Why Do We Have So Many Social Security Claims In Brazil?

Bruno Takahashi[1]

ABSTRACT

In his Reading the Landscape of Disputes: What We Know (And Think We Know) about Our Allegedly Litigious Society, Marc Galanter suggests a different reading of the landscape of disputes in the United States, exchanging the "litigation explosion" reading for a more "contextual" approach. Based on some of Galanter's strategies, our paper tries, in its first section, to question the common core, rejecting three of the most commons arguments used to explain the so called "litigation explosion" in Brazil: that Brazilians are too litigious, that our Judiciary is too small and that access to courts is too easy. In the second section, using social security claims as an example, we try to provide a different reading of the causes for so many lawsuits in that area. We argue, although in an exploratory way, that the dispute resolution system for social security claims pretends to use two filters – administrative agency and court-connected mediation – that do not imply fewer lawsuits and, in fact, could act as propellers for more cases to be brought to the Judiciary.

Keywords: Litigation. Brazilian Courts. Social Security Claims.

1. Introduction[2]

There were around 100 million lawsuits within the Brazilian courts in 2014, according to statistics of the National Justice Council of Brazil (CNJ).[3] It can be assumed that the number is even higher now, once the number of

[1] Federal Judge in Brazil. PhD candidate at University of Sao Paulo

judgments does not surpass the number of new claims. As the Brazilian population is comprised of around 200 million people,[4] or two times the number of lawsuits, a common anecdote tells that every Brazilian is either a plaintiff or defendant, as it is impossible to litigate alone.

This chaotic scenario leads to hasty generalization. One is that Brazilians are too litigious. Other is that the structure of our Judiciary is too small. Also, it is said that access to justice in Brazil is too easy. Usually, these arguments are used in press conferences and appear in mass media. Little is discussed about the truth behind them.

Marc Galanter, in his *Reading the Landscape of Disputes: What We Know (And Think We Know) about Our Allegedly Litigious Society*,[5] suggests a different reading of the landscape of disputes in the United States, thus exchanging the "litigation explosion" reading for a more "contextual" approach. Following some of Galanter's strategies, but adopting a reading that could be labeled as somewhat "institutional", the aim of this brief study is similar in the sense that we intend to refuse common sense interpretations about the landscape of disputes in Brazil.

In order to do that, we do not deny the "litigation explosion", but refuse or

---

2 This paper is part of a research still in progress about social security litigation in Brazil. Some preliminary conclusions of the research were presented in "Brazil-Japan Litigation and Society Seminar" (Shinshu University, Matsumoto, January 8th-9th, 2018) and in two Law & Society Annual Meetings (New Orleans, June 2sd-5th, 2016; and Mexico City, June 20th -23rd, 2017).

3 Based on the research *Justice in Figures-2015 (Justiça em Números-2015)*, conducted by the CNJ, in the beginning of 2014, there were 70.8 million lawsuits in the Brazilian courts. During that year, 28.9 million new cases were filed, which results in around 100 million lawsuits.

4 In 2014, the Brazilian population was stipulated in 202,768,562 inhabitants, according to the research *Brazil in Figures 2015 (Brasil em números 2015*, p.81) carried out by the Brazilian Institute of Geography and Statistics (IBGE).

5 31 *UCLA Law Review* 4, 1983.

at least mitigate the three arguments listed above. After that, using social security claims as an example, we try, although in an exploratory way, to provide a different reading of the causes for so many lawsuits.

2. Questioning the common core

It could be assumed that there are many lawsuits in Brazil. Despite of the difficulties to make comparisons among litigation rates across different societies, some data could show how big the problem is. We can make a briefly comparison between Brazilian's litigation rates and those from Japan and the United States, as these two countries are usually placed in opposite sides as the least and the most litigious society.

In 2013, 1,691,992 new lawsuits were filed in Japan,[6] against 28,300,000 in Brazil.[7] Even if we consider the distinction between the population of these countries for the same year, it turns to a rate of 14,077, 31 lawsuits per 100,000 people in Brazil and 1,329,15 in Japan, which means a difference over 10 times higher.[8] Although comparing statistics from previous years, Mark Ramseyer and Eric Rasmusen presented similar conclusion. In their study, the number of lawsuits filed per 100,000 in Japan is 1,768 and in United States is 5,806.[9]

---

[6] Based on the statistics of the Supreme Court of Japan (available at http://migre.me/tF2VU, last accessed on October 26th , 2014).

[7] According to statistics of the National Justice Council of Brazil (CNJ) (available at http://migre.me/txOBu, last accessed on January 27th, 2015).

[8] The population number in Brazil (201, 032, 714) is based on statistics provided by the Brazilian Institute of Geography and Statistics (IBGE) for 2013 (available at http://migre.me/txOAs, last accessed on January 27th 2015). The population number in Japan (127.298.000) is based on information obtained from the Statistics Bureau of the Ministry of Internal Affair and Communications of Japan (available at http://migre.me/txOyA, last accessed on January 27th 2015)

[9] Comparative Litigation Rates. Discussion Paper. Discussion Paper no. 681, 2010, p.5. Available at http://migre.me/txdcW.Last accessed on January 27th 2015.

