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# ARE THE HAVES GETTING EVEN MORE AHEAD THAN EVER?

## Reflections on the political choices concerning access to justice in Brazil in the search of a new agenda

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## ABSTRACT

This paper has the intention of rescuing and re-signifying the agenda of access to justice from the perspective of the political choices that motivated important legal frameworks in Brazil, specifically the creation of the small claims courts, class action regulations, the Judiciary Reform and the promulgation of a New Civil Procedural code. The focus of this study is not only to look at who access justice and how they do it, but also to the political choices that have been made concerning access to justice in Brazil in recent years, having as premise that the *blanket is short* and access for all is an unfeasible goal. The purpose of this article is to analyze normative texts and legislative debates that preceded relevant legal frameworks to extract and reflect upon the (explicit or implicit) political choices that impact access to justice in Brazil. Considering that these political choices greatly impact the relationship and imbalance of powers between RPs and OSs in the litigation game, the paper analyzed the winning and defeated normative discourses behind the legal frameworks related to access to justice.

## KEYWORDS

The access to justice in Brazil. Political and legislative choices. The winning and defeated normative discourses. The redistribution of access to justice: access for all as an unfeasible goal

## SUMMARY



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## INTRODUCTION

This article has the same starting point as the research presented by the authors, alongside with Paulo Eduardo da Silva, in the 2015 Law and Society Annual Meeting: what are the limits and possibilities for litigation to have a redistributive potential regarding access to justice in Brazil? Drawing upon this question, the goal of the previous article, inspired by Marc Galanter's reflections on the redistributive possibilities of civil procedure and the imbalance between the litigants (GALANTER, 1974), was to analyze the Brazilian litigation scenario, its players, and the role they played in the litigation game.

Still inspired by Marc Galanter previous and more recent reflections, this article is a continuity of the previous one, but with the additional intention of rescuing and re-signifying the agenda of access to justice from the perspective of the political choices that motivated important legal frameworks in Brazil, specifically the creation of the *Juizados Especiais Cíveis* (small claims courts) in 1984; class action regulations; the Judiciary Reform between 2004 and 2009 and the promulgation of a New Civil Procedural code in 2015.

Thus, the focus of this study is not only to look at **who** access justice and **how** they do it, but also to the **political choices** that have been made concerning access to justice in Brazil in recent years, having as premise that the *blanket is short* and access for all is an unfeasible goal (GALANTER, 2010). According to Galanter, the choices made in terms of accessing justice are political distributive decisions, and borders of access and of injustice are constantly shifting. The purpose of this article is to analyze normative texts and legislative debates that preceded relevant legal frameworks to extract and reflect upon the (explicit or implicit) political choices that impact access to justice in Brazil.

To carry out such intent, we start from the premise that there is no political neutrality in the legislative choices. Therefore, besides the normative text itself, we also analyze its social, economic, and political context, its legitimizing discourses, previous bills (that often contained antagonistic versions arising from legislature debates), media reports and academic references related to the four beforementioned legal frameworks: *juizados especiais cíveis* and class action (item 2); Constitutional Amendment 45/2004 on Judicial Reform (item 3) and the New Code of Civil Procedure (item 4).

Considering that these political choices greatly impact the relationship and imbalance of powers between RPs and OSs repetitive litigation game, the article will analyze the winning and defeated normative discourses behind the legal frameworks related to access to justice.

Thus, the hypothesis that arises is that the redistribution of access to justice was no longer present in the political choices made in Brazil since the 1990s, in view of the neoliberal wave that marked the judicial reform agenda. Such scenario contrasts with the previous legal framework (that of the class action law and of the creation of special courts in Brazil), where access to justice was at the epicenter of legal debates. Discourses that emphasize greater efficiency of courts and that blame litigiousness for its congestion and malfunctioning can be accounted for such paradigmatic transition, leaving aside the paradox of exclusion and absence that is perpetrated in Brazilian's judicial system, where a few repeat players are responsible for most of the case overload, while the most vulnerable groups are still secluded from official institutions.

## 1. ACCESS TO JUSTICE IN BRAZIL: NORMATIVE DISCOURSES AND DIFFERENT AGENDAS

In times where the expression "access to justice" has acquired multiple and sometimes even contradictory meanings, it is necessary to discuss what is the access to justice that we intend to address.

In Brazil, it is recurrent to those who use the notion of access to justice as a theoretical framework refer to the classic (and still relevant) comparative research conducted by Mauro Cappelletti and Bryant Garth in the well-known Project Florence. The so-called renewal waves that were described in the final report are

repeated to exhaustion in research projects in procedural law, as if the diagnosis made in the late 1970s – which, by the way, did not include data on Brazil and was translated into Portuguese only in 1988 (CAPPELLETTI, GARTH, trans. NORTHFLEET, 1988) – was still current.

