Riverboat Courts Provide Access to Justice in Brazil’s Remote Amazon Delta
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Riverboat court moored on Brazil's Amazon River. Photograph by Dado Gladieri used with permission.
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From the Executive Editor:
Implementing The Rule Of Law In Brazil’s Amazon Frontier
By Markus Zimmer

Abstract: This piece traces the courageous and dedicated efforts of Brazilian judge Sueld Pereira Pini and her colleagues in Brazil’s northern state of Amapá to undertake an ambitious effort to deliver justice and other government services to the marginalized and disenfranchised inhabitants of Macapá municipality. That municipality serves as the capitol of Amapá state, and its residents include those residing in remote communities in the hinterlands accessible only via dirt roads and trails as well as those the Balique archipelago, part of the enormous Amazon River Delta, whose communities are only accessible by water-based transportation. Developing the justice-distribution network known as Justicia Itinerante for the land-based communities and Justicia Fluvial Itinerante for the archipelago involved acquiring and converting buses and Amazon riverboats to function as mobile courts and utilizing them to conduct proceedings in a diverse assortment of civil, criminal, family and commercial cases. It is an inspiring narrative demonstrating how passion and determination can combine to provide access to justice for those governments all too often ignore.

Keywords: mobile courts, floating courts, access to justice, remote community justice, Amazon justice, Brazil’s mobile courts, riverboat courts, bus courthouses.

For the location of its 2018 International Conference, IACA’s Executive Committee selected the Federative Republic of Brazil, the largest country in the southern hemisphere of the Americas and home of the acclaimed Amazon Rainforest. Brazil is a shortened form of Terra do Brasil, land of Brazil, christened in the early 16th century by Fernão de Loronha, leader of a merchant consortium pursuing commercial exploitation of brazilwood for the production of wood dyes for the European textile industry.

Brazil ranks fifth both in size and population of the world’s countries; it comprises nearly half of the entire South American continent. The country’s diverse political, cultural and ethnic vibrancy stems in part from its neighborhood; it shares borders with Argentina, Bolivia, Colombia, French Guiana, Guyana, Paraguay, Peru, Suriname, Uruguay and Venezuela. Brazil’s political geography encompasses five regions subdivided into 26 states and a Federal District. Colonized by the Portuguese, Brazil declared its independence on 7 September 1822.

Brazil hosts an estimated one-third of all known animal species and makes up about half of the world’s rainforests. Its Amazon River conveys more fresh water into the Atlantic Ocean than any other river to any other body of water. At its narrowest point, the river is 1.6 kilometers or one mile wide; during Brazil’s monsoon, at its broadest point the Amazon’s width can reach 48 kilometers. The country’s enormous size, its dazzling and sometimes-inhospitable physical geography, and its numerous indigenous peoples, each with its own language, cultural traditions, religious beliefs and practices, pose inordinate government service delivery challenges.

A core theme of IACA’s Brazil conference is promoting access to justice for myriad souls worldwide suffering from lives of disenfranchisement and marginalization. If we take Brazil as an example, enabling access to justice for inhabitants in remote areas of Brazil’s Amazon basin poses numerous challenges. The enormous power of the river’s flow constantly mutates the labyrinthian network of streams, channels and inlets that lace the enormous delta, rendering fruitless any effort to create a grid of fixed roads intersecting the towns and villages strewn throughout the archipelago. For centuries, indigenous locals relied on homegrown mechanisms for criminal justice and dispute resolution, mechanisms that proved no match for and left them at the mercy of marauding bands of pirates and other rogues who ruled the delta’s
waterways. More recently, local oligarchs dispensed their own versions of enforcement, not far removed from tactics deployed by mobs and occasionally peppered with lynchings. The enforcement functions of the national justice system, replete with its own gargantuan challenges and inefficiencies was in no position to either effectively monitor these remote communities or to establish an institutional framework for preserving law and order within them until relatively recently.

Brazil's Northern border is anchored on the East by Amapá State. With the shape of a rough Rhombus, Amapá's North-eastern border abuts the Atlantic; its South-eastern border runs largely along the Amazon archipelago where its capital city, Macapá, is located. Amapá is Brazil's second-lowest populated state; over 90% of its population resides in Macapá. The majority of the state's inhabitants in Macapá, its hinterlands, and in remote settlements scattered along the delta, subsist at the poverty level, enjoy little in the way of government-sponsored social-assistance infrastructure, and traditionally are not significant beneficiaries of government largesse or services.

In 1996, an enterprising and impassioned judge, Sueli Pereira Pini, attached to the Juisado Especial Central Cível e Criminal da comarca de Macapá, the Special Civil Court of Macapá, created with her colleagues an access to justice initiative christened Justicia Itinerante or Itinerant Justice (IJ). In addition to her judicial functions, Judge Pini serves as Macapá municipality's special courts coordinator. IJ is a framework for delivering justice not only to the poor and disenfranchised within metropolitan Macapá’s impoverished slum areas, but extends throughout the 6,400 square-kilometer municipality whose jurisdiction, in addition to the capital city, includes myriad small communities in the hinterland accessible only via hazardous and, during monsoon, often impassable dirt roads and trails. To reach those far-flung communities, IJ utilizes a bus refurbished as a mobile courthouse that circulates through the bush country on a regular schedule, often convening court in town and village squares. Judge Pini wields her justice gavel with resolve when necessary, insisting that local officials undertake infrastructure upgrades to improve the sometimes-wretched conditions under which the poorest inhabitants eke out a living.

The jurisdiction also includes rural communities in the Balique archipelago, access to which is restricted to watercraft. For their denizens, most of whom subsist in poverty, access to justice in Macapá's trial-level courts entails unaffordable transportation costs, significant time commitments and sluggish adjudication, effectively putting justice beyond their reach and consigning them to vigilante-style relief such as bullying, domestic violence, drunken brawls, machete attacks, destruction of property, protracted feuds, etc. To deliver justice to those residents, Judge Pini created Justicia Fluvial Itinerante or Itinerant Fluvial Justice which relies on an Amazonian steam-powered riverboat doubling as the justice boat whose top-deck functions as a convertible courtroom and administrative space for dispensing local justice, sleeping quarters, and stowage for gear, food and drink, casefiles, equipment such as computers and water-purification systems, and furniture, including a portable dentist’s chair. The justice boat convenes its service with a 200-kilometer downstream crossing to the archipelago every other month with the judge and her legal staff on board, dispensing justice in a variety of civil, family, commercial and criminal cases. Apart from a single room in which formal hearings are convened, the riverboat has no refrigerated air conditioning, so dress codes are relaxed in the hot and humid tropical climate.

On a typical business day, the officials roll out of hammocks by 6:00 am, shower in one of the four stalls on board, dress, breakfast, and stow their personal affects before setting up tables and loading them with stacks of court case files arranged by docket calendar, legal reference texts and Brazilian legal codes, laptops and a printer prior to convening court. Litigants walk to the docked riverboat court from local villages or arrive by motor dingy or canoe, sometimes traveling for hours, from neighboring locales, queuing up by 7:00 am. Recognizing early in IFJ's debut that the inhabitants of these remote communities also lacked access to medical, dental, and other government services and products such as medicines, Judge Pini gradually expanded its scope to include doctors, nurses, dentists, psychologists, educators and assorted government professionals to accompany the judicial team.

The court's docket reflects its broad jurisdiction in what primarily comprise minor civil, criminal, family and commercial cases. Because Amapá state boasts Brazil's second-highest fertility rate and over 25% of birthmothers are in their teens, the caseload features numerous child-support disputes. As a single mother of four, Judge Pini takes an active interest in ensuring the welfare of small children and does not hesitate to order delinquent fathers to appear before her months after judgment was imposed. Other cases involve charges of contractual non-compliance in a variety of settings. In one case, a local fisherman defaulted on credit installment payments for supplies acquired at the general mercantile store. The store owner opted to accept an Amazonian pig in lieu of cash to settle the debt, and a police officer was dispatched to confiscate the animal and convey it to the court. Judge Pini remarked that having ordered a pig be taken into the court's custody was a first for her. The criminal prosecutor motioned that the pig be sentenced to death and promptly slaughtered, then slow-roasted for a special floating court dinner that evening. Judge Pini denied the motion, noting that "There's no death penalty in Brazil and no habeas corpus for pigs." Perhaps the most enjoyable aspect of her work is conducting marriage ceremonies in the natural beauty of Brazil's Amazon rainforest. After concluding a full day of proceedings, the riverboat team members relax with a beer on the top deck as the tropical sun recedes and the heat fades.

Where adjudicating a case that requires unique professional expertise not in her portfolio, Judge Pini may have a skilled professional accompany her. When reviewing a case in which three ranchers with adjoining island acreage each claimed property rights to new land created by the silt-depositing Amazon, she contracted with a land title expert to research and prepare a report, then brought him along on the day of the trial proceeding as a court-appointed expert. He disclosed his findings, equally unfavorable to all three. Shortly, a settlement agreement was reached that apportioned the new land equally among the three, at least while it survived Amazonian currents.

Case adjudication for litigants in these backcountry venues rarely involves retained counsel. Judge Pini has pro bono attorneys travel with her to assist otherwise clueless litigants and frequently dispenses with strict adherence to formal procedural requirements, relying instead on less-formal and streamlined approaches normally associated with settlement, mediation and related dispute-resolution tactics that simplify court processes in a manner that indigenous locals understand and prefer. Most litigants willingly accept the judgments and comply with them as the proceedings conclude, largely eliminating the need for enforcement process. Judge Pini lamented in 2005 that the pace of justice is "irresponsibly slow in Brazil, with 70% of case time wasted on formalities and not the issue itself." She went on to note that where the formal courts require an average of five years to dispose of cases, the justice boat court resolves 60% of its cases in a single hearing. When criminal matters are on the docket, the justice team is accompanied by armed sheriff's deputies or police officers in speedboats who fan out early mornings to apprehend and arrest suspects charged with violent and other crimes, ensuring their appearance at scheduled proceedings and providing courtroom security.
In the interim, other judges have been assigned to justice-boat adjudication, including Mayra Brandão, Pires Neto, Matias Pires Neto and Fabio Santana. Similar riverboat court jurisdictions have been replicated elsewhere in the enormous Amazon delta, complementing the traditional land-based courts. Nationally, in 1995, the federal government mandated the implementation of bus- and boat-based mobile justice networks in Brazil's sprawling and embryonic interior, also underserved. Judge Pini’s efforts have not escaped global notice and acknowledgement. In 2005, she was one of 1,000 women nominated collectively for the Nobel Prize in 2005 by the Swiss-based PeaceWomen Across the Globe.

The productivity, success and efficiency of this dual system, justice bus and justice boat, for the provision of court and other government services to vulnerable populations in Brazil is a testimony to Judge Pini’s humanity, passion, commitment to human rights, and tenacity, consistently administered under less-than-ideal conditions. The ongoing effort has its critics who seek to marginalize its accomplishments by invoking some of the enormous challenges facing the nation such as the ongoing plunder of Brazil’s dwindling rainforests and other natural resources, the protection of its fragile and endangered indigenous populations, the endemic public-sector corruption, and the trafficking of the country’s unique and diverse flora and fauna, among others. Such criticisms are misdirected, and those giving voice to them are advised to target their indignation on those whose authority and accountability vest them with the power to address those challenges. IACA salutes Judge Pini and her colleagues in Brazil and elsewhere for their significant contributions and personal sacrifices to the cause of justice and the rule of law for marginalized and disenfranchised souls.

To join Judge Pini and her colleagues in their riverboat justice initiative, click on this link: https://www.aljazeera.com/programmes/fightforamazonia/2012/02/201222713552170402.html. It features an inspiring, circa 45-minute documentary of them serving the indigenous populations of various communities of the archipelago as the justice boat navigates the Amazon.

The agenda for IACA’s September Conference at Brazil’s Iguazu Falls will include a session on access to justice in the country’s remote hinterlands. Consider joining us there for an unforgettable experience.

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Judicial Tenure and the Politics of Impeachment – Comparing the United States and the Philippines

David C. Steelman

Abstract: On May 11, 2018, Maria Lourdes Sereno was removed from office as the Chief Justice of the Supreme Court of the Philippines. She had been a vocal critic of controversial President Rodrigo Duterte, and he had labeled her as an “enemy.” While she was under legislative impeachment investigation, Duterte’s solicitor general filed a quo warranto petition in the Supreme Court to challenge her right to hold office. The Supreme Court responded to that petition by ordering her removal, which her supporters claimed was politically-motivated and possibly unconstitutional.

The story of Chief Justice Sereno should give urgency to the need for us to consider the proposition that maintaining the rule of law can be difficult, and that attacks on judicial independence can pose a grave threat to democracy.

The article presented here considers the impeachment of Chief Justice David Brock in the American state of New Hampshire in 2000, identifying the most significant institutional causes and consequences of an event that presented a crisis for the judiciary and the state. It offers a case study for the readers of this journal to reflect not only on the removal of Chief Justice Sereno, but also on the kinds of constitutional issues, such as judicial independence, judicial accountability, and separation of powers in any democracy, as arising from in conflicts between the judiciary and another branch of government.

Public office is a public trust. Public officers and employees must, at all times, be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency; act with patriotism and justice, and lead modest lives.

-- Constitution of the Republic of the Philippines (1987)

Ultimately of course this impeachment trial is not about Chief Justice Brock, even though his status, his interest, is very important, but I suggest to you that these proceedings transcend his interest and all of ours because this is really about the institutional integrity of the Supreme Court of New Hampshire.

-- New Hampshire Attorney Joseph Steinfield (2000)

I. Introduction

Impeachment – typically involving charges brought by the lower chamber of a legislature for trial in its upper chamber – is a means for removal of judges and other government officials for serious abuse of official power and public trust. It is available under the constitutions of the United States and 48 of its 50 sub-national state governments, the Republic of the Philippines, and a number of other countries.

