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Brazilian Civil Procedure in the 'Age of Austerity'?

Effectiveness, Speed, and Legal Certainty: Small Claims, Uncontested Claims, and Simplification of Judicial Decisions and Proceedings

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Abstract

The current debate in Brazilian Civil Procedure revolves around efficiency, legal certainty, and access to justice, not austerity. As a matter of fact, the debate over austerity is nonexistent in Brazil so far. By expanding the access to justice to a broader portion of the society, the legal system increased the number of cases and the costs associated with the judicial system. But the excess litigation and expense associated with the expansion of access to justice has contradictorily curtailed access to justice. This new situation demands new efforts to increase efficiency and legal certainty, while still increasing access to justice.

Keywords: austerity, civil procedure, access to justice, Brazil, small claims

1 Introduction: Efficiency and Legal Certainty versus Austerity

This article is inspired by a national report for the 'XV IAPL World Congress of Procedural Law: Effective Judicial Relief and Remedies in an Age of Austerity', held on 26-29 May 2015 in Istanbul, Turkey. Some questions submitted to the national reporters are unanswerable, because of a lack of empirical studies or the imprecision of those available, or because they are contradictory or incomplete.

Moreover, the questionnaire was written from a perspective that does not fit well with the peculiarities of the Brazilian legal system. As this article demonstrates, Brazil does not live the age of austerity in civil procedure yet for two reasons: first, because of the economic situation in the country and second, because the process of democratisation and increased access to justice is recent and incomplete, having started only in 1988, with the establishment of democracy and the enactment of the Constitution. In this generation, Brazil has advanced considerably regarding access to justice, giving dignity, and recognising the fundamental rights of thousands of Brazilians who were excluded from society. The Judiciary was a promoter of the redemocratisation, but this has meant an increment of the costs of the judicial system and may in the future be an obstacle to effectuating justice.

Another difficulty in addressing this topic is the ambiguity of the expression 'austerity', which may have several meanings in different situations in time and space. For example, the expression, 'austerity' 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, recent fiscal reforms have imposed rigid limits of expenses for the Judiciary and Prosecutors, linking them to the amount of collected taxes (Law 101/2001, known as 'Fiscal Responsibility Law'). This limitation, however, concerns the expenses of all public organs and is not specifically directed at the judicial system and was enacted before the current age of austerity.

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

This article discusses judicial proceedings for the resolution of small claims, uncontested claims, and simple matters, both from the perspective of current law as well as the proposed Code of Civil Procedure, approved by the Brazilian National Congress and sanctioned by the president, to come into force in 2016 (NCPC/2015).

The current legislation in Brazil on the subject is mostly the direct product of the 1988 Constitution (CF/88) and a law reform pursuant to a political pact among the leaders of all three branches of government ('Republican

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Pact'). Signed in 2004, the Executive, Legislative, and Judiciary branches joined forces to promote a speedy and efficient justice system in Brazil. 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. This initiative gave constitutional standing to the procedural objectives of efficiency (protection of fundamental rights, access to justice, speed) and legal certainty (stability of decisions and avoidance of contradictory decisions).[1]

The 2004 Constitutional Amendment brought about several important innovations. One was the fundamental right to judicial protection in a reasonable time (Art. 5, LXXVIII, CF/88). Another important innovation was the 'súmula vinculante' (Art. 103-A, CF/88), a kind of precedent-like statement enacted by the Brazilian Supreme Court (mostly a Constitutional Court) that binds the Judiciary and the Public Administration. 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) (Art. 102, § 3, CF/88). The Constitutional Amendment, therefore, created a new paradigm of efficiency and a new methodology for the courts of last resort in the Judiciary, particularly the Brazilian Supreme Court.[2]

We will also address the reduced involvement of courts in family law, wills, the small-claims courts, monitory action, and the *in limine* judgments as illustrations of recent legal reforms regarding cases involving simple matters, the simplification of judicial decisions, and uncontested claims. We will also address changes that may come with the enactment of the New Code of Civil Procedure and the legislative trends in Brazilian civil procedure.

All these innovations stem from the fixation of the Brazilian Civil Procedure with the ideals of efficiency, legal certainty, and access to justice, not austerity. As a matter of fact, so far a debate on austerity is nonexistent in Brazil. 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. But this excess litigation and expense associated with the expansion of access to justice has contradictorily curtailed access to justice. This new situation requires new efforts to increase efficiency and legal certainty, while still increasing access to justice.

1. *See* C.A. Alvaro de Oliveira, 'Os direitos fundamentais à efetividade e à segurança em perspectiva dinâmica', *Revista de Processo*, São Paulo: RT (2008) 155, at 11 (discussing the compatibility between these fundamental rights and their importance for current civil procedure).
2. *See* M. Taruffo, *Il Vertice Ambiguo. Saggi sulla Cassazione Civile*, Bologna: Il Mullino (1991); L.G. Marinoni, *Precedentes Obrigatórios*, 3rd edn., São Paulo: RT (2014); D. Mitidiero, *Cortes Superiores e Cortes Supremas. Do Controle à Interpretação, da Jurisprudência ao Precedente*, São Paulo: RT (2014).

2 Austerity and Reduction of Costs versus Effectiveness and Legal Certainty

Because they are not popular values, there is no open dialogue about austerity and the reduction of costs in the Brazilian Justice system. Except the above-mentioned Fiscal Responsibility Law, the subject of austerity in the Judiciary is practically nonexistent in Brazil. To the extent that it may be considered, it is debated behind closed doors – neither legal doctrine nor the annals of Congress make direct reference to it. It is clear that there is only a concern for efficiency and legal certainty, in total indifference to the problem of the costs of justice.

Indeed, in recent years most legal reforms of the Brazilian model of justice focused entirely on efficiency and legal certainty. By efficiency we mean (i) access to justice for the poor; (ii) judicial protection of individual and collective fundamental rights; and (iii) speedy proceedings. Legal certainty includes certainty and stability of judicial opinions, avoiding contradictory decisions and indirectly reducing the burden on the Judiciary by using new techniques for the resolution of repetitive cases.