Despite the outdated repetition of Cappelletti and Garth's text, fact is that the Brazilian academic research that derived from the "access to justice" theoretical premise has expanded and consolidated over the years. However, probably due to an uncritical repetition, its content acquired such fluidity that it reflected sometimes antagonistic values. Today, it is possible to identify claims resting on access to justice both for and against the suspension of individual claims in favor of sample trialing and of precedent formation. It is necessary, therefore, to define a meaning for access to justice in this paper, so that the hypothesis raised herein (that access to justice ceased to be the guideline of legislative reforms in the last decades), can be validly investigated.

In Brazil, access to justice is a social right provided for in the Federal Constitution of 1988, promulgated in a period of democratization after a dictatorial regime that made the Judiciary almost inaccessible to Brazilians for about two decades. The right to access justice is provided for in Article 5$^{th}$, XXXV, which establishes that no law can excluded threats or injuries from judicial adjudication. This is a distinctive feature of the Brazilian law and by which access to justice ought to be an enforceable right, both in its substantial dimension, of promoting social transformation, and in its procedural one, consistent with the expansion, rationalization, and control of governmental apparatus (institutions and procedures) aimed at the realization of constitutional rights

The way the work of Cappelletti and Garth was read in Brazil, nevertheless, turned the social right of access to justice into a sort of a *mantra* inserted into a utopian and acritical claim in favor of the universalization of access. Such claim had perhaps a symbolic relevance in a moment of conceptualizing a model of the Welfare State in the context of the 1988 Federal Constitution. However, unlike the European Welfare State that enticed the reflections consolidated at the Florence Project, Brazil lived only the promise of a Welfare State. After the dismantling of the Developmentalist State, a neoliberal state model of privatization and market oriented policies was implemented, which had a direct impact on the judicial and procedural reforms that followed the Federal Constitution of 1988.

For this paper, access to justice must continue to be perceived as a social right, but one that ought to be implemented in very different social, political, and economic context than that of the Florence Project. In that sense, unlike what Cappelletti and Garth tried to sustain by fostering a "universal movement of access to justice", access to justice, like all rights that require state policies, depends on limited resources, and must rely upon distributive political choices to guide institutional and normative designs aimed at distributing such right to certain players. In other words, an access to justice agenda that makes sense today in Brazil should consider political choices and the context in which they are inserted, as well as the interplay of interests in the legislative procedure that culminates in both substantive and procedural regulations.

Procedural law, which has long attempted to claim a technical neutrality, is certainly not immune from the dominant political and economic discourses and influences of litigation players. Brazilian studies, however, are not keen at addressing the political choices and the interests at stake in matters of civil procedural law, given the departmentalization still predominant in the superior educational system, where academic research takes place in a compartmentalized way. Studying civil procedure in Brazil often means interpreting normative provisions rather than critically questioning them from a more sociological and political perspective.

In the previous study, we discussed how the distribution of access in Brazilian justice currently favors repeat players, responsible for a significant portion of the contingent of lawsuits that causes the overload of the justice system, and that do not "derive from the proliferation of interpersonal conflicts, but from disputes involving certain public and private players, who resort to the courts or are sued by individuals in cases that deal with similar questions of fact and/or of law, given the magnitude and scope of the activities of the company or public entity involved" (GABBAY et al., 2017, p. 5). It is to be expected, therefore, that the recent political choices concerning access to justice in Brazil were also influenced by the discourses and interests of these repeat players, who are, after all, the main clients of the Brazilian justice system. Our hypothesis, once again, is that these reforms have gradually transformed the redistributive guideline of social right into a *non-issue*.

## 2. "LAW WILL PROVIDE FOR EVERY HARM, HOWEVER SMALL IT MAY BE": THE ACCESS TO JUSTICE TRIUMPH

> "The small claims courts are aimed at transforming the mentality according to which justice is slow, expensive, and complicated... rescuing the popular credibility that the Judiciary deserves and restoring the people's, especially in the middle and lower classes, the poor, that is, the common citizen, their trust in Justice and the fact that the law will provide for every harm, however small it may be" (WATANABE, 1985, p. 2)

As above mentioned, the 1980s was a period of democratization in Brazil, after two decades of dictatorship. This historical fact in key to understand how the access to justice agenda was addressed by the legislature at the time. In that sense, according to JUNQUEIRA (1996, p. 390-391), although it was possible to observe in the 1980s an alignment between Brazilian legislative changes and the global access to justice movement (described in the waves of the Cappelletti and Garth Florence Project report), the Brazilian access to justice movement was not influenced by a crisis of the Welfare State, but by the political opening and the strengthening of the social movements, that fought for the assurance of basic rights to Brazilian citizens after years of authoritarian rule. The period of democratization was thus marked by the vindication of civil and social rights by social movements, with the strikes in the late 1970s and social reorganizations that followed. This was a fundamental background to identify the nature of the then prominent legal discussions on the issue of access to justice, which were strongly influenced by the work of Boaventura de Sousa Santos and his reflections on legal pluralism (SANTOS, 2014).

Influenced by these academic hallmarks, until the mid-1980s, the most relevant normative changes were driven by the intent of designing more informal mechanisms for individual disputes of lesser complexity and collective claims.