1 This article is based in large part on research done for the book, The Impeachment of Chief Justice David Brock: Judicial Independence and Civic Populism (2017), by John Cerullo and David C. Steelman. The author is deeply grateful to Professor Cerullo for his contributions to the quality of this article.

2 Unaffiliated; Steelman is a retired lawyer and member of the bar in Massachusetts and New Hampshire. He worked from 1974 through 2013 for the National Center for State Courts. He was lead author of Caseflow Management: The Heart of Court Management in the New Millennium (2000, 2004), and co-author (with Richard Van Duizend and Lee Suskin) of Model Time Standards for State Trial Courts (2011). Contact information: email dsteelman8244@gmail.com; cellphone +1-603-391-2374.

3 Const. art. XI, sec. 1.

4 This quote is from Steinfield’s opening remarks in the Brock impeachment trial. Mary Brown, The Impeachment Trial of the New Hampshire Supreme Court Chief Justice (2001), 33.

5 U.S. Constitution, art. 1, sec. 2, 3 and 4.

6 See National Center for State Courts/American Judicature Society, “Methods of Judicial Selection>Removal of Judges,” http://www.judicialselection.com/judicial_selection/methods/removal_of_judges.cfm?state.

7 1987 Constitution of the Republic of the Philippines, art. XI.

8 See, for example, Gretchen Helmke and Julio Rios-Figueroa (eds.), Courts in Latin America (2011); H. P. Lee, Judiciaries in Comparative Perspective (2011); H. P. Lee and Marilyn Pittard, Asia-Pacific Judiciaries (2017); and Anja Seibert-Fohr (ed.), Judicial Independence in Transition (2012).
By an overwhelming bipartisan vote on July 12, 2000, the New Hampshire House of Representatives impeached David A. Brock, Chief Justice of the Supreme Court of New Hampshire, seeking his removal from office as the leader of that court and of the state’s entire judicial branch of government. Brock was the first state court chief justice in 70 years to be impeached, and only he sixth in American history. In over two centuries since 1789, no U.S. Supreme Court chief justice has ever been impeached. In the Philippines, by comparison, two supreme court chief justices have been impeached within the last decade. After being impeached on December 12, 2011, Philippine Chief Justice Renato Corona was removed and disqualified by the Senate on May 29, 2012. Then on March 9, 2018, a legislative committee approved articles of impeachment against Philippine Chief Justice Maria Lourdes Sereno. Before the articles of impeachment were transmitted to the Senate, however, Sereno was removed on May 11, 2018, by an 8-6 vote of the supreme court in proceedings on a petition of quo warranto filed by the Philippine solicitor general. Critics have argued that the removal of Sereno by such means was extra-constitutional, in that impeachment is ostensibly the only means by which judges or other high government officials may be removed from office. Indeed, one legislator observed that “[a]ny quo warranto petition questioning the authority or basis for Chief Justice Maria Lourdes Sereno to hold the position of chief magistrate is doomed to fail,” and that “The quo warranto ruse is an admission that an impeachment trial will not prosper in the Senate.” In New Hampshire, David Brock was easily acquitted in October 2000 at the conclusion of a trial in the state senate sitting as a court of impeachment. Yet the events before and after the impeachment proceedings show that there was much more at stake than any blameworthy behavior by Brock himself. Rather, Brock’s impeachment arose because of problems in four critical areas: (1) judicial independence; (2) judicial rulemaking; (3) judicial review; and (4) judicial ethics and accountability.

The historical context and implications of the Brock impeachment warrant the attention of scholars and court professionals in all countries where impeachment is provided as a way to remove a judicial officer on constitutional grounds. Even in countries where impeachment is not among the means available for removal of judges for cause, the Brock impeachment offers a case study worthy of international and reflection about the judicial function and separation of powers in any democratic form of government, whether in the Philippines or elsewhere.

II. Judicial Power and Accountability in the Philippines

Provisions for judicial power and accountability under Philippine constitutional provisions have changed over time. The 1899 Philippine Constitution gave the judicial branch of government absolute independence from the legislative and executive branches, with judicial accountability provided only by authorizing any citizen to file suit against a judge for any crime committed in the discharge of the judicial office. The 1935 Constitution authorized the Supreme Court to declare any treaty or law unconstitutional if two-thirds of all its members concurred, giving the Supreme Court power to promulgate uniform rules for all courts, subject to being repealed, altered or supplemented by the Philippine Congress. Supreme Court justices were among the high government officials subject to removal from office “on impeachment for any conviction of, culpable violation of the Constitution, treason, bribery, or other high crimes,” based on a two-thirds vote to impeach in the House of Representatives and conviction by a two-thirds vote after trial in the Senate.

The 1973 Philippine Constitution authorized the Supreme Court to declare any treaty or law unconstitutional if ten of its fourteen members concurred, and with Supreme Court rulemaking power still subject to being repealed, altered or supplemented by the Philippine Congress. Supreme Court justices and other high government officials were subject to removal from office for graft and corruption along with any culpable violation of the Constitution, treason, bribery, or other high crimes; and only a one-fifth vote of all members of the National Assembly was required for impeachment, with a two-thirds vote of all members required for conviction.9

9. Impeached state court chief justices before Brock were Edward Shippen (PA, 1803); John McClure (AR, 1871 and 1874); David Furches (NC, 1901); Frederick Branson (OK, 1927); and Charles Mason (OK, 1929).

10. See Federal Judicial Center, “Impeachments of Federal Judges,” https://www.fjc.gov/history/judges/impeachments-federal-judges.

11. Corona was found guilty of a charge of failure to make public disclosure of his assets, liabilities, and net worth. See Malia Ager, “Senate votes 20-3 to convict Corona,” Inquirer.net, May 29, 2012, available at http://newsinfo.inquirer.net/202929/senate-convicts-corona#ixzz5HI6zBhqF.

12. See Joe Torres, “Philippine legislators vote to impeach chief justice: Catholic bishops say move to oust top judge divisive,” UCANews.com, March 9, 2018, available at https://www.ucanews.com/news/philippine-legislators-vote-to-impeach-chief-justice/81748.

13. See Erin McCarthy Holliday, “Philippines Supreme Court ousts Chief Justice,” Jurist, May 11, 2018, available at http://www.jurist.org/paperchase/2018/05/philippines-supreme-court-ousts-chief-justice.php.

14. See Ellen T. Tordesillas, “Opinion: A lawyer-blogger’s view on the quo warranto petition vs Sereno,” ABS-CBN News, April 23, 2018, available at http://news.abs-cbn.com/blogs/opinions/04/23/18/opinion-a-lawyer-bloggers-view-on-the-quo-warranto-petition-vs-sereno; and Marvin Sy, “Senate body sets hearing on SC's quo warranto ruling,” MSN News, May 25, 2018, available at https://www.msn.com/en-ph/news/national/senate-body-sets-hearing-on-scs-quo-warranto-ruling/ar-AAoLk0?li=BBr8RiR.

15. Reina Leanne Tolentino, “Quo warranto or impeachment? Lawyers differ on ousting Sereno,” The Manila Times, March 4, 2018, available at http://www.manilatimes.net/quo-warranto-impeachment-lawyers-differ-ousting-sereno/383968.
Under the current Philippine Constitution, enacted in 1987, the judicial branch is granted fiscal autonomy, and appropriations for the judiciary may not be reduced by the legislature below the amount appropriated for the previous year. The Supreme Court may declare any treaty, international or executive agreement, or law unconstitutional by a simple majority vote of its members sitting en banc. No longer subject to legislative override as in prior constitutions, the Supreme Court has exclusive power to:

Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the integrated bar, and legal assistance to the under privileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.

As in the 1935 and 1973 Philippine constitutions, impeachment is the only means provided for the removal of Supreme Court justices and other high officials from office. Grounds for removal are broader, however, with “betrayal of public trust” added to “culpable violation of the Constitution, treason, bribery, graft and corruption, [and] other high crimes.” And after the experiment in the 1973 Constitution with impeachment and trial conviction by votes of the entire National Assembly, the current impeachment process now calls for impeachment by the House of Representatives (by a one-third vote of all members) and trial in the Senate (with the vote of two-thirds of all members required for conviction).

III. The Impeachment Crisis in New Hampshire

In January 1999, a New Hampshire state representative and a state senator co-sponsored a bill to have Chief Justice Brock removed from office by the governor who is authorized to remove a judge from office by a bill of address – that is, on a request by both chambers of the legislature on grounds warranting removal but insufficient for impeachment. The legislators seeking his removal criticized Brock, as head of the judiciary, for trying to silence attorneys critical of court decisions, for concealing records of judicial misbehavior, for attempting to intimidate a legislator, for usurping authority of the other branches of government, and for “pro-active behavior in the realm of policy.” After it was referred to a joint committee comprising six representatives and six senators, committee members voted unanimously against the bill for “lack of specificity,” after which the legislature decisively rejected it.

Although the 1999 bill of address against Brock failed, it nonetheless served as the precursor of a much more tumultuous event. In February 2000, a catastrophe arose when the supreme court had to hear the appeal from a trial court decision on the divorce of one of its members, Associate Justice Stephen Thayer. All of the justices had to recuse themselves. In a conference of the justices, when Chief Justice Brock announced the names of the substitute judges that he had appointed to hear that case, Thayer objected vehemently to one of the replacement judges. Knowing that it was a violation of court procedures for one judge to discuss a case involving a colleague in the presence of the other judges and believing that this was not the first time that Thayer may have violated judicial ethics and perhaps even criminal statutes, the clerk of the supreme court reported the matter in a memorandum to the attorney general of the state. The response by the attorney general's office was disastrous for Chief Justice Brock, because it recommended that legislators to conduct an investigation of court practices. The house of representatives accepted the recommendation of the attorney general and referred the matter to its judiciary committee. After three months of committee investigation, the result was an overwhelming bipartisan vote by the full house in July 2000 to file four articles of impeachment against Brock in the senate, alleging that he (a) perjured himself by lying under oath to legislators during their impeachment investigation, and (b) committed the impeachable offense of "maladministration" by (a) improperly intervening in 1987 litigation involving a powerful state legislator;
(b) engaging in ex parte discussions with Justice Thayer about the appeal of Thayer’s divorce case; and (c) overseeing a practice allowing recused justices to comment on and influence decisions in the cases from which they had recused themselves.  

When those charges were filed in the senate, Brock became only the second judge in state history to be impeached, and the first ever to be tried. Impeachment trial testimony began in September 2000, and proceedings were televised daily. In October, after three weeks of hearings, the Senate voted to acquit Brock of all of the charges.

The proceedings against Brock involved far more than the allegations about his purported ethical violations relating to the Thayer divorce case or the 1987 trial-court case. They were the culmination of tensions between the legislature and the judiciary that had been building for decades and were the focus of important developments in further legislative-judicial relations after the conclusion of Brock’s impeachment trial. Key developments before and after impeachment provide a context and explanation for the impeachment. They also shed light on critical concerns relating to judicial independence, court management, and separation of powers, which face the Philippines and many other democracies around the globe.

IV. Independence of the Judiciary

The removal of Philippine Chief Justice Sereno in 2018 reflects a crisis of judicial independence brought on by a fundamental conflict between the leaders of the judicial and executive branches of government. By contrast, the most significant consideration leading up to the Brock impeachment in 2000 was a fundamental dispute over the proper scope of judicial independence from legislative oversight.

When the New Hampshire Constitution was adopted in 1784, it created a government that limited the executive power of the governor in favor of the people’s elected legislative representatives. The governor’s appointment of judges was subject to approval by a separately-elected executive council, and judges were to serve “for good behavior” rather than at the pleasure of the executive.

As a reflection of legislative supremacy, the 1784 constitution also granted the state legislature full and unfettered power to create all courts in the state and establish their jurisdiction. In the exercise of that power, the legislature passed “court-clearing” statutes five times in the nineteenth century to abolish the highest court in the state, thereby removing all of its judges and allowing for the appointment of new judges by the political party that had come to power.

In 1901, there was yet another judicial reconstruction involving the supreme court as the state’s highest court and the superior court as its general-jurisdiction trial court. This time, however, the governor and the legislature agreed to retain all of the incumbent judges in those courts. A “gentlemen’s agreement” was reached, under which the majority of the five supreme court justices would be nominees of the political party in power, while the remaining two seats would be held by appointees of the minority party. This arrangement brought stability to the judicial branch for more than 60 years. It was not until 1966 that the people of New Hampshire approved an amendment to the New Hampshire Constitution, indicating that they were “in favor of protecting the supreme court and superior court from possible political interference by establishing them as constitutional courts.”

Under the American national constitution of 1789, the federal judicial power of the country was vested in the United States Supreme Court and other courts established by Congress. Yet New Hampshire did not grant constitutional recognition to its court of last resort, free of any legislative power over the creation or abolition of courts, until 178 years after the enactment of its 1784 constitution. See Figure 1.

Figure 1 compares all American states in terms of the elapsed time from their respective statehood dates to the dates when their respective state constitution granted the highest court constitutional recognition, thereby freeing it from any legislative power to create or abolish courts. As Figure 1 shows, 43 states granted constitutional recognition to the highest court in the state at or even before admission to statehood. No other state permitted continuing legislature power over the very existence of its highest court as long as New Hampshire.

