



Systemic Risk and Specialized Criminal Judges: The Brazilian TRF3 Case

ACADEMIC ARTICLE

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ABSTRACT

Systemic risk is a topic developed by several areas of knowledge to prevent serious harms to a system, as shown by the studies of specialists, such as Javadish, Lucas, Renn, Benoit, Li, Pan and He. The Brazilian Third Region Federal Court (*Tribunal Regional Federal da 3a. Região – TRF3*) is starting to consider “systemic risk” as a key feature to identify financial crimes, and consequently assign such cases to specialized judges, whilst Brazilian Criminal Law is struggling with this interdisciplinary concept. A case-study on the criminal decisions that mention “systemic risk” was conducted to understand “how” the Court developed the concept. This article seeks to indicate the collateral effects of such a criterion to Legal theory and Court’s Administration, amid the TRF3’s polemic decision of partially abolishing specialized judges in money laundering and financial crimes.

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Systemic risk is an interdisciplinary concept, that refers to the possibility of disastrous outcomes to a system. This class of outstanding results is approached by several areas of knowledge to create prevention mechanisms, including Law. The legal framework, however, is not always equipped to deal with systemic risk, as it seems to be the case of Criminal Law. The lack of compatibility may cause a misuse of the term, allowing it to be deployed as a justification to certain decisions instead of an empirical informed assessment. In any case, certain collateral effects of this choice can be expected.

The inadvertent consequences of applying systemic risk in legal reasoning can be seen in the recent Brazilian TRF3's criminal decisions that employ it as a key feature to assign financial crimes to specialized judges, considering its presence as a feature particular to financial crimes, enabling a differentiation from crimes against private property, since only the first would justify the jurisdiction of a specialized judge.¹

In Brazil, the Federal Justice is composed by the federal judges and six Regional Federal Courts of Appeal, whose jurisdiction is divided by regions, for instance the TRF3 has jurisdiction over the states of São Paulo and Mato Grosso do Sul.² The criminal jurisdiction of the federal judges encompasses crimes against the financial system and certain cases of money laundering.³

The TRF3's decision indicating a new criterion to define jurisdiction happens in the midst of a polemic decision made by the TRF3, that partially abolishes the specialized judges.⁴ Badaró explains that the current decision only partially abolishes the

1 The art. 1 of the Federal Statute 7492/86 (Brazil. National Congress. Federal Statute 7492/1986. Issued on 16/06/1986.) defines "financial institutions" as a "private or public legal entity whose main or ancillary activity" is "the capture, intermediation or application of financial resources of third parties, in national or foreign currency, or the custody, issuance, distribution, trading, intermediation or administration of securities". In its paragraph, there is the indication of those entities considered as equivalent to financial institution, that is, the "legal entity that captures or manages insurance, exchange, consortium, capitalization or any type of savings, or resources of third parties" and the "person who carries out any of the activities referred to in this article, even if occasionally".

2 The art. 106 of the Brazilian Constitution (BRAZIL. *Constitution of the Federative Republic of Brazil*. Brasília: STF, Secretaria de Altos Estudos, Pesquisas e Gestão da Informação, 2022, p.105. Available at: <https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf>. Accessed on 12/04/2023.) indicates that the Federal Justice is composed by Regional Federal Courts of Appeal and federal judges. The art. 108, I "e" of the Brazilian Constitution (BRAZIL. *Constitution of the Federative Republic of Brazil*. Brasília: STF, Secretaria de Altos Estudos, Pesquisas e Gestão da Informação, 2022, p.105. Available at: <https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf>. Accessed on 12/04/2023) indicates that the Regional Federal Courts of Appeal judge the "conflicts of venue between federal judges subject to the court", and the criminal appeals as stated on its incise II.

3 The art. 109 VI of the Brazilian Constitution (BRAZIL. *Constitution of the Federative Republic of Brazil*. Brasília: STF, Secretaria de Altos Estudos, Pesquisas e Gestão da Informação, 2022, p.106. Available at: <https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf>. Accessed on 12/04/2023) indicates that federal judges have jurisdiction over crimes against the financial system.

The art. 2 of the Brazilian Federal Statute 9613/98 (Brazil. Federal Congress. Federal Law 9613/1998. Issued on 04/03/1998) indicates that the Federal Justice has jurisdiction over money laundering cases when the crime that originated the illegal proceeds is a crime against the financial system, the economic-financial order, or the "Union's assets, services or interests, or its autarchies or public companies"; or whenever it is judged by the Federal Justice.

4 Brazil. TRF3. CJF3R Act n. 49, Published on 06/12/21. Available at: https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf. Accessed on 13/04/2023.

specialization, because the extinction affects only the exclusive dedication of those judges, who are now also able to decide the remaining federal criminal cases, thus, even after the reform, just few judges are assigned to decide cases of money laundering and financial crimes.⁵

The specialization started in 2001, when the Brazilian Federal Justice Commission (CJF), with the participation of “federal criminal judges, prosecutors, federal police, Central Bank” and the Brazilian federal tax authority and the Brazilian financial intelligence unity (COAF) conducted a study to understand “why there were few criminal cases concerning money laundering”.⁶ The Commission concluded for the necessity of judges’ specialization in 2003, as a result of that decision that set of criminal cases experienced an “exponential growth”.⁷