The clearest example of this approach can be extracted from the exposition of motifs (*exposição de motivos*) of the Law n. 7.244/1984, which created the small claims courts (*juizados de pequenas causas*). In its content, the legislature assigns its view on the most common problems in terms of civil courts judicial design:

(a) inadequacy of the current structure of the Judiciary to deal with the already common individual disputes, consistent with a classical conceptual of individual claims;

(b) insufficient regulation, both substantial and procedural, concerning collective disputes that, at that time, were not regulated by a specific statute;

(c) inadequacy of the procedural rules for small claims, so that courts are not able to provide for a cheap and fast solution for such disputes.

Concerning, specifically, the latter, the exposition of motifs is clear to assign that "it affects, as a rule, humble people, with no economic means to bear the costs and delays of a lawsuit". In that sense, the legislature asserts that "a merely formal right to access the Judiciary, without providing for basic conditions to addressing courts, does not attend one of the most basic principles of democracy, which is the adjudication of individual rights". The exposition of motifs also discusses that the urbanization of Brazilian population at the time was a cause of the escalation of *latent litigiousness* that purported the design of more accessible official forums:

> The increase of demographic concentration in urban areas, alongside with the fast growing of production and consumption of products and services, cause the escalation and multiplication of conflicts, especially in the field of economic relations.

The text shows clearly that the political choice that motivated the creation of the small claims courts in Brazil aimed at those who were distanced from the courts by formal and financial obstacles. Its goal was to provide them access to official mechanisms of dispute resolution (both adjudicative and consensual) as means to democratize access and inhibit violence and self-defense acts motivated by conflicts that did not find their way into the justice system:

> When such conflicts are left unresolved, they become a source of social tension and may easily be transformed into an anti-social behavior. It is necessary, therefore, to facilitate access to justice to the common person, removing all imposed. obstacles. High costs, delays and the almost certainty of the unfeasibility or uselessness of adjudication are restrictive elements, and its elimination is the fundamental core of the creation of a new judicial procedure and

the institution designed to apply such new procedural rules, the Small Claims Court.

Similarly, and still in the wake of democratization and of the then new Federal Constitution, the Class Action Act (Lei n. 7.437/1984) significantly enhanced the possibilities of bringing collective suits of great social relevance to courts. By then, as JUNQUEIRA (1996) also points out, the newly born Brazilian Law and Society field criticized the essentially individualistic approach of civil procedure rules and the conservative streak of Brazilian courts at the time, which were deemed as inaccessible and incapable of dealing with complex conflicts, especially when involving the vulnerable and low-income population[4]. These reflections influenced academic research that were relevant to a normative approach to this matter, which was the devising of collective actions in Brazil, similar the north American class actions, but in which certain public and private entities hold legal standing to file collective suits on behalf of groups and classes.

However, looking once again at the exposition of motifs (*exposição de motivos*) of the bills that were discussed by the National Congress at the time (PL 3034/1984 e 7347/1985), one cannot grasp so clearly the influence of the access to justice agenda, such as in the small claims legislative debate. The main divergence between the two versions revolves around knowing who would hold legal standing to represent the interests of groups and classes in a collective suit. In the end, the proposal set forth by the Bill n. 7347/985 prevailed, resulting in the Class Action Act (*Lei de Ação Civil Pública*), which provides for a hybrid legitimacy approach, in which both public (public prosecutor's office – *Ministério Público*, State, Municipalities, Federal Government[5]) and private (civil society organizations) entities may file class actions on behalf of groups and classes.

Denying individuals the legal standing to bring collective suits was justified by the belief that such procedural mechanism could be misused and that collective interests would not be adequately represented in courts[6]. Through the access to justice

[4] For a sociological approach on the issue, see FALCÃO, 1984, p. 79-101. A legal argument is discussed in GRINOVER, 1979, p. 25-44; GRINOVER, 1986a, p. 19-30; and GRINOVER, 1986b, p. 113-128; BASTOS, 1981, p. 36-44; BARBOSA MOREIRA, 1985, 55-77; BARBOSA MOREIRA, 1982, p. 7-19; NERY JR. 1983, p. 224-232; WATANABE, 1984, p. 197-206.

[5] And, more recently, the *Defensoria Pública* (public defender's office), met with great resistance by the *Ministério Público*, demonstrating, once again, the corporate interests that were involved in the discussion related to the legal standing for collective suits.

[6] BURLE FILHO, 2002, p. 407-408.

agenda standpoint, such (political) choice was considered a defeat, for not enabling the democratic participation and a major transformation in the civil procedure individualistic paradigm. On the other hand, the fact that civil society organizations can bring collective actions and represent social rights before courts of law was also seen as a possible incentive for civil society, in the process of political openness, to organize itself to defend its interests.

The history that followed showed that the more skeptical were right. Research from the 2000s pointed out that most of the collective suits in Brazil were filed by public prosecutors (MINISTÉRIO DA JUSTIÇA, 2007). Civil society has only recently begun to organize itself to promote strategic litigation in class actions, notably intending to claim social rights, such as housing, school, and health[7], but still faces the hardships of mobilizing and articulating collective interests, a complex issue that goes beyond the limits of this study.