That puts Brazil in a more litigious position than the United States, and very far away from Japan. Our aim, though, is not making comparative study or organizing a competition of the world's most litigious society. We are focused on rejecting three of the most common arguments used to explain the Brazilian "litigation explosion".

2.1. Are Brazilians too litigious?

As the anecdote that every Brazilian is involved in a lawsuit points out, the overwhelming litigation is usually attributed to our culture. In this sense, the number of cases flooding the courts is just a result of how Brazilians complain about everything and are ready to bring those dissatisfactions to a judge. It is the same kind of argument that tells that the Japanese are peaceful and Americans are litigious. Such as these arguments are known to be fragile, the same can be said in the case of Brazilians.

First, it is a common sense to say that Brazilians are friendly and happy. Carnival and soccer, two collective happenings, are commonly put as epitomes of that harmonious and joyful organization.

This view could be exemplified by the following passage of Stefan Zweig's book *Brazil Land of the Future*:[10]

> The Brazilian always preserves his innate gentleness and good manners. (…) On sees two men meeting in the street. They embrace. One would naturally suppose they are brothers or friends, one of them just returned from Europe of from some long voyage. But again at the next corner one notices two more men greeting each other in a similar manner. And only then does one

[10] Translated by Andrew St. James. New York: The Viking Press, 1941, p.140-141.

> realize that the accolade is simply a custom taken from granted among Brazilians, and the result of their inborn friendliness. Here courtesy is the basis of human relationship, accepting forms which we in Europe have long forgotten. (…) Every foreigner is received with the utmost courtesy, and everything possible is done for him. We who unfortunately have grown suspicious of anything natural and humane feel inclined to inquire of friends and recent immigrants if this unconcealed cordiality is not simply a formality, if this friendly way in which all classes manage to live together without any apparent hatred or envy is not just a mistaken idea gleaned from a superficial impression. But the answer is unanimous in praise of the most characteristic quality of this people who are innately so warm-heated. Everyone asks repeats the words of those who came here first: "*He mais gentil gente*" – "They are very kind people".

So, as well as for the Japanese, there are also writings praising Brazilian people's friendship and peacefulness.

A second argument is that most part of the Brazilian population is catholic, a religion that disseminates the idea of peace and harmony among its followers, encouraging the use of consensual mechanisms such as conciliation.[11] Also, there are a lot of people who do not know their rights

[11] In a pioneering study in Brazil, Aloísio Surgik traces back the origin of conciliation in the *Didaché*, an earlier Christian treatise of the 1st or 2nd century, that sustains in a passage the importance of reconciling with a friend before taking part of the Sunday's Cristian ceremony. Cf. *A Origem da Conciliação*. PhD Thesis. São Paulo: Faculdade de Direito da Universidade de São Paulo, 1984, p.357. Passages of the Bible are also cited by John Owen Haley as epigraphs in his famous essay The Myth of the Reluctant Litigant (*Journal of Japanese Studies*, vol.4, n.2, 1978, p.359).

because of economic and educational problems associated with a complex legislation.

Therefore, despite cultural factors leading to lack of litigiousness, the fact is that there are lots of lawsuits. If we take all these arguments together, the analysis seems less simplistic: culture might play some role, although not being a leading actor.

2.2. Is our Judiciary too small?

Facing a "litigation explosion", the straight answer is to increase the number of courts. It is placed as a frivolous supply and demand problem. If there are more suits (demand), there should be more courts (supply). This is an oversimplification that usually fails to take in consideration two aspects: our Judiciary is already very big; creating more courts could also lead to more lawsuits.

Let us analyze the first aspect. An exploratory research carried out by Luciano Da Ros[12] shows that the Brazilian Judiciary's budget for 2013 reached around USD 26.42 billion.[13] This amount is higher than the Gross Domestic Product (GNP) of 12 Brazilian States, if individually considered. It is equivalent to 1.3% of the national GNP, which puts the Brazilian Judiciary far away from other countries, as we can see below:

In the same research, Da Ros demonstrates that, although the number of judges per 100.000 inhabitants in Brazil (8,2) does not diverge from other countries, if we consider the number of civil servants and law clerks that work in the Brazilian Judiciary, it is possible to notice the huge size of its

---

12 O custo da Justiça no Brasil: uma análise comparativa exploratória. *Newsletter. Observatório de elites políticas e sociais do Brasil*. NUSP/UFPR, v.2, n. 9, July. p. 2-4.

13 Or BRL 62.3 billion. We used the exchange rate of December 2013, according to which USD 1.00 is worth BRL 2.358.

structure:

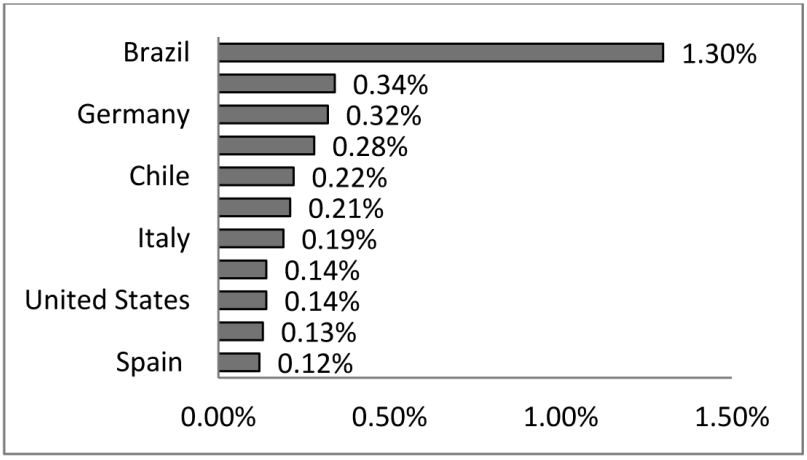

Figure 1. Cost of the Judiciary Power according to the percentage (%) of Gross Domestic Product (GNP) per selected country. Based on: DA ROS, Luciano. 2015. O custo da Justiça no Brasil…, cit. p.4.