The search for efficiency and legal certainty are movements simultaneously antithetical and complementary. The more people have access to justice, the higher the burden on the Judiciary and the less efficient it is. The higher the burden on the Judiciary, the higher the need for efficiency, legal certainty (for the reduction of contradictory opinions), and uniformity of decisions (to reduce the number of judicial proceedings).

The access to justice movement, therefore, leads to the need for 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 of the Judiciary. This overburdening has intensified a 'crisis' in the Brazilian Judiciary. Efficiency and legal certainty are the overall principles proposed as the solution for the so-called 'crisis' of the Judiciary.

It is in this context that the following recent initiatives are directed at attaining efficiency and legal certainty simultaneously: (i) the small claims courts (because of the reduced value of the claim and the lesser complexity of the subject matter) and (ii) simple and uncontested matters (cases without objection or in which the legal conflict had already been previously decided by test cases or precedent).

In order to promote an effective access to justice, Brazil created institutions specialised in the protection of collective and individual fundamental rights, broadening the functions of the Public Prosecutors (*Ministerio Publico*), and creating an institution of public advocacy with integral and free legal support for the poor (also in civil matters): the Public Defenders (*Defensoria Publica*).

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3 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 in a vulnerable procedural position (both in individual conflicts as well as in class-action conflicts). After a long period of 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. As was expected, the country was deeply influenced by the access to justice ideal of the mid-1970s to early 1980s.[3] The main concern of the Brazilian legislature during the process of redemocratisation of the state structures was, therefore, to ensure a broad access to justice, including asserting guarantees in the text of the 1988 Constitution.

The guarantee of access to justice was therefore written into the constitution and in the 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'.[4] Amongst the benefits for the poor are the waiving of court and expert fees and the waiving of fee shifting. The same benefits are also available for class actions. In addition, the Constitution created public institutions to guarantee access to justice.

The 1988 Constitution assigned to the Public Prosecutors (*Ministerio Publico*) the broad power to act for the protection of fundamental individual rights which are not 'disposable' (*droit indisponible*) and rights of social interest of diffuse and collective character. Therefore, Brazilian Public Prosecutors must act not only in the criminal arena or in the traditional protection of the family and orphans, but also for the protection of a broad array of rights, including the protection of elderly, disabled, children and adolescents, consumers, and workers, as well as in the areas of health, education, and the environment.

In order to discharge their functions, the Public Prosecutors may bring individual lawsuits, class actions, and intervene in proceedings as *custos iuris*.[5] 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 specialisation, as it was recognised by the scholarship.[6]

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

In the Brazilian Federal system, Public Prosecutors and Public Defenders operate both in the federal system and in the systems of the several states. There are, therefore, Federal Public Defendants and State Public Defendants.

These institutions have been improved recently, 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 evolution has been quick. The Public Prosecutors already has administrative and financial autonomy and is today an agency with full autonomy from the branches of government. This is fundamental because the Constitution gives it the ability to police the other state agencies' compliance with the Constitution and with respect to fundamental rights (Arts. 127, 129, II and IX, CF/88). 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 (Arts. 127, § 1, 129, § 4 and 93, CF/88). With these constitutional changes, the Office of the Public

3. The Italian jurist Mauro Cappelletti was the person who most strongly influenced this worldwide tendency. The influence of his legal thought and the Florence Project in Brazil is discussed in C.A. Alvaro de Oliveira, 'Cappelletti e o Direito Processual Brasileiro', in M. Cappelletti, *Processos, ideologias e sociedade*, H. Zaneti, Jr. (trans.), Porto Alegre: Sergio Antonio Fabris Editor (2010) II, at 7-16. 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 (H. Zaneti, Jr., *A Constitucionalização do Processo. O Modelo Constitucional da Justiça Brasileria e as Relações entre Processo e Constituição* [2007], 2nd edn., São Paulo: Atlas (2014), at 154; D. Nunes and L. Teixeira, *Acesso à Justiça Democrático*, Brasília: Gazeta Jurídica (2013), at 44). This, however, does not affect the correctness of some of the premises of the Florence Project, which analysed 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, dejuridicisation, and deburocratisation of the access to justice, from the perspective of the consumers of the justice system, not its operators. These premises are valid today as they were in 1978.

4. *See* F. Didier, Jr., and R. Oliveira, *Benefício da justiça gratuita*, 3rd edn., Salvador: Jus Podivm (2008) at 11.

5. Discussing this peculiar position of Public Prosecutors in Brazil in a comparative perspective, *see* A. Gidi, *Class Actions in Brazil*, 51 *American Journal of Comparative Law* 311, at 379-82 (2003); A.H. Benjamin, 'Group Action and Consumer Protection in Brazil,' in T. Bourgoignie (ed.), *Group Actions and Consumer Protection* (1992) 141, at 153 (showing that, as contrasted to their European counterparts, Brazilian Public Prosecutors are active in the protection of group rights); Findley, 'Pollution Control in Brazil', 15 *Ecology Law Quarterly* 1, at 66 (1988).

6. M. Cappelletti, 'L'accesso alla giustizia dei consumatori', in M. Cappelletti, *Dimensioni della Giustizia nella Società Contemporanee*, Bologna: Il Mulino (1994), at 110. For a critical view, cf. A. Gidi, *Rumo a um Código de Processo Civil Coletivo*, Rio de Janeiro: Forense (2008), at 400-18.

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Prosecutors no longer belongs to the Executive branch (as it did in the past), and instead exists as an autonomous institution, an institution indispensable to the administration of justice.

The development of the Office of the Public Defenders is more recent, although it was provided for in the 1988 Constitution (Art. 134, CF/88). Its administrative and functional autonomy are assured by the Constitution. Recent constitutional reform has conferred upon Public Defenders constitutional guarantees that are similar to the ones 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 the protection in all court instances, judicial and extrajudicial, of the individual and collective rights, in a form comprehensive and gratuitous to people in need … .