Despite the setbacks motivated by corporate interests, the Class Action Act and, later, the Consumer Rights Code (*Código de Defesa do Consumidor),* enacted by the Law n. 8.078/1990, were important normative hallmarks that allowed for the judicialization of social collective rights, particularly environmental and consumer collective claims. It was an indisputable advance for the access to justice agenda that was predominant at the time, to the extent that the underrepresented social claims sustained by social movements and other interest groups began, for the first time, to be addressed by courts of law.

The access to justice distributive approach was so influent that the Brazilian class action procedural law was designed as to not impact the individual standing. Brazil's class action conforms an *opt in* model in which even when a class action is ruled against class interests, individuals can bring lawsuits against the defendant and discuss the same issues once again. This allows for the coexistence of class actions and (sometimes thousands) of individual claims on the same matter, e.g. a contractual clause in a bank standardized contract, the granting of a certain medicine by the State, etc. One can certainly question the rationality of this model on the grounds that different outcomes may arise in the same factual scenario (*lottery case law*), but it is

[7] A good example may be extracted from the narrative of the strategic litigation related to vacancies in childcare public institutions, according to RIZZI, Esther; XIMENES, Salomão. "Litigância estratégica para a promoção de políticas públicas: as ações em defesa do direito à educação infantil em São Paulo", em Justiça e Direitos Humanos – Experiências de assessoria jurídica popular, Curitiba: Terra de Direitos, 2010, pp. 105-127.

hard to deny that this was political choice that prioritized access to justice, in detriment of a more managerial approach. Thus, collective suits were introduced in Brazil without the purpose of reducing or managing caseloads.

Finally, it is impossible to address all the debate around access to justice that was carried out during the debates that led to the promulgation of the Federal Constitution in 1988, but still is important to point out the structural and normative changes that were then discussed and set forth. Redefining the separation of the branches of power and checks and balances mechanisms, the Federal Constitution provided for a strengthened and accessible Judiciary, one that would also be responsible to control the other branches (art. 92). Besides, it also reestructured the *Ministério Público* (arts. 127 to 130) and the *Defensoria Pública* (arts. 134 and 135), responsible for providing legal aid for those who cannot afford in both criminal and civil matters (as well as in class actions). There was also a clear statement towards recognizing legal aid as a fundamental right (art. 5th, LXXIV) and determining that the Federal and State governments ought to establish small claims courts throughout the country (art. 98).

In terms of the legislative debate, there are some interesting excerpts that translate the influence of the agenda of access to justice at the time. For instance, the discussion on the structuring of the Brazilian model of legal aid and of the *Defensoria Pública* stresses the importance of providing access to justice for those who are excluded from the justice system. During the debates, public defender (*defensora pública*) Suely Pletz Neder stated that

> access to justice is a fundamental instrument to secure the conquests that society intends to insert in the Federal Constitution. If we do not establish such mechanisms for 80% of the Brazilian people, everything we decide today at the Constituent Assembly will, at best, benefit only 20% of the population.

Similarly, congressman Jairo Carneiro also sustained that:

> People do not have access to justice because justice is distant from the people, both in terms of distance and of costs. Therefore, this is a scenario, it is a flash so that we realize the importance of the concerns addresses by this subcomission about how we can democratize justice, how we can promote the participation of the community, of the

> common citizen in rendering justice. We have already discussed popular courts, mediation, and other settings, such as company committees, so that justice can be done in the presence and with direct participation of the community. If we are a poor country – which is indisputable – we have a *Defensoria Pública* as a public office, with equal pay as the *Ministério Público* and the Judiciary.

The diagnosis of lack of access to the poorest layers of Brazilian population and the political choice of addressing such reality (*giving access to those who do not have it*) can be clearly extracted from the debates carried out during the Constituent Assembly, especially in the Subcommittee responsible for the restructuring of the justice system. This agenda, according to the hypothesis investigated herein, ended up losing its breath throughout the years and the following legislative reforms, giving room to another agenda informed by economical and managerial concerns, and not addressing those who do not have.

## 3. "PARTIALITY (…), UNPREDICTABILITY AND (..) DELAYS: THE EFFICIENCY DRIVEN DISCOURSE AND THE DEFEAT OF THE ACCESS TO JUSTICE AGENDA

> "Partiality, because it affects the sense of justice itself, and unpredictability, because it impacts the incentive to seek justice, are probably the worst problems. Delays also bring about serious consequences, both for encouraging agents to behave opportunistically, initiating lawsuits that have little chance of success, and for being unfair to the party that has had their rights injured" (PINHEIRO, 2009, p. 115)

The Constitutional Amendment n. 45/2004[8], which took 12 years to be approved and became known as the Judicial Reform, is a clear example of how the access to justice agenda was defeated by a discourse of a crisis in the Judiciary and of its negative economic impacts.

