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## The Cost of Access to Justice Revisited— The ‘Age of Austerity’ in Brazilian Civil Procedure Five Years Later. Winds of Change?

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# The Cost of Access to Justice Revisited— The ‘Age of Austerity’ in Brazilian Civil Procedure Five Years Later. Winds of Change?

Antonio Gidi<sup>1\*</sup> and Hermes Zaneti, Jr.<sup>2\*\*</sup>

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## I EFFICIENCY AND LEGAL CERTAINTY VERSUS AUSTERITY

This article is a revisited and expanded version of a previous study written in 2014 as a national report for the XV IAPL World Congress of Procedural Law: Effective Judicial Relief and Remedies in an Age of Austerity held on May 26-29, 2015, in Istanbul, Turkey.<sup>3</sup> Much has changed in Brazil in the five years since this study was first published: there is a new Code of Civil Procedure (C.P.C./2015), a new political orientation in the Presidency, and, more specifically, a new economic orientation in the Ministry of Economy.

This new political trend is reflected in the new justice system in Brazil. Brazil is going through a phase of political instability and possibly constitutional crisis. The Executive and the Judiciary are not aligned. For example, the Brazilian Supreme Court has been controlling the acts of the President during the COVID-19 pandemic.<sup>4</sup> The issues discussed in this article are related to the institutional development. We will mention the political situation merely in passing. The Judiciary maintains its independence from the other branches of government and has acted in a restrained way

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<sup>3</sup> See Antonio Gidi & Hermes Zaneti, Jr., *Brazilian Civil Procedure in the ‘Age of Austerity’? Effectiveness, Speed, and Legal Certainty: Small Claims, Uncontested Claims, and Simplification of Judicial Decisions and Proceedings*, 8 ERASMUS L. REV. 244 (2015).

<sup>4</sup> Freddie Didier Jr., et al., *Brazilian Precedents in Covid-19: Supreme Court Matters*, BART KRANS & ANNA NYLUND (EDS.), COURTS COPING WITH COVID-19 (forthcoming 2021) (discussing several Supreme Court decisions allocating power between the states and the federal executive).

to defend the Constitution and the laws. Despite the stress in the institutions, democracy continues to prevail in Brazil.

These changes translate into a political agenda that is less concerned with broad access to social rights, and more focused on fiscal austerity and economic liberty. Among the many legislative changes that could impact this research, we must cite the social security reform (aimed at reducing the economic impact of the retirement of private and public workers)<sup>5</sup> and the employment law reform (aimed at reducing the social rights of workers and increasing job creation).<sup>6</sup> Additionally, several law reforms affected the public administration and the administration of justice.<sup>7</sup> Most notably, amendments to the Introductory Act to Brazilian Law (introducing considerations regarding the concrete impact of administrative and judicial decisions on the economy)<sup>8</sup> and the enactment of the Economic Freedom Act (creating rights of economic freedom, protection of the free initiative, and free exercise of economic activity, with the objective of stimulating investment and generating legal certainty through the de-bureaucratization of the public administration).<sup>9</sup>

These winds of change dramatically shifted the landscape that led to our first study on this matter—a time when the justice system was seen as a “non-cost,” and the only concerns were legal certainty, the effectiveness of judgments, and the reduction of the caseload.<sup>10</sup> The model criticized in our original study resulted in a “free justice,”

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<sup>5</sup> See GOVERNMENT OF BRAZIL, <http://www.brasil.gov.br/novaprevidencia/> (last visited Jan. 23, 2020).

<sup>6</sup> See Lei No. 13.467, de 13 de Julho de 2017, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 14.7.2017 (Braz.).

<sup>7</sup> See, e.g., Lei No. 13.655, de 25 de Abril de 2018, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 26.4.2018 (Braz.) (adding new provisions to Lei de Introdução às Normas do Direito Brasileiro); see also Lei No. 13.874, de 20 de Setembro de 2019, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.9.2019 (Braz.); see also Lei No. 13.709, de 14 de Agosto de 2018, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 14.8.2018 (Braz.).

<sup>8</sup> See Lei No. 13.655, de 25 de Abril de 2018, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 26.4.2018 (Braz.).

<sup>9</sup> See Lei No. 13.874, de 20 de Setembro de 2019, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.9.2019 (Braz.).

<sup>10</sup> Gidi & Zaneti, Jr., *supra* note 3, at 246.

which led to the tragedy of the commons of the Brazilian justice system, with more than 78.7 million lawsuits pending in 2018.<sup>11</sup>

As this paper will demonstrate, Brazil now enters the age of austerity in civil procedure for two reasons: first, the economic situation in the country including the internal debt crises, and second, the infancy of the process of democratization and increased access to justice, which began in 1988 with the establishment of democracy and the enactment of the Constitution. In this generation, Brazil has considerably advanced access to justice by giving dignity to and recognizing the fundamental rights of thousands of Brazilians who were previously excluded from society, most notably those without education or financial resources to use the Judiciary in the protection of their rights. This breadth of access to the judiciary led to demobilization of the government in guaranteeing direct access to other public bodies and oversight of the regulatory agencies of the financial system, telephone services, and aviation.<sup>12</sup> Curiously, the

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<sup>11</sup> The updated 2019 *Justiça em Números* Report contains the main data from the Brazilian justice system in 2018, with detailed information about the performance of the Judiciary, specifically, its expenses, structure, and number of pending cases. *See infra* note 80. The Report has been published since 2004 and has consistently improved its methodology. Every unit of the system of justice (state and federal) collaborate sending data. The numbers show, for the first time, a reduction in the number of legal proceedings: excluding enforcement proceedings, the number of cases was reduced by 1.2 million cases, which represents a 3.3% reduction. This reduction happened in the past two years, while from 2009 to 2016 the cases rose an average of 4% each year. The numbers in 2018 are the result of a 1.9% reduction in the number of cases filed, combined with a productivity increase of 3.8%. In 2018, 28.1 million legal proceedings were filed, and 31.9 million were adjudicated. This represents a net result of 13.7% more cases concluded than new cases filed. This was the first time in a decade that all areas of the Judiciary were able to adjudicate more cases than were filed. All 24 Circuits of the Employment Courts achieved the same feat. The expenses of the Judiciary in Brazil in 2018 was 93.7 Billion Reals (roughly equivalent to \$30 billion USD), an increase of 0.4% from 2017. As this paper was concluded, a new Report was published in 2020 with the information related to 2019. This article will mostly use the 2019 Report, with data of 2018. *See Justiça em Números*, CONSELHO NACIONAL DE JUSTIÇA 1 (2018) <https://www.cnj.jus.br/wp-content/uploads/2011/02/8d9faee7812d35a58cee3d92d2df2f25.pdf>.

<sup>12</sup> *See, e.g.*, Joaquim Falcão, *Regulatory Agencies and the Judiciary*, CONSELHO NACIONAL DE JUSTIÇA, <https://www.cnj.jus.br/agias-reguladoras-e-o-poder-judicio/> (last visited Jan. 24, 2020) (considering the impacts of the regulation in

most common litigants, both as plaintiffs or defendants, are public bodies.<sup>13</sup> The lack of direct support to the population and market control in turn, generates more pressure for access to justice through the Judiciary. The Judiciary, therefore, was a promoter of the re-democratization, but this change meant an increase in the cost of the administration of justice, which presented an obstacle to effectuating justice.

Moreover, the Judiciary does not raise enough money. A recent study on judicial fees confirmed that the Judiciary operates at a deficit, that there is a huge imbalance between states regarding judicial fees, and that the fee structure encourages appeals.<sup>14</sup> This information leads to the need to review the fee structure as well as the constitutional guarantee of free access to justice, which to this day, is conditioned solely on the self-declaration of financial need.

Another difficulty in addressing the shift to austerity is the ambiguity of the expression “austerity,” which may have different meanings in different situations. For example, the expression is generally employed by economists for rigor in the control of public expenses by measures of control based on a sustainable level of the public deficit (“austerity-control”). In this sense, the fiscal reforms of the 2000s imposed rigid limits on expenses for the Judiciary and Prosecutors by linking them to the amount of taxes collected (Law 101/2001, known as ‘Fiscal Responsibility Law’).<sup>15</sup> However, this limitation was enacted before the current age of austerity and was not specifically directed towards the expenses of the judicial system, but rather the expenses of all public organizations. Regardless, the

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the judicialization of the consumer claims and asking “do agencies have any responsibility or contribution in the face of increasing judicialization?”).

<sup>13</sup> See *100 Maiores Litigantes*, CONSELHO NACIONAL DE JUSTIÇA (2012), [https://www.cnj.jus.br/wp-content/uploads/2011/02/100\\_maiores\\_litigantes.pdf](https://www.cnj.jus.br/wp-content/uploads/2011/02/100_maiores_litigantes.pdf) (other major litigants are banks, insurance, and credit card companies).

<sup>14</sup> See DEPARTAMENTO DE PESQUISAS JUDICIARIAS, *DIAGNÓSTICO DAS CUSTAS PROCESSUAIS PRATICADAS NOS TRIBUNAIS* (2019) (Braz.) (available at: [https://www.cnj.jus.br/wp-content/uploads/2019/11/relatorio\\_custas\\_processuais2019.pdf](https://www.cnj.jus.br/wp-content/uploads/2019/11/relatorio_custas_processuais2019.pdf)).

<sup>15</sup> Lei Complementar No. 101, de 4 de Maio de 2000, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.5.2000 (Braz.).

Brazilian Judiciary is one of the most expensive in the world, accounting for roughly 2% of the Brazilian GDP.<sup>16</sup>

Despite the economic potential and territorial dimensions of the country, Brazilian people have always been dependent upon the Public Administration. Additionally, because a major part of the population is not independent from the State, we experience the situation of “austerity-necessity.” A deficient public service, connected to broad access to justice, is one of the aspects discussed in this paper.

This paper discusses judicial proceedings for the resolution of small claims, uncontested claims, and simple matters, from the perspective of the 2015 Code of Civil Procedure.

The current relevant legislation in Brazil is, for the most part, the direct product of the 1988 Constitution (CF/88) and law reform pursuant to a political pact among the leaders of all three branches of government (“Republican Pact”). Signed in 2004, the Executive, Legislative, and Judiciary branches joined forces to promote a speedy and efficient justice system in Brazil.<sup>17</sup> This pact led to the approval of Constitutional Amendment number 45 in 2004 (EC 45/2004), which promoted a major reform of the Brazilian Judiciary.<sup>18</sup> This initiative gave constitutional standing to the procedural objectives of efficiency (protection of fundamental rights, access to justice, and speedy trial) and legal certainty (stability of decisions and avoidance of contradictory decisions).<sup>19</sup>

The 2004 Constitutional Amendment brought about several important innovations. One was the fundamental right to judicial protection at a reasonable time (Article 5, LXXVIII, CF/88.) Another important innovation was the “*súmula vinculante*” (Article

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<sup>16</sup> Luan Sperandio, *Why Is the Brazilian Judiciary So Expensive and Slow?*, GAZETA DO POVO, <https://www.gazetadopovo.com.br/wisep-news/why-is-the-brazilian-judiciary-so-expensive-and-slow/> (last visited Sept. 27, 2020).

<sup>17</sup> See Pacto Republicano de Estado por um Sistema de Justiça Mais Acessível Ágil e Efetivo, de 13 de abril de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 26.5.2009 (Braz.).

<sup>18</sup> See Emenda Constitucional No. 45, de 30 de Dezembro de 2004, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 31.12.2004 (Braz.).

<sup>19</sup> See Carlos Alberto Alvaro de Oliveira, *Fundamental Rights to Effectiveness and Security in a Dynamic Perspective*, 1 REVISTA DE PROCESSO 57 (2008) (discussing the compatibility between these fundamental rights and their importance for current civil procedure).

103-A, CF/88), a precedent-like statement enacted by the Brazilian Supreme Court (mostly a Constitutional Court) that binds the Judiciary and Public Administration.<sup>20</sup> A third innovation was the prerequisite that all constitutional cases to be decided by the Brazilian Supreme Court have “general repercussion” (a kind of writ of certiorari to give the court control of its own docket) (Article 102(3), CF/88). The Constitutional Amendment, therefore, created a new paradigm of efficiency and a new methodology for the higher courts in the Judiciary, particularly the Supreme Court.<sup>21</sup>

After the system of precedents was established in Brazil, the Code of Civil Procedure of 2015 broadened and formalized the horizontal and vertical binding precedents. Trial judges and courts must follow their own precedents as well as the precedents of courts above them.<sup>22</sup>

This article will address the reduced involvement of courts in family law, wills, and other areas of de-judicialization. It will also discuss special proceedings and procedural techniques, such as small-claims courts, monitory action, and *in limine* judgments, as illustrations of recent legal reforms regarding cases involving simple matters, the simplification of judicial decisions, and uncontested claims. It will also discuss changes brought up by the Code of Civil Procedure of 2015, including the importance of binding precedents and techniques for the aggregation of cases as a strategy for reducing repetitive cases and for increasing legal certainty.

All these innovations stem not from austerity, but from the fixation of Brazilian civil procedure with the ideals of efficiency,

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<sup>20</sup> See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 103-A (Braz.) (“The Federal Supreme Court may (...) issue a *summula* (restatement of case law) which, as from publication in the official press, shall have a binding effect upon the lower bodies of the Judicial Power and the direct and indirect public administration, in the federal, state, and local levels, and which may also be reviewed or revoked, as set forth in law.”).

<sup>21</sup> See Emenda Constitucional No. 45, de 30 de Dezembro de 2004, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 31.12.2004 (Braz.).

<sup>22</sup> See generally, HERMES ZANETI JR., THE BINDING VALUE OF PRECEDENTS (Juspodivm ed., 4th ed. 2019); MICHELE TARUFFO, IL VERTICE AMBIGUO, SAGGI SULLA CASSAZIONE CIVILE (1991); LUIZ GUILHERME MARINONI, PRECEDENTES OBRIGATÓRIOS (Revista Dos Tribunais ed., 3rd ed. 2014); DANIEL MITIDIERO, CORTES SUPERIORES E CORTES SUPREMAS, DO CONTROLE À INTERPRETAÇÃO, DA JURISPRUDÊNCIA AO PRECEDENTE, XIII REDP. 934 (2013).



legal certainty, and access to justice. The debate about austerity, which was previously nonexistent in Brazil, has begun. By expanding access to justice to a broader portion of society, the legal system increased both the number of cases and the costs associated with the judicial system. However, the excess litigation and expenses associated with the expansion of access to justice have contradictorily curtailed access to justice. This current situation requires new efforts to increase efficiency and legal certainty, while still maximizing access to justice.

## II AUSTERITY AND REDUCTION OF COSTS VERSUS EFFECTIVENESS AND LEGAL CERTAINTY

Because austerity and the reduction of costs in the Brazilian justice system are not popular values, there was until recently, no open dialogue about them. Except for the above-mentioned Fiscal Responsibility Law in the 2000s,<sup>23</sup> the subject of austerity in the Judiciary was practically non-existent in Brazil. When the original article was written in 2014, austerity may have been considered behind closed doors, but neither legal doctrine nor the annals of Congress make direct reference to it. It was clear that there was only a concern for efficiency and legal certainty, with total indifference to the problem of the costs of justice.<sup>24</sup> As stated in the introduction, this approach has drastically changed.

We must first discuss the general approach to reforming the administration of justice. Then, we will discuss the winds of change which landed within Brazil over the past five years.

In recent years, most legal reforms of the Brazilian model of justice focused entirely on efficiency and legal certainty.<sup>25</sup> Efficiency means access to justice for the poor, judicial protection of individual and collective fundamental rights, and speedy proceedings.<sup>26</sup> Legal certainty includes confidence in and the stability of judicial opinions, avoidance of contradictory decisions,

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<sup>23</sup> See Lei Complementar N. 101, de 4 de Maio de 2000, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.5.2000 (Braz.).

<sup>24</sup> Gidi & Zaneti, Jr., *supra* note 3, at 246.

<sup>25</sup> See, e.g., the aggregate litigation and the binding precedents discussed below.

<sup>26</sup> Gidi & Zaneti, Jr., *supra* note 3, at 246.

and the indirect reduction of the burden on the Judiciary through the use of new techniques for the resolution of repetitive cases.<sup>27</sup>

The movement towards efficiency and legal certainty are not antithetical, but complementary. The more people have access to justice, the higher the burden on the Judiciary, and the less efficient it becomes— therefore, the higher the burden on the Judiciary, the greater the need for efficiency. Legal certainty (for the reduction of contradictory opinions) and uniformity of decisions (to reduce the number of judicial proceedings) help people make decisions on whether to file or contest lawsuits. They allow habitual litigants to adopt responsible strategies to avoid litigation, which is particularly important in a situation where repetitive cases are emanating from both the public sector and some sectors of the private market.