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), represent a major direct cost to the judicial system. But the costs also rise indirectly, because 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.[7]

This is a necessary development because of the constant omission from the State and the bad management of the Brazilian Public Administration, a vicious circle caused by the State when it does not do its job well and does not protect citizens' rights administratively. There is a recent tendency to reduce this autophagic litigation, raising the self-control of the Public Administration, by the recognition of administrative precedents (Art. 496, § 4, IV, CPC/2015) and through alternative dispute resolution (Art. 174, CPC/2015).[8]

Moreover, litigation in Brazil is comparatively cheap. In many situations, the law provides for a waiver of court fees, which are important in financing the cost of the judicial system. Even when there is payment of costs, they are cheap and independent from the value or complexity of the proceeding. The judiciary laws of each state set a maximum amount for these costs, which ultimately results in expensive and complex cases involving a considerable amount of money paying disproportionately low fees. 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.[9]

Even the attorney fees of private lawyers generally are not high, because of the large number of lawyers and the availability of public defenders.

For all these reasons, we conclude that, rightly or wrongly, Brazil is going in the opposite direction of international law reform: it is raising expenses with the judicial system. This can be explained in several different ways. First, because Brazil has experienced considerable economic growth in the past decades. By inserting itself in the international market, the country broadened the access to products and services for a major part of the population that was below the line of poverty in the 1970s and today is part of the economy of a budding consumer market. For example, Brazil has witnessed the steady increase of the so-called 'Class C' (group of people and families with a monthly income per capita of between 90 and 430 dollars), which today represents 54% of the Brazilian population and will move 1.17 trillion Reals in 2014 (about half a trillion dollars).[10]

Second, because Brazil has always been a country with a sharp financial inequality (austerity-necessity). European countries prospered after World War II and could then afford to provide their peoples with a series of social benefits but now need to curb them. Brazil, on the other hand, only just started distributing these benefits, and the time may come when it will have to face a similar problem (austerity-control).

Third, the Brazilian politics, since the redemocratisation in the 1980s, has taken a consistent turn to the left, adopting several policies of social inclusion.

7. *See* P.C.P. Carneiro, *Acesso à justiça*, 2nd edn., Rio de Janeiro: Forense (2003), at 182 (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); G.A. Rodrigues, *Ação civil pública e termo de ajustamento de conduta*, 2nd edn., Rio de Janeiro: Forense (2006), at 271-3 (discussing a study according to which two thirds of all class actions settled extraprocedurally by the Public Prosecutors (*compromisso de ajustamento de conduta*) were signed with the State or institutions connected to the State). For a critical view, *see* A. Gidi, *Rumo a um Código de Processo Civil Coletivo*, Rio de Janeiro: Forense (2008), at 404.

8. Some court decisions have limited the broad access to justice. A recent Supreme Court decision made it mandatory for the plaintiff to request a social security benefit administratively before being allowed to file a lawsuit. The plaintiff, however, only needs to make a request; it is not necessary to exhaust the administrative procedure. This shows how broad the access to justice is in Brazil (RE 631.240/MG, STF, Plenario, Rel. Min. Luis Roberto Barroso).

9. *See*, for example, ADI nº 4186/RO and ADI 3826/GO. *See* the study about expenses and court costs sponsored by CNMP (National Council of Public Prosecutors) discussed in <www.cnj.jus.br/imprensa/433-informacoes-para/imprensa/artigos/13592-as-custas-judiciais-em-foco> (accessed 5 August 2014).

10. *See* <http://exame.abril.com.br/economia/noticias/54-dos-brasileiros-formam-a-classe-c-diz-serasa-experian> (accessed 15 September 2014) (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.)

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None of these paths are wrong. On the contrary, social inclusion and effectiveness of rights are investments, not costs.[11] But Brazilians must acknowledge that these goals must not be pursued only on the Judiciary, or the cost of the Judiciary Branch may in the future lead to less effectiveness in the protection of these rights. The Brazilian Judiciary has played the role of a motor of social equality and must continue to have this role. But we must consider alternatives to the judicial solution, and even alternatives to public solutions, to ensure the effectiveness of the fundamental rights, as well as reducing costs, and increasing efficiency.

4 No Tradition of Empirical Research in Brazil and New Trends: The National Council of Justice (CNJ) and the Performance Evaluation of the Judiciary (ADJ)

Despite a lack of tradition of empirical research in Brazil, there has been a recent surge of statistical studies concerning the efficiency of the Brazilian justice system.[12] Being a diverse country with disparate regional realities, continental dimensions (Brazil is larger than Continental US and Europe), and a population of more than 200 million inhabitants, judicial statistics are difficult to gather, and the numbers difficult to interpret.

Inspired by European models, 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*). Art. 103-B of the Constitution established the National Council of Justice (*Conselho Nacional de Justiça*, CNJ), and Art. 130-A established the National Council of the Public Prosecutor (*Conselho Nacional do Ministério Público*, CNMP). The objective was to harmonise and standardise the services that provide access to justice and provide an effective control of the services. The Constitutional Reform created also a special department under the Ministry of Justice, the Secretary of the Reform of the Judiciary (*Secretaria de Reforma do Poder Judiciário*) to be a permanent entity responsible for centralising and proposing governmental initiatives to improve procedural rules and access to justice. The creation of these organisations 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.