The original text of the bill (PEC n. 96/1992), from congressman Helio Bicudo, was subject to changes that relied upon the negative impacts of the problems of the Judiciary in economic development, such as delays, legal uncertainty, and impressibility of judicial rulings in relevant matters. According to CUNHA and ALMEIDA, there is a clear difference between the original bill and the one that was

[8] The original text is available at <http://www2.camara.leg.br/legin/fed/emecon/2004/emendaconstitucional-45-8-dezembro-2004-535274-exposicaodemotivos-149264-pl.html>. Access on June 8th 2017.

approved, since the one sent in 1992 had a goal of constructing a more democratic justice system, and address issues such as *in forma pauperis* requests, legal aid, judicial pluralism, fairness, and impartiality by creating small claims courts and strengthening legal aid services. The bill approved in 2004, however, provided for a set of judicial mechanisms that centralized decision-making, while also demanding courts to be responsive and transparent in terms of costs, time, and technical capacity, by rendering rational, coherent and predictable decisions.

According to KOERNER, it is possible to identity three major trends in the Judicial Reform, according to the arguments sustained by judges, intellectuals, and politicians: (i) a conservative-corporatist trend; (ii) those in favor of a democratic judicial system; and (iii) a defense of a minimal judicial system, a trend that prevailed at the time (1999, p. 11-26). The conservative-corporatist trend was dominant among the higher officials of the judicial system, and it sustained that a judicial crisis could be addressed without significant structural changes. The response relied mainly in changes in the judicial organization and in the legislation (specially the civil procedure regulations), especially through the provision of more financial resources to courts for them to reorganize themselves with no need of external control. Such arguments expressed an essentially technical and individualistic view of the judicial system, which was intended to solve individual disputes and ought to preserve a hierarchized relation between its higher and lower officials. Alternatively, a different discourse sustained a reform that would provide for a more democratic judicial system, and it argued that the current model led to the isolation of judges from political and social issues, preventing courts from transforming the society, both by adjudication as through political participation. Critics were targeted to the organization of the judicial system and to the rules of civil procedure, deemed as obstacles for access to justice by the impoverished, in such a way that most of the population do not enjoy the social rights granted by the Federal Constitution (KOERNER, 2012, p. 11-18).

The prevailing discourse, however, was that of a minimal judicial system, claimed by the Federal Government and its officials, though not explicitly demonstrating their acceptance of a neoliberal project of judicial reform. Pursuant to this essentially economic driven agenda, the judicial crisis relied on structural and managerial problems, as well as in the increasing rates of litigation, which were then

seen as results of urbanization and democratization[9]. In that sense, the Constitutional Amendment n. 45/2004 embraced the goal of adapting courts to globalization and to the pursuit of economic growth, supposedly by reducing costs and delays in judicial proceedings and reclaiming judicial certainty in court rulings[10].

In a context of political and economic opening, an instrumental view on the Judiciary prevailed, according to which courts should be efficient and rulings ought to be predictable to secure the execution of contracts, private property, and debt collection in Brazil. Unlike in the previous period of reforms, when legal and law and society scholars played a relevant role in the legislative debate, economists were the ones who strongly influenced the Judicial Reform[11], providing government with studies on the costs and risks of slow and unpredictable courts, with negative impacts in credit, foreign investment, increased bank spreads and higher interest loans, thus jeopardizing the development of economic activity and economic growth. Such arguments were in alignment with international organizations' guidelines for judicial reforms in developing countries, especially in Latin America: independence, coercion, and managerial efficiency (DAKOLIAS, 1997). This neoliberal approach of the World Bank and the International Monetary Fund was also adopted by the Brazilian Central Bank, according to the Technical Document n. 35, of May 2003. It discusses the relation between the credit market and the judicial system, stressing the increase in litigation caused an overload and delays that prevented investments and economic growth, to the extent that (i) "legal uncertainty increases administrative costs for financial institutions, notably inflating risk assessment for credit"; and (ii) "reduces the certainty of payment even when there are contractual collaterals, thus pressing the risk premium embedded in the spread", concluding, thus, that courts had a relevant role in stimulating default and hindering credit granting (BANCO CENTRAL DO BRASIL, 2003, p. 14-16).

Perhaps the most controversial issue in the Judicial Reform was that of the external control of the Judiciary, which eventually led to the creation of the National Council of Justice (*Conselho Nacional de Justiça*). Among its attributions, the council

[9] Defending a neoliberal approach, there were also opinions in the sense that the judicial crisis was one of the *Welfare State*, since the increase in litigation was caused by the State's incapacity of providing for the social rights established by the Federal Constitution (KOERNER, p. 17-18).
[10] Once again according to KOERNER, an analysis of this scenario must also consider the impacts of a parliamentary committee of inquiry (CPI) that stated the problems of the judicial reform in a distorted manner, disqualifying the Judiciary as a valid player in the debates (p. 25-26).
[11] BACHA, 2004; PINHEIRO, CABRAL, 1998.

ought to supervise administrative and financial administration of all courts, as well as the fulfillment of functional duties by judges, by analyzing complaints against Judiciary officials and agents. Also, it is responsible for designing strategic planning of the judicial system, producing statistics on caseloads and defining (mostly quantitative) goals for courts, expressing once again the efficiency and managerial driven approaches that were prominent in the Judicial Reform.