The access to justice movement, therefore, mandates law reform to increase stability and legal certainty. As we will see below, this relationship of cause and effect is clear in Brazil; as the legislature's attention in encouraging access to justice has intensified, so has the need to deal with the overburdening on the Judiciary. This overburdening has worsened a "crisis" in the Brazilian Judiciary. Efficiency and legal certainty are the overall principles proposed as the solution for the "crisis" of the Judiciary. It is not clear, however, whether this scheme is sufficient or will lead to the expected results.

Recent initiatives, directed at attaining both efficiency and legal certainty, have been pursued in small claims courts (because of the reduced value of the claim and lesser complexity of the subject matter) and simple and uncontested matters (cases without objection, or in which the legal conflict had already been previously decided by test cases or precedent).<sup>28</sup>

To promote effective access to justice, Brazil created institutions specializing in the protection of collective and individual fundamental rights, broadening the functions of the Public Prosecutors (*Ministerio Publico*), and creating the Public Defenders (*Defensoria Publica*), an institution of public advocacy with integral

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<sup>27</sup> *Id.* at 245.

<sup>28</sup> *See, e.g.*, [consumidor.gov](http://consumidor.gov) (in connection with an ODR mechanisms connected with the small claims courts); *see also* Lei Nº 13.105, Art. 332, de 16 de Março de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.3.2015 (Braz.).

and free legal support for the poor in both criminal and civil matters.<sup>29</sup>

On the other hand, recent initiatives have tried to minimize the negative impact brought by the increased access to justice. These initiatives have ranged from the adoption of binding precedents and aggregate litigation to the growing use of ADR.

One strategy is to mandate a potential plaintiff to seek an amicable solution directly from the public body that caused the harm. Some court decisions have limited the broad access to justice. The Supreme Court made it mandatory for the plaintiff to administratively request a social security benefit before being allowed to file a lawsuit.<sup>30</sup> The plaintiff, however, only needs to make a request; it is not necessary to exhaust the administrative procedure.<sup>31</sup>

Another strategy to reinforce the multidoor judicial system is encouraging settlement. CPC/2015 established a mandatory procedural hearing in ordinary proceedings with the sole objective of conciliation and mediation.<sup>32</sup> The party who does not appear will be fined (CPC/2015, art. 334).<sup>33</sup> As technology has progressed judicial opinions have required consumers to go through online dispute resolution (ODR).<sup>34</sup> ODR is conducted through the Ministry of Justice's site [consumidor.gov.br](http://consumidor.gov.br).<sup>35</sup> This experience, in turn, led the National Council of Justice (CNJ)<sup>36</sup> to study an agreement between the site and the small claims courts to legally mandate ODR proceedings before a legal proceeding could be filed.<sup>37</sup> A pilot

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<sup>29</sup> Gidi & Zaneti, Jr., *supra* note 3, at 246.

<sup>30</sup> *Id.* at 248.

<sup>31</sup> *Id.*

<sup>32</sup> See Lei No 13.105, de 16 de Março de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.3.2015 (Braz.).

<sup>33</sup> *Id.*

<sup>34</sup> CONSUMER.GOV, FED. TRADE COMMISSION, <https://www.consumer.gov> (last visited Oct. 27, 2020).

<sup>35</sup> *Id.*

<sup>36</sup> See Gidi & Zaneti, Jr. *supra* note 3, at 248-49 (explaining the role of the National Council of Justice (CNJ)).

<sup>37</sup> CNJ recognizes that there is no impropriety in TJMA Resolution 43/2017, TJMA SOCIAL COMMUNICATION, <https://www.tjma.jus.br/midia/tj/noticia/500837> (last visited Nov. 4, 2020) (Due to the success of the platform, the Supreme Court of the state of Maranhão decided that only after attempting to mediate through the platform one is able to

project in the First Circuit of the Federal Courts (including the Federal District and the states of Minas Gerais, Acre, Amapá, Amazonas, Bahia, Goiás, Maranhão, Mato Grosso, Pará, Piauí, Rondonia, Roraima, and Tocantins) is already underway.<sup>38</sup>

In both cases, judicial judgments have been reduced without curtailing access to justice.<sup>39</sup>

Several initiatives have begun for the revision of the system of judicial fees and gratuitous judicial services.<sup>40</sup> Until recently, Brazil was not concerned with the value of judicial fees. A detailed study commissioned by the National Council of Justice (“CNJ”) detected an imbalance between the fees in each of the 26 states of Brazil and the federal judiciary.<sup>41</sup> The CNJ used this study to prepare legislative proposals.<sup>42</sup>

Moreover, the constitutional guarantee of free access to justice for people without financial means is being reevaluated.<sup>43</sup> Another study on the subject of gratuitous justice was commissioned by the Federal Courts’ National Intelligence Center and prepared by federal judges, Taís Schilling Ferraz and Vânia Cardoso Moraes.<sup>44</sup>

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have requests subjected to analysis by the court. The National Council of Justice understood that this procedure does not offend the guarantees of the parties. CNJ recognizes that there is no impropriety in TJMA Resolution 43/2017.).

<sup>38</sup> See Jeferson Melo, *Projeto Piloto Marca Integração Entre Pje e Consumidor.gov.br*, CONSELHO NACIONAL DE JUSTIÇA (Oct. 8, 2019), <https://www.cnj.jus.br/projeto-piloto-marca-integracao-entre-pje-e-consumidor.gov-br/>.

<sup>39</sup> *Id.*

<sup>40</sup> See Manuel Carlos Montenegro, *CNJ Submits to Congress a Bill to Regulate Court Costs*, CNJ NEWS AGENCY (Sept. 14, 2020) <https://www.cnj.jus.br/cnj-entrega-ao-congresso-proposta-de-lei-para-disciplinar-custas-judiciais/>.

<sup>41</sup> See Departamento de Pesquisas Judiciárias, *Diagnóstico Das Custas Processuais Praticadas Nos Tribunais* (2019), [https://www.cnj.jus.br/wpcontent/uploads/2019/11/relatorio\\_custas\\_processuais\\_2019.pdf](https://www.cnj.jus.br/wpcontent/uploads/2019/11/relatorio_custas_processuais_2019.pdf) (Braz.).

<sup>42</sup> Montenegro, *supra* note 40.

<sup>43</sup> See Taís Schilling Ferraz & Vânia Cardoso Moraes, *Nota Técnica N. 22/2019*, CENTRO NACIONAL DE INTELIGÊNCIA DA JUSTIÇA FEDERAL (May 31, 2019), <https://www.cjf.jus.br/cjf/corregedoria-da-justica-federal/centro-de-estudos-judiciarios-1/nucleo-de-estudo-e-pesquisa/notas-tecnicas/nota-tecnica-22-2019-2013-gratuidade-judiciaria/@@download/arquivo>.

<sup>44</sup> NATIONAL COUNCIL OF JUSTICE, <https://www.cnj.jus.br/sobre-o-cnj/quem-somos/> (last visited Feb. 11, 2021) (The National Council of Justice (*Centro*

As an example of how the courts are shifting their view of gratuitous justice, the study suggests that any such provision must be premised on a study of its impact on the budget and in the litigiousness in each state and court.<sup>45</sup> There is clear awareness now that judicial fees serve not only to balance the judicial budget but also to deter litigation. Another bill currently being debated in the Senate seeks to limit gratuitous judicial fees in Federal Small Claims Courts to people without financial means.<sup>46</sup> In the same vein, the Federal Government is considering limiting gratuitous litigation against Social Security only to people without financial means.<sup>47</sup>

The new Code of Civil Procedure aimed to address the issues of slow, excessive, and frivolous litigation, as well as to reduce the number of appeals. For example, amongst other devices, it provided for the reduction of judicial fees, an increase in attorney fees in case of an appeal, attorney fee-shifting, and fines in cases of non-compliance with performance (CPC/15, arts. 98-102 and 85).<sup>48</sup>

The Employment Law Reform limited gratuitous justice to those who have an income below 40% of the highest income of the Brazilian equivalent of Social Security.<sup>49</sup> The trend to limit gratuitous judicial fees to people without financial means is solid.

The main concern is to find a balance between the fees charged and the amount spent by the states with the judicial system, discourage frivolous litigation, and offer free judicial services to

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*Nacional de Justiça*) is a branch of the Federal Court's Council (Conselho da Justiça Federal)).

<sup>45</sup> Ferraz & Moraes, *supra* note 43.

<sup>46</sup> See Bruno Lourenço, *CCJ Aprova Fim da Isenção Irrestrita de Custas Judiciais nos Juizados Especiais*, RÁDIO SENDAO (May 17, 2019, 2:21 PM), <https://www12.senado.leg.br/radio/1/noticia/ccj-aprova-fim-da-isencao-irrestrita-de-custas-judiciais-nos-juizados-especiais>.

<sup>47</sup> See Thiago Resende, *Worker May Have to Pay Costs of Proceedings Against the INSS*, FOLHA DE S.PAULO, (Nov. 28, 2019, 2:00 AM), <https://www1.folha.uol.com.br/mercado/2019/11/trabalhador-podera-ter-de-bancas-custos-de-processos-contra-o-inss.shtml>.

<sup>48</sup> See Lei No. 13.105, de 16 de Março de 2015, art. 85 & 98-102, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.3.2015 (Braz.).

<sup>49</sup> The highest income for retirees in 2020 is about \$2,000 USD a month. See Lei No 5.452, de 1 de Maio de 1943, Art. 790 §3, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 9.8.1943 (Braz.).

those who need it.<sup>50</sup> Since access to justice for people with financial needs is a constitutional guarantee, even if some of these changes are constitutionally dubious, there is no doubt about the direction of the winds.

### III THE MAIN PUBLIC INSTITUTIONS THAT PROVIDE ACCESS TO JUSTICE IN BRAZIL (PUBLIC PROSECUTORS AND PUBLIC DEFENDERS) AND THE COST OF LITIGATING IN BRAZIL

Before we discuss the main issues, we need to address the issue of access to justice. Brazil has a broad array of procedural rules and proceedings designed for the protection of people who are procedurally vulnerable, such as groups of litigants with difficulty to organize themselves, employees, consumers, victims of environmental disasters, poor people, people with disabilities, minors, and the elderly (both in individual and class-action conflicts). After a long military dictatorship (between 1964 and 1985), democracy was re-established in Brazil at a time when the worldwide movement for access to justice was at its strongest.<sup>51</sup> As expected, the country was deeply influenced by the access to justice ideal of the mid-1970s to early 1980s.<sup>52</sup> As a result of this worldwide

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<sup>50</sup> See *Revisão das Normas Relativas à Cobrança de Custas dos Servicos Forenses da Concessão dos Benefícios da Justiça Gratuita*, CONSELHO NACIONAL DE JUSTIÇA (Nov. 28, 2019), <https://www.cnj.jus.br/agendas/revisao-das-normas-relativas-a-cobranca-de-custas-dos-servicos-forenses-da-concessao-dos-beneficios-da-justica-gratuita/>.

<sup>51</sup> Gidi & Zaneti, Jr., *supra* note 3, at 247.

<sup>52</sup> *Id.*; see also CARLOS ALBERTO ALVARO DE OLIVEIRA, MAURO CAPPELLETTI E O DIREITO PROCESSUAL BRASILEIRO, 45 (Revista da Faculdade de Direito da UFRGS) (2001) (The Italian jurist Mauro Cappelletti was the person who most strongly influenced this worldwide tendency.); HERMES ZANETI JR., A CONSTITUCIONALIZAÇÃO DO PROCESSO: O MODELO CONSTITUCIONAL DA JUSTIÇA BRASILEIRA E AS RELAÇÕES ENTRE PROCESSO E CONSTITUIÇÃO 154 (2nd ed. 2014); see also DIERLE JOSÉ COELHO NUNES & LUDMILA FERREIRA TEIXEIRA, ACESSO À JUSTIÇA DEMOCRÁTICO, 44 (2013) (There is a strong correlation between the conclusions of the Florence Project and the Welfare State, and this correlation must be updated. Since the social model of State is replaced in all contemporary democracies by a deliberative-procedimental democracy model, we need to combine the social investments of the Social State with the personal responsibilities of the Liberal State, granting more liberty at lesser cost, with a change in the size of the State and investment in preferred areas and the creation of independent control agencies. This, however, does not

movement, the main concern of the Brazilian legislature during the process of re-democratization of the state was to ensure broad access to justice, which was effectuated through guarantees in the 1988 Constitution.<sup>53</sup>

The guarantee of access to justice was therefore written into the Constitution and the procedural rules, ensuring free legal protection. Article 5, LXXIV, of the Brazilian Constitution, states that “the State will provide integral and free legal assistance to those with insufficient means”.<sup>54</sup> Some of the benefits for the poor include the waiving of court and expert fees and the waiving of fee-shifting.<sup>55</sup> These benefits are also available for class actions.<sup>56</sup> Additionally, the Constitution created public institutions to guarantee access to justice.<sup>57</sup>

The 1988 Constitution assigned to the Public Prosecutors (*Ministerio Publico*) the broad power to act for the protection of fundamental individual rights which are nonwaivable (*droit indisponible*) and rights of social interest of diffuse and collective character.<sup>58</sup> Therefore, Brazilian Public Prosecutors must act not only in the criminal arena, or the traditional protection of the family and orphans, but also for the protection of a broad array of rights. They commonly bring lawsuits in the areas of health, education, the environment, and for the protection of the elderly, disabled, minors, consumers, and workers.

To discharge their functions, the Public Prosecutors may bring individual lawsuits, class actions, and intervene in proceedings as

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affect the correctness of some of the premises of the Florence Project, which analyzed the problem of access to justice from a multidisciplinary approach (economic, sociologic, politic, etc.) and appointed as among the areas in need of reform: simplification, de-judicialization, and de-bureaucratization of the access to justice, from the perspective of the consumers of the justice system, not its operators. These premises are as valid today as they were in 1978.)

<sup>53</sup> Gidi & Zaneti, Jr., *supra* note 3, at 247.

<sup>54</sup> *Id.*; see also FREDIE DIDIER, JR. & RAFAEL ALEXANDRIA DE OLIVEIRA, *BENEFÍCIO DA JUSTIÇA GRATUITA* 11 (3rd. ed. 2008).

<sup>55</sup> Gidi & Zaneti, Jr., *supra* note 3, at 247.

<sup>56</sup> See Lei No. 7.347, de 24 de Julho de 1985, Art. 18, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 25.7.1985 (Braz.).

<sup>57</sup> See *infra* p. 36, especially the comments on public prosecutors and public defenders' role under the constitutional provisions.

<sup>58</sup> See Hermes Zaneti Júnior, *O MINISTÉRIO PÚBLICO E O NOVO PROCESSO CIVIL* (2018).

*custos legis*.<sup>59</sup> The role of the Public Prosecutors in the protection of group rights (diffuse and collective) against the State is possible only because of the constitutional guarantees of independence and specialization.<sup>60</sup>

The Constitution also granted Public Defenders (*Defensoria Publica*) the role of representing the interest of people who are economically and legally in need.<sup>61</sup> The representation is broad and can be judicial or extrajudicial, through individual lawsuits or class actions in the civil and criminal spheres.<sup>62</sup>

Public Prosecutors and Public Defenders operate both in the federal system and in the systems of the several states.<sup>63</sup> Therefore, there are Federal and State Public Prosecutors and Defenders.

These institutions have been recently improved, with extensive public investments and changes to their structure to guarantee administrative and financial autonomy from the three branches of government, particularly the Executive. This was the result of strong lobbying, first on the part of the Public Prosecutors, then of the Public Defenders. The institutions that present the largest growth now are the Public Defenders.<sup>64</sup> This growth is the result of political retaliation because Public Prosecutors have clashed with the highest

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<sup>59</sup> Antonio Gidi, *Class Actions in Brazil*, 51 AM. J. COMP. L. 311, 379-82 (2003) (discussing this peculiar position of Public Prosecutors from Brazil in a comparative perspective); Antonio Herman Benjamin, *Group Action and Consumer Protection in Brazil*, in THIERRY BOURGOIGNIE (ED.), GROUP ACTIONS AND CONSUMER PROTECTION 141, 153 (1992) (showing that, as contrasted to their European counterparts, Brazilian Public Prosecutors are active in the protection of group rights); Roger W. Findley, *Pollution Control in Brazil*, 15 ECOLOGY LAW QUARTERLY 1, 66 (1988) (discussing Public Prosecutors in Brazil).