The abolishment of the exclusivity inspired trenchant opinions on the opposite ends of the spectrum. A certain prosecutor considered that “it represents an unprecedented setback”, since he predicts that those “more complex” crimes will be put aside by judges to expedite decisions of less complex cases. According to him, those cases demand “prosecutors and judges” to acquire “multidisciplinary knowledge in Economics, Finances and Administration”. He criticizes the TRF3’s “unilateral” decision, foreshadowing negative “international repercussion”, since, as mentioned by another prosecutor, the benefits of the specialization outweigh the disadvantages, since it would allow a more efficient case management.⁸

The TRF3’s judge “responsible for leading the reform” justify the reevaluation of the priority given to those crimes, based on the crescent specialization of all federal judges on those subject matters.⁹ Another factor that played a role in that decision is a demand for an efficient Federal Justice, that would benefit from a more equal distribution of cases among the criminal judges, whereas now a specialized judge receives around 65% less cases than the others.¹⁰ Certain lawyers also advocate for the change, indicating that this specialization was even causing the judges to become

5 G. Badaró, *O Provimento 49/21 do CJF3R e as varas especializadas em lavagem de dinheiro*. Available at: <https://www.conjur.com.br/2022-jan-17/badaro-provimento-4921-cjf3r-varas-lavagem-dinheiro>. Accessed on: 17/01/2022.

6 Brazil. TRF2. CJS’ Resolution allows specialization for money laundering and organized crime, states Minister Dipp. Available at: <https://www10.trf2.jus.br/portal/resolucao-do-cjf-ratifica-especializacao-em-lavagem-de-dinheiro-e-organizacoes-criminosas-afirma-ministro-dipp/>. Accessed on 13/04/2023.

7 Brazil. Superior Court of Justice (Superior Tribunal de Justiça). Federal Justice Board (Conselho da Justiça Federal). Resolution (Resolução) n. 314. Published on 12/05/2003. Available at: [https://www.cjf.jus.br/publico/biblioteca/2003%20-%20RES%20314%20\(12.03.2003\).pdf](https://www.cjf.jus.br/publico/biblioteca/2003%20-%20RES%20314%20(12.03.2003).pdf) Accessed on 13/04/2023.

8 A. Aragão, *Medida da justiça federal de SP dá fim a varas especializadas em lavagem de dinheiro*. Available at: <https://www.jota.info/justica/medida-da-justica-federal-de-sp-da-fim-a-varas-especializadas-em-lavagem-de-dinheiro-21122021>. Accessed on 13/04/2022.

S. Rodas, *Fim das varas específicas de lavagem de dinheiro divide opiniões de especialistas*. Available at: <https://www.conjur.com.br/2021-dez-22/fim-varas-especificas-lavagem-dinheiro-divide-opinioes>. Accessed on: 13/04/2023.

9 Migalhas. *TRF-3 dá fim a varas especializadas em lavagem de dinheiro*. Available at: <https://www.migalhas.com.br/quentes/357016/trf-3-da-fim-a-varas-especializadas-em-lavagem-de-dinheiro>. Accessed on 13/04/2023.

10 S. Rodas, *Fim das varas específicas de lavagem de dinheiro divide opiniões de especialistas*. Available at: <https://www.conjur.com.br/2021-dez-22/fim-varas-especificas-lavagem-dinheiro-divide-opinioes>. Accessed on: 13/04/2023.

stricter or make them vulnerable to the social pressure for the conviction of the defendant from “media coverage”.¹¹

Efficiency can be considered an argument in favor of specialization, as Zimmer states, since it favors the improvement of an expertise knowledge to deal with “time-consuming, problematic and complex areas”, allowing the “generalist court” to “enhance” its “productivity” by focusing the efforts on the “vital issues on which resolution of the case depends, improving the Court’s “case management”.¹² The development of “specific expertise” to assess “financial and monetary matters” is defended by Goodhart and Lastra as a mean to “actually equip judges” to decide cases involving complex regulatory contexts, especially regarding economic regulation.¹³

Zimmer also refers to some of the arguments raised by the opponents of specialization. One of them is what Zimmer called “judicial isolation” to refer to the risk of specialized judges to create a “one-sided view of the issues, compromising their objectivity”, casting out “new ideas and novel approaches in interpreting and applying the law”.¹⁴

It is important to stress that even with the end of judges who deal exclusivity with money laundering and financial crimes at the TRF3, the “complete authority”, as Zimmer indicates, over money laundering and financial crimes is still reserved to few judges. The amplification of their jurisdiction, as decided by the TRF3, may cause the judges to set aside their “normally narrow focus”, as Zimmer says, to develop “the benefit of percolation and cross-pollination from other fields of law”. The remaining question is if the end of the exclusivity will cause a loss of efficiency.¹⁵

The decision of a TRF3’s judge to indicate systemic risk as a key-feature to define financial crimes boosts an argument in favor of the specialization, as to devise the legal concept of “systemic risk” an interdisciplinary analysis is required to identify “what” underlies such concept, demanding an expertise to consider complex empirical evidence. The assessment of the expert evidence has to be made by a judge prepared to deal with interdisciplinarity, by the widening of the magistrate’s “preunderstandings”, defined by Larenz as “the knowledge acquired in their training or later, with the latest professional and extra-professional experiences, mainly those linked to social facts and contexts”.¹⁶

The TRF3’s choice potentially originates collateral effects both to Legal theory and to the Court’s administration. A modification of the very concept of financial crimes is made by the indication of systemic risk as their main feature, since it creates a requirement to identify a trigger to systemic risk in each case of financial crimes. This identification has to be backed by expert evidence, which might create a venue for an institutional dialogue, allowing trusted public bodies, such as the Brazilian

11 Op. Cit.

12 M.B. Zimmer. *Overview of specialized Courts*. *International Journal for Court Administration*. August 2009, pp.1–3.

13 C. Goodhart, R. Lastra. *Populism and Central Bank Independence*. *Open Economies Review*. 29, 2018, pp.49–68. Available at: <<https://doi.org/10.1007/s11079-017-9447-y>>. Accessed on 17/04/2023.