The Ministry of Justice produced an Atlas of the Judiciary, showing the proportion of judges, public prosecutors, lawyers, and public defenders in the country. 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.[13]

But even good initiatives have negative consequences. As a contradictory, vicious circle, the broad openness to access to justice (constitutionally guaranteed) leads to a proliferation of lawsuits, which in turn represents the major difficulty for the fulfilment of the access to justice ideal in Brazil. A recent CNJ research has demonstrated what we already knew: that the major litigants in Brazilian civil justice are to be found in the public sector, in all its areas (cities, states, and the federal government) and among financial institutions (banks, insurance and credit card companies).[14]

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 behaviour is self-destructive, because it not only increases the expenses of the judicial system but also overburdens it with unnecessary work, bringing the economy to a halt, making the country less competitive, generating less wealth, and consequently raising less 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', or 'pilot cases', or 'test cases' for the aggregation and resolution of repetitive claims.[15] A CNJ study has shown the impact that repetitive claims have in the slowing of Bra-

11. Luigi Ferrajoli argues that the economic crisis and the weakening of fundamental rights in Europe led to an increase of social inequality. *See* L. Ferrajoli, *La Democrazia Attraverso i Diritti. Il Costituzionalismo Garantista come Modello Teorico e come Progetto Politico*, Roma/Bari: Laterza (2013), at 154/155. 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* L. Ferrajoli, *A Democracia Através dos Direitos. O Constitucionalismo Garantista como Modelo Teórico e como Projeto Político*, A.A. de Souza, A. Salim, A.C. Neto, A.K. Trindade, H. Zaneti, Jr., & L. Menim (trans.). São Paulo: RT (2015).
12. Many Brazilian scholars, such as Barbosa Moreira, have been complaining for decades about the lack of judicial statistics. *See* J.C. Barbosa Moreira, 'A Emenda Constitucional nº 45 e o processo', in J.C. Barbosa Moreira, *Temas de Direito Processual. Nona série*, São Paulo: Saraiva (2007), at 21/36, esp. at 31 ff. Law 11.364/2006 created the Department of Judicial Research (DPJ), which produces the annual report *Justice in Numbers*, discussing the performance of the courts. The most recent was published in 2012. *See* <www.cnj.jus.br/images/pesquisas-judiciarias/Publicacoes/sumario_exec_jn2013.pdf> (accessed 30 July 2014).
13. *See* <www.acessoajustiça.gov.br> (accessed 5 August 2014).
14. *See Os 100 maiores litigantes*, Brasília: CNJ (2012). <www.cnj.jus.br/images/pesquisas-judiciarias/Publicacoes/100_maiores_litigantes.pdf> (accessed 27July 2014) (discussing the 100 biggest litigants in Brazil).
15. A.P. Cabral, 'A escolha da causa-piloto nos incidentes de resolução de processos repetitivos', *Revista de Processo*, São Paulo: RT (2014) 231, at 201; A.P. Cabral, 'O novo procedimento-modelo (MusterVerfahren) alemão: uma alternativa às ações coletivas', 147 *Revista de Processo*, São Paulo: RT, at 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).

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zilian civil justice and has highlighted the need to adopt standardised proceedings to resolve repetitive conflicts.[16] 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.[17] The study shows that, despite being a national tendency, the Performance Evaluation of the Judiciary (ADJ) is a recent device in the majority of the countries that were part of the study and faces resistance because of the inadequacy and imprecision of certain evaluation criteria.

The study pointed to negative and positive aspects of the performance evaluation. For example, one negative aspect that lead 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 and it is not possible to adopt uniform criteria without taking into consideration the differences between complex proceedings (like class actions and bankruptcy, for example) and simpler proceedings (like family conflicts and collection claims).

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

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 the judicial activity by providing transparency, speed, efficiency, legal certainty, and a reduction in the amount of litigation. This would simultaneously accomplish both important elements of legal reform in Brazil: efficiency and legal certainty.

Unfortunately, the statistics available are not yet enough to address the most basic questions necessary for a correct understanding of the performance of the Brazilian Judiciary. Basic questions like the duration and cost of proceedings in Brazil are not yet clearly answered.

As an exception to the general state of disinformation, an official study identified the average duration of tax enforcement proceedings in federal courts. According to the 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 R$ 4,685.39 per proceeding, approximately U$ 1,976 dollars. Since the average collection claim is R$ 22,507.51 (about U$ 9,537 dollars), the average cost of tax enforcement proceedings in Brazil represent almost a quarter of the average value of the lawsuit.[18] Considering that the 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, contrary to the reality of civil proceeding between private parties and among private parties and the public sector. This demonstrates that it is necessary to correct something in the investment in access to justice, where we could spend less and obtain a more efficient justice system.

These studies are part of the movement started by the three branches of the Brazilian government in search for a more efficient and secure Judiciary, but the results are as yet inconclusive.

5 Efficiency and Legal Certainty versus Cost: Main Aspects of the Solution of the 'Crisis' of the Judiciary and an Important Political Initiative

As we demonstrated above, except for the Fiscal Responsibility Law there is no perceptible concern for austerity in the public expenses related to the Brazilian Justice System: the predominant concern has been efficiency and legal certainty.

The several recent law reform initiatives as well as the bill for a new Code of Civil Procedure (NCPC) reveal a concern to provide several techniques to address simple matters, small claims, and special proceedings for collecting debts based on documental evidence. For example, Congress improved the microsystem of small claims courts (called 'special civil courts' or *juizados especiais cíveis*) and created the 'monitory action', the binding precedents, and proceedings for the aggregation and resolution of repetitive conflicts related only to issues of law. 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 proceed-

16. *See* the general report by the Department of Judicial Research (DPJ), CNJ/DPJ, *Demandas repetitivas e a morosidade na justiça cível brasileira*, Brasília: CNJ/DPJ (2011), <www.cnj.jus.br/images/pesquisas-judiciarias/Publicacoes/pesq_sintese_morosidade_dpj.pdf> (accessed 27 July 2014).
17. *See* CNJ/DPJ, *Avaliação do desempenho judicial: desafios, experiências internacionais e perspectivas*, Brasília: CNJ/DPJ (2011), <www.cnj.jus.br/images/pesquisas-judiciarias/Publicacoes/40-211-1-PB.pdf> (accessed 27 July 2014).
18. IPEA, *Comunicados do IPEA nº 83. Custo unitário do processo de execução fiscal na Justiça Federal*, Brasília: IPEA (2011), <www.ipea.gov.br/portal/images/stories/PDFs/comunicado/110331_comunicadoipea83.pdf> (accessed 31 July 2014). *See also* the general report the Department of Judicial Research (DPJ), CNJ/DPJ, *A execução fiscal no Brasil e o impacto no Judiciário*, Brasília: CNJ/DPJ (2001), <www.cnj.jus.br/images/pesquisas-judiciarias/Publicacoes/pesq_sintese_exec_fiscal_dpj.pdf> (accessed 27 July 2014) (discussing fiscal enforcement, especially the research done by UFRGS and IPEA).