In 2003, a year before the enactment of the Constitutional Amendment n. 45/2004, the Ministry of Justice created an Office of Judicial Reform (*Secretaria de Reforma do Judiciário – SRJ* – extinguished in 2016). A year later, the *SRJ* published a paper on "the Judiciary and the Economy", expressively stating that delays and impediments for receiving credit in the courts directly affect the Brazilian economy, draws away foreign investors, and raises the interest rate, since banks represent about 40% of creditors that perceive debt collection through judicial lawsuits (MINISTÉRIO DA JUSTIÇA, 2005). The study sought to subsidize an institutional and legal reform, mostly in terms of procedural law, that would proceed this first stage of the Judicial Reform, and targeted the predictability of judicial decisions: the so-called "micro procedural reforms", which later informed the new Code of Civil Procedure, in 2015. Such procedural reforms intended to expedite judicial foreclosure and to implement procedural mechanisms for dealing with repeated litigation, strengthening the value of case law and precedents, and providing that a judicial ruling in a certain issue would permit the denial of appeals related to the same matters.

After the Constitutional Amendment was approved, Helio Bicudo stated that the Judicial Reform was nothing more than "make up" in the sense that it would "not make justice faster nor closer to people" and that his initial project was disfigured. He justified his criticism by enumerating the following problems: access to justice will not be facilitated, since the judicial system will become more centralized; binding precedents will only please appellate courts; justices from superior courts will continue to have lifelong careers and the entity created to control courts will only became an excuse to create another entity to be its supervisor[12].

GROSS and ALMEIDA (2012) raised three hypotheses for the prevail of such rationalizing and efficiency driven discourse over the democratizing access to justice

[12] Trechos extraídos da notícia "Congresso aprova reforma do Judiciário após 13 anos" publicada no Jornal "A Folha de São Paulo" em 18/11/2004, disponível em http://acervo.folha.uol.com.br/fsp/2004/11/18/2. Acesso em 08 jun. 2017.

agenda. The first one concerns Brazil's intent of entering the international market and conveying with guidelines set by international organizations for political reforms in developing countries, notably judicial reforms. Also, they see a correlation of internal forces in the political arena, remarkably among judicial ranks, towards the prevail of and economic discourse, which provided advantages not only to economic agents (businesses, financial institutions), but also to a political and judicial elite, that would benefit from having the decision-making power in the hands of higher courts and the maintenance of a close relationship between politics and justice. Lastly, the dispersion of law and society oriented empirical studies at the time suggests the prevail of an economic oriented analysis, that sustained a false antinomy between economic and social development, setting concerns related to access to justice and citizenship aside.

It appears that all three premises were intertwined in the legislative debate that culminated in reforms oriented at centralizing decision-making in the higher courts; quantitative and efficiency-oriented goals for courts; binding precedents and mechanisms of sample trialing (in which one case is trialed and the decision is applicable to similar cases); judicial filters and a clear emphasis in alternative dispute, especially settlement conferences, arbitration, and court mediation. In that sense, though the Constitutional Amendment dealt with relevant issues related to access to justice, such as the functional and administrative independence of the *Defensoria Pública* and the jurisdiction of federal courts for human rights violations, its central core is the efficiency of judicial activity, not access to justice. The prevalent discourse was that of a *litigation explosion* (GABBAY *et alli*, 2015, p. 13-14) that disseminated a fear of judicial uncertainty, in detriment of the concern with access to justice and the redistributive possibilities of civil procedure. Ironically, a distorted access to justice discourse was used to legitimize the reforms, associating access to predictability and efficiency, and not taking into account who were the key users of such overwhelmed court system and which players did truly benefit from the changes that were then embraced[13].

[13] RIBEIRO (2008, p. 471) asserts that: "the issue of access to justice as a possibility of citizens having their disputes adjudicated in a fast and indiscriminate way is related to the ideas surrounding the notion of civil society itself. In that sense, courts should be accessible to all issues presented in order to provide citizens with civil rights"

## 4. "DETER THE OVERLOAD OF LAWSUITS AND APPEALS PRODUCED BY UNBRIDLED LITIGATION": ACCESS TO JUSTICE SURRENDERED TO INVISIBILITY IN THE CODE OF CIVIL PROCEDURE OF 2015

> "Such is the challenge of this commission: to regain public trust in the Judiciary and make the constitutional promise of an effective and timely adjudication become true. How is it possible to deter the overload of lawsuits and appeals produced by unbridled litigation, which is permitted in nation that holds as principle to open its courts to claims of all sorts and to all and every injury or threat?" (BRASIL, 2010)

The trends that informed the judicial reform led also to the promulgation of a new Code of Rules Civil Procedure which succeed a series of legal reforms between 2001 and 2007 in the code that was in force since 1973, all leading to a neoliberal approach that was embraced in the process of consolidating that which would become the third codified set of civil procedural federal rules in Brazil (NUNES; PICARDI, 2011, p. 93-97).