14 M.B. Zimmer. *Overview of specialized Courts*. *International Journal for Court Administration*. August 2009, pp.1–3.

15 Idem, p.3.

16 K. Larenz. *Metodologia da Ciência do Direito*. Lisboa: Fundação Calouste Gulbenkian, 2019, p.289–290.

Central Bank, to inform the Court on systemic risk, and to be informed of frequent criminal conduct that might suggest a necessity to review the sector regulation. Such dialogue is already part of Brazilian regulation on financial crimes and can be further developed.¹⁷ In any case, the construction of an interdisciplinary concept reinforces the necessity of specialized judges.

To better understand the development of a legal concept of systemic risk and its use to define jurisdiction, a case-study of criminal decisions was conducted, encompassing Brazilian federal case-law. In the study result, only the TRF3 mentions the term “systemic risk” as a criterion to assign cases to criminal judges specialized in money laundering and financial crimes. The main goal of the case-study is to understand “how” the Court developed the concept of systemic risk, in an effort to understand if other disciplines are even considered to establish such concept, expanding the “preunderstandings” used in judicial legal reasoning.

The empirical research was the method chosen to this study, considering that this concept was not devised by the Legal Theory, but it was a TRF3’s response to a practical need.

1. HOW DO BRAZILIAN CRIMINAL LAW SCHOLARS APPROACH SYSTEMIC RISK?

“Systemic risk” is an interdisciplinary concept that is originated in Systemic Risk Regulation and it is “imported” to Criminal Law in certain cases.¹⁸ Brazilian Criminal Law scholars face difficulties to work with the concept since, as specialized scholars, they are not used to dealing with a concept that it is far away from their own specialty.

The very concept of systemic risk is quite hard to grasp, nonetheless, its empirical effects appear as a harsh reality as shown in the 2008’s economic crisis, as depicted by the German Criminal Law Professor, Schünemann, who portrays the financial 2008’s crisis, as “a participation in a ‘snow ball system’ similar to gambling (...) that no one would be able to walk away from before the inevitable system’s collapse”.¹⁹

The consensus is that the systemic risk features are easily detected, whilst its concept is still difficult to define. The main idea in systemic risk is the possibility of the conduct repetition to affect the system integrity, as stated by Benoit et al.²⁰ This classification of a certain conduct as systemic risk’s trigger is only achievable by an interdisciplinary study as acknowledged by Renn et al., especially with the use of ‘quantitative models’.²¹

17 The art. 26 single paragraph of the Federal Statute 7492/1986 (Brazil. **Federal Congress**. Federal Statute 7492/1986. Issued on 16/06/1986) states intervention (“assistência”) of the Brazilian Securities and Exchange Commission (CVM) and the Brazilian Central Bank can be admitted in criminal cases related to their regulatory sectors.

18 Balkin (J.B. Balkin, Interdisciplinarity as Colonization. *Washington & Lee Law Review*, 53 (3), pp.949–964) uses the term “imported” to deal with interdisciplinarity.

19 B. Schünemann, A chamada “crise financeira” – falha sistêmica ou criminalidade globalmente organizada? In B. Schünemann, *Estudos de direito penal, direito processual penal e filosofia do direito*. São Paulo: Marcial Pons, 2013, p.199.

20 S. Benoit et al, *Where the risks lie: A survey on Systemic Risk*. *Review of Finance*, 2017, pp.109–152; O. Renn et al. *Systemic Risks from Different Perspectives*. *Risk Analysis*. 42, pp.1902–1920; K. Lucas. *Theory of systemic risks: insights from Physics and Chemistry*. *Risk Analysis: an international journal*. 42 (9), pp.1935–1944. Available at: <<https://doi.org/10.1111/risa.13558>>. Accessed on: 25/01/2023.

21 O. Renn et al. *Systemic Risks from Different Perspectives*. *Risk Analysis*, (42), p.1903. Available at: <<https://doi.org/10.1111/risa.13657>>. Accessed on: 25/01/2023.

IRGC. *Guidelines for Systemic Risk Governance*. Lausanne: International Risk Governance Centre (IRGC), 2018, pp.49, 60, 61.

Different Sciences, such as Statistics, Economics, Biology, Geography, Physics, construct studies underlying the concept of systemic risk. Law has the task to “import” that concept and develop its own legal analysis, whose function is not to correct or deny the merits of the specialist decision originated in other Sciences, as indicated for instance in the Italian method, but to function as an external control capable to select the best scientific thesis to be applied in a case, accordingly to the opinion of the scientific community.²²

The options to create a legal concept of “systemic risk” are few. One might try to approach the imported concept based on Law’s rationality, as Silveira does, accepting that the notion of systemic risk would be the result of an “influence of a more than extra-criminal definition”, referring to “how the market would assess this question”, but restricting the concept of systemic risk to an “abstractionism”.²³

If Law’s rationality is used to understand a concept that is not legal, the conclusion reached is the only one feasible by this method: to consider “systemic risk” nothing more than an “abstractionism”, discarding the empirical analysis and quantitative methods underlying the concept. The empirical research, strange to Brazilian Law’s rationality, is not considered as a valid justification to the concept be built upon it.