32 N.H. House Journal 56, 2000 Session (July 12, 2000), 1667-1719 and 1755, House Resolution 51 bill text as amended, http://www.gencourt.state.nh.us/legislation/2000/HR0051.html.
33 In 1790, Justice Woodbury Langdon of the state’s highest court was accused of “corruptly and willfully” neglecting his duty by refusing to hold court in three counties at appointed times, but he resigned his position before an impeachment trial began. See Nathaniel Bouton, et al., Early State Papers of New Hampshire, Vol. 22 (1893), 747-756.
34 For a detailed analysis of the impeachment process, see John Cerullo and David Steelman, The Impeachment of Chief Justice David Brock: Judicial Independence and Civic Populism (2017), 111-91.
35 See Felipe Villamor, “She Stood Up to Duterte. Now She Faces Impeachment,” New York Times, March 2, 2018, available at https://www.nytimes.com/2018/03/02/world/asia/philippines-chief-justice-duterte.html;
36 N.H. Const. Part 2, Article 4.
37 See Richard Upton, “The independence of the Judiciary in New Hampshire,” 1 N.H. Bar J. 28 (1959).
38 The proposed constitutional amendment had been approved for submission to voters by the delegates at the 1964 constitutional convention. New Hampshire, Convention to Revise the Constitution, May 1964 (1964), 185–87. Voters approved the proposed amendment by a large margin. See New Hampshire, Manual for the General Court, 1967 (1967), 522.
The achievement of institutional independence from the legislature in 1966 was followed by (a) administrative unification of all courts in the state in 1978 under the leadership of the chief justice and the supreme court, and (b) budgetary unification in 1984, with virtually all court operating and capital expenditures funded by the state legislature. These steps in New Hampshire were part of a national “court unification movement,” comparable to similar steps in many other states.

Yet such a transformation of the state judicial branch from 1966 to 1984 may have been a dramatically different experience for state government in New Hampshire than it was for other states, where the institutional independence of the highest court had long been a given feature of the separation of powers. In New Hampshire, a state legislature long able to create or abolish all courts could not now do so.

Moreover, the costs for municipal and probate courts previously borne by local units of government had become a state-level responsibility. Legislators were now expected to fund a court system that was suddenly far less answerable to them than it had ever been. In addition, the newly-independent judiciary now resisted the legislative direction willingly accepted by most of the other state agencies that clamored for scarce public funds.

V. Rules Governing Court Practice, Procedure, and Administration

In that new environment, a source of growing tension between the legislature and the newly-independent judiciary involved the scope of authority to promulgate rules governing the judiciary. The constitutional amendment approved by voters in 1978 and

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39 N.H. Const. Part 2, Article 73-a.
40 See Jeffrey Leidinger, “The Move Toward State Financing: A New Hampshire Approach,” 7 Just. Sys. J. 103 (1982).
41 See Robert Tobin, Creating the Judicial Branch: The Unfinished Reform (1999), 139-48.
providing for administrative unification of the courts conferred power on the chief justice to enact rules with the force and effect of law to govern practice, procedure and administration in all courts.42

It is striking that subsequent New Hampshire events relating to rulemaking power, as part of the legislative-judicial tensions leading ultimately to the impeachment of Chief Justice Brock in 2000, had a parallel in the Philippines, where supreme court exercise of rulemaking power was among the factors provoking a “populist backlash” in that country.43

When the 1978 New Hampshire constitutional amendment affecting court rules had been under consideration in a constitutional convention, delegates were assured that the provision granting court-promulgated rules the force and effect of law would not eliminate or restrict the state legislature’s long-recognized ability to provide by statute for court procedures in the future.44 In New Hampshire and other states, control over court practice and procedure was traditionally subject to a concurrent exercise of power by both legislative and judicial branches of government.45 In a nineteenth-century decision, for example, the New Hampshire supreme court acknowledged a constitutionally-valid legislative role in judicial rulemaking, without consistently assigning any clear or fixed priority to one branch over the other.46

Yet the constitutional amendment taking effect in 1978 created a new landscape with challenges for both the legislature and the judiciary. An opportunity to test the limits of judicial authority came in State v. LaFrance47, which presented the question of whether the court’s power to set rules for proceedings in courtrooms was independent of statutory oversight. The case involved a general-jurisdiction trial judge’s enforcement of a court policy preventing police officers from wearing their firearms when they testified, or even when they were in a courtroom. The legislature had challenged that policy by passing a statute that explicitly stipulated that law officers would be permitted to wear firearms in any courtroom in the state, “notwithstanding any other rule, regulation, or order to the contrary.”48 When a criminal defendant claimed in July 1983 that his right to a fair trial would be violated if officers were permitted to testify against him while wearing guns, the constitutionality of the statute put in question. On appeal, the supreme court ruled in November 1983 that the statute was unconstitutional. It held that the separation of powers principle in general, and the established power to punish for contempt specifically, granted courts control over security measures within their own confines.

As a consequence of the LaFrance decision in 1983, delegates to the state constitutional convention in the following year offered resolutions for constitutional amendments aimed at what traditionalists saw as a judiciary spinning out of control. One of those resolutions proposed that supreme court rules should be effective only when not inconsistent with statute,” thereby signaling that judicial leaders must not ignore the need for suitable legislative involvement in the court rulemaking process.49 The resolution was supported by almost 60% of the voting delegates, but it failed to gain the necessary two-thirds majority required for its adoption. Although the resolution had not been adopted in the constitutional convention, its proponents had indeed sounded a “warning alarm.”

The alarm was sounded again in January 1995, when a legislative bill was filed seeking to repeal the constitutional amendments granting constitutional recognition to courts and administrative power to the chief justice.50 Supporters of the bill asserted that the judges have exempted themselves from the law, that they “ignore our rights,” that “the courts are destroying this country,” that New Hampshire citizens have been “victims of judicial arrogance,” and that the judiciary “has usurped the power of the legislature.”51 The bill was referred for interim study, and in October 1996 the study recommended by an overwhelming vote that it not be adopted.52

Disputes over who controlled courtroom security and ordinary court procedures, however, were mere skirmishes compared to the dispute that arose over who controlled rules of evidence. In 1996, the supreme court justices were asked for an advisory opinion on legislation proposing that there be a “rebuttable presumption of admissibility” for prior sexual assault evidence in cases of adult criminal defendants charged with rape or related crimes. In their 1997 “Prior Sexual Assault Evidence, or PSAE”) advisory opinion53, the justices wrote that a proposed statute on the admissibility of prior sexual assaults by an adult criminal defendant would be an unconstitutional violation of the separation of powers, because the legislation would intrude on the exclusive authority of the court to regulate evidence in such matters.

The PSAE opinion helped to precipitate Chief Justice Brock’s impeachment. Yet the impeachment proceedings did not resolve the problems over the legitimacy of legislative involvement in the promulgation of court rules. In 2002, 2004, and again in 2012, bills to

42 Article 73-a, supra.
43 Wen-Chen Chang (eds.), Asian Courts in Context (2014), 367-68.
44 New Hampshire, Journal of the Convention to Revise the Constitution, May 1974 (1974), 261-62.
45 Leo Levin and Anthony Amsterdam, “Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision,” 107 U. Pa. L. Rev. 1 (1958), 3.
46 Cater v. McDaniel, 21 N.H. 231 (1850).
47 A 2d 340 (1983).
48 N.H. Rev. Stat. Ann. §490:4(a) (1975).
49 New Hampshire, Journal of the Convention to Revise the Constitution, May 1984 (1984), 27.
50 CACRS, N.H. House of Representatives, Journal 11 (January 5, 1995), 159.
51 N.H. House of Representatives, Constitutional & Statutory Revision Committee, Public Hearing, CACR5 (January 25, 1995).
52 Constitutional & Statutory Revision Committee, Interim Study Report (October 16, 1996).
53 Opinion of the Justices (Prior Sexual Assault Evidence), 688 A.2d 1006 (1997).
amend the state constitution by giving the legislature concurrent power to enact statutes that would prevail over court rules in the event of a conflict, were passed in the legislature but failed as ballot questions to gain voter approval.54

Yet by 2012, new members of the supreme court were expressing public support for that year’s proposed constitutional amendment. Despite the failure of the proposed amendment as a ballot question, the court held in a unanimous decision that (a) the language used in the 1997 PSAE advisory opinion was unnecessarily broad, and (b) the judiciary and legislature share concurrent authority over court rulemaking, except that the legislature must not enact procedural statutes that the supreme court would find unconstitutional55. Then in 201456, the court held that a statute on a criminal defendant’s right to discovery does not necessarily violate separation of powers; and to the extent there is a conflict between a statute and a court rule, an otherwise-constitutional statute must prevail.

As we note above, the Philippine Supreme Court has experienced difficulties, comparable to those in New Hampshire, in its exercise of rulemaking power. Critics have characterized the court’s broad use of its rulemaking power as “extrajudicial judicial activism,” involving (a) the advancement of such substantive causes as human rights, environmentalism, and press freedom, “not by laying down precedent in the course of adjudication but by enacting rules purportedly in its administrative capacity over court procedure;” and (b) as in New Hampshire, a claim of exclusive judicial authority over court rulemaking, rejecting the validity of review by the elected branches of government.57

VI. Judicial Review and Constitutional Requirements for Legislative Actions

A common occurrence around the globe in recent decades has been the emergence of “a new method of pursuing political goals and managing public affairs,” through an expansion of judicial power at the expense of elected government institutions by means of “constitutionalism and judicial review.”58

Those who have studied American courts know that judicial review by the U.S. Supreme Court of the constitutional validity of legislative actions dates from the famous 1803 case of Marbury v. Madison.59 Court review of legislation is also broadly exercised under sub-national state constitutions.60 Judicial review in New Hampshire dates from 1786-87, when judges hearing the “Ten Pounds Act” cases declared that the statutes in question violated a litigant’s constitutional right to a jury trial in civil cases.61 After this successful assertion of judicial authority under the constitution to review legislative actions, the justices of the state’s highest court then declared in 1818 that legislative review of court decisions in individual cases was an invalid intrusion on judicial powers under the state constitution.62

Though judicial review is now exercised in many countries through centralized “constitutional courts,” the Philippines and other countries once subject to British colonial rule or American occupation have adopted a decentralized system with judicial review by both appellate and trial courts. In almost all countries, the exercise of judicial review has seen a common pattern.63 As has been the case in countries with centralized systems, the courts – especially the supreme courts – in countries with decentralized systems have in recent years exhibited varying degrees of judicial activism in invalidating unconstitutional statutes or expanding standing to sue to permit greater protection of individual rights or the public interest.

In the Philippine context, the exercise of judicial review after the era of Ferdinand Marcos led in such cases as Oposa v Factoran64 and Kilosbayan v Guingona65 to a perception among critics that the courts had “jeopardized their legitimacy” by venturing too far into the political thicket, thereby provoking a backlash against the judiciary.66

Similar events occurred in New Hampshire, where decisions rendered as part of a national “rights revolution” also provoked a strong backlash. The “rights revolution” involved a judicial turn toward a stronger, often counter-majoritarian defense of constitutional rights (and, arguably, identification of previously-recognized ones). It was a movement associated with the civil rights movement of the 1950s and 1960s, when activists turned to the judicial branch of government for relief from conditions that elected officials were unable or unwilling to address.

Of all the events that precipitated the impeachment of Chief Justice Brock, the most immediate and inflammatory issue was a set of court decisions overturning New Hampshire’s traditional method of financing its public schools almost entirely through local property taxes.
The initial case was brought in 1993 by the Claremont school district and four others, all comparatively poor. The plaintiffs (a student and a property taxpayer from each school district) argued that the New Hampshire constitution established a state duty to provide an adequate education to all its citizens, which the state had illicitly shunted off to local taxing districts.

Chief Justice Brock himself authored the crucial decisions on those claims, known as Claremont I and Claremont II. In Claremont I (1993), the court concluded that New Hampshire’s constitution conferred the right to an adequate public education on all citizens of the state, that the state had responsibility to provide that education, and that the state could not delegate it to local government units of widely varying financial means.67 In Claremont II (1997), the court found that the state’s initial effort at compliance with its prior ruling, conceding a larger state role in the provision of public education while avoiding state-level financing of it, simply did not pass constitutional muster.68

Between Claremont II and Brock’s impeachment in 2000, his Court would issue a set of further decisions and advisory opinions rebuffing other schemes the elected branches put forward, as well as initiatives aimed at vitiating or mitigating the effects of earlier Claremont holdings.69 With each new ruling, legislative frustration and rancor deepened. To its opponents, the court was systematically violating the separation of powers by meddling in policy questions (public finances, educational standards) that were clearly entrusted to the peoples’ representatives. These decisions clearly contributed to the atmosphere that fueled Brock’s impeachment.

New Hampshire’s highest court has a long history of decisions in review of constitutional requirements bearing on legislative actions. Yet, as Figure 2 shows, the Claremont decisions were part of a flurry of judicial review decisions rendered between 1967 and 2000, in the wake of the constitutional amendments implementing judicial modernization in 1966-78.

Official publication of decisions rendered by the highest state court of New Hampshire was not funded by the state legislature until 1817. From then until the end of the Civil War, judicial review of legislative action was limited, and legislative action was found constitutional in all but one. From the end of the Civil War to the end of the century, New Hampshire’s participation in a dramatic expansion of the national economy caused many more judicial review cases than there had been in the antebellum period. Though some cases involved issues arising under the federal constitution, most presented state constitutional issues, and the court upheld the constitutionality of legislative action in about eighty percent of them.

From the beginning of the 20th century until well after World War II, most of the judicial review decisions in New Hampshire addressed still addressed state constitutional issues, although a growing number had to do with the validity of legislation under the federal constitution. Especially in the period from the start of World War II until 1966, when New Hampshire granted constitutional recognition to its highest court, judicial review cases showed high constitutional harmony between the legislature and the judiciary.

67 Claremont School District v. Governor, 635 A. 2d 1375 (1993).
68 Claremont School District v. Governor, 703 A. 2d 1353 (1997).
69 See John Lewis and Stephen Borofsky, “Claremont I and II—Were They Rightly Decided, and Where Have They Left Us?” 14 U.N.H. L. Rev. 1 (2015).
The time from 1967 until 2000 was strikingly different, however, with an explosion of claims arising under the federal constitution. This was a reflection of the “rights revolution” occasioned by the application of federal due process and equal protection provisions to the states by the U.S. Supreme Court. There was also a much higher percentage of New Hampshire judicial review cases during this period in which the court overturned the validity of legislative action. The court found a violation in almost half of all state constitutional questions and more than one-third of all federal questions.