In 2009, little to no influence of a law and society agenda can be extracted from the debate that culminated in the new code. The assumptions that informed the proposals are mostly dogmatic and entirely theoretical claims.

Nevertheless, such dogmatic and technical arguments, invested by an attempted neutrality – as it is usually the case with procedural rules in Brazil – are also embedded by the efficiency and managerial discourses that become prominent during the Judicial reform. For instance, when presenting the first version of the bill for the new code, Fux stressed the importance of dealing with delays in court proceedings using the famous jargon "to delay justice is to deny justice" ("*justiça retardada é justiça denegada*") while also highlighting that the procedural rules should address the increasing litigation rates caused by the reforms that aimed at facilitating access to justice. He asserts that the legitimacy of the Judiciary itself relied upon the effectiveness of civil procedure and its capacity to "solve the problems" already identified by the "legal community", who claimed for a faster and lesser complex adjudication procedure. The commission established five goals:

> 1) establish explicitly and implicitly a fine tuning with the Federal Constitution; 2) create conditions for a judge to rule accordingly with underlying facts of the case; 3) simplify,

> solve problems and reduce the complexity of procedural subsystems, such as the appeals set of rules; 4) provide that each lawsuit has a maximum efficient result; and, 5) finally, since this last objective goal is partially achieved by the realization of latter, to give a greater degree of organicity and cohesion to the procedural system

These goals were expressed in procedural mechanisms that enhanced the binding value of precedents (which, until the Judicial Reform, had only an argumentative value) and the filters and sample trial mechanisms already devised during the previous reforms. Also, it demanded obligatory settlement and mediation hearings in all civil cases, stating that judges and courts should seek and prioritize consensual resolutions.

After the approval of the first version of the new code by the Senate (PLS nº 166/2010), on December 1st 2010, the Chamber of Deputies allowed for public consultation and formed a new commission of legal scholars[14], who were given the task of examining the large number of amendment proposals (more than 900) presented by the general public and congressmen. In spite of the political turmoil that followed the protests of June 2013 in Brazil, the discussion of the new Code of Civil Procedure gained considerable attention, perhaps due to its alleged political neutrality, compared with other sensitive reforms (welfare, labor, tax and political) that have been discussed in the country ever since the institutional and economic crisis that was then deflagrated.

Likewise, this report presented by the second commission was also a result of a discussion among elite lawyers and judges, who stated their concerns with "mass litigation", caused by the enhancement of access to justice in previous years, and its effects on the administration of courts and case dockets. Nonetheless, once again expressing an antagonistic view on the matter, the commission also stated that the new code aims at a speedy and cost-effective procedure that would be able to put into effect the constitutional right of access to justice. Also, the legislative debate that took place in Congress culminated in the veto of the one and only provision related to collective suits, which was a procedural mechanism that could be used to convert

[14] Fredie Didier Jr, Luiz Henrique Volpe Camargo, Leonardo Carneiro da Cunha, Alexandre Freitas Câmara, Daniel Mitidiero, Paulo Lucon, José Manuel Arruda Alvim, Rinaldo Mouzalas e Marcos Destefenni, later joined by Ada Pelegrini Grinover, Alexandre Freire, Antonio Carlos Marcato, Antonio Claudio da Costa Machado, Athos Gusmão Carneiro, Candido Rangel Dinamarco, Carlos Alberto Sales, Cassio Scarpinela Bueno, Dierle Nunes, José Augusto Garcia, Kazuo Watanabe, Lenio Streck, Luiz Guilherme Costa Wagner, Luiz Guilherme Marinoni, Paulo Cesar Pinheiro Carneiro, Regina Beatriz Tavares e Teresa Arruda Alvim Wambier.

individual claims into collective suits (*incidente de conversão da ação individual em coletiva*). This veto expresses the resistance against class action that was perpetrated by the legislature and elite lawyers and government officials after collective suits were filed against privatizations during the 1990s, and reasserts the preference of such players in techniques of sample trialing and binding precedents[15].

If the reforms that led to the regulation of class action and small claims court were oriented by the goal of facilitating access to justice, procedural rules concerning binding precedents and sample trial are clearly motivated by the efficiency driven agenda that became prominent during the Judicial Reform (RODRIGUES, 2015, p.555-567). Unlike in the class action, where there is a concern with adequate representation, in the sample trial framework, courts will choose a few cases or appeals to be trialed and the ruling thereof established will be applied in all similar cases. As already argued in the previous paper, such procedure tends to favor repeat players, who are able to concentrate efforts and strategies in the trial of the sample cases, in which they litigate against a one-shooter, who will have to – inadvertently and involuntarily – represent all those who will be affected by the ruling on the matter (GABBAY *et alli*, p. 17-18).