The other option is to totally ignore the other area, stating that all the systemic risk prevention system is merely “formal”, that is, without any connection to risk prevention. That was the path chosen by Oliveira, who states that the duties to report in money laundering are “a violation of the administrative rule that determines the transfer of information, as repeatedly asserted throughout this book, is just that: violation of an administrative rule”.²⁴ This conclusion is achieved without acknowledging the duties to report function on preventive measures of Systemic Risk Regulation to the Financial or the Economic System. Actually, a crucial role is played by data in Regulation, since Stiglitz indicates that creating hurdles to “information asymmetry” to be explored by the economic agents is a regulatory goal.²⁵ Information is even considered a “prerequisite for systemic risk management”, as Javadish states, since those data feed the predictive statistical models which seek to identify the triggers for the system’s collapse, accordingly to their nondeterministic causality.²⁶

The hurdles faced by Brazilian Criminal Law scholars are justified. Criminal liability does not perform with ease in systemic risk cases. Renn et al indicate the necessity of the conduct to be repeated by several agents to systemic risk be created, which is at odds with criminal liability, that only refers to individual conducts and its effects, without analyzing the aggregate effect of the conduct of others.²⁷ This lack of

²² J.B. Balkin, op. cit. n.18.

The “Italian method” mentioned refers to the one defined on the case *Sentenza Franzese* (Italy). *Corte Suprema di Cassazioni Penale*. Sez. U. n. 30328, decided on 10/7/2002).

²³ R.M.J. Silveira, *Direito Penal empresarial: A omissão do empresário como crime*. Belo Horizonte: D’Placido, 2018, pp.232–3.

²⁴ A.C.C. Oliveira, *Lavagem de dinheiro: Responsabilidade pela omissão de informações*. São Paulo: Tirant lo Blanch, 2019, p.288.

²⁵ J. Stiglitz. *Regulation and Failure*. In D. Moss & J. Cisterinino. (eds) *New Perspectives on Regulation*. Cambridge: The Tobin Project, 2009, pp.11 and 22.

²⁶ H.V. Javadish. *Data for systemic risk*. In J. Fouque & J. Langsam (Orgs.). *Handbook on Systemic Risk*. Cambridge: Cambridge University Press, 2013, p.3.

²⁷ O. Renn et al. op. cit. n.9.

compatibility can be overcome by developing an interdisciplinary method that would allow to understand when a certain conduct, that is already dangerous by itself to a legal interest, if repeated, might trigger systemic risk.

Considering the current difficulty to deal with the concept, one can imagine that it would be better to leave it aside, but the Brazilian TRF3 found an interesting use for systemic risk in Criminal Law. In recent TRF3's decisions, the reference to "systemic risk" is used in a pivotal function to legal interpretation, being a criterion to identify financial crimes and allocate those cases to judges specialized in money laundering and financial crimes.

This choice is based on the connection between "systemic risk" and collective interests, such as the financial system, since the effects of the trigger conducts must be analyzed referring to an object different from an individual right, as private property. To evaluate systemic risk, the jurist must aim a broader reference, such as the integrity of a system, which can only be achieved by the analysis of a collective interest.

A case-study was conducted to understand the TRF3's construction on the legal concept of systemic risk, considering the main features analyzed by the Court and the compatibility with the characteristics and conclusions indicated by other disciplines.

2. CASE-STUDY METHODOLOGY

The method used in the analysis of case-law is qualitative, with inductive analysis on judicial decisions to understand "how" the concept was defined, allowing "data to construct the concept".²⁸ A longitudinal cut, as defined by Creswell and Creswell, was made therefore, there was no time limitation in our research. The research was made on 11/April/2023.²⁹

The main data base accessed was of the "Conselho Federal de Justiça" (Federal Justice Board – CJF), through the website <<https://www.cjf.jus.br/jurisprudencia/unificada/>>. The CJF deals with the case-law of all six Regional Federal Courts (TRF) in Brazil, as well as the Federal Supreme Court (STF) and Superior Court of Justice (STJ).

The keywords used to research at the data base were: "risco sistêmico" ("systemic risk") without limitation of time or type of the decision. The search parameter "risco sistêmico" was chosen, because if mentioned in the *ratio decidendi* it can be identified by the search tool. As a result, 60 decisions were found, among civil and criminal cases, only four of them were criminal cases:

1. Brazil. Supreme Court. Habeas Corpus 86.758/PR. 1st Section ("1a. Turma"). Rapporteur: Minister Sepúlveda Pertence. Published on 02/05/2006: in this decision, the concept of "systemic risk" is used to justify the pretrial detention.³⁰

28 R. K. Yin, *Estudo de caso: planejamento e métodos*. Porto Alegre: Bookman, 2010, p.84.

29 J. W. Creswell & J. D. Creswell, *Projeto de Pesquisa: métodos qualitativo, quantitativo e misto*. Porto Alegre: Penso, 2021, p.125.

30 Brazil. Supreme Court. Habeas Corpus 86.758/PR. 1st Section ("1a. Turma"). Rapporteur: Minister Sepúlveda Pertence. Published on 02/05/2006. Available at: <<https://portal.stf.jus.br/processos/detalhe.asp?incidente=2324922>>. Accessed on: 11/04/23. The Court states: "nonetheless, it is pertinent to assess both the harm magnitude and the quality of the defendant as a recurrent criminal, considering if they are linked to concrete facts that demonstrate the "systemic risk" to public or economic order, or to the need for imprisonment to prevent criminal relapse".