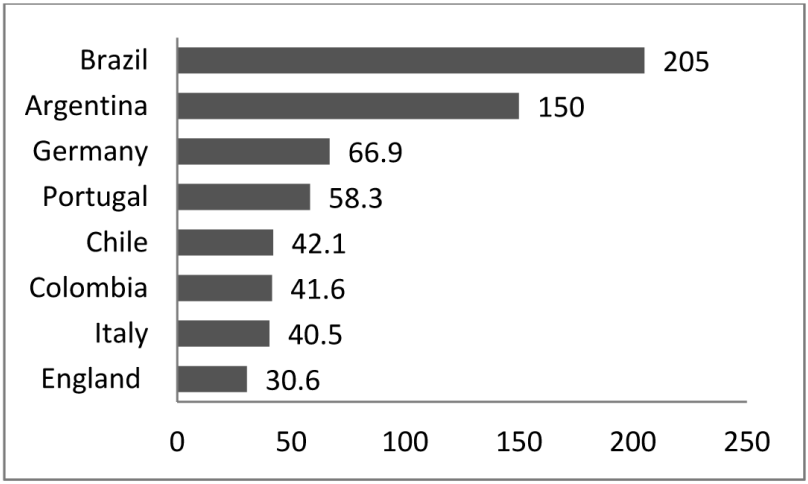

Figure 2. Number of officials working at the Judiciary per selected country. Based on: DA ROS, Luciano. 2015. O custo da Justiça no Brasil…, cit. p.6.

The above data illustrates that the Brazilian Judiciary is not small; in fact, it is too big. It should be enough to prevent proposals for the boundless creation of new courtrooms or the hiring of more and more people.

Also, this kind of proposal ignores that amplifying courts also means increasing lawsuits. In fact, by creating more courts, it is predictable that more cases will be filed. Nevertheless, the main issue is not exactly how many cases are filed, but if the consequence of that is good or not.

2.3. Is access to justice too easy?

Indeed, it is worth saying that having a great number of lawsuits is not necessarily negative. This could mean more knowledge of rights, less economical or structural barriers for accessing courts or, in some specific situations, a more independent Judiciary. Therefore, there is not a division between, on one side, a harmonious non-litigant society and, on the other, a belligerent litigant society.

Increasing access to justice for those who need it could be viewed as something to aspire and not to complain. Nevertheless, this access should not mean reinforcement of advantages to those who already have easy access to justice. Also, the "litigation explosion" should not lead to more barriers to those who do not have an easy path to courts.

Access to justice is granted in broad terms by article 5 item XXXV of the Brazilian Constitution, which establishes that "*the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power*". Therefore even a threat that does not cause actual damage to a right may be a reason for filing a suit.

This constitutional provision, associated with the increasing number of lawsuits, stories about frivolous cases that reach the Supreme Court, the great number of situations in which no courts taxes are required due to free

legal aid, contribute to reinforce a reading that access to justice is too easy in Brazil.

Consequently, some argue that more taxes should be required or that access to courts must be limited to great and important cases. This kind of opinion ignores that a considerable number of Brazilians do not know about basic rights, and that courtrooms are not equally placed within the country.[14]

Indeed, quantitative researches show a different scenario. A recent study carried out by the Brazilian Judges Association (AMB) shows that a few number of players is responsible for a great number of claims. These players are mainly institutions, more especially public institutions and government agencies.[15] Therefore, it is not that lots of Brazilians are filing suits; few institutions are resorting to courts too much. In this sense, it is not that access is too easy for all. There are still lots of people who do not know that filing a lawsuit is an option. Access to justice, in this sense, is easy mainly for those who are already in.

3. So what?

After questioning the common core, it is almost inevitable to ask: so what? In other words, if Brazilians are not that litigious by nature, our Judiciary is not that small and access is not so easy, why are there so many lawsuits in Brazil?

Obviously, it is impossible to find a simple cause-and-effect formula applicable to this matter. External causes like political, economic and even

[14] Access to justice and its relations with the distribution of courtrooms in Brazil is analyzed, for example, in: AVRITZER, Leonardo; MARONA, Marjorie; GOMES, Lilian (org). *Cartografia da Justiça no Brasil: uma análise a partir de atores e territórios*. São Paulo: Saraiva, 2014.