<sup>60</sup> MAURO CAPPELLETTI, DIMENSIONI DELLA GIUSTIZIA NELLA SOCIETÀ CONTEMPORANEE 110 (1994); see also ANTONIO GIDI, RUMO A UM CÓDIGO DE PROCESSO CIVIL COLETIVO 400-18 (Editora Forense, 1st ed. 2008) (providing a critical view).

<sup>61</sup> CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 134 (Braz.).

<sup>62</sup> *Id.*

<sup>63</sup> See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 127-29, 134 (Braz.).

<sup>64</sup> See generally, Lígia Mori Madeira, *Institutionalization, Reform and Independence of the Public Defender's Office in Brazil*, BRAZ. POL. SCI. REV. 48 (2014).



levels of government through anti-corruption operations, such as Lava-Jato.<sup>65</sup>

The evolution has been quick. The Office of the Public Prosecutors already has full administrative and financial autonomy from the branches of government.<sup>66</sup> This autonomy is essential because the Constitution gives it the ability to police the other state agencies' compliance with the Constitution, and with respect to fundamental rights (Articles. 127, 129, II e IX, CF/88).<sup>67</sup> Moreover, each public prosecutor is independent from the Chief Public Prosecutor in the same way that judges are independent from the Chief Justice of a tribunal (Articles. 127(1), 129(4) e 93, CF/88).<sup>68</sup> With these constitutional changes, the Office of the Public Prosecutors no longer belongs to the Executive branch (as it did in the past), and instead exists as an autonomous institution, one that is indispensable to the administration of justice.<sup>69</sup>

The development of the Office of the Public Defenders is more recent, although it was provided for in the 1988 Constitution (Article 134, CF/88).<sup>70</sup> Its administrative and functional autonomy is assured by the Constitution.<sup>71</sup> Recent constitutional reform has conferred upon the Public Defenders' guarantees that are similar to those conferred upon the Judiciary and Prosecutors. Article 134 states, somewhat poetically, that

“the Office of the Public Defenders is a permanent institution, essential to the jurisdictional function of the State, which has the objective, as an expression and instrument of the democratic regime, of giving legal orientation, promoting human rights and protection in all court instances, judicial and extrajudicial, of the individual and collective rights,

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<sup>65</sup> Bryan Harris, *Lead Prosecutor Quits Brazil's 'Lava Jato' Probe*, FIN. TIMES (Sept. 1, 2020), <https://www.ft.com/content/20dffdd9-05e6-442a-a1ac-c25335a863b6>.

<sup>66</sup> CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 127, §§ 2º-6º (Braz.).

<sup>67</sup> Gidi & Zaneti, Jr., *supra* note 3, at 247.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 247-48.

<sup>70</sup> CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 134 (Braz.).

<sup>71</sup> *Id.*

in a form comprehensive and gratuitous to people in need .....”<sup>72</sup>

Even though it is a necessary development for the full development of Brazilian society, the constitutional principle of broad access to justice, together with the maintenance of the public institutions that provide that access (Public Prosecutor and Public Defender), represents a major direct cost to the judicial system. But the costs also rise indirectly. The independence of the Public Prosecutor and the Public Defender means that they will bring lawsuits against the federal, state, and city governments. These lawsuits, some of them class actions, lead to major expenses with the construction of schools, hospitals, prisons, etc., and with damage claims against the State.<sup>73</sup>

This litigation is a necessary development because of the constant failure of the government in effectuating the public policies adopted in the Constitution of 1988 and subsequent statutes, as well as the bad management of the Public Administration, which perpetuates a vicious circle caused by the State’s failure to administratively protect citizen’s rights when violated. There is a recent tendency to reduce this autophagic litigation, raising the self-control of the Public Administration by the recognition of administrative precedents (Article 496(4), IV, CPC/2015) and through alternative dispute resolution (Article 174, CPC/2015).<sup>74</sup>

On the other hand, litigation in Brazil is still comparatively cheap. In many situations, the law provides for a waiver of court fees, which are usually necessary to finance the cost of the judicial

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<sup>72</sup> Gidi & Zaneti, Jr., *supra* note 3, at 248.

<sup>73</sup> See Paulo CEZAR PINHEIRO CARNEIRO, *ACESSO À JUSTIÇA* 182 (2003) (discussing a study conducted in Rio de Janeiro according to which 90% of the class actions were brought by the State and one-third of all class actions were brought against the State); see also GEISA DE ASSIS RODRIGUES, *AÇÃO CIVIL PÚBLICA E TERMO DE AJUSTAMENTO DE CONDUTA* 271-73 (Editora Forense ed., 2nd ed. 2006) (discussing a study according to which two thirds of all class actions settled extra procedurally by the Public Prosecutors (*compromisso de ajustamento de conduta*) were signed with the State or institutions connected to the State); see also ANTONIO GIDI, *RUMO A UM CÓDIGO DE PROCESSO CIVIL COLETIVO* 404 (Editora Forense ed., 1st ed. 2008) (providing critical perspective).

<sup>74</sup> Gidi & Zaneti, Jr., *supra* note 3, at 248-49.

system.<sup>75</sup> Even when there is payment of costs, the costs are low and independent from the value or complexity of the proceeding.<sup>76</sup> The judiciary laws of each state set a maximum amount for these costs, which ultimately results in disproportionately low fees paid for expensive and complex cases involving a considerable amount of money.<sup>77</sup> The Supreme Court decided that state laws that do not limit the amount of court fees are an unconstitutional violation of the principle of broad access to justice.<sup>78</sup> However, attitudes are currently trending away from the principle of broad access to justice as a result of the economic crisis and the indebtedness of the states.

Even the attorney fees of private lawyers are generally low because of the large number of lawyers and the availability of public defenders.<sup>79</sup>

A few years ago we could say that Brazil was going in the opposite direction of international law reform and raising expenses with the judicial system.<sup>80</sup> The current tendency, however, is to become more aware of the cost of the system of justice. The difference between the situation in 2014 and 2020 is striking. This contrast can be explained in several ways.

First, Brazil experienced considerable economic growth in the past decades.<sup>81</sup> By inserting itself in the international market, Brazil broadened access to products and services for a major part of the population that was below the line of poverty in the 1970s, who now account for a meaningful portion of a budding consumer market.<sup>82</sup> For example, Brazil has witnessed the steady increase of the so-called “Class C” (the group of people and families with a monthly income per capita of between \$90 and \$430), which today represents

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<sup>75</sup> *Id.* This is the case of small claim courts, the legal aid for the poor and the class actions fee system.

<sup>76</sup> *Justiça Em Números 2020 Sumário Executivo*, CONSELHO NACIONAL DE JUSTIÇA, [https://paineis.cnj.jus.br/QvAJAXZfc/opendoc.htm?document=qvw\\_1%2FPainelCNJ.qvw&host=QVS%40neodimio03&anonymous=true&sheet=shResumoDespFT](https://paineis.cnj.jus.br/QvAJAXZfc/opendoc.htm?document=qvw_1%2FPainelCNJ.qvw&host=QVS%40neodimio03&anonymous=true&sheet=shResumoDespFT) (last visited Mar. 24, 2020).

<sup>77</sup> Gidi & Zaneti, Jr., *supra* note 3, at 248-49.

<sup>78</sup> *See, e.g., S.T.F., ADI 4186/RO, Relator: Roberto Barroso, 10.12.2018 (Ro.)*.

<sup>79</sup> Gidi & Zaneti, Jr., *supra* note 3, at 248.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

54% of the Brazilian population and will spend 1.17 trillion Reals in 2014 (about half a trillion USD).<sup>83</sup>

However, the current reality is different, and the numbers are different. A crisis haunts the country, and the Federal Government adopted a political orientation more in line with the market and the economy than with social rights. The data points to an increase in extreme poverty that afflicts 13.5 million people.<sup>84</sup>

Second, Brazil has always been a country with sharp financial inequality (austerity-necessity).<sup>85</sup> European countries prospered after World War II and could afford to provide their people with a series of social benefits but now need to curb them.<sup>86</sup> Brazil, on the other hand, only just started distributing these benefits and may face a similar problem (austerity-control).<sup>87</sup> Today, the need to control public finances is strong. The federal public debt has reached a record high of over 4 Trillion Reals (roughly equivalent to \$1.2 trillion USD).<sup>88</sup> It would have been higher, but the federal government took austerity measures, including the control of public expenses and reduction of banking interest rates (responsible for the

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<sup>83</sup>See Mário Braga, *54% dos brasileiros formam a classe C, diz Serasa Experian*, EXAME (Feb. 18, 2014, 2:09 PM) <https://exame.com/economia/54-dos-brasileiros-formam-a-classe-c-diz-serasa-experian/> (stating that if the Brazilian Class C were a country, it would be the twelfth most populous with 108 million people, and the eighteenth in consumption, representing 58% of the credit in the country).

<sup>84</sup>See Carla Jiménez, *Extrema pobreza sobe e Brasil já soma 13,5 milhões de miseráveis*, EL PAIS (Nov. 6, 2019, 11:35 AM), [https://brasil.elpais.com/brasil/2019/11/06/politica/1573049315\\_913111.html](https://brasil.elpais.com/brasil/2019/11/06/politica/1573049315_913111.html).

<sup>85</sup>Gidi & Zaneti, Jr., *supra* note 3, at 248; *see also* LILIA M. SCHWARCZ AND HELOISA M. STARLING. *BRASIL: UMA BIOGRAFIA 172* (2015) (English publication available at: LILIA M. SCHWARCZ AND HELOISA M. STARLING, *BRASIL: A BIOGRAPHY*, (New York: Farrar, Straus and Giroux, 2018)) (discussing how Brazil since D. João is in debt with foreign countries).

<sup>86</sup>Gidi & Zaneti, Jr., *supra* note 3, at 248; *see also* L. Buendía, P.J. Gómez Serrano & R. Molero-Simarro, *Gone with the Crisis? Welfare State Change in Europe Before and Since the 2008 Crisis*, 150 SOC. INDIC. RES. 243–264 (2020) (available at: <https://doi.org/10.1007/s11205-020-02286-y>) (It is a well-known and debated trend, not only provoked by 2008 crisis.).

<sup>87</sup>Gidi & Zaneti, Jr., *supra* note 3, at 248.

<sup>88</sup>*Brazil National Government Debt*, CEIC, <https://www.ceicdata.com/en/indicator/brazil/national-government-debt> (last visited Sept. 11, 2020).

interest rates of its own debt).<sup>89</sup> Several states, who are facing difficulties to pay public workers, have started dismantling the populations' essential services.<sup>90</sup>

Third, Brazilian politics, since the re-democratization in the 1980s, has taken a consistent turn to the left, adopting several policies of social inclusion.<sup>91</sup> Currently, the Federal Government is led by a group aligned with economic liberalism and conservative customs. President Jair Bolsonaro openly opposes the left-wing Worker's Party, who governed the country in the previous years.<sup>92</sup>

None of these former paths were wrong. On the contrary, social inclusion and effectiveness of rights are investments, not costs.<sup>93</sup> But Brazilians must acknowledge that these goals must not be pursued only in the Judiciary. Otherwise, the cost of the Judiciary Branch may lead to less effectiveness in the protection of these rights. The Brazilian Judiciary has acted as the driving force behind social equality and must continue to play this role. But we must consider alternatives to the judicial solution, and even alternatives

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<sup>89</sup> See e.g., Idiana Tomazelli & Lorena Rodrigues, '*Nós vamos derrubar a dívida pública*', *diz Guedes*, UOL (Nov. 6, 2020), <https://economia.uol.com.br/noticias/estadao-conteudo/2020/11/06/nos-vamos-derrubar-a-divida-publica-diz-guedes.htm?cmpid=copiaecola> (specifically the recent comments of Paulo Guedes, Economy Minister, to control the public debt in times of COVID-19).

<sup>90</sup> See, e.g., Fernando Ferreira Filho and Volnei Piccolotto, *A Dívida Pública do Rio Grande do Sul: uma análise sob a Ótica da Hipótese de Fragilidade Financeira de Minks*, *ANÁLISE ECONÔMICA*, PORTO ALEGRE, v. 36, n. 71, p. 295-322, SET. 2018 (arguing that the policy of privatizations and concessions of public services, however, did not result in reduction of public debt in the State of Rio Grande do Sul).

<sup>91</sup> Gidi & Zaneti, Jr., *supra* note 3, at 248.

<sup>92</sup> See John Cherian, *Brazil on the Rampage*, *FRONTLINE* (Feb. 1, 2019), <https://frontline.thehindu.com/world-affairs/article26004053.ece>.

<sup>93</sup> See LUIGI FERRAJOLI, *LA DEMOCRAZIA ATTRAVERSO I DIRITTI. IL COSTITUZIONALISMO GARANTISTA COME MODELLO TEORICO E COME PROGETTO POLITICO* 154-155 (2013) (arguing that the economic crisis and the weakening of fundamental rights in Europe led to an increase of social inequality. In opposition to the neoliberal thought, the author defends that it was the European investment in social rights that allowed its growth after the World War II.); see also LUIGI FERRAJOLI, *A DEMOCRACIA ATRAVÉS DOS DIREITOS. O CONSTITUCIONALISMO GARANTISTA COMO MODELO TEÓRICO E COMO PROJETO POLÍTICO* (2015).

to public solutions, to ensure the effectiveness of the fundamental rights while reducing costs and increasing efficiency.

In this new situation, the importance of the Judiciary is to guarantee fundamental rights without unnecessarily increasing costs. The Judiciary must be able to manage its budget, protect fundamental rights, and assure access to justice for all (not only those with access to the Judiciary), without overburdening the Executive branch and the market, while at the same time forging a sustainable economic environment.

#### IV NO TRADITION OF EMPIRICAL RESEARCH IN BRAZIL AND NEW TRENDS: THE NATIONAL COUNCIL OF JUSTICE (CNJ) AND THE PERFORMANCE EVALUATION OF THE JUDICIARY (ADJ)

When we first addressed this issue in 2014, we mentioned a recent surge of statistical studies concerning the efficiency of the Brazilian justice system.<sup>94</sup> In the last six years, the reality has evolved.<sup>95</sup>

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<sup>94</sup> Many Brazilian scholars, such as Barbosa Moreira, have complained for decades about the lack of judicial statistics. See Jose Carlos Barbosa Moreira, *A Emenda Constitucional nº 45 e o Processo*, in JOSE CARLOS BARBOSA MOREIRA, 9 TEMAS DE DIREITO PROCESSUAL 21-36, esp. 31 ff (2007).

<sup>95</sup> Law 11.364.2006 created the Department of Judicial Research (“DPJ”), which produces the annual report *Justice in Numbers*, and discusses the performance of the courts. Lei No. 11.364, de 26 de Outubro de 2006, DIÁRIO OFICIAL DO UNIÃO [D.O.U.] de 27.10.2006 (Braz.). The most recent report was published in 2020, where the Judiciary made the data available in a searchable form that shows a picture of the expenses with the Judiciary and the lawsuits divided into various classes and subjects. See *Justiça em Números*, CONSELHO NACIONAL DE JUSTIÇA, [https://paineis.cnj.jus.br/QvAJAXZfc/opendoc.htm?document=qvw\\_1/PainelCNJ.qvw&host=QVS@neodimio03&anonymous=true&sheet=shResumoDespFT](https://paineis.cnj.jus.br/QvAJAXZfc/opendoc.htm?document=qvw_1/PainelCNJ.qvw&host=QVS@neodimio03&anonymous=true&sheet=shResumoDespFT) (last visited Aug. 30, 2020). The National Council of Public Prosecutors (“CNMP”) now publishes a report called “Public Prosecutors: A Picture” (*Ministério Público: Um Retrato*), with data collected from all Office of Public Prosecutors in all states and federal. See Conselho Nacional do Ministério Público, *Ministério Público um Retrato 2018* (Assessoria de Comunicação do CNMP, 2018), [https://www.cnmp.mp.br/portal/images/Publicacoes/documentos/2019/Anu%C3%A1rio\\_um\\_retrato\\_2018\\_ERRATA\\_1.pdf](https://www.cnmp.mp.br/portal/images/Publicacoes/documentos/2019/Anu%C3%A1rio_um_retrato_2018_ERRATA_1.pdf) (last visited Aug. 30, 2020). The current situation is much more advanced than in 2014, but it is still possible to

Being a diverse country with disparate regional realities, continental dimensions (Brazil is larger than the continental U.S. and Europe), and a population of more than 210 million,<sup>96</sup> judicial statistics are still difficult to gather, and the numbers are difficult to interpret.