2. Brazil. TRF4. *Habeas Corpus* 2006.04.00.027798-0/SC. Rapporteur: Federal Tribunal Judge Wowk Penteado. Judged on 13/09/2006: in this decision, the concept of “systemic risk” is used to justify the pretrial detention.³¹
3. Brazil. TRF1. *Criminal Review* (“Apelação Criminal”) 0000409-50-2001.4.01.3500. Rapporteur: Federal Tribunal Judge Monica Sifuentes. Judged on 09/06/2015: in this decision, the concept of “systemic risk” is only a reference to receivership’s goals.³²
4. Brazil. TRF3. *Criminal Review* (“Apelação Criminal”) nº 0000173-85.2018.4.03.6139. Rapporteur: Federal Tribunal Judge Fausto de Sanctis. Published on 08/11/22: it is important to emphasize that only the case decided by the TRF3 refers directly to systemic risk as a criterion to assign a specialized judge to a certain decision.

The official website of the TRF3 was accessed at: <<https://web.trf3.jus.br/base-textual/Home/ListaResumida/1?np=0>> to analyze all three decisions connected to the criminal case, thus all three decisions refer to the same criminal case:

1. 1. Brazil. TRF3. *Criminal Review* (“Apelação Criminal”) nº 0000173-85.2018.4.03.6139. Rapporteur: Federal Tribunal Judge Fausto de Sanctis. Published on 08/11/22.
2. 2. Brazil. TRF3. *Criminal Review* (“Recurso em sentido estrito”) nº 0000374-77.2018.4.03.6139/SP. Rapporteur: Federal Tribunal Judge Fausto de Sanctis. Published on 15/08/2019.

A third decision is mentioned as a precedent for this analysis, although it does not cite the term “systemic risk”, hence, it was also analyzed:

3. 3. Brazil. TRF3. *Conflict of venue* (“Conflito de jurisdição”) n. 0000441-29.2018.4.03.0000/SP. Rapporteur: Federal Tribunal Judge Fausto de Sanctis. Published on 28/02/2019.

3. THE CASE-STUDY’S RESULTS: THE TRF3’S CONSTRUCTION OF “SYSTEMIC RISK” AS A CRITERION TO ASSIGN A CASE TO A SPECIALIZED JUDGE

The criminal case analyzed in the TRF3’s decisions is a fraud in a home financing contract with the *Caixa Econômica Federal*, a Brazilian financial institution, as a part of the *Programa Minha Casa, Minha Vida* (“My House, My Life Program”), which is a

31 Brazil. TRF4. *Habeas Corpus* 2006.04.00.027798-0/SC. Rapporteur: Federal Tribunal Judge Wowk Penteado. Judged on 13/09/2006. Available at: <https://consulta.trf4.jus.br/trf4/controlador.php?acao=consulta_processual_resultado_pesquisa&selForma=NU&txtValor=2006.04.00.027798-0&chkMostrarBaixados=&todasfases=&todosvalores=&todaspartes=&txtDataFase=&selOrigem=TRF&sistema=&txtChave=>>. Accessed on: 11/04/23. The Court states: “nonetheless, it is pertinent to assess both the harm magnitude and the quality of the defendant as a recurrent criminal, considering if they are linked to concrete facts that demonstrate the “systemic risk” to public or economic order, or to the need for imprisonment to prevent criminal relapse (STF precedent).”

32 Brazil. TRF1. *Criminal Review* (“Apelação Criminal”) 0000409-50-2001.4.01.3500. Rapporteur: Federal Tribunal Judge Monica Sifuentes. Judged on 09/06/2015. Available at: <<https://arquivo.trf1.jus.br/PesquisaMenuArquivo.asp>>. Accessed on: 11/04/23. The Court states: “The receivership constitutes a restriction on the powers of administration and operation of new businesses by the institution, as well as it restricts the assets use, enjoyment and disposition the company and the former administrators, to avoid systemic risk and to protect the company’s creditors.”.

Welfare Program to enable home ownership. The main question is to decide whether this conduct is a financial crime to determine if this case must be assigned to a specialized judge.

Initially, the Court indicates that the “systemic risk” is used to differentiate between the “fraud to obtain an illicit advantage” and financial crimes, since only the later are assigned to specialized judges.³³ The effects of the conduct assume a main role instead of the protected interest. The systemic risk effects are described as a reference to “impact level and the fraud relevance regarding the National Financial System” or the conduct’s “effective nature and its relevance to the Financial System”.³⁴ The mention of an “orchestration capable of shake the integrity of the Financial System” is a clear statement of that concern.³⁵ Those references are used to emphasize the idea that the conduct by itself should be able to interfere with the whole Financial System to constitute this kind of crime, suggesting an analysis of systemic risk in Criminal Law, such as indicated in the excerpt that suggests an “extraordinary quality” of the financial crime “to promote a relevant orchestration presenting a menace to order and security of the financial market”.³⁶

The indication of a system as an endangered object by a singular conduct is the first feature of the Court’s legal concept of “systemic risk”. The idea that one singular conduct may cause risk to the integrity of a system, however, is not supported by the specialist’s studies, such as Renn et al that indicate the necessity of the repetition of a conduct by several agents to systemic risk be created.³⁷

33 The fraud to obtain an illicit advantage (“*estelionato*”) is stated at the art. 171 of the Brazilian Criminal Code (Brazil. *Criminal Code*. Decreto-Lei n. 2848. Issued on 07/12/1940), “obtaining, for oneself or for another, an illicit advantage, causing harm to others, misleading someone, through fraudulent means” is punished with by a term of imprisonment from one to five years and a fine. If “the crime is committed to harm a public body or an popular economy, social assistance or beneficence body”, the “penalty shall be increased by a third”, accordingly to its third paragraph.