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ings directly even in the absence of a judgment (which is called 'judicial executive title').

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. In addition, there is a budding but substantial ideological movement to reduce the culture of litigiousness through the techniques of mediation, conciliation, and reduced involvement of courts in certain matters like family law and wills.[19]

But the reduction of costs associated with the jurisdictional activity is not a main concern in Brazil – if it is a concern at all, it is an indirect objective that is rarely discussed. The main debate is on procedural efficiency, access to justice, and legal certainty.

As mentioned above, the need for the improvement of the Brazilian Judiciary lead to the creation of a special department under the Ministry of Justice (*Secretaria de Reforma do Poder Judiciario*) to be a permanent department responsible for centralising and proposing governmental initiatives to improve procedural rules and access to justice. In 2004, the three branches of the Brazilian Federal Government signed a political agreement, known as the Republican Pact (*Pacto Republicano*), to promote a faster and more efficient Judiciary. These efforts led to several law reform initiatives, including amendments to the Code of Civil Procedure, the broadening of the jurisdiction of small-claims courts, and even to a major Constitutional Amendment (EC 45/2004).

Together, the joint initiatives of the Executive, Legislative, and Judiciary (Republican Pact) had a considerable impact on society because in Brazil, despite it being a federal system, only the Federal Government may enact legislation about procedural matters (Art. 22, I, CF/88). Since state courts apply the federally enacted Code of Civil Procedure, these initiatives have a direct impact in state courts throughout the country. The main objectives of these initiatives are to strengthen the protection of human rights, to increase efficiency in the jurisdictional service (reasonable duration of process and prevention of conflicts), to protect the universal access to justice (especially of the poor), to strengthen Rule of Law (*Estado Democrático de Direito*, *État de droit*), and to protect the individual members of the judicial system.

The concern with efficiency and legal certainty, however, 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. These criticisms may be extended to Art. 8 of the CPC/2015, which also refers to 'efficiency'.[20] These criticisms are 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.

Five years after the first Republican Pact was signed, the three branches of government signed the Second Republican Pact. In order to promote access to justice, it provided for the strengthening of the Public Defenders and of 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 (nor large companies) against the state and municipality. 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.[21] 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. The creation in 2009 of courts for small-claims against states and municipalities was the direct result of the above-mentioned CNJ study that demonstrated that the public sector is one of the main litigators in civil courts.[22]

After that, there was 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 (Art. 174).

The current debate in Brazil revolves around the broadening of these simplified procedures and mass forms of legal proceedings. The main scholarly concern is whether the excessive simplification and massification may reduce the quality of substantial justice and whether it is a violation of the procedural guarantees provided in the

19. Art. 3, §§ 1 to 3 of the CPC/2015 recognises as a fundamental norm the encouragement of alternative dispute resolution, such as arbitration and consensual resolution (mediation, conciliation, etc.). In the administrative area, *see* Resolution 125/2010 from the National Council of Justice (CNJ) and Resolution 118.2014 of the National Council of Public Ministry (CJMP).

20. Art. 8 of the CPC/2015 ('in applying the legal order, the judge will take into consideration the social objectives and the demands of the common welfare, protecting and promoting the dignity of the human being and observing proportionality, reasonability, legality, publicity, and efficiency').

21. *See* A. Gidi, *Rumo a um Código de Processo Civil Coletivo. A Codificação das Ações Coletivas no Brasil*, Rio de Janeiro: Forense (2008) (discussing and critiquing the main projects for Class Action Codes in Brazil); F. Didier, Jr., and H. Zaneti, Jr., *Curso de Direito Processual Civil. Processo Coletivo*, 9th edn., Salvador: Jus Podivm (2014), IV (*idem*, and transcribing in appendix the main projects).

22. The full text of the Republican Pact can be found at <www.planalto.gov.br/ccivil_03/Outros/IIpacto.htm> (accessed in 26 July 2014).

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Brazilian Constitution.[23] This is the current debate, 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. In addition, the overall cost of litigation is low. This is a further incentive to the proposal of meritless claims (by plaintiffs) and the meritless resistance to the fulfilment of legitimate claims (by defendants). This, in turn, overburdens the Judiciary and increases the expenses, generating a vicious circle that is difficult to stop.

The need for austerity, therefore, has not been identified in the Brazilian political debate so far. As a matter of fact, it has been completely ignored, even if 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, individuals). 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 US common law) and an infra-constitutional structure (with 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.

6 The Peculiarities of the Brazilian Justice System: American Constitutional Structure versus European Infra-Constitutional Rules

The Brazilian civil procedure (infra-constitutional rules) belongs to the civil law tradition of Continental Europe, strongly influenced by Portuguese,[24] Italian, and German procedural traditions. However, the Brazilian constitutional matrix was profoundly influenced by the US Constitution, including its judicial organisation. This is the reason why Brazil does not have an Administrative Justice system (the conflicts between private parties and the State are decided by the Judiciary) and offer 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).[25]

This peculiarity generates a 'methodological paradox'.[26] 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. Both are considered civil claims and civil proceedings in a broad sense, and the civil procedure adopted is the same, but while the first is regulated by private law, the second is regulated by public law.[27] However, 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 being allowed to order the production of evidence *sua sponte* (Art. 370, CPC/2015). The parties retain the initiative to request a response from the Judiciary (*principio da demanda*, Art. 2º, CPC/2015), but the proceedings progress by official decree (*sua sponte*), with a strong trend to a public view of procedure.[28]