The 2004 Constitutional reform of the Judiciary (EC 45/2004) created public entities to exercise external control of the Judiciary and the Public Prosecutors (*Ministério Público*).<sup>97</sup> Article 103-B of the Constitution established the National Council of Justice (*Conselho Nacional de Justiça*, CNJ), and Article 130-A established the National Council of Public Prosecutors (*Conselho Nacional do Ministério Público*, CNMP).<sup>98</sup> The objective was to harmonize and standardize the services that provide access to justice and provide effective control of these services. The Constitutional Reform also created a special department under the Ministry of Justice: the Secretary of the Reform of the Judiciary (*Secretaria de Reforma do Poder Judiciário*). The Secretary of the Reform of the Judiciary was a permanent entity responsible for centralizing and proposing governmental initiatives to improve procedural rules and access to justice. Because of budget limitations, the government extinguished the Secretary of the Reform of the Judiciary in 2016 transferring its role to the National Secretary of Justice (*Secretaria Nacional de Justiça*).<sup>99</sup> The creation of these organizations has led to positive results – all of them produce statistics that measure the efficiency of the Brazilian system of justice and offer concrete data to support law reform.

In 2013, The Ministry of Justice published an Atlas of the Judiciary, showing the proportion of judges, public prosecutors,

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criticize the initiative regarding the completeness of the data and inconsistencies in how it is fed.

<sup>96</sup> *Population, Total – Brazil*, WORLD BANK, <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=BR%20.-BR> (last visited Sep. 19, 2020).

<sup>97</sup> See Emenda Constitucional No 45, de 30 de Dezembro de 2004, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 31.12.2004 (Braz.).

<sup>98</sup> CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 103-A, 103-B (Braz.).

<sup>99</sup> See Sérgio Renault, Pierpaolo Cruz Bottini & Maria Tereza Sadek, *Fim da Secretaria de Reforma do Judiciário é uma perda importante*, CONSULTOR JURÍDICO (Mar. 30, 2016), <https://www.conjur.com.br/2016-mar-30/fim-secretaria-reforma-judiciario-perda-importante>.

lawyers, and public defenders in the country.<sup>100</sup> According to the data for 2013, Brazil has approximately 625,000 lawyers, 17,100 judges, 14,070 public prosecutors, and 6,030 public defenders for 201 million inhabitants.<sup>101</sup>

But even good initiatives have negative consequences. As a contradictory and vicious circle, constitutionally guaranteed broad access to justice leads to a proliferation of lawsuits, which in turn burdens the judiciary and limits the reach of the constitutionally guaranteed ideal. CNJ research has demonstrated what we already knew: the major litigants in Brazilian civil justice are from the public sector in all its areas (cities, states, and the federal government), and from financial institutions (banks, insurance, and credit card companies).<sup>102</sup>

It is ironic to see the State as the main culprit for overburdening the judiciary. The State, to avoid spending money, refuses to comply with its obligations and behaves illegally against its citizens, forcing them to turn to the Judiciary for help. This behavior is self-destructive because it not only increases the expenses of the judicial system, but also overburdens it with unnecessary work that brings the economy to a halt, makes the country less competitive, generates less wealth, and consequently raises fewer taxes.

The overburdening of Brazilian courts created by the broad access to justice guaranteed in the Constitution has led to the current tendency of the Brazilian civil procedure system to create “model proceedings,” “pilot cases,” or “test cases” for the aggregation and resolution of repetitive claims.<sup>103</sup> A CNJ study shows the impact that

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<sup>100</sup> See Danyelle Simões, *Atlas é o Maior Banco de Dados Sobre a Justiça No Brasil*, MINISTÉRIO DA JUSTIÇA E SEGURANÇA PÚBLICA (Dec. 16, 2013), <https://www.justica.gov.br/news/atlas-e-o-maior-banco-de-dados-sobre-a-justica-no-brasil-1>.

<sup>101</sup> *Id.*

<sup>102</sup> See *100 Maiores Litigantes*, CONSELHO NACIONAL DE JUSTIÇA (2012), [https://www.cnj.jus.br/wp-content/uploads/2011/02/100\\_maiores\\_litigantes.pdf](https://www.cnj.jus.br/wp-content/uploads/2011/02/100_maiores_litigantes.pdf).

<sup>103</sup> Antonio do Passo Cabral, *A Escolha da Causa-Piloto nos Incidentes de Resolução de Processos Repetitivos* 231 REVISTA DE PROCESSO 201 (2014); Antonio do Passo Cabral, *O Novo Procedimento-Modelo (MusterVerfahren) Alemão: Uma Alternativa às Ações Coletivas*, 147 REVISTA DE PROCESSO 123 (2007) (The new CPC/2015 provided for two types of repetitive cases (Art. 928): (a) an incident for the resolution of repetitive cases (IRDR) and (b) the repetitive special and extraordinary appeals (REER)).



repetitive claims have on the slowing of the Brazilian civil justice system and highlights the need to adopt standardized proceedings to resolve repetitive conflicts.<sup>104</sup>

Another CNJ initiative to promote efficiency in the Judiciary was the general report comparing data on the experience of selected countries with the evaluation of the performance of the Judiciary.<sup>105</sup> The study shows that the new trend is to evaluate the performance of the Judiciary. This kind of study was absorbed by a broader study called “Justice in Numbers” (*Justiça em Números*)<sup>106</sup> and the Performance Evaluation of the Judiciary.<sup>107</sup>

The 2011 Performance Evaluations pointed to negative and positive aspects of the performance evaluation.<sup>108</sup> For example, one negative aspect that led to resistance from legal professionals against the evaluation was that the criteria did not take into account that different proceedings have different levels of complexity.<sup>109</sup> Furthermore, it is not possible to adopt uniform criteria without taking into consideration the differences between complex proceedings, (like class actions and bankruptcy) and simpler proceedings (like family conflicts and collection claims). This kind of problem persists given the difficulty to adjust the complexity of each case to the performance of each judge.

Another negative concern is that the evaluation could lead to a weakening of judicial independency: judges would seek to increase productivity by automatizing decisions. This concern is still valid

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<sup>104</sup> See *Demandas Repetitivas e a Morosidade na Justiça cível Brasileira*, CONSELHO NACIONAL DE JUSTIÇA (Julio 2011), [https://www.cnj.jus.br/wp-content/uploads/2011/02/pesq\\_sintese\\_morosidade\\_dpj.pdf](https://www.cnj.jus.br/wp-content/uploads/2011/02/pesq_sintese_morosidade_dpj.pdf); see also *Relatório do Banco Nacional de Dados de Demandas Repetitivas e Precedentes Obrigatórios*, CONSELHO NACIONAL DE JUSTIÇA (2018), <https://www.cnj.jus.br/wp-content/uploads/2011/02/03a6c043d7b9946768ac79a7a94309af.pdf>.

<sup>105</sup> See *AVALIAÇÃO DO DESEMPENHO JUDICIAL: DESAFIOS, EXPERIÊNCIAS, INTERNACIONAIS E PERSPECTIVAS*, CONSELHO NACIONAL DE JUSTIÇA (2011), <https://www.cnj.jus.br/wp-content/uploads/2011/02/40-211-1-PB.pdf>.

<sup>106</sup> See generally *Justiça Em Números 2019 Sumário Executivo*, CONSELHO NACIONAL DE JUSTIÇA, <https://www.cnj.jus.br/wp-content/uploads/contendo/arquivo/2019/08/8ee6903750bb4361b5d0d1932ec6632e.pdf> (last visited Oct. 1, 2020).

<sup>107</sup> *Id.*

<sup>108</sup> See *AVALIAÇÃO DO DESEMPENHO JUDICIAL*, *supra* note 105.

<sup>109</sup> *Id.*

but has significantly reduced in past years. Younger judges are better adapted to the tools of electronic proceedings and tend to be more attentive to the effective management of their caseload.

On the other hand, the evaluation may bring advantages: implementing qualitative and quantitative controls, as well as incentives, to judicial productivity may improve the results of judicial activity by providing transparency, speed, efficiency, legal certainty, and a reduction in the amount of litigation. This method would simultaneously accomplish both important elements of legal reform in Brazil: efficiency and legal certainty.

The implementation of the taxonomy and the controls by means of electronic reports periodically sent to the court and then to the CNJ to feed Justice in Numbers led to a major transformation. Now, a judge may obtain information in real-time about the volume and type of cases in his or her court, as well as the status of each proceeding just by accessing the court's website.<sup>110</sup> These electronic reports also allow tribunals to oversee the online work of judges.<sup>111</sup>

This implementation also sheds light on basic questions like the duration and cost of proceedings in Brazil. According to the report Justice in Numbers, the average time between the filing of the complaint and the judgment has increased between 2015 and 2018.<sup>112</sup>

According to same report, the average duration of a proceeding from the filing of a complaint to the *res judicata*, after all appeals, is 3 years and 8 months.<sup>113</sup> This duration is a frustratingly long time to wait to have one's right formally recognized in court. But this information is meaningless. In the Brazilian system, a plaintiff may have his or her right recognized in court, but not have his or her right realized in practice. In most cases, including when the defendant is the government, after *res judicata*, plaintiffs still need to begin a proceeding to judicially enforce the judgment before the defendants

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<sup>110</sup> See *Brazil: Federal Supreme Court Launches Central Database*, LIBR. OF CONG. (Apr. 19, 2012), <https://www.loc.gov/law/foreign-news/article/brazil-federal-supreme-court-launches-central-database/>.

<sup>111</sup> See *Monthly Productivity Module*, CONSELHO NACIONAL DE JUSTIÇA, <https://www.cnj.jus.br/pesquisas-judiciarias/modulo-de-productividade-mensal/> (last visited Jan. 23, 2021).

<sup>112</sup> See *Justiça Em Números 2019*, *supra* note 106, at 8.

<sup>113</sup> See *Justiça em Números 2019*, *supra* note 106.

comply.<sup>114</sup> The average duration of the enforcement proceeding from the time of *res judicata* until its closure, is 8 years and 1 month in the Federal Justice and 6 years and 2 months in the State Justice.<sup>115</sup> This time is in addition to the 3 years and 8 months mentioned above. Moreover, in addition to a long and frustrating wait, a final resolution may never come to fruition. These statistics do not show the number of enforcement proceedings that were closed unsuccessfully; many enforcement proceedings were abandoned because the court was not able to locate any property belonging to the defendant.<sup>116</sup>

As if these numbers were not sufficiently depressing, they fail to reflect reality because these averages also include small claims courts, which are speedier and less generous with appeals.<sup>117</sup> In the regular justice system, the rule is that almost all judgments are appealed and need to be enforced judicially.<sup>118</sup> There is yet another distortion: the averages also include lawsuits that were dismissed early in the proceeding,<sup>119</sup> further pushing the numbers artificially down. Therefore, the real average duration of a proceeding for the regular justice system is much higher than reported.

Those are the reasons why the current 2020 Justice in Numbers report (referring to 2019) separated the numbers from the regular justice system and the small claims courts.

Below is the average duration of each proceeding in the regular justice system, excluding those dismissed early in the proceeding:

First instance: 3 years and 11 months

Second instance: 2 years and 1 month

Enforcement: 7 years

Average duration of proceedings in small claims courts:

First instance: 1 year and 8 months

Second instance: 2 years and 3 months

Enforcement: 1 year and 9 months

This new way of reporting the data confirms what everyone knew in practice: (1) that proceedings in the small claims courts are

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See generally *Justiça em Números 2019*, *supra* note 106.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

faster than in the regular justice system, and (2) that excluding cases of early dismissal would give a more accurate average of duration of proceedings.<sup>120</sup>

As has been the premise of this article all along, there is a cost in maintaining these judicial proceedings for so long. There is an obvious cost for the interested parties, but there is also a cost for the economy of the country in the face of an ineffective legal system. And there is a cost in the administration of justice because courts are backlogged, heavy and slow, and demand more materials and more personnel. Thus, we all lose.

Today, we know how much the justice system in Brazil costs. According to *Justice in Numbers*, the total expenses with the Judiciary correspond to 1.4% of GDP or 2.6% of the total expenses of the Union, the state, and the municipalities.<sup>121</sup> In 2018, the cost for the justice system was 449.53 Reals.<sup>122</sup> This cost is not a huge amount taken out of context: it is a mere \$150 USD. But, it becomes a significant amount considering that it is about half the monthly minimum wage.<sup>123</sup>

Unfortunately, the report does not offer precise information about the average cost of legal proceedings. But one may use the overall expenses of the Federal Courts to arrive at an estimated cost of about 7.252 Reals (about \$2,500 USD) per proceeding.<sup>124</sup>

Another official study identified the average duration of tax enforcement proceedings in federal courts.<sup>125</sup> According to the

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<sup>120</sup> See generally *Justiça Em Números 2020 Sumário Executivo*, CONSELHO NACIONAL DE JUSTIÇA, [https://www.cnj.jus.br/wp-content/uploads/2020/08/WEB\\_V2\\_SUMARIO\\_EXECUTIVO\\_CNJ\\_JN2020.pdf](https://www.cnj.jus.br/wp-content/uploads/2020/08/WEB_V2_SUMARIO_EXECUTIVO_CNJ_JN2020.pdf) (last visited Oct. 1, 2020); see also Erik Navarro, ANÁLISE ECONÔMICA DO PROCESSO CIVIL: COMO A ECONOMIA, O DIREITO E A PSICOLOGIA PODEM VENCER A “TRAGÉDIA DA JUSTIÇA” 56-61 (2020).

<sup>121</sup> See *Justiça Em Números 2020*, *supra* note 120.

<sup>122</sup> *Id.*

<sup>123</sup> See *Justiça Em Números 2019*, *supra* note 106.

<sup>124</sup> See Hermes Zaneti Jr. and Gustavo Mattedi Reggiani, *Estabilização da Tutela Antecipada Antecedente e Incidental: Sugestões Pragmáticas para Respeitar a Ideologia de Efetividade do CPC/2015*, 284 R.T. 213 (2018) (considering twelve years and nine months as the average duration of a proceeding in Federal Courts, from filing to enforcement).

<sup>125</sup> See *A EXECUÇÃO FISCAL NO BRASIL E O IMPACTO NO JUDICIÁRIO*, CONSELHO NACIONAL DE JUSTIÇA (2011), <https://www.cnj.jus.br/wp->

study, the average duration of judicial tax enforcement proceedings is 8 years, 2 months, and 9 days per proceeding, and the average cost is about 4,685.39 Reals per proceeding approximately \$1,976 USD).<sup>126</sup> Since the average collection claim is 22,507.51 Reals (about \$9,537 USD), the average cost of tax enforcement proceedings in Brazil represents almost a quarter of the average value of the lawsuit.<sup>127</sup> Considering that cost is merely the expense incurred by the Judiciary, (it does not include the cost incurred by the Administration) and the value refers to the total value of the claim (not the amount actually collected), this data reveals that the judicial service in tax enforcement proceedings is very expensive. Therefore, this data demonstrates that it is necessary to correct something in the investment in access to justice, where we could spend less while still creating a more efficient justice system. This study led to legislative bills seeking to dejudicialize the enforcement of tax and other governmental credits (known as fiscal enforcement or *execução fiscal*).<sup>128</sup>

The problem of fiscal enforcement is particularly important because these proceedings represent more than one-third of all proceedings pending in Brazil. A legislative bill allowed arbitration and private enforcement of the debt.<sup>129</sup> In the introduction to the bill,

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content/uploads/2011/02/2d53f36cdc1e27513af9868de9d072dd.pdf (discussing fiscal enforcement, especially the research done by UFRGS and IPEA).

<sup>126</sup> See CUSTO UNITÁRIO DO PROCESSO DE EXECUÇÃO FISCAL NA JUSTIÇA FEDERAL, IPEAL INSITUTO DE PESQUISA ECONÔMICA EPLICADA (Mar. 31, 2011),

[https://www.ipea.gov.br/portal/images/stories/PDFs/comunicado/110331\\_comunicadoipea83.pdf](https://www.ipea.gov.br/portal/images/stories/PDFs/comunicado/110331_comunicadoipea83.pdf).

<sup>127</sup> *Id.*; see also A EXECUÇÃO FISCAL NO BRASIL E O IMPACTO NO JUDICIÁRIO, *supra* note 128.

<sup>128</sup> See Senador Antonio Anastasia (PSDB/MG), *Projeto de Lei No. 4257, de 2019*, SENADO FEDERAL, <https://legis.senado.leg.br/sdleg-getter/documento?dm=7984784&ts=1594035701857&disposition=inline>.