A financial crime that might be relevant to the criminal case discussed in the forementioned decision can be found in the article 19 of the Lei 7492/1986 (Brazil. *Federal Congress*. Federal Law 7492/1986. Issued on 16/06/1986.), which establishes as a crime to “obtain financing, through fraud, at a financial institution”, punished by a term of imprisonment from two to six years and a fine. Accordingly to its paragraph, there is an indication that the penalty must be increased by one third “if the crime is committed in detriment of an official financial institution”.

34 Brazil. TRF3. *Criminal Review* (“*Apelação Criminal*”) n° 0000173-85.2018.4.03.6139. Rapporteur: Federal Tribunal Judge Fausto de Sanctis. Published on 08/11/22. Available at: <<https://web.trf3.jus.br/base-textual/Home/ListaColecao/9?np=11>>. Accessed on: 11/04/23.

Brazil. TRF3. *Conflict of venue* (“*Conflito de jurisdição*”) n. 0000441-29.2018.4.03.0000/SP. Rapporteur: Federal Tribunal Judge Fausto de Sanctis. Published on 28/02/2019. Available at: <<https://web.trf3.jus.br/base-textual/Home/ListaColecao/9?np=1>>. Accessed on: 11/04/23.

35 Brazil. TRF3. *Conflict of venue* (“*Conflito de jurisdição*”) n. 0000441-29.2018.4.03.0000/SP. Rapporteur: Federal Tribunal Judge Fausto de Sanctis. Published on 28/02/2019. Available at: <<https://web.trf3.jus.br/base-textual/Home/ListaColecao/9?np=1>>. Accessed on: 11/04/23.

36 Brazil. TRF3. *Criminal Review* (“*Apelação Criminal*”) n° 0000173-85.2018.4.03.6139. Rapporteur: Federal Tribunal Judge Fausto de Sanctis. Published on 08/11/22. Available at: <<https://web.trf3.jus.br/base-textual/Home/ListaColecao/9?np=11>>. Accessed on: 11/04/23.

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37 O. Renn et al. op. cit. n.9.

The second feature presented is the nature of the arguments to determine if a conduct would unfold in systemic risk. The TRF3 states that the “real state financing displays a clear legal nature” considering it a “private contract”, which only admits Public Regulation to avoid “abusive practices from the financial institutions” against the consumers, hence, the “financial institutions” should not be “unnecessary protected” by classifying breaches of financing contract as a “kind of white-collar crime”.³⁸ The same reasoning appears when is stated that the “the mere obtention of financing with fraud does not possesses the intrinsic quality to harm or to risk National Financial System in its integrity”, since it is based on credit scoring, a “calculated risk, market digested and with little consistency”.³⁹ The TRF3 even considers that it is part of the sector’s risk to accept certain contracts with consumers whose credit scoring is questionable, concluding that “a mere legal act”, a “loan contract”, is not capable to attack the “National Financial System in its integrity”, thus, “a potential risk” to the system is not verified.⁴⁰

This second feature of the legal concept constructed by the TRF3 indicates that an interdisciplinary method needs to be evolved going beyond the sector’s legal Regulation. Currently, the Court considers that if a risk is managed by the sector regulation, it does not have potential to endanger the system, even if unlawful. Legal Regulation is considered the main and only source of specialized information to declare a conduct as a trigger to systemic risk, without the creation of an arena to discuss a possible regulatory failure, for instance. There is no indication of studies from other disciplines, such as Economics, to support the conclusion that “obtention of financing with fraud” if repeated, might be or not a trigger to systemic risk.

The same trend is clear in other excerpts, where the interdisciplinary analysis is based on a mere reference to the term “systemic risk”, without indicating the studies that support that claim. The Court declares that its decision was based on the “the facts stated” by the accusation, indicating that there is no evidence of “necessary and effective harm to the National Financial System”, concluding that “a loan taken from a federal financial institution (*Caixa Econômica Federal* – CEF), even as part of the “My house, my Life” Program (*Programa Minha Casa Minha Vida*), it is not capable to pose as a threat to our Financial System”.⁴¹ In the decision, there is no clear indication of the expert opinion consulted by the judge, thus it is not possible to say if the decision is based only in the judge’s personal opinion to what must constitute a source of systemic risk to Brazilian Financial System.

38 Brazil. TRF3. *Conflict of venue* (“Conflito de jurisdição”) n. 0000441-29.2018.4.03.0000/SP. Rapporteur: Federal Tribunal Judge Fausto de Sanctis. Published on 28/02/2019. Available at: <<https://web.trf3.jus.br/base-textual/Home/ListaColecao/9?np=1>>. Accessed on: 11/04/23.

39 Brazil. TRF3. *Criminal Review* (“Recurso em sentido estrito”) nº 0000374-77.2018.4.03.6139/SP. Rapporteur: Federal Tribunal Judge Fausto de Sanctis. Published on 15/08/2019. Available at: <<https://web.trf3.jus.br/base-textual/Home/ListaColecao/9?np=1>>. Accessed on: 11/04/23.