Although too little time has passed since the Brock impeachment to support firm conclusions, data on the exercise of judicial review in New Hampshire are intriguing. Decisions to date in judicial review cases from 2001 through 2016 have been more favorable to the constitutionality of legislative action than they were in the preceding three decades. On both state and federal constitutional claims, the court has upheld the constitutional validity of legislation about seventy percent of the time.

This undoubtedly reflects changes in the makeup of the high-court bench, with a shift in judicial philosophies. The Brock impeachment crisis may have changed the dynamics of judge appointments by governor and council. It may also signal a broad transition in America and other countries to what might be called a “post-rights-revolution” atmosphere.

VII. Judicial Ethics and Mechanisms for Judicial Accountability

Like Philippine Chief Justice Sereno,71 New Hampshire Chief Justice Brock was charged with violations of applicable ethical requirements. Surely, the immediate and proximate cause for Brock’s impeachment in 2000 was the set of ethical questions that had come to the attention of the state attorney general and the legislature in association with the assignment of substitute judges to hear the appeal of Justice Stephen Thayer’s divorce case. Yet that was only the most recent among the questions concerning legislators about supreme court oversight of judicial behavior.

Decisions the court rendered on questions of judicial ethics and accountability took on a significance after 1966 that they might not have been accorded in earlier times. They were highly fraught now, testing the manner in which the judiciary would exercise new powers now that it was institutionally and operationally liberated from legislative control. Would the high court’s exercise of administrative authority assure legislators that judges were being held accountable?

The supreme court’s decision in the case of In Re Mussman72 would trouble proponents of legislative supremacy long afterward. The case questioned whether the court had the authority to investigate the behavior of an individual judge and impose disciplinary measures short of actual removal from office. But the broader issue was whether the judicial branch leadership might police its own ranks, rather than having the exercise of supervisory power over judicial personnel be a power exclusive to the legislature through impeachment or address, and the executive through address. Although the court in Mussman explicitly re-affirmed that the power to remove a judicial officer belonged solely to the elected branches, its decision cited a statute confirming its responsibility to prevent and correct errors and abuses in lower courts, including approval of lower court rules and the establishment and enforcement of canons of judicial ethics.73

In 1977, the court took unto itself substantially more of the disciplinary function once held exclusively by the legislative and executive branches, by creating the state’s first judicial conduct committee (JCC). Traditional means of dealing with misconduct by judges in American states had included impeachment, address, and popular election, which might be inadequate for dealing with misbehavior not rising to the level of overt corruption or criminality.74 To address that shortcoming, proposals had been advanced in the 1940s and 1950s to incorporate permanent disciplinary commissions into state judiciaries, and in 1960 California voters had amended their constitution to adopt one.

The New Hampshire Supreme Court was among the first to adopt a code of conduct based on the American Bar Association’s Model Code of 1972, and its eleven-member JCC was created to enforce it. The JCC in its original form was essentially an agency of the court, which appointed nine of its members and wrote the rules by which it functioned.75 No one anticipated how controversial that body would prove to be.

70 See Mark Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law (2009).
71 Chief Justice Sereno was accused by lawmakers of failure to declare her wealth in full from her 17-years as a law school professor. See R.G. Cruz, “Gadon complaint over SALN shows desperation,” ABS-CBN News, January 29 2018, available at http://news.abs-cbn.com/news/01/29/18/gadon-complaint-over-saln-shows-desperation-sereno-lawyer.
72 289 A. 2d 403 (1972).
73 The court rejected Mussman’s claim that it had no jurisdiction, arguing that the only remedy available under the constitution was either impeachment or address. This was the second of three cases involving Mussman. In 1971, the state bar association sought disciplinary action against Mussman for professional misconduct. Asserting inherent and statutory power to supervise attorney conduct for public protection and the maintenance of public confidence in the bar, the court suspended Mussman from the practice of law. Mussman’s Case, 286 A.2d 614 (1971). After its 1972 decision, the court then heard a petition by the attorney general for an inquiry into Mussman’s conduct as a part-time judge. Once again exercising its supervisory power, the court suspended Mussman from the bench. In re Mussman, 302 A. 2d 822 (1973).
74 See Charles Geyh, et al., Judicial Conduct and Ethics, 5th ed. (2013), 40, 761.
75 Aspirational standards of judicial conduct were first developed by the American Bar Association in 1924. In 1972, they were replaced with a model code of judicial conduct to serve as a guide for judges and a basis for disciplinary actions, with terms that were largely mandatory. See James Alfini, et al., “Dealing with Judicial Misconduct in the States: Judicial Independence, Accountability and Reform,” 48 S. Tex. L. Rev. 890 (2007). By the 1980’s, every state had its own judicial discipline commission. See Cynthia Gray, “Judicial Conduct Commissions: How Judicial Conduct Commissions Work,” 28 Just. Sys. J. 405 (2007).
What state legislators did perceive, however, was that the court’s administrative domain was expanding, arguably at their expense. Fears of a self-aggrandizing judiciary were clearly heightened in many legislators’ minds by a spectacular scandal involving John C. Fairbanks, a probate lawyer who had served 33 years as a part-time first-instance judge. On December 28, 1989, Fairbanks was indicted by a grand jury for embezzling $1.8 million from probate clients between 1983 and 1989. He disappeared the very next day, then evaded the law for over four years until he was found dead in a Las Vegas hotel in March 1994.76

What concerned legislators was not just Fairbanks’s own misdeeds, but the failure of the judicial branch’s internal ethical monitors to act on them despite longstanding complaints. Legislative investigators were particularly frustrated by the confidentiality protocols of the JCC, which precluded access to information investigators deemed necessary to determine the full scope of judicial corruption. Successive investigating committees were empaneled, one of which heard Chief Justice Brock himself attribute the problems to such holdovers from the pre-1966 era as choosing local notables lacking professional training to serve as part-time judges and elected probate registers without adequate supervision.77 Then-Governor Steve Merrill, however, provided an alternative interpretation, one more congenial to some legislators’ views. He argued that judicial modernization had gone too far, removing judges from the necessity of public accountability.78

The residual shame of the Fairbanks scandal, together with the problems of judicial ethics in the Thayer divorce case, ensured that there would be changes relating to judicial ethics and mechanisms for judicial accountability after the Brock impeachment trial. There was general agreement that changes were required in how the judiciary related to citizens and other branches of government. Starting in 2001, efforts to make such changes took different directions based on competing perceptions of what would be required.

A critical issue involved revision of judicial discipline practices to enhance their credibility with citizens and elected officials. In January 2001, a blue-ribbon task force created by the supreme court delivered a report recommending that compliance with the code of judicial ethics be mandatory, with failure to comply being a potential basis for disciplinary action. They urged the establishment of a new “conduct commission” independent of the court in terms of membership, physical location, staffing, and budget.79 In response, the supreme court entered an order creating that new conduct commission, as recommended by the task force, with the pre-task-force JCC remaining temporarily in existence to complete action on all pending matters until after legislative funding was available to support the new commission.80

The legislature had different expectations, however, and it established a conduct commission of its own by statute.81 Then in 2003 it enacted another statute, requiring that all complaints against judges and court clerks under the 2001 statute be heard by the new statutory commission rather than the holdover JCC.82 The JCC thereupon filed a court petition challenging the constitutionality of the 2003 statute. In June 2004, the supreme court ruled the statute unconstitutional, holding that the regulation of court proceedings and officers, including power to discipline judges, is an inherent and exclusive power of the judicial branch.83 With the acquiescence of the legislature, the court then took steps to resolve the issue by following task force recommendations and creating a new JCC, with membership including executive and legislative appointees, formal independence from the supreme court, and its own separate office location, staff and budget.84

VIII. Conclusion

As the administrative head of a court system subject to major institutional changes, New Hampshire Chief Justice David Brock faced the challenge of addressing the full scope of their unanticipated consequences. Almost two decades later, we can see that judicial practices and behaviors tolerated before the constitutional amendments of 1966-78 were no longer acceptable in terms of expectations that citizens and their elected officials might have for judges. The achievement of institutional independence for the New Hampshire judiciary did not and could not entail complete autonomy from the state legislature.

Brock’s impeachment in 2000 presented a crisis of historic dimensions for the government and citizens of New Hampshire. Yet its gravity may fall short of the potentially-existential national crisis presented for the Philippines by the much more recent removal of Maria Lourdes Sereno from office as the Chief Justice of the Supreme Court of the Philippines in May 2018.

76 The Fairbanks story generated considerable public interest. See Royal Ford, “Scandalous Judge’s Legacy Won’t Die: Rural N.H. town reels from tale of disorder in the court,” Boston Globe, September 18, 1997, B1, http://www.scribd.com/doc/229520210/John-C-Fairbanks-Scandalous-Judge-s-Legacy-Won-t-Die-Rural-n-h#scribd, and Paul Montgomery, “Small-town Scandal Still Casts a Long, Dark Shadow,” New Hampshire Magazine (July 1999), 13, available on line at http://www.gnbtaxpayers.com/FAIRBANKS,%20JOHN,%20JUDGE%20-%20SCANDAL%20-%20COVER-UP.pdf.

77 Fairbanks and his family had been respected members of the community for some time. See Donna Chiacu, “Ex-Judge’s Problems Mystify Newport Neighbors, Associates,” Concord Monitor, October 30, 1989; and Roger Talbot, “Fairbanks’ Delinquency Tolerated; Officials Trusted Ex-Judge,” Manchester Union-Leader, April 30, 1995.

78 See Paula Monopoli, American Probate: Protecting the Public, Improving the Process (2003), 21.

79 Jonathan DeFelice and Wilfred Sanders, Task Force for the Renewal of Judicial Conduct Procedures, Report to Supreme Court of New Hampshire (2001).

80 N.H. Supreme Court Order (May 7, 2001), https://www.courts.state.nh.us/supreme/orders/ordr0507.htm.

81 N.H. Laws 2001, Ch. 267.

82 N.H. Laws 2003, Ch. 319:171.

83 Petition of JCC, 855 A. 2d 535 (2004).

84 N.H. Supreme Court Order, R-2004-004 (January 25, 2005), https://www.courts.state.nh.us/supreme/orders/20050125.htm.
Nonetheless, the Brock impeachment story provides us with a comparative story to help assess events with Sereno in the Philippines and other episodes that may come in the future. Both situations involved claims of individual ethical violations, which were the ostensible basis for each judge’s removal. But deeper factors were at play, involving claims by critics that the judiciary had overstepped its legitimate constitutional powers in two critical areas:

1. authority to make rules governing court practice, procedure and administration; and
2. judicial review of the constitutional validity of legislative actions.

The recent removal of Philippine Chief Justice Sereno provides grounds for serious reflection by judges, justice officials and scholars about judicial independence and separation of powers in a democracy. New Hampshire Chief Justice Brock’s impeachment can aid such reflection by providing a story that can be compared or contrasted with the events in the Philippines.
Constitutional Grounds for Judicial Independence as a Guarantee for Proper Administration of Justice (Comparative Legal Analysis). The Armenian Experience

by Arpine Ashot Hovhannisyan

Abstract
The article reveals the constitutional grounds of judicial independence within the context of recent constitutional reforms in the Republic of Armenia. It discusses the issues of cooperation of the judicial, executive and legislative powers in the frames of the new parliamentary form of government. In particular, the article discusses the issue of the role of the legislative body of the Republic of Armenia in formation of the judiciary. It also turns to the issues of the internal and external independence of the Supreme Judicial Council which is itself responsible for the independence of the judiciary and the appointment of judges. As a conclusion, the article outlines the advantages and disadvantages of the current and new constitutional regulations.

Keywords: appointment of judges; Supreme Judicial Council; judge member; judicial independence; non-judge member.

Introduction: constitutional reforms
During the entire history of the constitutional reforms in the Republic of Armenia, particularly in its two main stages (1995-2005 and 2005-2015), the focus was on such fundamental issues as to ensure the constitutional guarantees of the independence of the judiciary and its integrity, a clear functional relationship between the judicial authorities and to substantially strengthen the counterbalancing role of the judiciary in line with the standards of the rule of law in relation to other branches of state power.

Background information and the reasons for improving the independence of the judiciary
The Constitution of the Republic of Armenia adopted in 1995 played a significant role in the establishment of democracy in the Republic of Armenia, strengthening the basis of a rule-of-law State, finding constitutional solutions in crisis situations, gradual development of the institutions of the State power, and prescribing the constitutional safeguards for the protection of human rights.

However, over time certain issues have arisen which led to the necessity for constitutional reforms. In particular, new conceptual approaches were required for ensuring constitutional safeguards for the independence and integrity of the judicial power. The reforms were to be directed at strengthening the constitutional safeguards for the independence of judicial power, establishing administrative justice, ensuring clear functional interrelations among the institutions administering judicial power. There was a need for a Justice Council to guarantee the self-governance of the judicial power in compliance with international legal standards and to be formed on the basis of new principles. The system of constitutional justice was to become more operative and efficient by completing the list of objects and subjects subject to constitutional supervision and establishing efficient guarantees for the protection of fundamental rights as well as the required procedural preconditions for ensuring the supremacy of the Constitution.

The constitutional reforms carried out as a result of the referendum held in the Republic of Armenia on 27 November 2005, having achieved some progress in terms of integral solutions with regard to the above-mentioned issues, contained also a number of incomplete solutions which currently need to be resolved and have completed the integral solutions. They, in particular, concern the following issues requiring fundamentally new approaches: the recent history of constitutional developments in the Republic of Armenia have shown that, due to objective and subjective reasons, the development of independent statehood has still not reached a milestone where one could claim that democracy stands on firm ground, human rights are safely protected, an effective system of government is in place, and the courts are independent and impartial.

And one of the issues that has become very urgent and required conceptually new approaches at the level of constitutional solutions is to ensure that the balancing role of the judiciary vis-à-vis other branches of power should be safeguarded constitutionally in line with the standards of the rule of law.