The Brazilian Justice system is concerned with the implementation of the fundamental rights of liberty and social rights, of groups and of individuals, of the protec-

23. *See, e.g.* F.G. Miranda Netto, 'Garantias do processo justo nos juizados especiais cíveis', in F.G. Miranda Netto and F.B. Rocha (orgs.), *Juizados Especiais Cíveis*, Rio de Janeiro: Lumen Juris (2010), at 49-69.
24. This vocation was identified by E.T. Liebman, *Istituti del diritto comune nel processo civile brasiliano*, in E.T. Liebman. *Problemi del processo civile*, Napoli: Morano (1962), at 490-516, esp. at 494 and 500.
25. *See* H. Zaneti, Jr., *Il valore vincolante dei precedenti*, Tesi di Dottorato, Università degli Studi di Roma Tre. Facoltà di Giurisprudenza. Scuola Dottorale Internazionale 'Tullio Ascarelli'. Tutor: Prof. Luigi Ferrajoli. Roma. 450 p. *See* Mattei, Ruskola, & Gidi, *Schlesinger's Comparative Law*, 7th edn., St Paul: Foundation Press (2009), at 523-53 (offering a comparative view of the administrative and constitutional justice system in the civil law tradition).
26. *See* C.R. Dinamarco, *Instituições de direito processual civil*, 3rd edn., São Paulo: Malheiros (2003) 1, at 176 ('from 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.')
27. *See* F.C. Pontes de Miranda, *Comentários ao Código de Processo Civil* (updated by Sergio Bermudes), 5th edn., Rio de Janeiro: Forense (1997) 1, at 46 ('the [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 …').
28. *See* C.R. Dinamarco, *Instituições de Direito Processual Civil*, 3rd edn., São Paulo: Malheiros (2003), at 168. 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 (Art. 190, allowing the parties to change the proceeding; Art. 191, allowing the parties and the judge to elaborate the calendar for the practice of procedural acts) and a judicial hearing to plan the proceeding (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.

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tion of the traditional subjective rights and of new legal situations that need adequate judicial protection. Indeed, Brazil has one of the most developed class action systems outside the common law tradition.[29]

Slowly, legal reform has directed the Brazilian procedural system towards the resolution of repetitive claims and to the establishment of binding precedents, like appeals to the Superior Tribunal of Justice (highest court for infra-constitutional matters) and to the Supreme Federal Court (highest court for constitutional matters). Moreover, the bill for the New Code of Civil Procedure provides for binding precedents (Arts. 926 and 927) and a proceeding for the resolution of repetitive claims (Art. 928).[30]

Because 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.

Although it is a recent development, even the previous law strengthened the normative force of court interpretation: an appeal 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 (Art. 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 (Arts. 103 and 103-A, CF/88).

The trend is clearly towards further strengthening the binding effect of decisions of superior courts and the techniques for the resolution of repetitive litigation. The trend is also towards strengthening the microsystem of small-claims courts. 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 will increase the power of the judge and of the parties, but will also increase the judges' responsibility and parties' obligations.

29. *See* A. Gidi, *A Class Action como instrumento de Tutela Coletiva dos Direitos. As ações coletivas em uma perspectiva comparada*, São Paulo: RT (2007); A.G.C. Mendes, *Ações Coletivas no Direito Comparado e Nacional*, 2nd edn., São Paulo: RT (2009); A. Gidi, *Rumo a um Código de Processo Civil Coletivo. A Codificação das Ações Coletivas no Brasil*, Rio de Janeiro: Forense (2008); H. Zaneti, Jr., and F. Didier, Jr., *Curso de Direito Processual Civil. Processo Coletivo*, 9th edn., Salvador: Jus Podivm (2014).

30. Binding precedents were analysed in H. Zaneti, Jr., *Il valore vincolante dei precedenti*, Tesi di Dottorato, Università degli Studi di Roma Tre. Facoltà di Giurisprudenzam, Scuola Dottorale Internazionale 'Tullio Ascarelli', Tutor: Prof. Luigi Ferrajoli. Roma at 450; H. Zaneti, Jr., *O Valor Vinculante dos Precedentes. O Modelo Garantista (MG) e a Redução da Discricionariedade Judicial. Uma Teoria dos Precedentes Normativos Formalmente Vinculantes*, Salvador: Jus Podivm (2014).

7 Lawyer Representation and Free Justice

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 of lawsuits and a growing number of law schools, Brazil is one of the countries with the highest number of lawyers in the world. In regular civil courts (*i.e.* not small-claims courts), professional representation by an attorney is mandatory. Self-representation in court is not allowed: no one may bring a lawsuit *pro se*. Rather than a conscious policy choice, this was the result of strong lobbying by the Brazilian Bar Association (*Ordem dos Advogados do Brasil – OAB*) during the drafting of the 1988 Constitution. The Brazilian Bar Association actively participated in the process of redemocratisation of Brazil in the 1980s, 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 the lawyer was 'essential to the administration of justice': 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, the rule is that the parties must advance the payment of attorney's fees, court fees, and the necessary expenses dealing with the production of evidence, such as advancing the payment of expert witnesses. At the end of the proceeding, these costs will be reimbursed by the losing party (fee shifting). 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 is no fee shifting. This rule is valid only in the first instance, not on appeal. The same rules apply in class actions: no court fees and no fee shifting. In addition, there is full legal aid for individuals and companies that need financial support.

Those considered 'in need' under the law qualify to be represented by the Public Defender, a governmental agency. The public defenders are chosen in a highly selective public exam and appointed for life. The Public Defenders must give legal advice and judicial representation in all instances of the court system to people 'in need'.

Slowly, all states have been creating State Public Defenders. In the federal sphere, the Federal Government created the Federal Public Defenders (*Defensoria Publica da Uniao*). Although the ideal of full legal aid has not as yet been fulfilled,[31] law reform and increasing

31. A 2013 study demonstrated the 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. <www.ipea.gov.br/sites/mapadefensoria>.

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investment in the area means that the progress made towards full legal aid is considerable.