<sup>129</sup> Projeto de Lei 6.204/2019, available at

<https://www25.senado.leg.br/web/atividade/materias/-/materia/139971> V. Joel Dias Figueiredo Júnior, O alvissareiro Projeto de Lei 6.204/19: desjudicialização de títulos executivos civis e a crise da jurisdição estatal, *GenJurídico*, December 06, 2019, available at <http://genjuridico.com.br/2019/12/06/projeto-de-lei-6204-desjudicializacao/>.

Luciano Athayde Chaves, A desjudicialização da execução: o Projeto de Lei nº 6.204/2019, *Conjur*, March 25, 2021, available at

Congress cited information from the 2017 edition of *Justice in Numbers*, which pointed to a 91% backlog in fiscal enforcement.<sup>130</sup> This percentage means that out of each 100 proceedings of fiscal enforcement in a year, only 9 are concluded. This percentage is the highest backlog of any kind of proceeding in the Brazilian judicial system.<sup>131</sup>

Overall, these studies are part of the movement started by the three branches of government in the search of a more efficient and secure Judiciary, but the results are not yet conclusive.

#### V EFFICIENCY AND LEGAL CERTAINTY VERSUS COST: MAIN ASPECTS OF THE SOLUTION OF THE “CRISIS” OF THE JUDICIARY AND AN IMPORTANT POLITICAL INITIATIVE

In the 2014 version of this article, the main concern in Brazil regarding the Judiciary was efficiency and legal certainty.<sup>132</sup> In the few years after that, the Brazilian Judiciary went through a transformation derived from the change in the economic situation of the country. The result is a new concern for austerity in public expenses related to the Brazilian Justice System.<sup>133</sup> It is now concerned with data about the total cost and with Fiscal Responsibility Law. All of this is in addition to the predominant concern in 2014 of efficiency and legal certainty, considering that these objectives are not contradictory, but complementary.

Several recent law reform initiatives, especially the new Code of Civil Procedure (CPC/15), reveal a concern to provide techniques to address simple matters, small claims, and special proceedings for collecting debts based on documentary evidence.<sup>134</sup> For example, Congress improved the microsystem of small claims courts (called “special civil courts” or *juizados especiais cíveis*) and created the

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<https://www.conjur.com.br/2021-mar-25/athayde-desjudicializacao-execucao-pl-62042019>.

<sup>130</sup> See *Justiça em Números 2017*, CONSELHO NACIONAL DE JUSTIÇA

<https://www.cnj.jus.br/wp-content/uploads/2019/08/b60a659e5d5cb79337945c1dd137496c.pdf> (last visited Apr. 26, 2021).

<sup>131</sup> *Id.* at 113.

<sup>132</sup> Gidi & Zaneti, Jr., *supra* note 3, at 245.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

“monitory action,” the binding precedents, and proceedings for the aggregation and resolution of repetitive conflicts related only to issues of law.<sup>135</sup> Congress also increased the number of ‘extrajudicial executive titles’ or ‘extrajudicial enforcement instruments’ (*títulos executivos extrajudiciais*), which are documents, like checks, bills of exchange, some public documents, and even some contracts, that are considered so certain that the creditor may file enforcement proceedings directly, even in the absence of a judgment (which is called “judicial executive title”).<sup>136</sup>

These procedural techniques increase the efficiency and legal certainty of the Brazilian legal system because they promote a speedy delivery of justice, make rights effective, reduce litigation, and avoid contradictory judgments. Additionally, there is a substantial ideological movement to reduce litigious culture through mediation, conciliation, and reduced involvement of courts in certain matters like family law and wills.<sup>137</sup>

Reduction of costs associated with the judicial activity is now one of the main concerns in Brazil and is discussed in courts and the CNJ.<sup>138</sup> Both the courts and the CNJ have included in their agenda considerations of cost and proportionality of the investment, without disregarding the classic debate on procedural efficiency, legal certainty, and access to justice..

As mentioned above, the need for the improvement of the Brazilian Judiciary led to the creation of a special department under the Ministry of Justice (*Secretaria de Reforma do Poder Judiciário*) to be a permanent department responsible for centralizing and proposing governmental initiatives to improve procedural rules and access to justice. In 2004, the three branches of the Brazilian Federal Government (the Executive, Legislative, and Judiciary) got together to sign a political agreement. This agreement was known as *Pacto Republicano* (Republican Pact). The objective was to promote a

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See C.P.C. 2015 art. 3 (recognizing as a fundamental norm, the encouragement of alternative dispute resolution, such as arbitration and consensual resolution (mediation, conciliation, etc.); see also CONSELHO NACIONAL DE JUSTIÇA, Res. 118.2014.

<sup>138</sup> See generally, *Justiça em números 2020*, *supra* note 120.

speedy and efficient Judiciary.<sup>139</sup> These efforts led to several law reform initiatives. For example, the Code of Civil Procedure was amended and the jurisdiction of small-claims courts was expanded. These efforts led even to a major Constitutional Amendment (EC 45/2004).<sup>140</sup>

The Republican Pact had a powerful impact in Brazil. Despite being a federal system, only the Federal Government may enact legislation about procedural matters.<sup>141</sup> This means that state courts throughout Brazil apply the federally-enacted Code of Civil Procedure in its state proceedings. Therefore, these initiatives had a direct impact in every court in the country. These initiatives had other objectives in addition to increase efficiency of the jurisdictional services through prevention of conflicts and the reasonable duration of process. They also intended to protect the universal access to justice (especially of the poor), and to strengthen the Rule of Law and the protection of human rights.<sup>142</sup> Nowadays, these measures are combined with a growing concern for austerity and the cost for the system of justice, which is now intensely discussed by the political community in Brazil, a sign of the economic and fiscal crisis that affects the country.<sup>143</sup>

Furthermore, these concerns with efficiency and legal certainty may be exaggerated. Several criticisms have been raised relating to these law reforms because their excessive concern with efficiency may deny certain procedural guarantees. But so far, the Brazilian Constitutional Court (*Supremo Tribunal Federal*) has maintained the constitutionality of all procedural rules that have been challenged.<sup>144</sup> These criticisms may be extended to Article 8 of the CPC/2015, which also refers to “efficiency.”<sup>145</sup> These criticisms are

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<sup>139</sup> See *II Pacto Republicano de Estado por um Sistema de Justiça Mais Acessível Ágil e Efetivo*, PRESIDÊNCIA DA REPÚBLICA, [http://www.planalto.gov.br/ccivil\\_03/Outros/IIpacto.htm](http://www.planalto.gov.br/ccivil_03/Outros/IIpacto.htm) (last visited Oct. 1, 2020).

<sup>140</sup> *Id.*

<sup>141</sup> CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 22, I.

<sup>142</sup> See *II Pacto Republicano de Estado*, *supra* note XXXXX.

<sup>143</sup> See generally, *id.*

<sup>144</sup> See, e.g., ADI 5534, Rel. Dias Toffoli, j. 12.18.2020.

<sup>145</sup> C.P.C. 2015, art. 8. (“When applying the legal order, the judge will take into consideration the social objectives and the demands of the common welfare,



correct because the protection of rights must be “effective” (which is a legal concept), not “efficient” (which is an economic concept). Therefore, the reduction of the costs of the Judiciary must be made to guarantee a better result in the investments in the direct protection of the rights, not in the reduction of this protection.<sup>146</sup>

Five years after the first Republican Pact was signed, the three branches of government signed the Second Republican Pact.<sup>147</sup> To promote access to justice, it provided for the strengthening of the Public Defenders and the devices that guarantee comprehensive legal aid for the poor; a review of the class action statute to improve the protection of the diffuse, collective, and homogeneous individual rights and to obtain a more efficient judgment of mass conflicts; and the creation of small-claims courts for use by individuals and small companies (not large companies) against the state and municipality.<sup>148</sup> These priorities reveal the current relevance of the Public Defenders, class actions, and the small-claims courts.

There was no consensus in the Legislative Branch regarding class action law reform; despite the production and broad discussion regarding a bill proposing a new class action law, it was not approved.<sup>149</sup> But, the Second Republican Pact led to the enactment of several statutes and yet another Constitutional Amendment strengthening the Public Defenders and creating the small-claims court for claims against states and municipalities.<sup>150</sup> The creation in 2009 of courts for small claims against states and municipalities was the direct result of the above-mentioned CNJ study that

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protecting and promoting the dignity of the human being and observing proportionality, reasonability, legality, publicity, and efficiency.”).

<sup>146</sup> See Xandra Kramer & Shusuke Kakiuchi, *Austerity in Civil Procedure and the Role of Simplified Procedures*, 8 ERASMUS L. REV. 139, 145-46 (2015).

<sup>147</sup> See *II Pacto Republicano de Estado*, *supra* note 142; see also *Brazil: Reform of the Judiciary*, LIBR. OF CONG. (Apr. 24, 2009), <https://www.loc.gov/law/foreign-news/article/brazil-reform-of-the-judiciary/>.

<sup>148</sup> *Id.*

<sup>149</sup> See ANTONIO GIDI, RUMO A UM CÓDIGO DE PROCESSO CIVIL COLETIVO: A CODIFICAÇÃO DAS AÇÕES COLETIVAS NO BRASIL (2008) (discussing and criticizing the main projects for Class Action Codes in Brazil); see also FREDIE DIDIER, JR. & HERMES ZANETI, JR., CURSO DE DIREITO PROCESSUAL CIVIL: PROCESSO COLETIVO 4 (2014).

<sup>150</sup> See *II Pacto Republicano de Estado*, *supra* note 139.

demonstrated that the public sector is one of the main litigators in civil courts.<sup>151</sup>

After that, came more law reform. The Code of Civil Procedure of 2015 provided that the Union, the states, and the municipalities will create institutions to promote mediation and conciliation (Article 174).<sup>152</sup>

Until recently, the debate in Brazil revolved around the broadening of these simplified procedures and mass forms of legal proceedings. The main scholarly concern was whether the excessive simplification and massification may reduce the quality of substantial justice, and whether it was a violation of the procedural guarantees provided in the Brazilian Constitution.<sup>153</sup> This issue was the debate of the time, not austerity.

On the other hand, even with the recent creation of all these new benefits, there is no corresponding increase in the value of court fees and sometimes they are even waived by law for people without the means to pay them.<sup>154</sup> Moreover, the overall cost of litigation is low.<sup>155</sup> The tendency is to address this issue. With the crisis, one of the main concerns is to make the Judiciary sustainable, if not self-sufficient, through judicial fees. There is a growing awareness that extremely low judicial fees are an incentive for frivolous litigation.<sup>156</sup> We stated this concern in 2014: “This is a further incentive to the proposal of meritless claims (by plaintiffs) and the meritless resistance to the fulfillment of legitimate claims (by defendants). In turn, these low fees overburden the Judiciary and

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<sup>151</sup> *Id.*

<sup>152</sup> C.P.C. 2015, art. 174.

<sup>153</sup> See, e.g. Fernando Gama de Miranda Netto, *Garantias do Processo Justo nos Juizados Especiais Cíveis*, in FERNANDO GAMA DE MIRANDA NETTO AND FELIPE BORRING ROCHA (ORGS.), *JUIZADOS ESPECIAIS CÍVEIS* 49-69 (2010).

<sup>154</sup> C.P.C. 2015, art. 98.

<sup>155</sup> See CONSELHO NACIONAL DE JUSTIÇA, *DIAGNÓSTICO DAS CUSTAS PROCESSUAIS PRATICADAS NOS TRIBUNAIS* 35 (2019) (research concluding that the Judiciary collects 62.6% of its expenses), [https://www.cnj.jus.br/wp-content/uploads/2019/11/relatorio\\_custas\\_processuais2019.pdf](https://www.cnj.jus.br/wp-content/uploads/2019/11/relatorio_custas_processuais2019.pdf).

<sup>156</sup> Fernanda Elisabeth Nöthen Becker & Alexandre Moraes da Rosa, *As Custas Judiciais como Mecanismo de Desincentivo à Litigância Abusiva*, ENAJUS ENCONTRO DE ADMINISTRAÇÃO DA JUSTIÇA, [https://www.enajus.org.br/2018/assets/sessoes/056\\_EnAjus.pdf](https://www.enajus.org.br/2018/assets/sessoes/056_EnAjus.pdf) (last visited Jan. 23, 2021).

increases the expenses, generating a vicious circle that is difficult to stop.”<sup>157</sup>

Until recently, the need for austerity was not a part of the public and political debate in Brazil. Even though the concept of austerity is not limited to the global financial crisis that started in 2007, and includes the need to reign in the judicial costs or the effects on society in general and the parties in particular (companies, consumers, and individuals), it had been completely ignored. These effects are negative externalities and must be addressed because, in the long run, they reduce the potential for economic development and the distribution of wealth, further reducing the effectiveness of the fundamental rights that the State must provide.

Below, we address the historical and sociological construction of the Brazilian Justice system and its peculiarities, especially the relationship between a constitutional order (strongly influenced by the U.S. common law) and an infra-constitutional structure (with a strong influence of the Continental European tradition). Understanding these peculiarities is essential to forge the path for a justice system that is speedy, cheap, efficient, and predictable, without violating the substantial and procedural guarantees provided for by the Constitution.

## VI THE PECULIARITIES OF THE BRAZILIAN JUSTICE SYSTEM: AMERICAN CONSTITUTIONAL STRUCTURE VERSUS EUROPEAN INFRA-CONSTITUTIONAL RULES

Brazilian civil procedure (infra-constitutional rules) belongs to the civil law tradition of Continental Europe, strongly influenced by Portuguese,<sup>158</sup> Italian,<sup>159</sup> and German procedural traditions. However, the Brazilian constitutional matrix was profoundly influenced by the U.S. Constitution, including its judicial

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<sup>157</sup> Gidi & Zaneti, Jr., *supra* note 3, at 251.

<sup>158</sup> See HERMES ZANETI JR., *IL VALORE VINCOLANTE DEI PRECEDENTI* (2014); UGO MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, *SCHLESINGER'S COMP. L.* 523-53 (2009) (offering a comparative view of the administrative and constitutional justice system in the civil law tradition).

<sup>159</sup> The comparison with Italian civil procedure is one of the most common. See, e.g., MICHELE TARUFFO & DANIEL MITIDIERO, *A JUSTIÇA CIVIL: DA ITÁLIA AO BRASIL, DOS SETECENTOS A HOJE* (2018).

organization. The combination of influences is why Brazil does not have an administrative justice system (the conflicts between private parties and the State are decided by the Judiciary), and why there is a broad possibility of judicial review (with judicial control of administrative acts and a diffuse and concentrated review of constitutionality of legislative acts by the Judiciary).<sup>160</sup>

This peculiarity generates a “methodological paradox.”<sup>161</sup> Brazil has an encompassing system of civil justice, in which the same judge that decides conflicts between private parties also decides conflicts between private parties and the state.<sup>162</sup> Both are considered civil claims and civil proceedings in a broad sense, and the civil procedure adopted is the same.<sup>163</sup> However, the first is regulated by

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160 HERMES ZANETI JR. A CONSTITUCIONALIZAÇÃO DO PROCESSO. O MODELO CONSTITUCIONAL DA JUSTIÇA BRASILEIRA E AS RELAÇÕES ENTRE PROCESSO E CONSTITUIÇÃO 5 (2014); *see also* VINCENZO VARRANO AND VITTORIA BARSOTTI, 1 LA TRADIZIONE GIURIDICA OCCIDENTALI 508 (2010); MARIO G. LOSANO, OS GRANDES SISTEMAS JURÍDICOS. INTRODUÇÃO AOS SISTEMAS JURÍDICOS EUROPEUS E EXTRA-EUROPEUS 215 (2007) (American comparative law scholars have also stressed the point as a significant gap between Latin American models of power control and European models); *see also* David S. Clark, *Judicial Protection of the Constitution in Latin America*, 2 HASTINGS CONSTITUTIONAL L.Q. 405-442 (1975).

161 *See* CANDIDO RANGEL DINAMARCO, 1 INSTITUIÇÕES DE DIREITO PROCESSUAL CIVIL 176 (2003) (“[F]rom a global perspective, the Brazilian procedural culture offers a major *methodological problem* because it accepts concepts and proposals from European masters, especially Germans and Italians, and at the same time, its political and constitutional formula of separation of state powers resembles the North American model.”).