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2 See Concept of the Constitutional Reforms of the Republic of Armenia developed by the Specialized Commission on Constitutional Reforms adjacent to the President of the Republic of Armenia and approved by the President of the Republic of Armenia on March 14, 2015, Yerevan, pp. 4-5, Համաձստակություն Հայաստանի Հանրապետության համաձայնության մասին պաշտոնակարգ փուլի 14-րդ կանոնադրության արդարադատության կողմից 2015 թվականին պաշտոնակարգ արդարադատության կողմից 14-րդ կանոնադրության արդարադատության կողմից 2015 թվականին արդարադատության կողմից 14-րդ կանոնադրության արդարադատության կողմից 2015 թվականին.
Changes in the legal framework for the Judicial Organization

The introduction of the parliamentary form of government serves as a legal basis for a modification of the relationships not only of the legislative and the executive branch of state power, but of the legislative and judicial branches as well. In particular, it has led to the commencement of the role of the legislative power in the organization of the judiciary. But the legal basis for the organization and functioning of the judicial power within the framework of the so-called new constitutional model of separation of powers has been enshrined given the special role of this branch of power. It is well-known that within the system of checks and balances, the judicial power is characterized not only by the function of justice but also by the legal capacity to influence the decisions of the legislative and executive authorities and to balance them.2 Judicial power bears the burden to prevent the establishment of an authoritarian system of government and management of a democratic society in case the legislature initiates anti-constitutional laws and the executive power undertakes their exercise.4

The legal basis for the regulation of the fundamental issues of the judiciary in the context of recent constitutional reforms has been introduced given the fact that in the constitutional system of separation and balance of powers the judiciary has a balancing or stabilizing role and that the primary precondition for the realization of such a mission is the protection of the judicial power from any unlawful influence or interference: only the judiciary that is granted with functional, institutional, material and social independence may serve as the guarantor of the rule of law, effective justice and fair trial in the country.5

Supreme Judicial Council

In conformity with the aim of establishing an independent, separate and accountable judicial power, the paramount conceptual issues that have been solved within the constitutional reforms are the clarification of the legal grounds of the status, organization and operation of the Supreme Judicial Council (successor of the current Council of Justice) as a guarantor of the independence of the judiciary.

The status of the Supreme Judicial Council

The independence of the judiciary is not merely a declaratory provision, and its implementation requires the existence of appropriate safeguards. Among these safeguards, the most prominent is the existence of a guarantor of the independence of the judiciary as an independent state body, such as the Council of Justice of the Republic of Armenia in the context of the current legislative regulation, and its successor – the Supreme Judicial Council in the light of constitutional regulations with amendments of December 6, 2015.

As the European Commission For Democracy Through Law (Venice Commission) has already noted: ‘Many European democracies have incorporated a politically neutral High Court of Justice or an equivalent body into their legal systems - sometimes as an integral part of their Constitution - as an effective instrument to serve as a watchdog of basic democratic principles. These include the autonomy and independence of the judiciary, the role of the judiciary in the safeguarding of fundamental freedoms and rights, and the maintaining of a continuous debate on the role of the judiciary within a democratic system. Its autonomy and independence should be material and real as a concrete affirmation and manifestation of the separation of powers of the State. (…)’.6

According to Article 164 of the Constitution with amendments of 6 December 2015: ‘The Supreme Judicial Council is an independent state body that guarantees the independence of the courts and judges’. Previously this mission belonged to the Council of Justice, but there was no direct constitutional reference to the status of this body. The aforementioned constitutional provision explicitly states that the constitutional mission of the Supreme Judicial Council is to guarantee the independence of the judiciary. The existence of such a regulation is of high importance as it serves a guiding rule for the definition of the liabilities of the Supreme Judicial Council. The main liabilities of the Supreme Judicial Council are stipulated in Article 175 of the Constitution with amendments of December 6, 2015 which are following:

1. Draw up and approve the lists of candidates for judges, including candidates subject to promotion;
2. Propose to the President of the Republic the candidates for judges subject to appointment, including those subject to appointment by way of promotion;
3. Propose to the President of the Republic the candidates for chairpersons of courts and the candidates for chairpersons of chambers of the Court of Cassation, subject to appointment;
4. Propose to the National Assembly the candidates for judges and for Chairperson of the Court of Cassation;
5. Decide on the issue of secondment of judges to another court;

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3 See V. Savitsky, Organization of the Judiciary in the Russian Federation, Moscow, Russian Academy of Sciences, Institute of State and Law, 1996, p. 29 (Савицкий, В.М. Организация судебной власти в Российской Федерации: учеб. пособие для вузов / В.М. Савицкий; Рос. акад. наук, Ин-т гос. и права, Акад. правовой ун-т - М.: Бек, 1996, с. 29).

4 See M.V. Buglai, Constitutional Law of the Russian Federation: Textbook for Universities, 2002, p. 361 accessed at http://www.webnomos.ru/images/ПРАВО/УЧЕБНИК/КОНСТИТУЦИИ/ПРАВО_BUGLAY_ucheb.pdf on 30 October 2017 (Буглай М. В. Конституционное право Российской Федерации: Учебник для вузов. - 3-е изд., изм. и доп.-М.: Издательство НОРМА (Издательская группа НОРМА-ИНФРА-М), 2002, с. 361).

5 See G. Danielyan, V. Ayvazyan, A. Manasyan, supra note 3, pp. 159-160.

6 See European Commission For Democracy Through Law (Venice Commission), Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, 1998, CDL-INF(1998)009, §5, Strasbourg, France, accessed at http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(1998)009-e on 24 November 2017.
Providing the Supreme Judicial Council with excessive powers that are not directly related to the guarantee function of judicial independence which is necessary and sufficient for the realization of its constitutional mission. Therefore, we believe that the Supreme Judicial Council should have been vested with powers strictly deriving from his status of independence of the judiciary and the exclusion of external interference into internal affairs of the judiciary. And besides, the justification for the judicial councils to have administrative functions is the promotion of the independence of the judiciary, and their powers are largely related to the appointment, promotion and disciplinary liability of the judges; and the determination of the composition and the procedure of formation of judicial councils.

The interpretation of new constitutional regulation of the powers of the Supreme Judicial Council of Republic of Armenia leads to the conclusion that the latter is entrusted with the liabilities which are directly related to the independence of the judiciary (e.g. to select judges, to terminate their powers, to subject the judges to disciplinary liability and so on). Most of them are identical with previous liabilities of the Council of Justice. But the new list of the liabilities of the Supreme Council of Justice which also include the authority to approve the costs of its own expenditures, including the courts, and submit them to the Government for inclusion in the Draft State Budget (Article 175(1)(9) of the Constitution with amendments of 6 December 2015). Given that the independence of the judiciary is closely related to proper funding, it is quite legitimate to delegate this authority to the Supreme Judicial Council. The Venice Commission’s position on this issue is that the Supreme Judicial Council may be a representative of the judiciary in the budgetary process by formulating a budget draft and submitting a proposal to the competent authority.7

The list of the liabilities of the Supreme Judicial Council enshrined in the RA Constitution is not exhaustive and the Article 175(4) of the Constitution provides that other authorities of this body could be stipulated in the RA Judicial Code. The latter constitutional provision has lead to a lot of debates whether the authorities provided by law should strictly derive from the constitutional mission of the Supreme Judicial Council to provide the independence of the judiciary or they may include some court management or administrative issues. The regulation of this issues in the New Judicial Code of the Republic of Armenia adopted by the RA National Assembly on February 8, 2018 which came into force on March 1, 2018 the liabilities of the Supreme Judicial Code include a range of issues which are not connected with the constitutional mission of this body or are the result of a very broad interpretation of the judicial independence. In particular, the Supreme Judicial Council has the authorities to approve the rules of relationship of courts with the mass media, the rules for submission of documents to the court, classification of cases and other rules of court management, define description of sample furnishings of the courtroom and the judges’ office, define the procedure of evaluation of the judicial servants’ performance, its criteria and the form of characteristics, establish the procedure for allocating uniforms to court bailiffs and so on (Article 89 of the RA Judicial Code).

Of course, it should be noted that although the protection of the independence of the judiciary is a common purpose for the vast majority of the judiciary councils, they address this issue in different manner. In many countries, the key task of the establishment of councils is the protection of the judiciary from the supremacy of executive, legislative and political power. In some other countries, councils address the issue of securing the internal independence of the judiciary. In many countries, the concern is the material resources that judges spend on organizational (administrative) issues, so the management functions are transferred to councils.8 It should be noted, however, that the justification for the judicial councils to have administrative functions is the promotion of the independence of the judiciary and the exclusion of external interference into internal affairs of the judiciary. And besides, the existence of constitutional grounds for the organization and operation of judicial councils is typical for the countries of the first model. Therefore, we believe that the Supreme Judicial Council should have been vested with powers strictly deriving from his status of a constitutional guarantor of judicial independence which is necessary and sufficient for the realization of its constitutional mission. Providing the Supreme Judicial Council with excessive powers that are not directly related to the guarantee function of judicial independence can endanger the latter’s possibility to effectively carry out its main constitutional function.

The composition of the Supreme Judicial Council

A number of fundamental international legal instruments on the independence of the judiciary have particular reference to the issue of the composition and the procedure of formation of judicial councils.

The comparative analysis on the High Councils for Judiciary reveals that there are different models of composition of the councils, that membership to judicial councils differs from country to country and largely depends on the political motives for their creation. It

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7 See CDL-PI(2015)001 supra note 9.  
8 Generally, two main models regarding the status, the role and the liabilities of judicial councils are distinguished: the Southern European model, in which the council primarily focuses on the management of the judiciary, the main role of the judicial councils is to protect and strengthen the independence of the judiciary, and their powers are largely related to the appointment, promotion and disciplinary liability of the judges; and the Northern European model, in which the council has extended powers in the area of administration, court management and budgeting. See Comparative analysis on the High Councils for Judiciary in the EU member states and judicial immunity, accessed at (http://www.justicereformukraine.eu/wp-content/uploads/2014/09/Report_Councils_eng.pdf) on 30 October 2017. See also V. Autheman, S. Elena, Global Best Practices: Judicial Councils, Lessons Learned From Europe and Latin America, IFES Rule of Law White Paper Series, accessed at http://www.ifes.org/publications/global-best-practices-judicial-councils-lessons-learned-europe-and-latin-america on 31 October 2017.
should be noted that the most successful models are those in which public figures and the members of civil society are represented.9

The analysis of the structure of judicial councils of the EU Member States has revealed that non-judicial members of the councils mainly represent other fields of the legal profession: prosecutors (Bulgaria, France, Romania, Spain, Italy, Latvia, Malta, Estonia), notaries (Latvia), lawyers (Belgium, Bulgaria, Denmark, France, Malta, Ireland, Slovenia, Spain), university professors (Belgium, Bulgaria, Croatia, Slovenia, Spain). There are cases when the representatives of other professions are also included in the councils, for example, in Sweden two representatives of trade unions are members of the council.10

The study of the international experience shows that the selection of non-judicial members by the legislature is a widespread practice. For example, in Belgium the total number of members of High Council of Justice is 44, 22 of whom represent the judicial power. The 22 judicial members are elected by their peers - each linguistic college comprises at least 1 judge and 1 prosecutor. 22 non-judicial members are appointed by the Senate – each linguistic college comprises at least:

1. 4 lawyers (members of the bar for at least 10 years),
2. University or college of higher education professors having at least 10 years of professional experience and
3. 4 members who hold a university or equivalent degree as well as 10 years of relevant professional experience.11

Article 130 of the Constitution of Bulgaria states that: ‘The Supreme Judicial Council shall consist of 25 members. The President of the Supreme Court of Cassation, the President of the Supreme Administrative Court, and the Prosecutor General shall be ex officio members of the said Council. Eligibility for non-ex-officio membership of the Supreme Judicial Council shall be limited to jurists of high professional standing and moral integrity who have practiced law for at least 15 years. Eleven of the members of the Supreme Judicial Council shall be elected by the National Assembly by a majority of two thirds of the National Representatives, and eleven shall be elected by the judicial authorities’. More detailed regulations are defined by the Bulgarian law “On Judicial System”, Article 17 of which stipulates that: ‘The National Assembly elects 11 members of the Council from among judges, prosecutors, investigators, university professors, lawyers and other representatives of law profession. The candidacy of a member of the Council in the National Assembly may be nominated by the members of parliament. Together with the nomination, documents on the professional qualifications of the candidate, the length of the professional experience and the required scientific degree must be provided. Not later than 7 days before the parliamentary hearings, certain public non-governmental organizations, high education and scientific institutions should submit their opinions related to the candidate which should published on the official website of the National Assembly’12. Or Article 65 of the French Constitution states that: ‘The High Council for the Judiciary shall consist of a section with jurisdiction over judges and a section with jurisdiction over public prosecutors. The section with jurisdiction over judges shall be presided over by the Chief President of the Cour de cassation. It shall comprise, in addition, five judges and one public prosecutor, one Conseiller d’État appointed by the Conseil d’État and one barrister, as well as six qualified, prominent citizens who are not members of Parliament, of the Judiciary or of administration. The President of the Republic, the President of the National Assembly and the President of the Senate shall each appoint two qualified, prominent citizens’.13

According to Article 94.1 of the Constitution with amendments of 27 November 2005, the Council of Justice of the Republic of Armenia consists of 9 judges and 4 law scholars. The apparent quantitative dominance of the judicial members has led to the situation when in practice the membership of legal scholars was not a serious counterbalance. Many of the problems that have emerged in the course of the action of this body have demonstrated that the existing arrangements were not enough to effectively pursue the key objective of ensuring the independence of the judiciary, as it was often identified exclusively with the narrow inner interests of the judiciary. Besides, the independence of this body itself was under suspicion. So, the danger of corporatism and the dominance of exclusively internal interests of the judiciary were more than obvious.