Major litigation cases already show that such advantages of repeat players are indeed true. A meaningful example is the litigation related to the charge of brokerage fees by large developers and builders when real estate properties where purchased before the completion of the project. In such cases, the fees were disputable, since buyers did not hire or brokerage services, nor were given the possibility to choose their broker, conforming a practice known as "joint sale" (*venda casada*) which is prohibited by consumer legislation. Defendants alleged that contractual clauses were clear and that the statutory term to dispute the fees would only be of three years, and not five years, as predicted in consumer law for general claims. Rulings rendered by court of appeals of different states were favorable to consumers until the case reached the *Superior Tribunal de Justiça* and was trialed as a sample case[16]. After a public hearing in which repeat players and a few representatives of consumer organizations

[15] "Pursuant how the provision is written it could lead to the conversion of individual claims into collective suits in judgmental manner, even to the detriment of the parties' interest. The subject requires regulation of its own to ensure its full effectiveness. In addition, the new Code already includes mechanisms to address repeated litigation. This is also the stand taken by the Brazilian Bar Association (OAB)" (veto of article 333 of the new Code of Civil Procedure).

[16] Special appeals n. 1551951, 1551956, 1551968 e 1599511, trialed on August 24th 2016 according to the prevailing decision rendered by Justice Paulo de Tarso Sanseverino.

argued the case, there was a clear and abrupt change as to the judicial approach to the matter, with the higher court deciding that the fees were legal and that the statutory term for claims related to such contracts would be of three, and not five years, which led to the dismissal of several lawsuits filed by buyers throughout the country.

## CONCLUSION: FOR A NEW ACCESS TO JUSTICE AGENDA IN BRAZIL

The underlying purpose of this paper is to discuss political choices that informed the most important legal reforms of recent years, in order to reflect on how access to justice is being distributed in Brazil. If the wake of democratization was conducive to distributing access to those who were not users of the judicial system, later reforms led to justice being distributed to the ones that were the main players of the ligation game, such as financial institution, governmental agencies, and public and private repeat players, who are now able to enjoy considerable strategic advantages from procedural mechanisms.

The decline of access to justice is steeper than ever. Elite legal scholars are often aligned with judicial corporate interests of those of repeat players, being elite lawyers themselves. As a result, procedural and institutional reforms are informed by a prevailing discourse that blames the problems of the Judiciary on the fact that access to justice was facilitated and that individuals and civil society are using courts excessively. Meanwhile, such reforms claim to effectively address the right to access to justice on terms of providing effectiveness and legal certainty are actually aimed at bringing managerial solutions to the overload of courts, without regarding that such congestion is caused by litigation involving repeat players, such as already discussed in the previous paper. In that sense, the political choices reinforce repeat players advantages and do not distribute access to those who do not have it.

A change in this scenario demands that we go beyond the waves of Cappelletti and Garth, acknowledging that even these elementary premises were not reached in Brazil, but also readdressing this issue by recognizing that the universalization of access to justice is not a feasible goal. To insist in that is to hinder the political choices that are inevitably made and to purport the appropriation of the notion of access to justice – an indisputably strong discourse – by other agendas that are not necessarily aimed at social transformation.

It is therefore necessary to admit that access to justice has to be distributed to those who don't have it, and that this implies taking some justice from those who have it in excess. In that sense, it is possible once again perceive new venues to attend to the suppressed demands by those who not only are distant from courts, but that often seen as intruders in judicial system that insists in being overly bureaucratic, arrogant, and self-centered (SANTOS, 2011, p. 38). Also, a new access to justice agenda should foster the mobilization of civil society in strategic litigation by investing in legislative and even judicial norms that would reinstate class action as a mechanism of structural reforms that ought to provide for adequate representation and procedural parity between parties. Lastly, by focusing in the have nots, courts should not be overwhelmed with claims that are a result of disputable conducts perpetrated by repeat players, which should be discouraged with penalties from regulatory agencies and even punitive damages, still not embraced by Brazilian law.

Though there seems to be ways to bring back access to justice from its invisibility, criticism and reflection on political choices concerning judicial institutions are still confined to a very small share of academia, and only very recently we can see an expansion of empirical research in law schools that actually defy the prevailing discourses that were here discussed. Despite the fact that the transformative potential of adjudication depends on who are the players and how to they play the litigation game, it seems rather unlikely that the current players that stand for the have nots will be able to overturns the game, especially considering the conservative trends that are now prevailing in Congress and in the Judiciary amidst the unprecedented institutional crisis that Brazil is going through.

A first step, however, is to shine some light on the fact that institutional and procedural reforms are never neutral and they always express political choices that should be properly addressed by legal scholars. Instead of shielding such choices in seemingly indisputable economic or theoretical frameworks, they must be able to reconnect the legal debate to empirical research, moving away from an empty discourse towards a consistent and plural reflection on the limits and potentials of courts and of granting access to justice to those who are excluded from the judicial system. This was the agenda that ought to be sought and that this article intended to put forward.

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