162 HERMES ZANETI JR. A CONSTITUCIONALIZAÇÃO DO PROCESSO. O MODELO CONSTITUCIONAL DA JUSTIÇA BRASILEIRA E AS RELAÇÕES ENTRE PROCESSO E CONSTITUIÇÃO 5 (2014); *see also* VINCENZO VARRANO AND VITTORIA BARSOTTI, 1 LA TRADIZIONE GIURIDICA OCCIDENTALI 508 (2010); MARIO G. LOSANO, OS GRANDES SISTEMAS JURÍDICOS. INTRODUÇÃO AOS SISTEMAS JURÍDICOS EUROPEUS E EXTRA-EUROPEUS 215 (2007) (American comparative law scholars have also stressed the point as a significant gap between Latin American models of power control and European models); *see also* David S. Clark, *Judicial Protection of the Constitution in Latin America*, 2 HASTINGS CONSTITUTIONAL L.Q. 405-442 (1975).

<sup>163</sup> The Supreme Court has already ruled several times on the existence of the system in Brazil and its constitutional character, resulting from the 1988 Federal Constitution. To illustrate: “As is known [in Brazil], the checks and balances system is adopted, whereby the Powers of the the State interacts, even though it uses functions that are not typical of them, in order to allow a mutual inspection

private law, while the second is regulated by public law.<sup>164</sup> The peculiarities of the public law litigation are ignored, and both types of litigation are regulated by liberal procedural guarantees that are—by design—predominantly concerned with private litigation.

Because of these characteristics, Brazilian judges have a central role in conducting proceedings (although the procedural law is detailed) with broad investigative powers, including their ability to order the production of evidence *sua sponte* (Art. 370, CPC/2015).<sup>165</sup> The parties retain the initiative to request a response from the Judiciary (*principio da demanda*, Article 2, CPC/2015), but the proceedings progress by official decree (*sua sponte*), with a strong trend to a public view of procedure.<sup>166</sup>

The Brazilian Justice system is concerned with the implementation of the fundamental rights of liberty and social rights, of groups and of individuals, for the protection of the traditional subjective rights and of new legal situations that need

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that materializes the harmonious combination of the main state functions (legislating, executing the laws and applying them in specific cases).” (S.T.F. – PET n. 1.302/DF. rel. Min. Maurício Correa, j. 02.03.2003).

<sup>164</sup> See PONTES DE MIRANDA, 1 COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL 46 (1997) (“[T]he [Brazilian] civil procedure does not distinguish the type of right or claim, whether it has a public or private nature, or whether it belongs to a public or private party. European jurists, even the most advanced, have not yet accepted the civil litigation in a broad sense, which is the Brazilian model, which treats public law claims (even constitutional claims) the same way as private law claims. The [Brazilian] system recognizes the hierarchy of legal norms ..., but *establishes an equal justice under equal procedural law*, except insignificant exceptions.”).

<sup>165</sup> See art. 370, *caput*, (“The judge must, *ex officio* [*sponte sua*] or at the request of the party, determine what evidence is necessary for a judgment on the merits.”), C.P.C, see Teresa Arruda Alvim; Fredie Didier Jr. (coord.) CPC Brasileiro para a Língua Inglesa (2017).

<sup>166</sup> See CANDIDO RANGEL DINAMARCO, INSTITUIÇÕES DE DIREITO PROCESSUAL CIVIL 168 (2003). This trend will be reduced considerably with the new Code of Civil Procedure of 2015. Some examples are the possibility of procedural arrangements between the parties and the judge; see, e.g., C.P.C. art. 190 (Braz.) (allowing the parties to change the proceeding); see also C.P.C. art. 191 (Braz.) (allowing the parties and the judge to elaborate the calendar for the practice of procedural acts); see also C.P.C. art 357(3) (stating that in complex cases the judge will hold a hearing to hear the parties and build a procedural plan together). At the same time, the difference between the public and the private in civil procedure is losing its meaning.

adequate judicial protection.<sup>167</sup> Indeed, Brazil has one of the most developed class action systems outside the common law tradition.<sup>168</sup>

Slowly, legal reform has directed the Brazilian procedural system towards the resolution of repetitive claims and the establishment of binding precedents, like appeals to the Superior Tribunal of Justice (highest court for infra-constitutional matters) and the Supreme Federal Court (highest court for constitutional matters).<sup>169</sup> Moreover, the bill for the New Code of Civil Procedure provides for binding precedents, (Articles 926, 927, 489, § 1º, V and VI) and a proceeding for the resolution of repetitive claims (Article 928).<sup>170</sup>

In this aspect, the Brazilian model is a hybrid between civil law and common law; precedents in Brazil still have a predominantly persuasive character, as is the rule in the civil law tradition. However, even before the new Code of Civil Procedure, certain types of precedent, such as the ones originating in a “repetitive appeal” and *súmulas vinculantes* (see above), bind the Judiciary and the Public Administration as long as the same issues of fact and law are involved.<sup>171</sup>

Although it is a recent development, even the previous law strengthened the normative force of court interpretation; an appeal

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<sup>167</sup> Gidi & Zaneti, Jr., *supra* note 3, at 252.

<sup>168</sup> ANTONIO GIDI, A CLASS ACTION COMO INSTRUMENTO DE TUTELA COLETIVA DOS DIREITOS. AS AÇÕES COLETIVAS EM UMA PERSPECTIVA COMPARADA (2007); *see also* ALUISIO GONÇALVES DE CASTRO MENDES, AÇÕES COLETIVAS NO DIREITO COMPARADO E NACIONAL (2009); *see also* Gidi, *supra* note 149; *see also* Zaneti & Didier, *supra* note 149.

<sup>169</sup> *See* Daniel Mitidiero, *The Ideal Court of Last Report A Court of Interpretation and Precedent*, 5 INT’L JOURNAL OF PROCEDURAL LAW 201-218 (2015); DANIEL MITIDIERO, CORTES SUPERIORES E CORTES SUPREMAS. DO CONTROLE À INTERPRETAÇÃO, DA JURISPRUDENCIA AO PRECEDENTE (2013); LUIS GUILHERME MARINONI, O STJ ENQUANTO CORTE DE PRECEDENTES (2013).

<sup>170</sup> *See* Hermes Zaneti, Jr., IL VALORE VINCULANTE DEI PRECEDENTI (2014) (analyzing binding precedents); *see also* HERMES ZANETI, JR., O VALOR VINCULANTE DOS PRECEDENTES: O MODELO GARANTISTA (MG) E A REDUÇÃO DA DISCRICIONARIEDADE JUDICIAL: UMA TEORIA DOS PRECEDENTES NORMATIVOS FORMALMENTE VINCULANTES (2014); *also* HERMES ZANETI, JR., O VALOR VINCULANTE DOS PRECEDENTES (2019).

<sup>171</sup> *See* CODIGO DE PROCESSO CIVIL [C.P.C. 1973] art. 518(1) (1973) (Braz.); CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL DE 1988 [CONSTITUTION], art. 103-103(a).

will not be allowed if an opinion is in agreement with a decision (*súmula*) from the Superior Tribunal of Justice or the Supreme Federal Court (Article 518(1), CPC/1973) and the organs of the public administration are bound by decisions of concentrated constitutional control and by *súmulas vinculantes* from the Supreme Federal Court (Articles 103 and 103-A, CF/88).<sup>172</sup>

The trend is clearly towards further strengthening the binding effect of decisions of superior courts and the techniques for the resolution of repetitive litigation.<sup>173</sup> The trend is also towards strengthening the microsystem of small-claims courts.<sup>174</sup> As we will see below, in some kinds of small-claims courts there is already a mechanism for the resolution of repetitive litigation. The new Brazilian Code of Civil Procedure of 2015 increased the power of the judge and the parties, but also increased the judges' responsibility and parties' obligations.<sup>175</sup>

The trend is towards a more active control over the duration of proceedings and over behavior against objective good faith and cooperation.<sup>176</sup> The 2015 Code provides sanctions for judges who do not decide cases within a reasonable time without justification.<sup>177</sup> These cases may be redistributed to another judge (CPC/2015, Art.

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<sup>172</sup> See *id.*

<sup>173</sup> See S.T.F., Pleno, RE n. 655.265/RS, Rel. Min. Luiz Fux, Rel. para Acórdão Min. Edson Fachin, j. 13.04.2016; see also STJ, AREsp n. 634.051/SP, Rel. Min. Rogério Schietti Cruz, j. em 01.08.2017, DJE 07.08.2017 (“Maintaining the factual and normative premises that guided that judgment, the Court's conclusions (*ratio decidendi*) in the said declaratory action are reaffirmed (...) The role of the Supreme Court's as an Apex Court requires it to give unity to the law and maintain the stability to its precedents”).

<sup>174</sup> See S.T.J., RCD na Rcl 14.730/SP, Rel. Ministro Mauro Campbell Marques, Primeira Seção, julgado em 11.02.2015, DJe 24.02.2015 (considering different laws as part of a microsystem); FELIPE BOHRING ROCHA. MANUAL DOS JUIZADOS ESPECIAIS CÍVEIS ESTADUAIS: TEORIA E PRÁTICA 20 (2016).

<sup>175</sup> See Hermes Zaneti Jr., *O Princípio da Cooperação e o Código de Processo Civil: Cooperação para o Processo*. In.: PAULO HENRIQUE DOS SANTOS LUCON; JULIANA CORDEIRO DE FARIA; EDGARD AUDOMAR MARX NETO; ÉSTER CAMILA GOMES NORATO REZENDE (ORG.). PROCESSO CIVIL CONTEMPORÂNEO. HOMENAGEM AOS 80 ANOS DO PROFESSOR HUMBERTO THEODORO JÚNIOR 142-53 (2018).

<sup>176</sup> C.P.C. *supra* note 171, at art. 4, 5, 6, 12.

<sup>177</sup> See art. 235, (notice to perform the act within ten (10) days, risk of administrative sanctions, and, if the inaction persists, the case records are to be sent to the legal substitute of the judge to be decided within ten (10) days).

235).<sup>178</sup> Parties may be sanctioned for not participating in the settlement hearing, for abusive appeal, and for contempt of court.<sup>179</sup> The general prohibition of acts against the justice system has been timidly applied to sanction behavior against the good faith and cooperation.<sup>180</sup> This kind of sanction is necessary to encourage a change in behavior.

John Sorabji warned:

The failure to secure a consistent approach to compliance with case management and other procedural obligations in England post-1999 exemplifies this difficulty. If the Brazilian courts are to ensure the new CPC's new case management powers and contract procedure operate effectively, they are likely to have to take a consistent approach to the exercise of those powers and a similar approach to non-compliance as the English courts have since 2013 finally started to do. If they do not, they run the risk of rendering the new forms of case management and procedure dead letters: as nothing more than the law on the page rather than the law in action.<sup>181</sup>

For example, this new approach of English courts can be confirmed in a recent English case, where the unreasonable refusal to engage in mediation resulted in costs from the date the defendant

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<sup>178</sup> *Id.*

<sup>179</sup> *See id.* at art. 233-35.

<sup>180</sup> *See* STJ. REsp 1.628.065-MG. Rel. Paulo de Tarso Sanseverino, 3<sup>a</sup> T, j. 02.21.2017; Jornada CEJ/CJF, “Enunciado 148: The reiteration by the creditor or debtor of matters already mentioned may give rise to the imposition of a fine for conduct contrary to good faith”; STJ, 2.<sup>a</sup> Turma, REsp 1.676.027/PR, rel. Min. Herman Benjamin, j. 26.09.2017, DJe 11.10.2017 (cooperation principle); Frederico Augusto Leopoldino Koehler; Marco Aurélio Ventura Peixoto; Silvano José Gomes Flumingnan. Enunciados CJF. Conselho da Justiça Federal. Jornadas de Direito Processual Civil 298-99 (2019).

<sup>181</sup> *See* John Sorabji, *Procedural Proportionality and Flexibility in England and Brazil*, in HERMES ZANETI JR AND MARCO ANTONIO RODRIGUES (EDS.), COOPERAÇÃO INTERNACIONAL 588, 588 (2019).



failed to respond to an offer to mediate.<sup>182</sup> Master O'Hare ordered the defendant to pay costs on the indemnity basis from the date it failed to respond to an offer to mediate:

In respect of the defendant's failure to mediate, I think the only sanctions available for me to impose are to award costs on the indemnity basis and to award interest on those costs from a date earlier than today, today being the normal date. I am persuaded that the defendant's refusal to mediate in this case was unreasonable [...] Case law on this topic is largely about penalties imposed on parties who are in other respects the successful party. In *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576 and in other cases, penalties were imposed upon winners. They do not involve the imposition of further penalties upon losers.<sup>183</sup>

## VII. LAWYER REPRESENTATION AND FREE JUSTICE

So far, we have discussed the heavy burden on the Brazilian Judiciary caused by the broad access to justice provided for in the Brazilian Constitution and subsequent laws. Because of the increase in lawsuits and a growing number of law schools, Brazil has one of the highest numbers of lawyers in the world.<sup>184</sup> In regular civil courts (i.e. not small-claims courts), professional representation by

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<sup>182</sup> *Reid v. Buckinghamshire Healthcare NHS Tr.* [2015] EWHC B21 (U.K.) (stating that caselaw is generally about penalties imposed upon winners, not losers).

<sup>183</sup> *Reid v. Buckinghamshire Healthcare NHS Tr.* [2015] EWHC B21 (U.K.)

<sup>184</sup> See *INSTITUCIONAL / QUADRO DE ADVOGADOS*, OAB NACIONAL, <https://www.oab.org.br/institucionalconselhofederal/quadroadvogados>, (accessed on 01/13/2021); LUÍS ROBERTO BARROSO. SEM DATA VENIA. UM OLHAR SOBRE O BRASIL E O MUNDO 205 (2020).

an attorney is mandatory.<sup>185</sup> Self-representation in court is not allowed: no one may bring a lawsuit *pro se*.<sup>186</sup> Rather than a conscious policy choice, this reality was the result of strong lobbying by the Brazilian Bar Association (*Ordem dos Advogados do Brasil – OAB*) during the drafting of the 1988 Constitution.<sup>187</sup> The Brazilian Bar Association actively participated in the process of re-democratization of Brazil in the 1980s,<sup>188</sup> but as any professional association, it, too, has priorities that exclusively support the corporative interests of the groups that it represents, even if they are not in the best interest of society. Their participation resulted in an unprecedented constitutional provision stating that a lawyer was ‘essential to the administration of justice’.<sup>189</sup> Although not essential in numerous developed democracies in the world, in Brazil the lawyer was made essential by constitutional provision.

Other important aspects are the expenses and court fees. In Brazil, parties must advance the payment of attorney’s fees, court fees, and the necessary expenses associated with the production of evidence, such as advancing the payment of expert witnesses.<sup>190</sup> At the end of the proceeding, these costs will be reimbursed by the losing party (fee-shifting).<sup>191</sup> But this general rule has important exceptions. Contrary to the rule in ordinary proceedings, in small-claims courts the parties do not have to pay any court costs and there

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<sup>185</sup> C.P.C. 2015, *supra* note 154, at art. 103; *see also* Neil Montgomery and Helena Calderano, *Regulation of the legal profession in Brazil: overview*, THOMPSON REUTERS PRACTICAL L. (Apr. 1, 2018), <https://uk.practicallaw.thomsonreuters.com/8-637-9911>.

<sup>186</sup> *See id.*

<sup>187</sup> *See* Gary M. Reich, *The 1988 Constitution a Decade Later: Ugly Compromises Reconsidered*, 40 J. OF INTERAMERICAN STUD. AND WORLD AFF. 5, 5-6 (1998).

<sup>188</sup> *See* LILIA SCHWARCZ AND HELOISA STARLING, BRASIL. UMA BIOGRAFIA 469-70, 476 and 495 (2015) (discussing that the Brazilian Bar Association (OAB) participated in the official 1978 meetings to prepare the transition from dictatorship to a democratic government, in the acts against the torture and in the resumption of habeas corpus during the dictatorship, and in the impeachment of President Fernando Collor in 1992).

<sup>189</sup> CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 133. (“The lawyer is indispensable to the administration of justice.”)

<sup>190</sup> C.P.C. 2015, *supra* note 154, at art. 82-84.

<sup>191</sup> *Id.* at art. 85.

is no fee-shifting.<sup>192</sup> This rule is valid only in the first instance, not on appeal.<sup>193</sup> The same rules apply in class actions: no court fees and no fee-shifting.<sup>194</sup> Additionally, there is full legal aid available for individuals and companies that need financial support.<sup>195</sup>

Those considered “in need” under the law qualify to be represented by Public Defenders.<sup>196</sup> The Public Defenders are chosen in a highly selective public exam and appointed for life.<sup>197</sup> The Public Defenders must give legal advice and judicial representation in all instances of the court system to people “in need.”<sup>198</sup>

Slowly, all states have been creating State Public Defenders.<sup>199</sup> In the federal sphere, the Federal Government created the Federal Public Defenders (*Defensoria Pública da União*).<sup>200</sup> Although the goal of full legal aid has not yet been fulfilled,<sup>201</sup> law reform and increased investment indicate considerable progress.