[15] *O uso da Justiça e o Litígio no Brasil*. Brasília: AMB, 2015.

cultural factors[16] could reflect in the levels of litigation. However, we think that those factors interfere in the way in which a dispute resolution system works and, in reversal, are influenced by this system. Therefore, looking closely at a particular dispute resolution setting could give us insights about the causes of litigation.[17]

In this paper, we will focus on Brazilian social security conflicts. These conflicts follow a general standard, characterized by a basic allocative problem of whether or not to grant a benefit to a person that argues to be in a situation of risk protected by public social security, such as an important disease or the loss of a family member.[18] The parties are those asking for some benefit and the public social security the administrative agency called *Instituto Nacional do Seguro Social* (INSS). As a general rule, the claim should be addressed directly to the administrative agency; if the response is negative, filing a suit is possible.

Selecting this kind of dispute is not a random choice. Indeed, the INSS appeared at first place in two reports on the 100 biggest litigants produced by the Department of Judicial Research of the National Justice Council (CNJ) based on the years of 2010 and 2011,.[19] 2010's data shows that INSS had the

16 The fact that cultural factors do not play the main role, as we argue above in 1.1, does not mean that they do not play any role at all.

17 In some sense, we are adopting Marc Galanter's suggestion that the character and impact of litigation might be better understood if we began by looking at parties and their relation to dispute institution (Afterword: Explaining Litigation. *9 Law & Society* Rev., 1975, p.347). Nevertheless, we are focusing in dispute institution and their agents.

18 This analysis is based in FREITAS JR, Antonio Rodrigues de. Conflitos intersubjetivos e apropriações sobre o justo. São Paulo: Atlas, 2013, *passim*.

19 As Daniela Monteiro Gabbay *et alii* point out, although these researches have different objects and applied different methods, the results are strikingly similar (*Why the 'Haves' Come Out Ahead in Brazil? Revisiting Speculations Concerning Repeat Players and One-Shooters in the Brazilian Litigation Setting*, available at: http://migre.me/txnpk. Last accessed on: April 16th , 2016, p.6).

largest national litigant rate (22.33%).[20] In turn, between January 1st and October 31th, 2011 the INSS was present in approximately 34% of all cases submitted to the Federal Court and 79% to Federal Small Claim Courts.[21] For these reasons, INSS surely is a *repeat player* (*RP*) according to Marc Galanter's denomination.[22]

In contrast, the plaintiff is usually a person in a vulnerable situation (who could not work because of a disease; who is old to keep on working; who lost a relative that used to give financial support, and so on). His financial conditions are precarious and his schooling level is low.[23] So to say, it is a *one-shotter* (*OS*) according to Galanter's classification.

Therefore social security conflicts in Brazil are basically an *OS vs RP* type. Although we do not have reliable data about the number of judicial decisions that favored INSS, the setting of the dispute resolution system itself could be seen as dangerous for the *one-shotter*, especially if poor and less educated, and mainly considering the use of court-connect mediation in this

---

[20] Available at: http://migre.me/kyAiY, last accessed on July 20th, 2014.

[21] Available at: http://migre.me/kyAln, last accessed on July 20th, 2014.

[22] Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change. *Law and Society Review*, 1974, vol 9, nº 1.

[23] Indeed, an empirical research conducted by the Institute of Applied Economic Research (*IPEA*), found that users of Federal Small Claim Courts (*JEFs*) have the following characteristics: a) are individuals (plaintiffs in 99.8% of cases); b) there is a balance on the gender of plaintiffs, with a slight prevalence of women (52.2% against 47. 7% men); c) the average are adults (over 30 years), with the highest concentration in the range between 46 and 60 years of age; d) they are mainly low-income people with poor education, who do not have necessary information about their rights or the functioning of the judiciary, are poorly educated (when they have legal representative) and "are not protagonists of 'their process ' ". (*Acesso à Justiça Federal: dez anos de juizados especiais*. Brasília: Conselho da Justiça Federal, Centro de Estudos Judiciários, 2012, p.96-98). It is important to note that the same research points out that the INSS takes part in 73.1% of the cases, confirming the "widespread perception in the legal environment of the Federal Small Claim Courts receives priority social security claims" (*idem*, p.108).

scenario. We will come back to this discussion later.

For better understanding how these factors work and how they relate to the high levels of litigation, it is important to give some explanations about our dispute resolution system.

3.1. Some words about Brazilian's dispute resolution system for social security conflicts

It is important to outline some aspects of the dispute resolution system for social security conflicts in Brazil. Although oversimplified, the scheme presented here aims to highlight how that system works. In the further sections, we will speculate that the way it works reflects the increasing number of lawsuits.

Basically, as Gabbay *et alli*[24] explain Brazil is a unified jurisdiction, meaning that claims involving Public Administration and its agencies may be taken to courts for judicial review. In a large sense, the Brazilian Judiciary is organized in two different branches, being federal or state, each of them divided in lower and higher courts. There is also the Supreme Court (*Supremo Tribunal Federal*) for constitutional matters, and the *Superior Tribunal de Justiça* for interpretation of federal law.