This problem has probably been solved by the new constitutional regulations, which have provided equal quantitative representation of judges and non-judges (5 judges and 5 non-judges). As regards the procedure of formation of the Supreme Judicial Council, in accordance with the same regulations, the Judge members shall be elected by the General Assembly of Judges, and the non-judge members shall be elected by the National Assembly by a majority of at least three-fifths of the total number of the members of parliament from among law scholars and other prominent lawyers with high professional qualifications and professional experience of at least 15 years.

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9 See V. Autheman, S. Elena, supra note 10. See also See https://www.hurights.or.jp/archives/other_documents/section1/1995/08/beijing-statement-of-principles-of-the-independence-of-the-judiciary-in-the-lawasia-region-beijing-1.html accessed at 24 November 2017. European Commission For Democracy Through Law (Venice Commission), Judicial Appointments, 2007, CDL-JD(2007)001, Strasbourg, France. accessed at http://www.venice.coe.int/webforms/documents/default.aspx?pdfilee=CDL-JD(2007)001-e on 24 November 2017.

10 See Comparative analysis on the High Councils for Judiciary in the EU member states and judicial immunity, supra note 10.

11 See Conseil Supérieur de la Justice (CSJ)–Hoge Raad voor de Justitie (HRJ) access at https://www.encj.eu/images/stories/pdf/factsheets/hrj_csj-belgium.pdf on 31 October 2017.

12 See Bulgaria Judicial System Act (2007) access at http://www.legislationline.org/topics/country/39/topic/9 on 31 October 2017.

13 See Organic Law on the Superior Council of the Magistracy of France (1994, amended 2017) access at http://www.legislationline.org/topics/country/30/topic/9 on 31 October 2017.

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In order to fulfill certain constitutional regulation the RA Judicial Code enshrines that judge members of the Supreme Judicial Council shall be elected by the General Assembly according to the following groups:

1. one member from the Court of Cassation.
2. one member from Court of Appeal
3. one member from the Court of Cassation
   and three members from first instance courts, at least one member from the courts of general jurisdiction from the regions.

The composition of the Supreme Judicial Council should include judges of all specifications (criminal, civil and administrative). The gender-based balance shall be taken into consideration in the election process. And the general rule is that the number of representatives of the same gender is limited to a maximum of three judges to ensure the proper gender-based representation.

A member of the Supreme Judicial Council elected by the General Assembly may be a judge with at least ten years’ experience. In accordance with Judicial Code, the judges’ experience shall be deemed to be the office in the position of a judge at the Constitutional Court, the international court with participation of the Republic of Armenia and the member of the Supreme Judicial Council elected by the RA National Assembly. A judge member of Supreme Judicial Council may not be the Chairman of the Court or the Chamber of the Court of Cassation. In case of such an election their powers as the Chairman of the Court or the Chamber of the Court of Cassation shall terminate.

Although Article 174 (6) of the RA Constitution enshrines that the requirement for the termination of the powers of judges during the term of office in the Supreme Judicial Council can be set by the Judicial Code, however, the solution provided by law is a different one. In particular, taking into account the extra burden of the judge as a member of the Supreme Judicial Council, 75 percent deduction of workload has been established for him/her in the Judicial Code.

What regards to non-judge members of the Supreme Judicial Council, the RA Judicial Code repeats the constitutional regulation related to the requirements for the appointment to the certain post. Professional work experience in certain meaning is the professional activity in the field of law. A person may submit certain documents on his/her being a reputable lawyer. A judge may not be elected by the National Assembly as a member of the Supreme Judicial Council. A person who has limitations (e.g. he or she has been convicted of a crime regardless of whether or not the conviction has not been discontinued or cancelled; he or she has been convicted of an intentional crime regardless of whether or not the conviction has discontinued or cancelled; he or she has a physical impairment or disease hindering his/her appointment to the position of a judge and so on) for the appointment to the post of a judge prescribed by the RA Judicial Code may not be elected by the National Assembly as a member of the Supreme Judicial Council.

The members of the Supreme Judicial Council are elected for five year term of office without the right to be re-elected. Immediately after being elected the members of the Supreme Judicial Council take an oath consequently in the National Assembly and in the General Assembly in a formal ceremony. The newly elected member of the Supreme Judicial Council shall assume his/her post from the date of expiry of the term of office of the previous member.

From the point of view of guaranteeing the independence of the Supreme Judicial Council, the constitutional regulation that states that the head of the Supreme Judicial Council is elected by the Council from its members within the term and in the manner prescribed by the Judicial Code is of high importance. Meanwhile, in the current legislative regulation, the Justice Council is presided over by the President of the Court of Cassation, which is problematic in terms of internal independence of the body. In accordance with Judicial Code the candidacy of all the members of the Supreme Judicial Code is voted by secret ballots for the post of the Chairman of the Supreme Judicial Council. The latter is elected by majority of votes of all members. The Chairman of the Supreme Judicial Council shall be elected until the end of his term of office as a member of the Supreme Judicial Council. The Chairman of the Supreme Judicial Council shall preside the sessions of the Supreme Judicial Council, sign the decisions, present the Council in relations with other bodies, etc..

In the light of guaranteeing the independence of the Supreme Judicial Council, the constitutional regulation providing that the Head of the Council is alternately elected from among its judges and its non-judge members by the terms and the procedure prescribed by the Judicial Code is of very important. Meanwhile, in accordance with the current legislative regulation, the President of the Court of Cassation convenes and presides the sessions of the Council of Judges which is problematic in terms of internal independence of this body.

In the context of the above mentioned, we can state that the new constitutional basis for the composition of the Supreme Judicial Council could serve as guarantee for internal and external independence of this body. These new regulations address existing problems and are most consistent with international legal standards.

**The procedure for the appointment (selection) of judges**

In general, there are certain legal criteria set out in international legal instruments in relation to the procedure for the appointment of judges. Thus, for example, the international legal instruments, as a general requirement, enshrine the idea that selection and career
of judges should be based on objective criteria, merit, having regard to qualifications, integrity, ability and efficiency\textsuperscript{14}, to exclude political considerations.\textsuperscript{15} In accordance with principle 1.2 c of the Recommendation No. R (94) 12 of the Committee of Ministers to member states on ‘The Independence, Efficiency and Role of Judges: The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules’. In general, the international experience shows that systems of judicial appointments come in four basic configurations: 1. appointment by political institutions; 2. appointment by the judiciary itself; 3. appointment by a judicial council (which may include non-judge members); 4. selection through an electoral system.\textsuperscript{16} Moreover, in the framework of the third model mentioned above, judges are appointed by judicial councils or by the political bodies upon the recommendation of judicial councils. According to the new constitutional arrangements the second type of the third model will operate in our domestic legal system. In accordance with Article 166 (7-8) of the Constitution the judges and the chairmen of the first instance courts and the court of appeal are appointed by the President of the Republic upon the suggestion of the Supreme Judicial Code. Thus, Article 166 (3) of the Constitution with amendments of 6 December 2015, prescribes that: ‘The Judges of the Court of Cassation are appointed by the President of the Republic of Armenia upon the recommendation of the National Assembly and that the National Assembly selects the proposed candidate by at least three-fifths of the total number of the members of the parliament from among the three candidates nominated for each position by the Supreme Judicial Council’. Article 166 (5): ‘The National Assembly elects the Chairperson of the Court of Cassation for a term of six years from among the judges of the Court of Cassation by a majority vote of the total number of the members of the parliament upon the recommendation of the Supreme Judicial Council’.

In this regard, it should be noted that the appointment of judges by the legislature is a common international practice. For example, in Moldova the chairman, the vice-presidents and the judges of the supreme court are elected by the legislative body upon the recommendation of the Council of the Magistrates (Article 116 of the Constitution). In Georgia judges of the Supreme Court are also appointed by the legislature upon the suggestion of the President (Article 90). In Latvia, Lithuania, Serbia, Slovenia judges are appointed by the legislative body. The mechanism of appointment of judges in the supreme court by the legislative body is also widespread in England and the United States.

Additionally, as an important safeguard against a possible politicization of the process, it is necessary to emphasize the legislative regulation which provides that the Judges of the Court of Cassation are elected for a certain period of time but not until the termination of the term of office. Besides, the National Assembly has no powers to terminate the powers of the judge.

Moreover, it should be stressed that within the parliamentary form of government, this regulation is a mechanism to ensure certain accountability in the context of checks and balances. In this respect, it should be noted that, even despite some concerns, the proposed procedure ensures the expression of the will of the people during the process of the election of the judges of the high judicial body through the representative body with the primary mandate of the people. Besides, the general approach is that justice should not only be conducted but should also be visible. And this idea requires each judge to be perceived as independent and impartial in the society. This is especially important for judges of the highest court of the country, and the public confidence in this regard should be a priority for every democratic state. Therefore, it is important to ensure the transparency of the procedure of the appointment of the judge of high instance courts.

It should be noted that no matter whether the sessions in the Supreme Judicial Council are held publicly or it is composed of the members elected by the National Assembly, only parliamentary debates provide the attention of the public to the issue under discussion. This means that parliament and especially the parliamentary fractions will vote for those candidates who have the greatest public confidence and good reputation because the choice of a non-trusted candidate can damage the reputation of the fraction. Besides, the decision is made by 3/5 votes of the members of parliament, which means that in the Armenian context a single parliamentary fraction is not sufficient to make a decision and that mutual consent of all powers is necessary which is also a guarantee to avoid politicization of the process.

\textsuperscript{14} See Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, access at http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx on 31 October 2017. See also The Committee of Ministers of the Council of Europe, Recommendation No. R (94) 12 Of The Committee Of Ministers To Member States On The Independence, Efficiency And Role Of Judges (1994) 1.2 c principle, access at https://advokat-prnjavorac.com/legislation/Recommendation.pdf on 31 October 2017.

\textsuperscript{15} See CDL-AD(2007)028, supra note 12, See also The Consultative Council Of European Judges, Opinion No 1 (2001) Of The Consultative Council Of European Judges (CCJE) For The Attention Of The Committee Of Ministers Of The Council Of European Standards Concerning The Independence Of The Judiciary And The Irremovability Of Judges (Recommendation No. R (94) 12 On The Independence, Efficiency And Role Of Judges And The Relevance Of Its Standards And Any Other International Standards To Current Problems In These Fields, §17, 23, Strasburg France, accessed at https://rm.coe.int/1680747830 on 24 November 2017.

\textsuperscript{16} See Judicial Appointments and Judicial Independence, United States Institute of Peace, 2009, access at https://www.usip.org/sites/default/files/Judicial-Appointments-EN.pdf on 31 October 2017.
The new role of the Chairmen of the Courts

In the sense of securing the internal independence of the courts, the constitutional amendment, according to which the chairpersons of the courts are elected by rotation principle for a limited term of office could serve as a strong legal framework (Article 166 (4-6) of the Constitution).

In accordance with current legislation, the chairpersons of the courts are appointed for the full term of office. And at the present time, such a settlement in the circumstances of the existence of the Council of Court Chairpersons led to excessive centralization and the neglect of the simple truth that the chairman of the court is also a judge, who should just have certain extra powers of organizational kind in order to secure the normal functioning of the court. In accordance with para. 11 of the Kyiv Recommendations: ‘The role of court chairpersons should be strictly limited in the following sense: they may only assume judicial functions which are equivalent to those exercised by other members of the court. Court chairpersons must not interfere with the adjudication by other judges and shall not be involved in judicial selection. Neither shall they have a say on remuneration (…). They may have representative and administrative functions, including the control over non-judicial staff. Administrative functions require training in management capacities. Court chairpersons must not misuse their competence to distribute court facilities to exercise influence on the judges’. In this context, the necessity of guaranteeing the internal independence of the courts is also emphasized by the Venice Commission17 and the Committee of Ministers of the Council of Europe.18

Conclusion

Summarizing, we can state that the new constitutional amendments and the new Judicial Code of the RA aimed at their implementation have created a solid basis for the genuine independence of the judiciary. In particular, it refers to the balanced composition of the institutional guarantor of the independence of the judiciary such as Supreme Judicial Council, the rotation of the chairmen from non-judges and judges. These regulations are serious guarantees for the independence of this body itself which in its turn will lead to proper realization of the constitutional mission of this body.

With regard to the powers of the Supreme Judicial Council, enshrined in the RA Constitution, it is fully consistent with the status of the guarantor of the independence of the judiciary. However, the provisions of the Judicial Code related to the jurisdiction of the Supreme Judicial Council are problematic, since in many cases they are not directly related to the constitutional function of this body to guarantee the independence of the judiciary, and they are mainly aimed to provide proper management of court system.

Besides, new regulations of appointment of judges, particularly those providing certain liabilities of the RA National Assembly will make the process more transparent and help to fill the judicial system with professional judges who have been elected as a result of the public discussion process.

Nevertheless, these conclusions are mere estimations, and clear conclusions on these arrangements can only be made based on the results of their practical application.

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17 See European Commission For Democracy Through Law (Venice Commission) (2014), Opinion on the Draft Law on introducing amendments and addenda to the judicial code of Armenia, 2014, CDL-AD(2014)021, Strasbourg, France, accessed at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)021-e 24 November 2017.

18 See The Committee of Ministers of the Council of Europe, Recommendation CM/Rec (2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities, access at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805af87e88478 on 31 October 2017.
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The Expansion of Online Dispute Resolution in Brazil

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Abstract:
This article examines Online Dispute Resolution (ODR) by analyzing its primary components (i.e., e-mediation and e-negotiation) and then applying that analysis to the implementation of an ODR system in Brazil. The authors believe that the implementation of ODR in Brazil will be challenging due to legislative constraints and a prevailing pro-litigation sentiment, which is widely perceived as the default resolution option. However, the authors contend that, by systematically demonstrating the benefits of ODR and sharing best practices gleaned from other countries, ODR will slowly take root in Brazil, eventually becoming a preferred option for resolving disputes.

Introduction

Official legal statistics supplied by the National Justice Council® (CNJ) show that the Brazilian state court system is facing a crisis. One might even say that the Brazilian legal system is almost in a state of bankruptcy; its slowness is shocking, its lack of efficiency is crippling, and it is proving inadequate to achieve its core mission: delivering timely justice to citizens.