In a region without Public Defenders, the role of lawyers for the poor may be exercised by Public Prosecutors or by court-appointed attorneys. Even if the parties are represented by private attorneys of their choice (paid or not), they may still request legal aid. This means that the court fees will be waived and that they will not be liable for attorney's fee shifting in case they lose.[32]

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 justice for litigants. But since there is no free lunch, a Justice entirely dispensed by public entities must be entirely financed by taxes paid by citizens: this may not be a sustainable recipe in the long run, as the European reality has demonstrated.

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. But there must be control and we must avoid excesses, so that the expenses do not soar out of control and end up bringing 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. Moreover, as we have mentioned before, the main problem of 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. 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). This is not a major obstacle to access to justice, but is necessary to force the Public Administration to be effective without the Judiciary.

8 The Available Simplified Proceedings: Small-Claims Courts, Monitory Action, *in Limine* Judgement, 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.

The laws reduced the need for court involvement in family law, wills, and notary activities, which led to a debureaucratisation of several proceedings, like insolvency of companies, changes in public registry, probate, and divorce. 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 (Arts. 982, 983, 1.031 and 1.124-A, CPC). This avoids unnecessarily long and costly judicial proceedings to resolve consensual matters. Yet, contradictorily, the presence of an attorney is still mandatory, 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.[33] They have jurisdiction to decide cases of less complexity, giving more freedom to the parties and more procedural powers to the judge.[34]

There is a microsystem of three small-claims courts created by three statutes, enacted within a 15-year period: 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 12.153/09). 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.[35]

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.[36] 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. In several aspects, the courts adopt different rules.[37]

One of the many differences amongst 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 dollars). Its jurisdiction is limited to cases of less complexity, such as

32. This matter is regulated in the CPC/2015. *See* Arts. 98 to 102, demonstrating the efficient lobby of the public defenders in Congress.

33. *See* O.A.B.d. Silva, *Juizado de pequenas causas*, Porto Alegre: LeJur (1985); F.B. Rocha, *Manual dos juizados especiais cíveis estaduais*, 6th edn, São Paulo: Atlas (2012) (discussing the history of the small-claims courts, originally created in Brazil in 1984 by Law n. 7.244).
34. C.R. Dinamarco, *Instituições de Direito Processual Civil*, 3rd edn., São Paulo: Malheiros (2003), at 168.
35. F.B. Rocha, *Manual dos juizados especiais cíveis estaduais*, 6th edn., São Paulo: Atlas (2012).
36. *Ibid*.
37. *See* F.C. Dall'Alba, *Curso de juizados especiais. Juizado especial cível, juizado especial federal, juizado especial da Fazenda Pública*, Belo Horizonte: Editora Fórum (2011) (offering a comprehensive comparison between all types of small-claims courts in Brazil).

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summary proceeding cases. The two Public Claims Small-Claims Courts, both federal and state (*Juizados Especiais Federais* and *Juizados Especiais da Fazenda Publica*) decide public claim cases up to sixty times the monthly minimum wage (about 18,900 dollars) and are not limited to cases of less complexity.

The repetition of the word 'claim' in our English translation of the small-claims courts 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 'public claims' (which are claims of a public nature against the states and against the federal government).

Another difference amongst 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 in it or in the regular courts. 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. In the two Public Claims Small-Claims Courts, both federal and state the statute is clear: the jurisdiction is absolute (exclusive). Therefore, any claim over the jurisdictional amount must be brought in the regular courts.

Another difference amongst the three types of small-claims courts in Brazil is that each statute lists subject matters that are excluded. 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.

There are also structural differences amongst 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).

Another difference amongst the three types of small-claims courts in Brazil is the need for legal representation. The general rule is that the parties do not need to be represented by lawyers. Initially, lawyers reacted against 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 U$ 6,300.00), but a lawyer is essential in claims between twenty and forty times the monthly minimum wage.

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

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). 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 (Art. 5, XXXV, CF/88).

In all three types of small-claims courts, interlocutory decisions are not appealable except by an independent writ (*mandado de segurança*).[38]

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. The appeal has only devolutive effect (*i.e.* no suspensive effect), but the judge may stay the proceeding to avoid irreversible damage.

One of the most interesting features of the proceedings in small-claims courts is the possibility of uniformisation of the decisions of the appeal panels through the resolution of repetitive appeals.[39] Curiously, the proceeding for uniformisation 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 uniformisation of interpretation of federal law whenever there is a conflict in the appellate panels relating to substantive law. The uniformisation may be regional or national (Law 10.259/2001 Art. 14 and Law 12.153/2009, Arts. 18 and 19).

There is no specific provision of uniformisation in the statute regulating the Civil Claims Small-Claims Court,[40] but whenever there is conflict of interpretation between the appellate panels, the parties may take the case to the Brazilian Supreme Court (*Superior Tribunal*

38. But *see* B.G. Redondo, 'Da recorribilidade das decisões interlocutórias nos Juizados Especiais Cíveis Federais e Estaduais', in F.G. Miranda Netto and F.B. Rocha (orgs.), *Juizados Especiais Cíveis*, Rio de Janeiro: Lumen Juris (2010), at 181-206.
39. This proceeding was inspired by the German model proceeding (*Musterverfahren*), although some commentators also compare it with the English Group Litigation Order (GLO). *See* A.d.P. Cabral, 'O novo procedimento-modelo (Musterverfahren) alemão: uma alternativa às ações coletivas', 147 *Revista de Processo*, at 123 (2007), item 4. *See* A.A.A. Bastos, 'A estabilidade das decisões judiciais como elemento contributivo para o acesso à justiça e para o desenvolvimento econômico', 227 *Revista de Processo*, at 295 (2014); G.R. Amaral, 'Efetividade, segurança, massificação e a proposta de um 'incidente de resolução de demandas repetitivas'', 196 *Revista de Processo*, at 237 (2011); A.P. Cabral, 'A escolha da causa-piloto nos incidentes de resolução de processos repetitivos'. 231 *Revista de Processo*, at 201 (2014); D.J.C. Nunes, 'Novo enfoque para as tutelas diferenciadas no Brasil? Diferenciação procedimental a partir da diversidade de litigiosidades.' 180 *Revista de Processo*, at 109 (2010).
40. *See* F.B. Rocha, above n. 35, at 260-1.

