              | Unified the bills 2.468/2015 and 2.384/2015, and annexed the bill 414/2015 in the Senate | Lower House to the Senate |
| November/2015 | Opinion about the Bill 168/2015 (Parecer)             | Opined for returning the twofold admissibility   | Senate                    |
| December/2015 | Letter from three STJ justices to the Senate (Ofício) | Asked for the return the twofold admissibility   | STJ to the Senate         |
| February/2016 | Law 13.256/2016                                       | Returned the twofold admissibility   | -                         |