This present situation is perhaps the inheritance of an older Brazil, in which the government was wired in an inefficient, complex and corrupt bureaucracy laden with unenforceable, incongruent, and obsolete laws. Fortunately, new laws introduced in 2015 aimed to overhaul the legal system and address these shortcomings. However, regardless of these legislative changes, without a broader cultural revolution in the legal community, these challenges will continue unabated.

For many years, the court system was the only legal means available for conflict resolution in Brazil. As a result, the courts have received great numbers of legal filings, and the “culture of litigation” has grown deep roots. Furthermore, the re-democratization of Brazil has contributed significantly to an increase in court cases. In this environment, procedural law has forcefully steered disputants toward litigation, which has led to a decreased focus on collaborative approaches.

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5 Created by Constitutional Amendment n. 45/2004, one of the most significant reforms in the Constitution of 1988, the National Justice Council- CNJ- is responsible for the management and strategic planning of the Judiciary, as well as its supervision. Its role is strictly administrative and it endeavors to perfect institutions and transparency regarding court management and decisions. (Zampier, D. (2014). Reforma constitucional que criou CNJ completa 10 anos. [online] Available at: http://www.cnj.jus.br/2rdh [Accessed 19 Dec. 2016].)
6 One of CNJ’s duties is the production of the Briefing “Justice in Numbers”, which is basically an annual statistical analysis of the Judiciary’s activities. This analysis is public and is sent to the Congress so that the measures may then be taken to better develop the legal system. Available at: http://www.cnj.jus.br/programas-e-acoes/pj-justica-em-numeros. (Conselho Nacional de Justiça, (2005). RESOLUÇÃO No. 4, DE 16 DE AGOSTO DE 2005. Brasilia.) [Accessed 19 Dec. 2016]
7 Approximately 25 million claims are filed every year in Brazilian courts; together with other 74 million pending cases in the court system, resulting in almost 100 million lawsuits pending judgment in 2016. Adding to this massive backlog is the slow processing of cases by the courts. On average, before reaching an appellate court, trial courts take an average of eleven years to render decisions. Expenses related to the maintenance and expansion of this legal apparatus, in 2015, were estimated in R$ 79.2 billion, a per capita expense of R$ 387.56 per year. Data further indicates that during the last six years this cost has increased significantly. In addition to paying taxes to help finance the court apparatus, litigants must also pay additional fees if they want to see their case through. Costs to litigants reached R$ 9.2 billion in court fees in a single year. (In: Justiça em Números. (2016). 1st ed. [ebook] Brasilia: CNJ, p.33. Acess: http://www.cnj.jus.br/programas-e-acoes/pj-justica-em-numeros. (Conselho Nacional de Justiça, (2005). RESOLUÇÃO No. 4, DE 16 DE AGOSTO DE 2005. Brasilia.)[Accessed 19 Dec. 2016].
8 MARINONI, Luiz Guilherme e BECKER, L. A. Influência das relações pessoais sobre a advocacia e o processo civil brasileiro. In: BECKER, L.A. (org.). Qual é o jogo do processo? Porto Alegre: Sérgio Antônio Fabris Editor, 2012, p. 451.
9 As a result, the courts have received great numbers of legal filings, and the “culture of litigation” has grown deep roots. Furthermore, the re-democratization of Brazil has contributed significantly to an increase in court cases. In this environment, procedural law has forcefully steered disputants toward litigation, which has led to a decreased focus on collaborative approaches.
10 Adversarial forms of conflict resolution – litigation – are predominant to other forms that prefer the common good and long term relationships. The paradigm of cooperation as the prime solution to social relations has prevailed; however, in its place was offered a new paradigm of cooperation based on game theory and in other conceptions, such as the Nash equilibrium or the prisoners' dilemma. (Manual de Mediação Judicial. (2013). 5th ed. [ebook] Brasilia: Conselho Nacional de Justiça, pp.55-64.)
The obstacles to the access to justice have caused commotion in public administration circles. It is clear to many in government that bold action is required to address these challenges. As a result, alternative dispute resolution (ADR) has been attracting special attention. In 2015, the Law of Mediation was introduced (Lei 13,140/2015) and the enforcement reach of the Law of Arbitration (13,129/2015) was expanded. These legislative reforms, aimed at increasing the efficiency of the Brazilian Justice System, culminated with the introduction of a New Civil Process Code, NCPC (Lei 13,105/2015). Throughout the debates around the formulation of this code, MPs discussed the importance of finding alternatives to judicial conflict resolution. Mediation, arbitration, and conciliation were all reinforced and stimulated in Brazil, based on the mechanisms contained in the legislation.

This effort toward the creation of a more efficient legal system without encroaching on individual rights, has not yet achieved its final objective. It is important to strengthen the measures already underway; and it is also clear now that new ideas are also necessary to fully attain the improvements required.

One such new idea is technology. Improvements in technology and communication networks have had a major impact on many areas of society. A period has started in which disruptive innovations can be applied to the practice of law. The field of Online Dispute Resolution, focuses on the question of how technology can be used to help individuals find fast and fair resolutions to their disputes.

The 46th paragraph of the aforementioned Law of Mediation (Lei 13,140/2015) authorized private mediators and companies to utilize ODR both in judicial and extrajudicial channels. This reform aimed at enabling the private sector to contribute to the overcoming of the challenges related to the access to justice in Brazil.

These initiatives have been successful in promoting the development of ODR in the country. Now, e-mediation and e-negotiation are important conflict resolution tools in Brazil. With the use of ODR, disputes may be resolved both more quickly and cost-effectively than resolutions through the courts. These techniques are now described within the judiciary as constructive processes. It is now the official policy of the Brazilian judiciary to promote online mechanisms for conflict resolution, and this development offers the opportunity of a true transformation of the litigation culture that has so long dominated the Brazilian legal system.

In this article, we intend to analyze the Brazilian conflict resolution system and the initiatives aligning it to global trends promoting ODR. To achieve that, the article is divided into three parts. Part I is dedicated to the global development of ODR. Part II focuses on initiatives in progress around e-mediation and e-negotiation in the Brazilian legal system. To conclude, Part III details the challenges that Brazil faces moving forward in the use of Internet and information technology to expand access to justice.

Part I: The Global Trend Toward ODR

Online Dispute Resolution first emerged in the late 1990s as a means to resolve disagreements regarding purchases conducted over the Internet. Early pioneers such as the global eBay marketplace and the Internet Corporation for Assigned Names and Numbers (ICANN) were examples of how high volumes of disputes could be resolved in cross-jurisdictional transactions. Since that time ODR has grown into a global movement backed by many dozens of providers around the world, and undergirded by a strong academic and theoretic foundation. The National Center for Technology and Dispute Resolution (odr.info) serves as a hub for this global movement, supporting a global network of ODR Fellows and an Annual Conference that has met more than fifteen times in five continents.

ODR first entered the American market in 1996, and each subsequent project has evolved in terms of reach, technology, and sophistication. By 2010, eBay resolved more than 60 million disputes per year through its ODR platform, more than the entire US Civil Court system.

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11 The Lei 13,129/2015 modifies the letter of the articles 1st, 2nd, 4th, 13th, 19th, 23rd, 30th, 32nd, 33rd, 35th and 39th of the Lei 9,307/1996, thus modifying and enhancing arbitration in Brazil. The main reforms consist of permitting public administration to make use of this mechanism as well as it: a) allows the parties to choose their judges; b) interrupts prescription terms whenever arbitration is instituted; c) concudes precautionary and urgency decisions within the use of arbitration; d) originates the arbitral letter (document); and the arbitral decision. All in all, all of those mechanisms represent the development and growth of arbitration in Brazil, translated from Portuguese (Presidência da República, 2015). Lei nº 13.129. Brasília.)

12 As assessed in the first elaborative preview of the New Civil Process Code “The preview stipulation of mediation and arbitration, conceived in the 144th and 153rd articles endeavours answering these conflict resolution mechanisms and all its promising perspectives” SENADO FEDERAL, (2012). COMISSÃO ESPECIAL DESTINADA A PROFÉRIR PARECER AO PROJETO DE LEI NO 6,025, DE 2005, AO PROJETO DE LEI NO 8.046, DE 2010, AMBOS DO SENADO FEDERAL, E OUTROS, QUE TRATAM DO “CÓDIGO DE PROCESSO CIVIL” (REVOGAM A LEI NO. 5.869, DE 1973). PROJETOS DE LEI NOS. 6,025, DE 2005, E 8.046, DE 2010. [translated from Portuguese]online.p.24. Available at: http://s.conjur.com.br/dl/relatorio-cpc-sergio-barradas.pdf [Accessed 19 Dec. 2016].

13 “[…] The development of technology, the diffusion of the Internet and the enhancement of recording and transmission devices are indispensable options and operationalize hearings—thus enabling them to be more dynamic and original, shortening distances.” [translated from Portuguese] (OLIVEIRA, V. (2016). O juiz e o novo código de processo civil. 1st ed. Curitiba: CRV, p.148.)

14 “ODR is the application of information and communications technology to the practice of dispute resolution.” (Rule, C. (2015). Technology and the Future of Dispute Resolution. Dispute Resolution Magazine, 1(1), p.2.)

15 (Manual de Mediação Judicial. (2015). 5th ed. [ebook] Brasilia: Conselho Nacional de Justiça, p.56. Deutsch, M. (1973). The resolution of conflict. 1st ed. New Haven: Yale University Press.)

16 “Much of ODR’s early development was based in the US for several reasons: (a) the early development of US-based internet, for defense and research projects; (b) the deeply-set roots and early adoption of ADR processes in the US; (c) the competitive and innovative nature of the US ADR market; (d) the high-quality ICT infrastructure; (e) the tech savvy, increasingly wired population; and (f) US corporate culture, demanding instant accessibility of people and information.” (Pearlstein, A., Hanson, B. and Ebner, N. (2013). ODR in North America. Online Dispute Resolution Theory and Practice, p.19.)

17 “ODR has been available since 1996. Its development can be defined as passing through three broad stages: a ‘hobbyist’ phase where individual enthusiasts started work on ODR, often without formal backing; an ‘experimental’ phase where foundations and international bodies funded academics and non-profit organisations to run pilot programs; an ‘entrepreneurial’ phase where a number of for-profit organisations launched private ODR sites.” (Conley Tyler, M. (2004). 115 and Counting: The State of ODR 2004. Proceedings of the Third Annual Forum on Online Dispute Resolution, University of Melbourne, p.2.).
2011 eBay spun out some of its ODR technology to start Modria.com, an ODR provider that supports resolutions around the world. Since 2000, ODR mechanisms have resolved more than 400 million disputes globally, and that number continues to grow.

International organizations have promoted ODR as a solution to access to justice challenges since 2002. UNCITRAL, the United Nations organization in charge of harmonizing global laws, convened a Working Group devoted to ODR with more than 66 member nations. As ODR took off in geographies like North America and Europe, the development of ODR in Brazil began in earnest a decade later. An international survey of the growth of ODR by Melissa Conley Tyler indicated that Brazil’s use of ODR lagged behind initiatives in other geographies, but the clear potential of ODR approaches in tackling the challenges being experienced in Brazil was clear even before ODR experiments began in earnest. The delay in Brazil’s adoption of ODR approaches might have even been a benefit in retrospect, as other geographies tested and refined ODR tools, ensuring that Brazil could learn from best practices prior to beginning their own initiatives. The geographies that were most successful in implementing ODR were those that coordinated its launch between many stakeholders, including governmental organizations, foundations, chambers, private start-ups or individual enthusiasts.

In Europe, the number of private and public ODR start-ups has grown steadily. Certain countries have led the way as early adopters (e.g. England, The Netherlands), but now the more conservative governments on the Continent are following suit. In 2015, the European Union adopted a new regulation requiring all merchants in EU Member States to notify their consumers about the availability of ODR, and the EU launched its own ODR filing form to collect buyer complaints and distribute them to regionally appropriate ODR service providers. An excellent example of the expansion of dispute resolution in Europe is the Directive 2008/52/CE de le Parlement Européen et de Conseil de 21 Marz, 2008, which points out some guidelines for the use of mediation in EU member states in certain cases such as torts and contract disputes, where the parties were from different countries.

The Civil Justice Council in the United Kingdom recently convened a working group consisting of experts in the ODR field to study its application in civil cases. The Final Report of this working group recommended that the Ministry of Justice create something called “Her Majesty’s Online Court,” which would be designed to use ODR approaches to resolve civil cases less than £25,000 without requiring disputants to show up in person at the court, or to be represented by a lawyer. As Lord Justice Fulford, the Senior Presiding Judge of England and Wales, put it, “ODR will be an integral part of the going [court] digitalization process. It is absolutely necessary for the survival of the justice system in the UK.” The UK has now earmarked more than £700 million to help fund this modernization of the justice system, and ODR will likely be an integral component.

ODR has shown particular traction within courts and legal service organizations. The provincial government of British Columbia, in Canada, recently created an online resolution process, the Civil Resolution Tribunal, which aims to move most low-dollar value civil disputes from the courts to ODR systems. British Columbia has been on the cutting edge of ODR for some time, and now the British Columbia Legal Services agency has launched MyLawBC.com, which uses ODR to expand services to low-income families in the province. The Dutch Legal Aid Board has also used ODR to support divorce and separation cases, and the Indian government has launched the Online Consumer Mediation Center (OCMC) to resolve disputes between buyers and sellers in India.

If anything, the momentum behind ODR appears to be growing around the world. Those who have seriously considered the problem of access to justice, especially for high volume/low value cross-jurisdictional disputes, have come to the conclusion that ODR is the best option for the future. Judges, Bar Association Presidents, regulators, general counsels, and legal aid attorneys are all faced with shrinking budgets, growing numbers of self-represented litigants, and changing expectations amongst the constituencies they are trying to serve. The track record ODR has already achieved in a wide variety of global applications is encouraging them to think seriously about how ODR can work in their home geographies. With all this momentum, it’s no surprise that legal sector leaders in Brazil are asking the same questions.