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de Justica – STJ).[41] A Bill has been proposed to provide a National Uniformisation Panel to provide a proceeding similar to the Public Claims Small-Claims Courts (Bill 5.741/2013). There is a strong reaction to this project, however, especially from an institution that represents the small-claims courts (FONAJE)[42] and the Consumer National Secretariat (SENACON).[43] The main arguments against the bill are: (i) in practice only major corporations will be able to finance the uniformisation proceeding; (ii) the uniformisation panels will stop the natural maturation of the subject debated in the several first and second instance courts; and (iii) the uniformisation panels would be a 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.

Another important development is the monitory action. The Brazilian monitory action is an action to be used by a creditor of a certain amount, a fungible good or a mobile good.[44] If the creditor presents a document without executive force, he or she can use that action to demand the payment or delivery of the good in 15 days. If the debtor does not present a defence, the creditor obtains an 'executive judicial title' and may enforce it in court (Arts. 1.102-A, 1.102-B, and 1.102-C, CPC/1973).

The monitory proceeding is not mandatory: the creditor may choose the traditional civil proceeding. 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) (Art. 1.102-C, § 1, CPC).

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 deburocratisation of the justice system.[45] The European order for payment is applicable since 2008 in civil and commercial matters, independently of the type of court. We need profound law reforms that change the structure of legal proceedings, even with unwanted collateral effects. We need to preserve the procedural guarantees, but adapt them to the current needs of society.

Finally, there is the *in limine* judgement against the plaintiff whenever the issue to be decided is a legal matter and the court has previously decided a similar issue. 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. If the plaintiff appeals, the judge will have 5 days to reconsider his or her decision. Only then will the defendant be served with process to present an answer to the appeal (Art. 285-A, CPC/1973).

9 'Age of Austerity' in Brazilian Civil Justice? A Needed Balance

Brazil has always lived the austerity-necessity because it has always been a country without adequate resources, and where there has always been deeply ingrained social inequality. But the current 'Era of Austerity' or 'financial crisis' (austerity-control) has not reached Brazil yet, or at least we have not felt the effects yet. There are clear signs that the Brazilian economy is slowing down, but this has not affected the behaviour of the government regarding the Judiciary and incumbent expenses. As we have demonstrated, the main concern in Brazil is efficiency and legal certainty. This means more investment in the institutions of the administration of justice, like the Judiciary, the Public Prosecutor, and the Public Defender, as well in a cheap justice, almost free, which stimulate litigiousness.

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

41. *See* decisions from STF in RE 571.572-8/BA, the Res. 12/2009 STJ, and case law thereafter which, in face of the absence of appeals of the small-claims courts understood that an appeal was allowed when the decision of the small-claims courts were contrary to the dominant case law from STJ. *See* E. Cambi and V.S. Mingati, 'Nova hipótese de cabimento da reclamação, protagonismo judiciário e segurança jurídica', 196 *Revista de Processo*, at 295 (2011).

42. *See* <www.fonaje.org.br/site/> (accessed 06 August 2014) (where FONAJE repudiates this project and informs that there are 45 million lawsuits in the small-claims court system, 36 million of which are consumer protection suits).

43. *See* <www.fonaje.org.br/site/wp-content/uploads/2013/11/SENACON-Turma-Nacional-de-Uniformiza%C3%A7%C3%A3o.pdf> (accessed 06 August 2014).

44. *See* C.R. Dinamarco, *A reforma do Código de Processo Civil*, 2nd edn., São Paulo: Malheiros (1995), at 230. Sobre a ação monitória no Brasil consultar: TUCCI, José Rogério Cruz e. *Ação monitória.* 2nd edn. São Paulo: Revista dos Tribunais (1997); E. Talamini, *Tutela monitória: a ação monitória (Lei 9.079/95)*, 2nd edn., São Paulo: Revista dos Tribunais (2001); L.G. Marinoni and D. Mitidiero, *Código de Processo Civil: Comentado artigo por artigo*, São Paulo: Revista dos Tribunais (2008); H. Zaneti, Jr., and R. Mazzei, 'Ação monitória: primeiras impressões após a Lei n. 11.232/05', in P. Hoffman and L.F.d.S. Ribeiro (org.), *Processo de Execução Civil: Modificações da Lei 11.232/05*, São Paulo: Quartier Latin (2006), at 249-74. 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 Justica*). The new Code of Civil Procedure broadens the admissibility of monitory actions also to enforce obligations to do and not do (Arts. 700 and 702).

45. *See* Regulation 1896/2006, <http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l16023_pt.htm> (accessed 30 July 2014). ('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 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.')

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of the 'free justice', the fact that certain proceedings designed to facilitate the administration of justice are not mandatory (such as the small-claims courts), as well as the historic need to provide the population with basic fundamental rights (such as health, education, environment, honest administration, respect of consumers).

The solutions proposed by the legislature, as a consequence of an extremely liberal vision of the access to justice, as an individual right that is indisposable (*droit indisponible*) and absolute and not as a public service, ended up worsening the problem, creating what we can identify as an 'Era of Indulgence.' In the Era of Indulgence, money is spent and access to justice is not obtained because of the judiciary backlog generated by the access to justice. Moreover, the backlog overburdens the public coffers with unnecessary expenses.

Only recently did the legislature start to reduce the unrestricted access to justice through filters in appeals, mandatory simplified proceedings, aggregation of repetitive cases (test cases), binding precedents, etc. But all of this was done not to obtain 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.

Unfortunately, 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. In the future, the 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 without obtaining a proportional increase in the efficiency and effectiveness of the judicial system. This is the general picture of the Brazilian Justice System so far.

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