Then, a person who wishes a social security benefit should request it to the specialized administrative agency, *i.e.*, INSS. If the request is denied, the person has two options: appeal for another administrative decision or file a lawsuit. If she decides to file a lawsuit, she has to turn to the federal court that has jurisdiction over her residence, although there is also another alternative. Indeed, if her home place is not in a city where a federal court branch is located, the suit can be filed with the state court of that city, considering that

[24] *Why the 'Haves' Come Out Ahead in Brazil?...*, cit. p.4

there are more state than federal courts.[25] In any case, appeals must be addressed to the correspondent Federal Circuit Court (*Tribunal Regional Federal*).[26]

As a general rule, a person seeking a social security benefit must first request it to the administrative agency called INSS.[27] If the claim is denied, it is possible to appeal to higher administrative authorities or to file a lawsuit. Usually, it is admitted to appeal at administrative level and also file a lawsuit. If a suit is brought, the judge could send the case for mediation and, if settlement cannot be reached, adjudicate the case or simply decide on the case, skipping mediation, on the grounds that mediation is not possible.[28]

It is easy to notice that there are different agents designated to decide on a social security claim. We should also emphasize that, usually, social security claims are solved by an adjudicative process, concluded by a decision rendered by the administrative agency or the court. The use of mediation is increasing, but mainly as a mechanism stimulated by judges during the judicial process as a fast way to clean up dockets.

Anyway, in this setting we could see that two mechanisms work (or at

---

[25] As it is written in article 109, paragraph 3, of the Brazilian Constitution: "*Cases in which the parties are a social security institution and its beneficiary shall undergo legal proceeding and trial in the state courts, in the forum of the domicile of the beneficiaries or insured participants, whenever the district is not the seat of a federal court of first instance, in which case the law may allow othercases to be also processed and judged by the state courts*".

[26] See article 109, paragraph 4, of the Brazilian Constitution: "*In the event of the preceding paragraph, the appropriate appeal shall always be taken to the Federal Circuit Court within the area of jurisdiction of a judge of first instance*". There are 5 Federal Circuit Courts in Brazil.

[27] Such understanding, with a few dissenting voices, has recently been adopted by the Brazilian Supreme Court (STF), according to the decision regarding Extraordinary Appeal (*Recurso Extraordinário*) No. 631240, as of September 03rd, 2014.

[28] See article 334 of the Brazilian Code of Civil Procedure.

least try to work) as litigation filters, getting social security claims off the road that leads to a judge's decision. One is external, represented by the need to firstly submit the request to the administrative agency. The other is internal, that is, the use of mediation during the judicial process.[29] Analyzing these filters could help in finding the reasons for so many social security lawsuits in Brazil.

3.2. Deciding social security conflicts

As showed above, the decision of a social security claim is attributed to two different agents. One is the administrative agent that works in the INSS. The other one is the judge. Also, it is common to affirm that administrative agencies make too many mistakes. This opinion is centered mainly in the considerable number of court decisions that reverts administrative decisions,[30] ignoring that administrative agents and judges have different limits and incentives. In other words, it is not that administrative agents make many mistakes, but that what is wrong for an administrative agent may not be so considered by a judge.

According to Alexandre Schumacher Triches,[31] among millions of people

---

[29] The idea of internal and external filters of litigation was taken from an article by Susana Henriques da Costa, where she identifies the institutionalization of court-connected mediation in Brazil with internal filters (STF e os filtros ao acesso à Justiça: gestão processual ou vantagem ao grande litigante? *Supremo em Pauta*. São Paulo: Estado de S. Paulo, September 18th, 2014, available at http://migre.me/txOJa, last accessed on April 17th, 2016).

[30] Based on administrative data, Adler Anaximandro de Cruz e Alves affirms that more than half of social security benefits denied by the INSS are granted by the courts (A atuação cidadã da AGU na redução da litigiosidade envolvendo o Instituto Nacional do Seguro Social. In: *Publicações da Escola da AGU: Trabalhos Vencedores do Concurso de Monografias da AGU em 2009-2010*. Brasília: EAGU, ano IV, nº 15, 2012, p.31).

[31] *Direito Processual Administrativo Previdenciário*. São Paulo: Revista dos Tribunais, 2014, p.151.

who deals with social security issues, there are individuals with different characteristics, including those intended to defraud the system. Because of that, administrative agents usually suspects that the applicant may be taking advantage of this condition to perpetrate a fraud. By denying a request, administrative agents also preserve themselves from disciplinary sanctions for technical error.

Moreover, objectives are ambiguous and conflicting. What would be the goal of an administrative agent? Prevent fraud or select more properly those who are entitled to a benefit? Analyze each case in detail or hastily decide the largest number of cases?[32]

In contrast, judges are more independent and less worried about being punished for granting a social security benefit. Frequently, when interpreting a statute, a judge is more concerned about being just than about being loyal to the legal words.

Indeed, in a research conducted in 2005 about the profile of Brazilian judges,[33] when asked if judicial decisions must be oriented mainly by legal standards, consider economic consequences and commit to social results, a substantial number of judges pointed out the importance of variables extrinsic to legal standards. In fact, although the large majority (86.5%)

---

[32] This idea is based on Michael Lipsky's study of street-level bureaucracy. For Lipsky: " Street-level bureaucrats characteristically work in jobs with conflicting and ambiguous goals. Is the role of the police to maintain order or to enforce the law? Is the role of public education to communicate social values, teach basic skills, or meet the needs of employers for a trained work force? Are the goals of public welfare to provide income support or decrease dependency?" (*Street-Level Bureaucracy: dilemmas of the individual in public services*. 30th anniversary expanded edition. New York: Russel Sage Foundation, 2010, p.40).