40 Brazil. TRF3. *Conflict of venue* (“Conflito de jurisdição”) n. 0000441-29.2018.4.03.0000/SP. Rapporteur: Federal Tribunal Judge Fausto de Sanctis. Published on 28/02/2019. Available at: <<https://web.trf3.jus.br/base-textual/Home/ListaColecao/9?np=1>>. Accessed on: 11/04/23.

41 Brazil. TRF3. *Criminal Review* (“Recurso em sentido estrito”) nº 0000374-77.2018.4.03.6139/SP. Rapporteur: Federal Tribunal Judge Fausto de Sanctis. Published on 15/08/2019. Available at: <<https://web.trf3.jus.br/base-textual/Home/ListaColecao/9?np=1>>. Accessed on: 11/04/23.

It is possible to question if a fraud in home financing should be considered as a financial crime, since there is specialized literature indicating fraud in home financing as probable systemic risk source, as seen in Li et. al. study.⁴² The decision does not point out the interdisciplinary method that led the judge to discard the conduct as a financial crime, that is, it is not possible to say with certain the reason why this specific conduct must not be understood as a trigger to systemic risk. In the decision, there is no reference to expert evidence or a study that would rule out that sort of conduct as a trigger, based on scientific arguments.

The lack of an appropriate method to approach interdisciplinarity guarantees a conclusion without empirical studies to back it. In the same decision, it is affirmed that “attaining financing with fraud” does not result in harm that might be “measured economically”.⁴³ In fact, the decision affirms that the financial institution would receive “a benefit” from the contract, whilst the harm to the “confidence in the system” is considered an “immaterial value”. It is interesting that this conception ignores the fact that such harm or risk to the “confidence in the system” might generate economic effects, such as affirmed by Dill who refers to the “panic theory” or “fear-induced illiquidity” effects on the Financial System.⁴⁴

It is possible to conclude that this interesting TRF3’s attempt to construct a legal concept of “systemic risk” as a criterion to assign specialized judges certain criminal cases can be reduced to a mere rhetorical argumentation, if an interdisciplinary method is not further developed.

4. POSSIBLE CONSEQUENCES OF THE DECISION TO USE “SYSTEMIC RISK” AS A CRITERION TO ASSIGN CASES TO SPECIALIZED JUDGES

The TRF3’s chosen criterion to assign certain criminal cases to specialized judges might have two kinds of consequences: one related to the Court’s administration and another to Criminal Law’s legal theory.

The Court’s reform clashes with the decision to choose an interdisciplinary criterion to determine specialized judges’ jurisdiction. When the Court’s decision sets apart “systemic risk”, an interdisciplinary concept, to define the specialized judge’s jurisdiction, the Court is also demanding a new level of expertise to be achieved by the magistrate, that is, to be equipped to use an interdisciplinary method.

This interdisciplinarity shall be expressed by the use of expert evidences, regarding systemic risk to the financial system, that can come from well-established Brazilian institutions responsible for monitoring systemic risk, such as the Brazilian Central Bank, that should give a better indication of which conduct might be considered a trigger

42 S. Li – Q. Pan – J. He. *Impact of systemic risk in the real estate sector on banking return*. SpringerPlus 5 (61), 2016. Available at: <<https://doi.org/10.1186/s40064-016-1693-8>>. Accessed on: 25/01/2022.

43 Brazil. TRF3. *Criminal Review* (“Recurso em sentido estrito”) nº 0000374-77.2018.4.03.6139/SP. Rapporteur: Federal Tribunal Judge Fausto de Sanctis. Published on 15/08/2019. Available at: <<https://web.trf3.jus.br/base-textual/Home/ListaColecao/9?np=1>>. Accessed on: 11/04/23.

44 A. Dill, *Bank Regulation, risk management and compliance: theory, practice and key problem areas*. London: Routledge, 2020, pp.161–3.

to systemic risk.⁴⁵ It is important that experts from other disciplines are listened as well as informed on the hurdles concerning the regulation enforcement that might be detected by the Judiciary. The sharing of experiences, although not with the Judiciary branch, is already in motion, for instance in the UK, where the Financial Services Compensation (FSCF) Scheme's 2020s Strategy indicates as a goal to perfect regulation and avoid "future failures" the necessity to share "with government and regulators" the "causes and consequences of failures".⁴⁶

The second consequence might be experienced in Criminal Law's theory, which will have to evolve to include an analysis on systemic risk made by Systemic Risk Regulation, even if not directly. The attempt to consider Criminal Law as a regulatory tool has been indicated by the Responsive Regulation theory, developed by Ayers and Braithwaite, but it is important to understand that a demand to develop an interdisciplinary method that would encompass financial regulation has to be constructed without losing its own rationality.⁴⁷

A decision that only aims to organize the specialized judge jurisdiction can impact the very concept of financial crimes, notably in cases involving crypto-assets. The studies show that the connection between crypto-assets and the financial system might be enough to create systemic risk, as stated by Parma et al.⁴⁸ If the new concept of financial crimes is observed, even a case of fraud involving crypto-assets is possible to be assigned to specialized judges, since it has the potential to be considered a trigger to systemic risk.