In a region without Public Defenders, the role of lawyers for the poor may be exercised by court-appointed attorneys.<sup>202</sup> Even if the parties are represented by private attorneys of their choice (paid or not), they may still request legal aid.<sup>203</sup> This option means that the

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<sup>192</sup> Lei N° 9.099, de 26 de Setembro de 1995, art. 54 (Braz.).

<sup>193</sup> *Id.* at art. 55.

<sup>194</sup> *Id.*

<sup>195</sup> C.P.C. 2015 *supra* note 154, at art. 185.

<sup>196</sup> *Supra* note 193 at art. 5° (“the State shall provide full and free-of-charge legal assistance to all who prove insufficiency of funds”) and 134 (“The Public Legal Defence is a permanent institution, essential to the jurisdictional function of the State, and is responsible primarily (...) the full and free-of-charge defence, in all levels, both judicially and extrajudicially, of individual and collective rights of the needy.”).

<sup>197</sup> *See* CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], art. 134.

<sup>198</sup> *Id.*

<sup>199</sup> *A Defensoria Pública, MAPA DA DEFENSORIA PÚBLICA NO BRASIL*, <https://www.ipea.gov.br/sites/en-GB/mapadefensoria> (last visited Jan. 23, 2021).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* (citing to a 2013 study that demonstrated a lack of public defenders in 72% of Brazilian districts, which means that the public defenders are present in only 754 of the 2,680 districts).

<sup>202</sup> C.P.C. 2015 *supra* note 154, at art. 72 (“If there is no Public Defender in the area, the judge must invest a lawyer in that function”).

<sup>203</sup> *Id.* at art. 98-102.

court fees will be waived and that they will not be liable for the attorney's fee-shifting if they lose.<sup>204</sup>

This reality demonstrates how the Brazilian Justice system constantly invests in a system of comprehensive and free legal aid for people in need, a direction that is directly against the world trend of austerity. There is the risk of arriving at a completely free judiciary for litigants. But since there is no free lunch, a judiciary entirely dispensed by public entities must be entirely financed by taxes paid by citizens. But, this may not be a sustainable recipe in the long run, as the European reality has demonstrated.<sup>205</sup>

It is undeniable that Brazil needs to broaden its judicial protection to people in need, and the country is far from providing the comprehensive and free access to justice that it has promised. However, there must be control and excesses must be avoided, so that the expenses do not soar out of control and bring about a reduction in the protection of fundamental rights. An out of control and unplanned expansion may lead to setbacks in the future, as is the situation in Europe now.<sup>206</sup> Moreover, as we have mentioned before, the main problem of the backlog in the Brazilian judicial system results from a deficit in the public service and in consumer protection, which can be corrected by the Public Administration and by regulatory agencies, which double the expenditure of maintaining the judicial structure for the protection of these rights.<sup>207</sup> Therefore, the Brazilian Supreme Court has recently demanded that a plaintiff bring his or her claim administratively, in the Social Security administrative agency, before having access to the Judiciary (RE 631.240/MG).<sup>208</sup> This requirement is not a major obstacle to access to justice, but is necessary to force the Public Administration to be effective without the Judiciary.

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<sup>204</sup> *Id.* (demonstrating the efficient lobby of the public defenders in Congress).

<sup>205</sup> See Xandra Kramer & Shusuke Kakiuchi, *Austerity in Civil Procedure and the Role of Simplified Procedures*, 8 ERASMUS L. REV. 139, 145-46 (2015).

<sup>206</sup> See HAZEL GENN, *JUDGING CIVIL JUSTICE* 51 (2010) (explaining the "sorry state of the civil courts" as an effect of "the resources allocated to the courts").

<sup>207</sup> No. 631.240, de 9 de Março de 2014, RECURSO EXTRAORDINARIO MINAS GERAIS [R.E.M.G.] de 3.9.2014 (Braz.).

<sup>208</sup> *Id.*

### VIII THE AVAILABLE SIMPLIFIED PROCEEDINGS: SMALL-CLAIMS COURTS, MONITORY ACTION, IN LIMINE JUDGMENT, & REDUCED INVOLVEMENT OF COURTS IN FAMILY LAW AND WILLS

As a result of the Republican Pact mentioned above, several changes in the Brazilian procedural system towards more efficient and speedy procedures were introduced. These changes were repeated in the new Civil Procedure Code enacted in 2015.<sup>209</sup>

The laws reduced the need for court involvement in family law, wills, and notary activities, which led to a de-bureaucratization of several proceedings like insolvency of companies, changes in public registry, probate, and divorce.<sup>210</sup> These proceedings were once of the exclusive jurisdiction of the Judiciary, but since 2007 may be decided administratively by a Notary Public, as long as the parties are in agreement and there is no interest of minors involved.<sup>211</sup> This process avoids unnecessarily long and costly judicial proceedings to resolve consensual matters. Yet, contradictorily, the presence of an attorney is still mandatory,<sup>212</sup> which may increase costs unnecessarily in simple proceedings.

Yet another relevant factor in the Brazilian legislation is the creation of small-claims courts, inspired by the American experience.<sup>213</sup> They have jurisdiction to decide cases of less complexity, giving more freedom to the parties and more procedural powers to the judge.<sup>214</sup>

There is a microsystem of three small-claims courts created by three statutes enacted within 15 years: state small-claims courts (*Lei* 9.099/1995), federal small-claims courts (*Lei* 10.259/01), and small-claims courts for claims against the Administration (*Lei*

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<sup>209</sup> See generally, C.P.C. 2015, *supra* note 154.

<sup>210</sup> See *Lei* N° 11.441, de 4 de Janeiro de 2007.

<sup>211</sup> *Id.*

<sup>212</sup> *Lei* N° 13.105, Art. 103, de 16 de Março de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.3.2015 (Braz.) (available in English: <https://dpsionline.co.uk/wp-content/uploads/2019/06/Brazilian-Code-of-Civil-Procedure.pdf>).

<sup>213</sup> See OVIDIO BAPTISTA DA SILVA, *JUIZADO DE PEQUENAS CAUSAS* (1985); FELIPE BORRING ROCHA, *MANUAL DOS JUIZADOS ESPECIAIS CÍVEIS ESTADUAIS* 3-9 (2012) (discussing the history of the small-claims courts, originally created in Brazil in 1984 by *Lei* 7.244).

<sup>214</sup> See Candido Rangel, Dinamarco, *INSTITUIÇÕES DE DIREITO PROCESSUAL* (2003).

12.153/09).<sup>215</sup> These three statutes have similarities and differences, but they complement each other, creating an integrated legal system of procedural norms that are subsidiary to each other. The Code of Civil Procedure is used only in the absence of a specific rule in the microsystem.<sup>216</sup>

Moreover, there are principles of procedure that are specific to the small-claims courts: orality, simplicity, informality, procedural economy and speed, and constant incentive to settle.<sup>217</sup> The law inaugurated a new paradigm in Brazilian procedural law when it allowed the federal and state government to settle claims.

Despite the subsidiarity and common principles, there is no uniformity in the three types of small-claims courts as the courts have different rules.<sup>218</sup> One of the many differences between the three types of small-claims courts in Brazil is subject-matter jurisdiction. The Civil Claims Small-Claims Courts (*Juizados Especiais Cíveis*) decide civil claims up to forty times the monthly minimum wage (about \$12,600).<sup>219</sup> Its jurisdiction is limited to cases of less complexity, such as summary proceeding cases. The two Public Claims Small-Claims Courts, both federal and state (*Juizados Especiais Federais* and *Juizados Especiais da Fazenda Pública*), decide public claim cases up to sixty times the monthly minimum wage (about \$18,900) and are not limited to cases of less complexity.<sup>220</sup>

The repetition of the word “claim” in our English translation of the small-claims court’s names is not inadvertent. One small-claims court has jurisdiction over “civil claims” (which are claims of a private nature) and two small-claims courts have jurisdiction over

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<sup>215</sup> Lei Nº 9.099, de 18 de Setembro de 1995, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 27.9.1995 (Braz.); Lei Nº 10.259, de 12 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.7.2001 (Braz.); Lei Nº 12.153 de 22 de Dezembro de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.12.2009 (Braz.).

<sup>216</sup> Felipe Borring Rocha, MANUAL DOS JUIZADOS ESPECIAIS CÍVEIS ESTADUAIS (2012).

<sup>217</sup> *Id.*

<sup>218</sup> See FELIPE CAMILO DALL-ALBA, CURSO DE JUIZADOS ESPECIAIS: JUIZADO ESPECIAL CIVEL, JUIZADO ESPECIAL FEDERAL E JUIZADO ESPECIAL DA FAZENDA PÚBLICA (2011) (offering a comprehensive comparison between all types of small claims courts in Brazil).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

“public claims” (which are claims of a public nature against the states and the federal government).<sup>221</sup>

Another difference between the three types of small-claims courts in Brazil is whether their jurisdiction is exclusive, i.e. whether the use of the small-claims court is mandatory. Most scholars say that the jurisdiction of the Civil Claims Small-Claims Courts is relative (not exclusive), i.e. the plaintiff may choose between bringing a claim there or in the regular courts.<sup>222</sup> If the claim is over the jurisdictional amount (forty times the monthly minimum wage), the plaintiff may still bring his or her claim in the Civil Claims Small-Claims Courts, but in that case, the plaintiff waives the amount over the jurisdictional limit.<sup>223</sup> In the two Public Claims Small-Claims Courts, both federal and state, the statute is clear: the jurisdiction is absolute (exclusive).<sup>224</sup> Therefore, any claim over the jurisdictional amount must be brought in the regular courts.

Another difference between the three types of small-claims courts in Brazil is that each statute lists subject matters that are excluded.<sup>225</sup> For example, neither of these three small-claims courts have jurisdiction to decide class action cases, regardless of the value of the claim or the complexity of the subject matter.<sup>226</sup>

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<sup>221</sup> Lei Nº 9.099, de 18 de Setembro de 1995, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 27.9.1995 (Braz.); Lei Nº 10.259, de 12 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.7.2001 (Braz.); Lei Nº 12.153 de 22 de Dezembro de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.12.2009 (Braz.).

<sup>222</sup> See FERNANDO DA COSTA TOURINHO NETO & JOEL DIAS FIGUEIRA JÚNIOR, JUIZADOS ESPECIAIS CÍVEIS E CRIMINAIS: COMENTÁRIOS À LEI N. 9.099/1995 89 (2017); see also Lei Nº 9.099, de 18 de Setembro de 1995, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 27.9.1995 (Braz.).

<sup>223</sup> See FERNANDO DA COSTA TOURINHO NETO & JOEL DIAS FIGUEIRA JÚNIOR, JUIZADOS ESPECIAIS CÍVEIS E CRIMINAIS: COMENTÁRIOS À LEI N. 9.099/1995 89 (2017); see also Lei Nº 9.099, de 18 de Setembro de 1995, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 27.9.1995 (Braz.).

<sup>224</sup> See JOEL DIAS FIGUEIRA JÚNIOR AND FERNANDO DA COSTA TOURINHO NETO, JUIZADOS ESPECIAIS CÍVEIS E CRIMINAIS: COMENTÁRIOS À LEI N. 9.099/1995 89 (2017); see also Lei No. 10.259, de 12 de Julho de 2001 (Braz.); Lei No. 12,153, de 22 de Dezembro de 2009 (Braz.).

<sup>225</sup> Lei Nº 9.099, de 18 de Setembro de 1995, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 27.9.1995 (Braz.); Lei Nº 10.259, de 12 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.7.2001 (Braz.); Lei Nº 12.153 de 22 de Dezembro de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.12.2009 (Braz.).

<sup>226</sup> See Enunciado Nº 139 do FONAJEF, AJUFE (The exclusion of the jurisdiction of the Special Courts System as regards demands on diffuse or

There are also structural differences between the three types of small-claims courts. All of them have three main professionals: (i) judges (usually from the same judicial career of the regular judges and selected in the same entrance exam); (ii) lay judges (graduated in law, but not in the judicial career); and (iii) mediators (specifically trained to hold conciliation sessions between the parties).<sup>227</sup>

Another difference between the three types of small-claims courts in Brazil is the need for legal representation. Contrary to the general rule in civil and criminal litigation<sup>228</sup>, in small-claims courts the parties do not need to be represented by lawyers.<sup>229</sup> Initially, lawyers reacted negatively to this rule, so the older statute is more timid than the newer ones.

In the Civil Claims Small-Claims Courts (the older statute), the parties do not need to be represented by lawyers in claims below twenty times the monthly minimum wage (approximately \$6,300 USD), but a lawyer is essential in claims between twenty and forty times the monthly minimum wage.<sup>230</sup> In the two Public Claims Small-Claims Courts, both the federal and the state, which are the most recent statutes, plaintiffs do not need to be represented by

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collective rights or interests, including homogeneous individuals, applies both to individual demands of a multitudinous nature and to collective actions.). MARIA DO CARMO HONÓRIO; ERICK LINHARES; GUILHERME RIBEIRO BALDAN (ORGS.). OS ENUNCIADOS DO FONAGE E SEUS FUNDAMENTOS 79 (2019).

<sup>227</sup> *Id.*

<sup>228</sup> Lei Nº 8.906, de 4 de Julho de 1994, Art. 1, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.7.1994 (Braz.).

<sup>229</sup> Lei Nº 9.099, de 18 de Setembro de 1995, Art. 9, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 27.9.1995 (Braz.) (“In claims of value up to twenty minimum wages, the parties will appear in person and may be assisted by a lawyer; in claims of higher value, legal assistance is mandatory”); Lei Nº 10.259, de 12 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.7.2001 (Braz.); Lei Nº 12.153 de 22 de Dezembro de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.12.2009 (Braz.) (The Supreme Court ruled considering constitutional the self-representation limited to civil matters in small claims courts).

<sup>230</sup> Lei Nº 9.099, de 18 de Setembro de 1995, Art. 9, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 27.9.1995 (Braz.) (“In claims of value up to twenty minimum wages, the parties will appear in person and may be assisted by a lawyer; in claims of higher value, legal assistance is mandatory”); Lei Nº 10.259, de 12 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.7.2001 (Braz.); Lei Nº 12.153 de 22 de Dezembro de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.12.2009 (Braz.) (The Supreme Court ruled considering constitutional the self-representation limited to civil matters in small claims courts).



lawyers regardless of the size of their claim.<sup>231</sup> This statute generates a situation of inequality because the government, on the defense side, will always be represented by its own lawyers. Legal representation is mandatory in appealing all three types of small-claims courts. Moreover, on appeal, except in case of legal aid, the parties will have to pay court fees and attorneys' fees to the winner.<sup>232</sup>

In order to protect its market share, the Brazilian Bar Association (OAB) filed several direct actions before the Supreme Court challenging the constitutionality of the provisions waiving attorney representation in small-claims courts. The OAB argued that the mandatory representation by lawyers in all civil matters was an essential part of the Brazilian justice system. The argument was based on an ambiguous language of the Brazilian Constitution, which says, in part, that "the lawyer is indispensable to the administration of justice."<sup>233</sup> It is at most debatable that this language means that attorney representation is essential to every lawsuit. Most likely, it is merely an aspirational or inspirational language, repeated with other words when the Constitution refers to Public Prosecutors<sup>234</sup> and Public Defenders<sup>235</sup>. The Supreme Court, therefore, has consistently ruled that access to justice, informality, orality and other principles of the small claims courts justify self-representation.<sup>236</sup>

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<sup>231</sup> Lei Nº 10.259, de 12 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.7.2001 (Braz.); Lei Nº 12.153 de 22 de Dezembro de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.12.2009 (Braz.).

<sup>232</sup> Lei Nº 10.259, de 12 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.7.2001 (Braz.); Lei Nº 12.153 de 22 de Dezembro de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.12.2009 (Braz.).

<sup>233</sup> See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] Art. 133 (Braz.) ("The lawyer is indispensable to the administration of justice, and they are inviolable by their acts and manifestations in the exercise of the profession, in the limits of the law.").

<sup>234</sup> See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] Art. 127 (Braz.) ("The Office of the Public Prosecutors is a permanent institution, essential to the jurisdictional function of the State...").

<sup>235</sup> See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] Art. 134 (Braz.) ("The Public Defenders is a permanent institution, essential to the jurisdictional function of the State...").