[33] Reported by SADEK, Maria Tereza. Judiciário e Arena Pública: Um Olhar a partir da Ciência Política. In: GRINOVER, Ada Pellegrini; WATANABE, Kazuo (org.). *O Controle Jurisdicional de Políticas Públicas*. 2 ed. Rio de Janeiro: Forense, 2013, p.20-1.

confirms the preponderance of legal standards, this option does not exclude the compromise with social results (78.5%). Also, commitment to economic factors was also considered by a substantial number of judges (36.5%). These numbers could be interpreted as evidence that Brazilian judges consider a lot the social and economic impact of their decisions, which, especially in sensible areas, such as social security claims, might mean not reading legal texts so literally.

Facing various incentives and goals, a wide range of performances becomes possible, whether to deny or to provide a certain benefit. This is compounded when it is noted that the discrepancy of interpretations is permitted by the vast amount of existing laws and normative acts under Social Security. For example, according to another research, from 2000 to 2006, there were enacted 459 ordinary laws affecting directly or indirectly the pension funds area.[34] Excessive regulation does not mean uniform interpretations; on the contrary, it allows the most varied understandings, because even contrary positions can be based on the interpretation of one among several existing standards.[35] In this context, the complexity and instability of laws are commonly remembered as litigation causes.

These leads to what Alexander Schumacher Triches[36] calls "excessive subjectivity" in the analysis of social security benefits. In a framework of various incentives and lots of regulations, it is expected that each agent with decision-making power set his own parameters, following the criteria and values that he considers most appropriate. Not only an administrative agent is different from a judge, but there is also a considerable variation between one administrative agent and another, or among different judges.[37]

---

[34] According to GIANNATASIO, Arthur Roberto. Estudo de Caso em Previdenciário. . In: GABBAY, Daniela Monteiro; CUNHA, Luciana Gross. *Litigiosidade, Morosidade e Litigância Repetitiva no Judiciário: uma Análise Empírica.* São Paulo: Saraiva, 2012, p. 66.

Different interpretations alone are not a problem, as various points of views of decision-makers are part of any dispute resolution system. In an attempt to create some minimal standardization, administrative guidelines are issued, courts establishes precedents[38] and so on. However, one decision is not aware of the other. Neither administrative agencies become aware of court decisions nor the courts care about how the INSS works.

In an idealized model, social conflicts should be solved at the administrative level and only in hard cases by the Judiciary. Also, as a hard case is solved by the courts, the administrative behavior should be adapted to follow the

---

35 As Marc Galanter points out: "The authoritative legal learning becomes more massive and elaborate. There are more legislation and more administrative regulation and more published judicial decisions. But rules propounded by legislatures, administrative bodies and appellate courts do not carry a single determinate meaning when 'applied' in a host of particular settings. Variant readings are possible in any complex system of general rules. Damaska observes that 'there is a point beyond which increased complexity of law, especially in loosely ordered normative systems, objectively increases rather than decreases the decision maker's freedom. Contradictory views can plausibly be held, and support found, for almost any position.' As the authoritative learning produced at the top of the system becomes more complex and refined, decision-makers and other actors are both constrained and supplied with resources for innovative combination. Of course, whether they will use them depends on their other resources." (Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society, p.46).

36 *Direito Processual Administrativo Previdenciário*, p.156

37 Analyzing internal data on the number of benefits requests denied by administrative agents until July 25th, 2007 Adler Anaximandro de Cruz e Alves points out that it is common to see distortions of almost 20% in administrative agencies located in cities with the same socioeconomic profile as Londrina/ PR, which has 38% of negative answers, and Maringá/ PR, with 45% of rejections on benefits (A atuação cidadã da AGU na redução da litigiosidade envolvendo o Instituto Nacional do Seguro Social, cit., p.29).

38 Sometimes it takes a long time to create a judicial precedent, and this delay can also be seen as a cause of litigation. The discussion on the possibility of a retired person to waive his previous benefit in order to receive a better one ("*desaposentação*") started in the Supreme Court on October 19th, 2011 (Extraordinary Appeal No. 661256), and, by the time of writing this paper on April 17th, 2016, was not over yet.

precedent in future requests. Nevertheless, that is not what happens.

It means that a Supreme Court decision is not automatically respected by the street-level bureaucrat that works in the INSS analyzing requests. Also, it is not guaranteed that a benefit that was given by the administrative agency would have been given by a judge. Given the uncertainty of decisions and the various existing interpretations, it is expected (at least for those well-informed and holding favorable conditions) to go through several decision-makers until perhaps obtain a positive answer.

To put it in a nutshell, administrative agents and judges have different incentives, therefore, differently interpreting the law. Administrative agents are more worried about being punished for a wrong decision and more biased to find frauds in many claims. Judges tend to use constitutional principles to expand the possibilities to obtain a benefit and rarely are personally punished from a bad decision. A great number of new legislation every year allows a greater number of interpretations. Attempts to create some standards are flawed as there is little communication between administrative agency and courts. Therefore, decisions rendered by administrative agents, who were supposed to work as filters, are frequently viewed exclusively as another inevitable step in the way to courts. For those who have information and conditions, negative decisions by administrative agents are only propellants to filing a lawsuit.