This change can indicate a stricter legal context to analyze the criminal conduct. For instance, the UK plans to expand financial crimes to encompass the crimes committed with crypto-assets, indicating stricter standards to be followed by the virtual assets sector, considered "broader" than those stated by the regulation against money laundering.⁴⁹

The Brazilian regulation on crypto-assets indicates as guidelines to the virtual assets sector the "deterrence of money laundering and terrorist financing and mass destruction weapons".⁵⁰ It is possible to realize that the deterrence of financial crimes

45 The official website of the Brazilian Central Bank states that: "The monitoring process is carried out from two perspectives: macroprudential, focused on the identification and evaluation of vulnerabilities that may impact the National Financial System (SFN), and microprudential, aimed at monitoring the risks to which the Supervised Entities are exposed, as well as the compliance to operational and prudential limits." (Brazil. GovBr. *Banco Central do Brasil*. Available at: <<https://www.bcb.gov.br/en/financialstability/monitoringnfs>>. Accessed on 23/01/2022).

46 UK. SFO. *Memorandum of understanding between the Serious Fraud Office and The Financial Services Compensation Scheme*. Available at: <<https://www.sfo.gov.uk/download/memorandum-of-understanding-between-the-financial-services-compensation-scheme-and-the-serious-fraud-office/>>. Accessed on: 17/04/2023.

47 I. Ayers & J. Braithwaite, *Responsive Regulation: transcending the Deregulation debate*. Oxford: Oxford, 1992.

48 B. Parma, A. Ismail, F. Melo, and N. Sugimoto. *Regulating the Crypto Ecosystem: The Case of Unbacked Cryptoassets*. IMF Fintech Note 2022/007. Washington DC: International Monetary Fund, 2022, p.34. Available at: <<https://www.imf.org/en/Publications/fintech-notes/Issues/2022/09/26/Regulating-the-Crypto-Ecosystem-The-Case-of-Unbacked-Crypto-Assets-523715>>. Accessed on: 21/02/2022.

49 UK. HM Treasury. *Future financial services regulatory regime for cryptoassets: Consultation and call for evidence*, 2023, p.19. Available at: <www.gov.uk/official-documents>. Accessed on 15/02/2022.

50 Federal Law 14478, issued on 21/12/2022

is also considered, since the new legislation changes the Brazilian Financial Crimes Act (*Lei 7492/1986*) by adding the crypto exchanges as an equivalent to “financial institution”, which will extend the application of the Brazilian Financial Crimes Act to this sector. A new crime was also added to the Brazilian Criminal Code at the art. 171-A, a crime against private property, referring to virtual assets. The remaining question is if the new art. 171-A will also be considered a financial crime, since it might be considered a trigger to systemic risk.⁵¹

5. CONCLUSIONS

The TRF3’s decision of partially abolishing the specialization of the Courts is polemic. On one hand, a Court’s effort towards the specialization of certain judges to deal with complex cases is a requirement to improve judge’s legal reasoning as indicated by Larenz.⁵² On the other hand, the amplification of jurisdiction of the specialized judges might be a solution to end the “judicial isolation” indicated by Zimmer.⁵³ In the midst of this polemic, the TRF3’s choice of “systemic risk” as a criterion to assign criminal cases to specialized judges might justify the necessity of specialization, considering its complexity.

The construction of an interdisciplinary method is an obstacle to be overcome to understand a concept “imported” from other areas of knowledge, which cannot be done without specialization. The legal concept of systemic risk constructed by the TRF3 is able to indicate that the endangered object is a system, considering only the effects of one conduct, ignoring the repetition as an important concept element. The TRF3’s concept is based on the sector legal regulation, indicating a lack of expertise on interdisciplinary analysis, since a legal analysis is not enough to back the classification of a conduct as a systemic risk trigger. Empirical studies are demanded to support decisions like the one from TRF3, that aims to avoid that “each and every financing contracted with fraud” would be considered a crime against the Financial System.⁵⁴

The connection between Systemic Risk Regulation and Criminal Law is a very interesting intake on the topic. This set of decisions might indicate an innovation in Brazilian tradition. This interdisciplinary method, if well-constructed, would encompass not only Criminal Law, but also the other intertwined disciplines within this topic, such as Economic Regulation, Welfare benefit regulation and the systemic risk regulator’s opinion.

In the Brazilian TRF3 case, the choice of “systemic risk” to characterize financial crimes might be positive, considering the possibilities for the Court’s administration and the Legal Theory. Those consequences might be unintended by the Court, which only highlight the importance of carefully consider the criteria to define specialized

⁵¹ The art. 171-A of the Brazilian Criminal Code (Brazil. *Criminal Code*. Decreto-Lei n. 2848. Issued on 07/12/1940) indicates as a crime “to deceive” others by “organizing, administrating, promoting and distributing wallets or intermediate operations” with “virtual assets” to get “illicit profit” and “cause harm to others”.

⁵² K. Larenz. *Metodologia da Ciência do Direito*. Lisboa: Fundação Calouste Gulbenkian, 2019, p. 289–290.

⁵³ M.B. Zimmer. *Overview of specialized Courts*. *International Journal for Court Administration*. August 2009, pp.1–3.

⁵⁴ Brazil. TRF3. *Criminal Review* (“*Apelação Criminal*”) nº 0000173-85.2018.4.03.6139. Rapporteur: Federal Tribunal Judge Fausto de Sanctis. Published on 08/11/22. Available at: <<https://web.trf3.jus.br/base-textual/Home/ListaColecao/9?np=11>>. Accessed on 11/04/23.

judges' jurisdiction. If the "systemic risk" was chosen as merely a rhetorical reference to justify reducing the workload of specialized judges, it might cause inadvertent effects on Criminal Law's Legal Theory which will hinder the very development of the concept.

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