<sup>236</sup> S.T.F., ADI 1539, Relator: Min. Maurício Corrêa, 24.4.2003, SUPREMO TRIBUNAL FEDERAL JURISPRUDÊNCIA [S.T.F.J.] (Braz.); S.T.F., ADI 3168,

The protection of urgent matters (including anticipatory decision) is expressly allowed in both the federal and state Public Claims Small-Claims Courts (with the possibility of interlocutory appeal of the decision).<sup>237</sup> The law regarding the Civil Claims Small-Claims Courts does not provide this protection expressly. Therefore, the protection of urgent matters is only allowed by interpretation of the Constitution, which provides for a general power for provisional matters and anticipation of the final decision (Article 5, XXXV, CF/88).<sup>238</sup> Appeal of the final judgment, however, is allowed in all three small-claims courts to be decided by a panel of three first instance judges.<sup>239</sup> The appeal only has a devolutive effect (i.e. no suspensive effect), but the judge may stay the proceeding to avoid irreversible damage.<sup>240</sup>

One of the most interesting features of the proceedings in small-claims courts is the possibility of uniformization of the decisions of the appeal panels through the resolution of repetitive appeals.<sup>241</sup>

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Relator: Joaquim Barbosa, 08.06.2006, SUPREMO TRIBUNAL FEDERAL JURISPRUDÊNCIA [S.T.F.J.] (Braz.).

<sup>237</sup> Dall-Alba, *supra* note 218.

<sup>238</sup> CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], Art. 5 (XXXV) (Braz.); *see* HERMES ZANETI JR., A CONSTITUCIONALIZAÇÃO DO PROCESSO. O MODELO CONSTITUCIONAL DA JUSTIÇA BRASILEIRA E AS RELAÇÕES ENTRE PROCESSO E CONSTITUIÇÃO 145 (2014); *see also, e.g.*, S.T.F., ADPF 172 MC-REF, Relator: Min. Marco Aurélio, 06.10.2009, SUPREMO TRIBUNAL FEDERAL JURISPRUDÊNCIA [S.T.F.J.] (Braz.).

<sup>239</sup> Lei Nº 9.099, de 18 de Setembro de 1995, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 27.9.1995 (Braz.); Lei Nº 10.259, de 12 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.7.2001 (Braz.); Lei Nº 12.153 de 22 de Dezembro de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.12.2009 (Braz.).

<sup>240</sup> Lei Nº 9.099, de 18 de Setembro de 1995, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 27.9.1995 (Braz.); Lei Nº 10.259, de 12 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.7.2001 (Braz.); Lei Nº 12.153 de 22 de Dezembro de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.12.2009 (Braz.).

<sup>241</sup> This proceeding was inspired by the German model proceeding (*Musterverfahren*), although some commentators also compare it with the English Group Litigation Order (GLO). *See* Antonio do Passo Cabral, *O Novo Procedimento-Modelo (Musterverfahren) Alemão: Uma Alternativa às Ações Coletivas*, 147 REVISTA DE PROCESSO 123 (2007); *see* Antonio Adonias A. Bastos, *A Estabilidade das Decisões Judiciais Como Elemento Contributivo para o Acesso à Justiça e para o Desenvolvimento Econômico*, 227 REVISTA DE PROCESSO 295 (2014); Guilherme Rizzo Amaral, *Efetividade, Segurança, Massificação e a Proposta de um 'Incidente de Resolução de Demandas Repetitivas'*, 196 REVISTA DE PROCESSO 237 (2011); Antonio do Passo Cabral,

Curiously, the proceeding for uniformization of appellate decisions is not uniform in the three small-claims courts: each one has its own proceeding.

In the Federal and State Public Claims Small-Claims Court, for example, it is possible to request uniformization of interpretation of federal law whenever there is a conflict in the appellate panels relating to substantive law.<sup>242</sup> The uniformization may be regional or national (Law 10.259/2001 Article 14 and Law 12.153/2009, Articles 18 and 19).<sup>243</sup>

There is no specific provision of uniformization in the statute regulating the Civil Claims Small-Claims Court,<sup>244</sup> but whenever there is a conflict of interpretation between the appellate panels, the parties may take the case to the Brazilian Supreme Court (*Superior Tribunal de Justiça* – STJ).<sup>245</sup> A bill was proposed to provide a National Uniformization Panel to provide a proceeding similar to the Public Claims Small-Claims Courts (Bill 5.741/2013).<sup>246</sup> There was a strong reaction to this project, however, especially from an institution that represents the small-claims courts (FONAJE): with a backlog of millions of cases, this Bill will only bring delays

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*A Escolha da Causa-Piloto nos Incidentes de Resolução de Processos Repetitivos*, 231 REVISTA DE PROCESSO 201 (2014); Dierle Nunes, *Novo Enfoque para as Tutelas Diferenciadas no Brasil? Diferenciação Procedimental a Partir da Diversidade de Litigiosidades*, 180 REVISTA DE PROCESSO 109 (2010).

<sup>242</sup> Lei Nº 10.259, Art. 14, de 12 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.7.2001 (Braz.); Lei Nº 12.153, Art. 18-19, de 22 de Dezembro de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.12.2009 (Braz.).

<sup>243</sup> Lei Nº 10.259, de 12 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.7.2001 (Braz.).

<sup>244</sup> See Rocha, *supra* note 216, at 260-61.

<sup>245</sup> The appellate system of small claims courts is unnecessarily complex. STJ, AgRg nos EDEcl no PUI n. 694/SP, Rel. Min. Reynaldo Soares da Fonseca, Terceira Seção, v.u., DJE 2.4.2018. Now the issue is left to state courts to apply the caselaw from STJ. Some state courts have created panels of uniformization exclusively to decide cases against the caselaw from STJ. See, e.g., *Turma de Uniformização de Interpretação de Lei*,

<http://www.tjes.jus.br/institucional/coordenadorias/institucionalcoordenadoriasjuizados-especiais-civeis-e-criminais/decisoes-da-turma-de-uniformizacao/>.

<sup>246</sup> See *Projeto De Lei 5741/2013*, Câmara dos Deputados, <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=580322> (last visited Mar. 24, 2021).

without any significant improvement.<sup>247</sup> The Bill was withdrawn in 2015. The main arguments against the bill were: (i) in practice, only major corporations will be able to finance the uniformization proceeding; (ii) the uniformization panels will stop the natural maturation of the subject debated in the several first and second instance courts; and (iii) the uniformization panels would be the sixth degree of jurisdiction, increasing the time and effort to decide conflicts and violating the main principles of economy and efficiency in small-claims courts.<sup>248</sup> Although the bill was not enacted, the CPC/15 provided that the Small Claims Courts are bound by second instance decisions from the “incident for the resolution of repetitive cases” (IRDR) (CPC/2015, art. 985).<sup>249</sup> Additionally, the new procedural system has provided for binding precedents.<sup>250</sup>

Another important development is the so-called “monitory action.”<sup>251</sup> The Brazilian monitory action is available to pursue any kind of obligations: pay money, deliver things, to do or refrain from doing a certain act.<sup>252</sup> The creditor only needs written evidence of his or her right to obtain a subpoena.<sup>253</sup> The debtor must pay, deliver,

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<sup>247</sup> See *Mais de 100 projetos querem mudar funcionamento de juizados especiais*, *ConJur* January 27, 2015 (quoting Ricardo Chimenti), available at <https://www.conjur.com.br/2015-jan-27/100-projetos-mudar-competencia-juizados-especiais>.

<sup>248</sup> *Id.*

<sup>249</sup> Lei Nº 13.105, Art. 985, de 16 de Março de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.3.2015 (Braz.).

<sup>250</sup> See HERMES ZANETI JR., *O VALOR VINCULANTE DOS PRECEDENTES. TEORIA DOS PRECEDENTES NORMATIVOS FORMALMENTE VINCULANTES* (forthcoming 2021).

<sup>251</sup> Lei Nº 13.105, Art. 700, de 16 de Março de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.3.2015 (Braz.) (“An action for the execution of an unenforceable instrument *may be filed* by whoever alleges, on the basis of written unenforceable evidence, that he or she has a right to claim, from a competent debtor: I – the payment of a sum of money; II – the delivery of a fungible or non-fungible thing or of movable or immovable property; III – the performance of an obligation to do or not to do.”).

<sup>252</sup> Lei Nº 13.105, Art. 700, de 16 de Março de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.3.2015 (Braz.).

<sup>253</sup> See CANDIDO RANGEL DINAMARCO, *A REFORMA DO CÓDIGO DE PROCESSO CIVIL* 230 (1995); see JOSE ROGERIO CRUZ E TUCCI, *AÇÃO MONITÓRIA* (1997) (discussing the monitory action in Brazil); EDUARDO TALAMINI, *TUTELA MONITÓRIA: A AÇÃO MONITÓRIA* (2001); LUIZ GUILHERME MARINONI &

do, or refrain from doing within 15 days.<sup>254</sup> If the debtor does not present a defense, the creditor obtains an “executive judicial title” and may enforce it in court (CPC/2015, Articles 700, 701 and 702).<sup>255</sup>

The monitory proceeding is not mandatory: the creditor may choose the traditional civil proceeding,<sup>256</sup> but the monitory proceeding offers advantages for the creditor (who may have his or her claim satisfied quickly) and for the debtor (who may have costs and attorney’s fees waived if the request is complied with).

Despite the similarities, the structure and scope of the Brazilian monitory proceedings are different from the “European order for payment procedure” (Regulation 1896/2006), an injunctive proceeding for payment that is more effective than its Brazilian counterpart to obtain the practical result in a reasonable amount of time and the de-bureaucratization of the justice system.<sup>257</sup> The

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DANIEL MITIDIERO, CÓDIGO DE PROCESSO CIVIL: COMENTADO ARTIGO POR ARTIGO (2008); Hermes Zaneti, JR., and Rodrigo Mazzei, *Ação Monitória: Primeiras Impressões Após a Lei n. 11.232/05*, in PAULO HOFFMAN AND LEONARDO FERRES DA SILVA RIBEIRO (EDS.), *PROCESSO DE EXECUÇÃO CIVIL: MODIFICAÇÕES DA LEI 11.232/05 249-74* (2006); Hermes Zaneti, JR., and Rodrigo Mazzei, *Ação Monitória: Primeiras Impressões Após a Lei n. 11.232/05*, in PAULO HOFFMAN AND LEONARDO FERRES DA SILVA RIBEIRO (EDS.), *PROCESSO DE EXECUÇÃO CIVIL: MODIFICAÇÕES DA LEI 11.232/05 249-74* (2006). The monitory action generated a rich practical and theoretical debate, resulting in the enactment of several ‘Judicial Statements’ (*Súmulas* n. 233, 282, 299, 339) from the Brazilian Supreme Court (*Superior Tribunal de Justiça*). See HEITOR SICA, 10 COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL 142-53 (2018) (discussing arts. 674 to 718 of the CPC/15).

<sup>254</sup> Lei Nº 13.105, Art. 701, de 16 de Março de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.3.2015 (Braz.)

<sup>255</sup> *Id.* at Art. 700-02.

<sup>256</sup> *Id.* at Art. 700.

<sup>257</sup> *See generally*, European Order for Payment Procedure, EUR. PARL. DOC. (COM 1896) (2006).

(“The regulation, which has applied since 2008, establishes a European procedure for orders for payment. The procedure simplifies, speeds up, and reduces the costs of litigation in cross-border cases concerning uncontested pecuniary claims. The regulation permits the free circulation of European orders for payment throughout European Union (EU) countries by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the EU country of enforcement prior to recognition and enforcement. (...) The European order for payment procedure applies to civil and commercial matters in cross-border cases, whatever the nature of the court

European order for payment has been applicable since 2008 in civil and commercial matters, independently of the type of court.<sup>258</sup> The country needs profound law reforms that change the structure of legal proceedings, even with unwanted collateral effects. Although we need to preserve the procedural guarantees, they must be adapted to the current needs of society. This shift is underway.

Finally, there is the *in limine* judgment against the plaintiff whenever the issue to be decided is a legal matter and the court has previously decided a similar issue in a binding precedent.<sup>259</sup> In such cases, the defendants do not need to be served with process for the court to decide the case on the merits against the plaintiff.<sup>260</sup> If the plaintiff appeals, the judge will have five days to reconsider his or her decision.<sup>261</sup> Only then will the defendant be served with process to present an answer to the appeal (CPC/2015, Article 332).<sup>262</sup>

#### IX. “AGE OF AUSTERITY” IN BRAZILIAN CIVIL JUSTICE? A NEEDED BALANCE

Brazil has always had experience with living under the austerity necessity because it has always been a country without adequate resources and deeply ingrained social inequality. But the current “Era of Austerity” or “financial crisis” (austerity-control) has finally reached Brazil. The Brazilian economy slowed down between 2014

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or tribunal. A cross-border case is one in which at least one of the parties is domiciled or habitually resident in an EU country other than the country of the court hearing the action. The regulation applies to all EU countries except Denmark.”)

<sup>258</sup> *Id.*

<sup>259</sup> Lei Nº 13.105, Art. 332, de 16 de Março de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.3.2015 (Braz.) (“In cases that waive the evidentiary stage, the judge, regardless of the service of summons upon the defendant, shall deny, on a preliminary basis, any claim that contradicts: I – a precedent established by the Federal Supreme Court or by the Superior Court of Justice (...) § 2 If an appeal proper is not filed, the defendant shall be notified of the *res judicata* judgment, under art. 241.”).

<sup>260</sup> Lei Nº 13.105, Art. 332, de 16 de Março de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.3.2015 (Braz.).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

and early 2020,<sup>263</sup> and the decrease affected the behavior of the government through the Judiciary and incumbent expenses. As we have demonstrated, after decades concerned exclusively with efficiency and legal certainty, Brazil woke up for fiscal adjustment and the balance of the accounts of the Judiciary.

Court fees have recently risen, several bills try to address the free justice system, and a broad Employment Law Reform show concern for austerity measures.<sup>264</sup> The unfortunate consequence is that it all means fewer rights and less access to justice, which may affect constitutional guarantees.

As a general criticism, it is clear that several deficiencies in Brazil overburden the Judiciary and generate a structural inefficiency of the system. For example, the ideal of ‘free justice,’ the fact that certain proceedings designed to facilitate the administration of justice are not mandatory (such as some kinds of small-claims courts), as well as the historic need to provide the population with basic fundamental rights (such as health, education, environment, honest administration, and respect of consumers).

The country adopted an extremely loose vision of the access to justice as an individual right that is absolute and nonwaivable (*droit indisponible*). The Judiciary was not seen merely as a regular public service. Therefore, legislative solutions ended up worsening the problem, and creating what we can identify as an Era of Indulgence. In the Era of Indulgence, money is wasted and access to justice is not obtained because of the judiciary backlog generated by the broad access to justice. Moreover, the backlog overburdens the public coffers with unnecessary expenses. The government is using the Justice in Numbers report to address these issues.<sup>265</sup>

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<sup>263</sup> *Brazil Overview*, WORLD BANK,

<https://www.worldbank.org/en/country/brazil/overview> (last updated Oct. 14, 2019).

<sup>264</sup> See <https://www12.senado.leg.br/noticias/materias/2018/07/05/austeridade-economica-prejudica-politicas-sociais-afirmam-debatedores> (meeting held at Senate, criticizing the social impacts of the austerity policies).

<sup>265</sup> See CONSELHO NACIONAL DE JUSTICA, <https://www.cnj.jus.br/pesquisas-judiciarias/justica-em-numeros/> (arguing that the Justice in Number Report is the most important source of official statistics since 2004 and it is used as indicators and tool of analysis to the management of the Judicial branch) (last visited Apr. 12, 2021).

Only recently did the legislature start to reduce the unrestricted access to justice through filters on appeals, mandatory simplified proceedings, aggregation of repetitive cases (test cases), binding precedents, etc. This restriction was done, however, not to obtain the economy, but to obtain efficiency and legal certainty. It is hoped, however, that these law reforms will also represent a reduction in the costs of the public machinery.

Despite the enormous effort in recent years to obtain empirical data and judicial statistics, the research conducted is insufficient to make a complete and accurate evaluation of the performance of the Judiciary. Future research will certainly allow a more precise evaluation of its performance and will allow verification of whether the current law reforms have been successful.

For the time being, in Brazil, we spend more money without obtaining a proportional increase in the efficiency and effectiveness of the judicial system—this reality is the general picture of the Brazilian Justice System so far. We believe that, with the new-found focus in the management of the Judiciary, this reality may begin to change. One may see a slow decrease in costs and litigiousness. We hope, however, that this goal may be obtained without a reduction in the quality of service of justice, the protection of human rights, and the access to justice, particularly of those in need.