3.3. Mediating social security conflicts

After a lawsuit is filed, it tends to continue until a judicial decision is rendered, imposing a winner and a loser. As an option, parties could settle their case, usually assisted by a mediator. In social security cases, this second option is provided almost exclusively by court-connected mediation services.

That means that mediation as a litigation filter works *inside* court's

proceedings, thus being an internal filter. By being so, it does not affect the emergence of new lawsuits, but only try to extinguish the existing ones. Also, mediation is usually tried only after substantive pieces of evidence are presented, which could lead to unwanted effects.

Indeed, it is important to recall that we are facing a conflict between a *repeat player* (INSS) and a *one-shotter* (individual plaintiff). Marc Galanter[39] points out that it is not expected that *repeat players* make agreements in cases which are expected to create a desirable precedent for them, because, as they hope to litigate again, they can select cases to bring to trial among those that are more likely to result in favorable ruling. On the other hand, *one-shotters* are willing to give up the possibility of creating a "good law" in exchange for a tangible gain.

In turn, Owen Fiss[40] says that settlement is based on each party's capacity to finance the litigation. The unequal distribution of resources or the ability to support costs will invariably affect the process of reaching consensus. Disregarding this factor perpetuates inequality, without improving the social point of view.

Therefore, it is important to consider that the INSS can play with statistics and estimate in advance the possible outcome of the demand. Although decisions involving social security claims are not very uniform in Brazil, *a repeat player* like INSS could manage to find some tendency in a great mass of muddle cases. It could, for example, know how a specific judge tends to decide on a case and thus try to settle only when the chances of victory are considerable low. In contrast, plaintiffs accept the proposal often because of their cultural, informational and economic deficiencies. Because of

---

39 Why the 'Haves' Come out Ahead…, cit. p. 101-2.

40 Against Settlement. In: FISS, Owen. *The Law as it Could Be*. New York/London: New York University Press, 2003, p. 93-94.

these, an *one-shotter* usually does not know even who the judge is.

Moreover, settlement proposals made by the INSS commonly impose waiving a substantial part of the social security benefit. Usually, the plaintiff must agree to receive only 80% of the amount that would be granted in a trial.

Widespread judicial delays associated with urgency, makes an agreement a way to shorten the time for receiving the benefit. However, if the delay of a court decision is the reason for the plaintiff to accept an agreement, from the moment that courts start being well-organized, no longer mediation would be useful. This is what Paulo Afonso Brum Vaz[41] calls "efficiency paradox", that is, the more efficient a court is, the lower the probability of a consensual solution.

In short, the use of mediation in social security conflicts usually favors the *repeat player* INSS, and then reinforces imbalance of power. It is used mainly when the lawsuit already exists, thus not attacking the causes of litigation. As it is a good option for INSS, it is also an incentive so that the services provided by administrative agents continue to be as they are, without trying to be more paced with judicial decisions. In addition, it could also lead to an increase in litigation rates, as it turns a settle during a lawsuit into a somehow rational choice for the *repeat player*.

4.Conclusion

In order to read the landscape of disputes in Brazil in a different way, we questioned the common core by refusing three of the main reasons usually

41 VAZ, Paulo Afonso Brum. Conciliações nos conflitos sobre direitos da Seguridade Social. *Revista de Doutrina da 4ª Região*. Porto Alegre: Tribunal Regional Federal da 4ª Região, n. 43, ago. 2011. Available at: http://migre.me/loVWk. Last accessed on: September 01st 2014.

associated with the "litigation explosion". We argue that cultural explanations could also conclude that Brazilians are rather peaceful than litigious. Also, we sustain that our Judiciary is not too small, being responsible for a substantial part of the public budget. In addition, we defend that access to justice is still difficult for lots of people, as courts are basically used intensively by those who are *repeat players*.

Taking social security claims as an example, we tried to explore some causes for the high litigation rates in that area. Basically, we focused on the dispute resolution system frequently designed for those cases. By analyzing the system, we identified two litigation filters that try to minimize the number of lawsuits: administrative agency decisions (external filter) and court-connected mediation (internal filter). However, we argue that because of different incentives, associated with the lack of communication, administrative decisions are not paced with court decisions. In a similar way, mediation is used almost exclusively after the lawsuit is filed, not attacking litigation causes. Also, as used basically in cases that INSS knows it would probably lose, it reinforces the advantages of the *repeat player*, then making a good option to maintain the system as it is. In short, administrative agency decisions and court-connected mediation work less as filters than as propellers.

BIBLIOGRAPHY

ALVES, Adler Anaximandro de Cruz e. A atuação cidadã da AGU na redução da litigiosidade envolvendo o Instituto Nacional do Seguro Social: considerações acerca de instrumentos de ação da AGU capazes de promover o amplo reconhecimento de direitos sociais. In: *Publicações da Escola da AGU: Trabalhos Vencedores do Concurso de Monografias da AGU em 2009-2010*. Brasília: EAGU, Brasília: EAGU, ano IV, nº 15, 2012, p.7-44.

ASSOCIAÇÃO DOS MAGISTRADOS BRASILEIROS. *O Uso da Justiça e o Litígio no Brasil*. Brasília: AMB, 2015.

AVRITZER, Leonardo; MARONA, Marjorie; GOMES, Lilian (org). *Cartografia da Justiça no Brasil: uma análise a partir de atores e territórios*. São Paulo: Saraiva, 2014.

BRASIL. *Constitution of the Federative Republic of Brazil: constitutional text of October 5, 1988, with the alterations introduced by Constitucional Amendments no. 1/1992 through 64/2010 and by Revision Constitutional Amendments no. 1/1994 through 6/1994*. 3. ed. Brasília : Chamber of Deputies, Documentation and Information Center, 2010.

CONSELHO NACIONAL DE JUSTIÇA. *Cem maiores litigantes – 2011*. Available at http://migre.me/kyAiY. Last accessed on: July 20th , 2014.

_____. *Cem maiores litigantes – 2012*. Available at http://migre.me/kyAln. Last accessed on: July 20th , 2014.

_____. *Justiça em Números – 2014*. Available at: http://migre.me/txOBu. Last accessed on: January 27th , 2015

_____. *Justiça em Números – 2015*. Available at http://migre.me/rIg4b. Last accessed on: October 4th , 2015.

COSTA, Susana Henriques da. STF e os filtros ao acesso à Justiça: gestão processual ou vantagem ao grande litigante? Supremo em Pauta. São Paulo:

Estado de S. Paulo, September 18th, 2014. Available at: http: //migre.me/txOJa. Last accessed on: April 17th, 2016.

FISS, Owen. Against Settlement. In: FISS, Owen. *The Law as it Could Be*. New York/London: New York University Press, 2003, p. 90-104.

DA ROS, Luciano. 2015. O custo da Justiça no Brasil: uma análise comparativa exploratória. *Newsletter. Observatório de elites políticas e sociais do Brasil*. NUSP/UFPR, v.2, n. 9, julho, p. 1-15.

FREITAS JR, Antonio Rodrigues de. Conflitos intersubjetivos e apropriações sobre o justo. In: SILVA, Luciana Aboim Machado Gonçalves da (org.). *Mediação de Conflito*. São Paulo: Atlas, 2013.

GABBAY, Daniela Monteiro, SILVA, Paulo Eduardo Alves da Silva, ASPERTI, Maria Cecília de Araújo, COSTA, Susana Henriques da. *Why the 'Haves' Come Out Ahead in Brazil? Revisiting Speculations Concerning Repeat Players and One Shooters in the Brazilian Litigation Setting*. Available at: http://migre.me/txnpk. Last accessed on: April 16th, 2016.

GALANTER, Marc. Afterword: Explaining Litigation. *9 Law & Society* Rev., 1975, p.347.

_____. Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society, 31 *UCLA Law Review* 4, 1983. Available at: http://migre.me/qXuiJ. Last accessed on: July 28th, 2015.

_____. Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change. *Law and Society Review*, 1974, vol 9, nº 1, p.95-160.

GIANNATASIO, Arthur Roberto Capella; ASPERTI, Maria Cecília de Araujo Asperti; SILVA, Paulo Eduardo Alves da. Estudo de Caso em Previdenciário. In: GABBAY, Daniela Monteiro; CUNHA, Luciana Gross. *Litigiosidade, Morosidade e Litigância Repetitiva no Judiciário: uma Análise Empírica*. São Paulo: Saraiva, 2012.

HALEY, John Owen. The Myth of the Reluctant Litigant. *Journal of Japanese Studies*, vol.4, n.2, 1978.

INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA. *Brasil em Números*. Vol. 23 – 2015. Rio de Janeiro: IBGE, 2015.

INSTITUTO DE PESQUISA ECONÔMICA APLICADA. *Acesso à Justiça Federal: dez anos de juizados especiais. Brasília*: Conselho da Justiça Federal, Centro de Estudos Judiciários, 2012.

LIPSKY, Michael. *Street-Level Bureaucracy: dilemmas of the individual in public services*. 30th anniversary expanded edition. New York: Russel Sage Foundation, 2010.

RAMSEYER, J. Mark; RASMUSEN, Eric B.. Comparative Litigation Rates. Discussion Paper. Discussion Paper no. 681, 2010, p.5. Available at: http://migre.me/txdcW. Last accessed on: January 27th 2015.

SADEK, Maria Tereza. Judiciário e Arena Pública: Um Olhar a partir da

Ciência Política. In: GRINOVER, Ada Pellegrini; WATANABE, Kazuo (org.). *O Controle Jurisdicional de Políticas Públicas*. 2 ed. Rio de Janeiro: Forense, 2013, p.1-32.

SURGIK, Aloísio. *A Origem da Conciliação*. PhD thesis. São Paulo: Faculdade de Direito da Universidade de São Paulo, 1984.

TRICHES, Alexandre Schumacher. *Direito Processual Administrativo Previdenciário*. São Paulo: Revista dos Tribunais, 2014.

VAZ, Paulo Afonso Brum. Conciliações nos conflitos sobre direitos da Seguridade Social. Revista de Doutrina da 4ª Região. Porto Alegre: Tribunal Regional Federal da 4ª Região, n. 43, ago. 2011. Available at: http://migre.me/loVWk. Last accessed on: September 01st 2014.

ZWEIG, Stefan. *Brazil Land of the Future*. Traslated by Andrew St. James. New York: The Viking Press, 1941.