18 Modria raises $5M to make resolve customer complaints in the cloud. [online] Reuters.com. Available at: https://www.reuters.com/article/idUS279454625820130708 [Accessed 17 June 2018].
19 “As of July 2004, at least 115 ODR services had been launched worldwide, settling more than 1.5 million disputes. ODR services offer examples of using technology to resolve everything from eBay disputes to commercial litigation; from family disputes to the Sri Lankan peace process. There are now ODR services in all regions.” (Conley Tyler, M. (2004). 115 and Counting: The State of ODR 2004. Proceedings of the Third Annual Forum on Online Dispute Resolution, University of Melbourne, p.1.)
20 (Conley Tyler, M. (2004). 115 and Counting: The State of ODR 2004. Proceedings of the Third Annual Forum on Online Dispute Resolution, University of Melbourne, p.2.).
21 Ross, G. and Poblet, M. (2013). ODR in Europe.
22 European Parliament and The European Union Council, (2008). DIRECTIVA 2008/52/CE DO PARLAMENTO EUROPEU E DO CONSELHO – May 21st, 2008 relates certain aspects of the civil and commercial mediation. Estorasburgo: Jornal Oficial da União Europeia.
23 “13. The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time-limits for a mediation process. Moreover, the courts should be able to draw the parties’ attention to the possibility of mediation whenever this is appropriate.” (European Parliament and The European Union Council, (2008). DIRECTIVA 2008/52/CE DO PARLAMENTO EUROPEU E DO CONSELHO)
24 Rule, Colin and Schmitz, Amy. The New Handshake: Online Dispute Resolution and the Future of Consumer Protection, American Bar Association Press, 2017. Page 18.
25 Rule, Colin. “Technology and the Future of Dispute Resolution,” in Dispute Resolution Magazine, a publication of the American Bar Association, Winter 2015.
26 Katsh, E. and Rule, C. (2015). What we know and need to know about Online Dispute Resolution. South Carolina Review, 67(329), pp.5-6.
Part II: The Growth of ODR in Brazil: e-negotiation and e-mediation

A truism in dispute resolution is that the best time to resolve a dispute is as early as possible. The longer a dispute goes on, the more difficult it can build, making resolution even more elusive. Tackling a dispute early in its lifecycle can optimize the chance that the issue can be resolved by mutual agreement between the parties. And even better than resolving a dispute early is preventing the dispute from arising in the first place. As Louis Kriesberg and Bruce W. Dayton put it:

It is easier to stop a conflict from escalating destructively if the struggle has not persisted for a long time and not escalated greatly. This underlies the high interest among conflict resolution practitioners in the potential of early warning and preventive diplomacy.27

In dispute resolution, delays can make disputes escalate and intensify. Therefore, moving quickly to resolve cases is extremely important. The legal system is not optimized around speed, and that generates frustration on the part of disputants.26 ODR systems need to be easily accessible and fast moving to avoid generating that kind of frustration. In response to this dynamic, important legislative reforms were put into motion in order to improve the timeliness of the Brazilian legal system.29

The New Civil Process Code (Lei 13.105/2015) and the Law of Mediation (Lei 13,140/2015), legal bills which enhanced and amplified the usage of ADR, made explicit the acceptability of using technology, including virtual environments, as a permissible form of mediation.30 The 334th article, 7th paragraph of the NCPC says: “The conciliatory audience or mediation audience may be realized electronically in the terms of the Law” [translated from Portuguese]. In a similar way, the 46th article of the Brazilian Law of Mediation notes: “Mediation may be realized by internet or by any other means of communication that permits distance transactions, since the parties agree.” [translated from Portuguese]

These measures signal a strong political will towards modernizing the conflict resolution systems in Brazil, especially through the inclusion of new technologies. These moves have created a fertile environment for the development of ODR in Brazil. Although the changes in the field of conflict resolution are a recent development in Brazil, several private initiatives have quickly emerged to implement ODR in Brazil. The openness of the Brazilian legal system to ODR has signaled to the marketplace that ODR approaches are welcome, and that is causing developments to accelerate.

The expansion of internet access is also fueling the reach of ADR. Brazil is a very large country, with marked differences in income and infrastructure across the different regions of the country. However, the use of communication technology via the internet opens access to redress for many Brazilians who are located in distant or rural locations.32 Online options for filing cases and communicating with counter parties may make justice possible if the parties are physically separated by these great distances. In addition, the procedural flexibility of ODR, married to the flexibility of online communications, provides conditions that allow conflicts to be resolved faster and, consequentially, more effectively, because haste avoids the aforementioned escalation in complexity and frustration.

Therefore, we now observe in Brazil an acknowledgement of the advantages associated with ODR that have been described by experts in other countries which implemented ODR mechanisms previously. This development is stimulating the development of ODR experiments in the public and private sector aimed at realizing these efficiency, speed, and cost improvements.35

According to a study on ODR performed by the group “Law, Research, Innovation and Technology” of the Faculty of Law in the University of Brasilia, the present online platforms existing in Brazil practice of e-negotiation and of e-mediation, focus primarily on the resolution of conflicts involving consumption.

We will now delve into the specifics of e-negotiation and e-mediation systems as deployed in Brazil and examine the services and platforms some of the online dispute resolution providers that have recently launched.

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27 Kriesberg, L. and W. Dayton, (2011). Constructive Conflicts: From Escalation to Resolution. (4), p. 198.
28 C. (2002). Introduction to Online Dispute Resolution for Business. [online] Mediate.com. Available at: http://www.mediate.com/articles/rule2.cfm [Accessed 30 Dec. 2016].
29 Brazilian Law, originated from the Continental-Germanic stream, promote the letter of the Law to an uppermost source of Rights; therefrom one can observe a will of change by the political power.
30 Conflict spires is the name of the social effect- so described by experts in the matter- in which the parties reactions escalate and interpose- thus generating so an intense and damaged conflict as the original issue. Therefore the means of a conflict are as much important as the conflict itself (Manual de Mediação Judicial, (2015), 5th ed. [ebook] Brasilia: Conselho Nacional de Justiça, p.48)
31 Despite its limitations due to legal and security issues, ADR offers a greater range of conflict solutions mechanisms than the traditional path, from the perspective of the procedure (Mediation, Arbitration, Conciliation) to the perspective of the third party to assist the parties.
32 The distance between Manaus, Brazilian Northern economic pole, and Porto Alegre, the Southern capital is 3,133km – that is approximately the distance between Barcelona and Moscow plus 100km; or between Washington D.C. and Phoenix, Arizona.
33 Colin Rule Discusses the Intersection between ADR and Online Dispute Resolution (ODR). (2012). Jams Dispute Resolution Alert, pp. 4-5.
34 Direito Tec is a research and development group from the Law Faculty of the Universidade de Brasilia based in Brasilia (DF). The group focused on the study of innovation in Law, specifically regarding new technologies (LegalTech) in order to provide Brazilian students with that knowledge and stimulate the development of ODR and even more.
II. 1. E-negotiation

Negotiation is a form of conflict resolution where the dispute is resolved only between the disputing parties, with no third party neutral involved. Depending on how the e-negotiation is designed, the resulting process can result in an enforceable agreement which may enable one party of the other to compel judicial enforcement if necessary. We will now analyze three e-negotiation providers to call out the variations in their approaches.

The oldest and most used e-negotiation tool in Brazil is called “Reclame Aqui”38. In this online platform (i) the consumers are able to register their complaints related to products, services or companies; (ii) then, the companies are summoned to answer the complaints, presenting the available solutions; (iii) and, at last, the consumer registers his evaluation regarding the attitude of the company and informs whether his matter was plainly solved or not. In such procedure the parties are not helped by a third party and the participation of lawyers is dismissed.

“Reclame Aqui” has generated promising results in that it promotes quick communication between the parties. Reclame Aqui is an e-negotiation platform created founded in 2001 that answers 30,000 demands per day. There are 120,000 companies and 15 million users registered35. The platform is free of cost and its mechanisms maintain high levels of solvency of the negotiated terms, even though they do not generate a judicially-binding executive title. Basically, the developed strategy to bind the negotiators to the result of their deliberation relies on the publicity of the results obtained. It causes, consequently, a concern to the companies regarding the building of a good reputation in the market as well as to their buyers36. After all, “reputation systems allow users to make judgments as to which sellers provide the greatest chance of a successful transaction, and therefore lowest risk of dispute”37.

Another existing platform is “Sem Processo”38. In contrast to Reclame Aqui, the negotiation in this case is practiced by lawyers rather than by the parties themselves. In order to engage the negotiation procedure, (i) one person’s attorney must initiate the process by sending a demand to “Sem Processo” which, in turn, (ii) communicates the demand to the legal team of the involved company. Sem Processo then opens a virtual space for the e-negotiation to take place.

The use of “Sem Processo” is free for the lawyers of consumers, with the costs shifted to the respondent companies. The platform focuses on the creation of an environment that enables the lawyer to solve the consumer’s problems directly with the company. The negotiated terms are signed by both parties’ lawyers, and in line with the terms in the 784th article; item IV of the NCPC39, the platform generates an extrajudicial executive title40 that is enforceable by a court.

The negotiation takes place in a private virtual environment that treats the negotiated agreement as confidential, thus possibly conferring an advantage to the company for the agreement avoids the creation of a precedent. However, some consumers may also appreciate this design, especially those consumers who do not wish to have their issues exposed.

Another e-negotiation tool is called “Dra. Luzia”41. Its platform is divided into two stages. In the first stage, it operates as a technological support to lawyers, law firms, and inside counsel by generating documents, pleadings, appeals, etc. – essentially automating the formal legal process. The platform creates petitions in a semi-automatic way by using artificial intelligence techniques focused on two specific legal subareas: analytics and legal research. Dra. Luzia ambitiously intends to be the first platform in the world that can intelligently write legal papers in order to improve lawyer efficiency. It concentrates its energy on automatizing repetitive activities, in order to efficiently unravel complex analysis, thus reducing the need for time consuming manual labor, and avoiding mistakes.

In the second stage, Dra. Luzia offers e-negotiation similar to sophisticated ODR platforms available outside of Brazil. The e-negotiation stage utilizes a cognitive computation system which foresees and advances the ODR process appropriate to each individual dispute. The system gradually learns each specific situation via textual analysis in order to advance the solution via algorithmic tools. Once the system provides a suggested resolution to the parties, the users can rework it as they see fit.

The last platform we will examine is another available e-negotiation mechanism: “e-Conciliar,”42 whose concept involves facilitating the negotiation of an issue involved in a currently active judicial process. According to the 841st article of the NCPC, this form of transaction
is available only to Torts. An eventual agreement, if certified by the judge in the active judicial process, solves the matter of the cause and generates a judicial executive title\(^{43}\) which is legally enforceable.

While many of these examples focus on cases within the courts or at risk of being filed in court, there is also a considerable and growing use of e-negotiation as a means of resolution/prevention of conflicts outside of the justice system. The primary application of e-negotiation in this context is the field of consumer relations. The efficiency of ODR is extremely helpful in resolving consumer issues before they undermine customer trust and loyalty, or bubble up in social media. It is not necessary to have the threat of judicial enforcement to make these extrajudicial e-negotiation processes successful, because the parties are more than adequately incentivized by their desire to preserve strong buyer-seller trust\(^{44}\).

The use of e-negotiation mechanisms is especially interesting when there is no explicit conflict of interests between the parties, or when the conflict is still in an early stage. These online platforms are intended to smooth communication between the parties at the earliest appearance of a potential problem and to foster mutually-acceptable resolutions in an extrajudicial path. However, disputants do not always possess the psychological or emotional fortitude to engage in a negotiation without the help of a third party. In those situations, e-mediation may be a better process to attain an agreement.

**II.2. E-mediation**

E-negotiation is often very informal, but e-mediation is slightly more regulated. The challenge of ensuring the process and true impartiality of neutrals requires a bit more oversight than e-negotiation processes, which are entirely driven by the parties themselves. In Brazil, our research has verified the dynamic of a growing preference for mediation as ODR techniques become more legitimized. The legal changes specifically call out e-mediation as a preferred process, so that may explain why e-mediation has improved its status in such a short period of time.

From this perspective, e-mediation has the highest profile due to its up to date legal authorization (Law 13,105/2015 and 13,140/2015). As such, there are quite a few recent e-mediation initiatives in Brazil: “Dra. Luzia”\(^{45}\), “Vamos conciliar”\(^{46}\), “Justiça sem processo”\(^{47}\) and “Juster”\(^{48}\). These platforms operate in a straightforward and similar way, facilitating face-to-face mediation via videoconferencing to enable the parties to communicate with the mediator, so there is no need to examine each in turn.

As a rule, e-mediation requires a software platform that assures the confidentiality and privacy of the negotiations. Parties are often quite sensitive to the security of the information shared in these online sessions, though any outcome must be agreed to by both disputants\(^{49}\). Adherence to the agreed upon solution is improved because both parties have veto power over any resolution achieved, ensuring that the parties feel ownership over the outcome. However, Brazilian Law (specifically, the NCPC) also confers a judicially binding element to any agreement achieved, ensuring it has executive title and can be enforced in the courts\(^{50}\).

One of the pros of e-mediation is that “records are preserved and reviewable, allowing for more seamless processes and joint frames of reference.”\(^{51}\) Therefore, any future legal challenges to the mediation outcome can be quickly resolved if the parts had previously agreed to give access of their registers\(^{52}\). Mediation outcomes cannot be a coercive, so agreements cannot be annulled with the argument that one of the parties did not consent to the outcome achieved. Should such a protest arise, the maintenance of records may be presented to verify that in fact both parties did agree to the outcome. This is one of the most attractive aspects of the mediation process: a cooperative model\(^{53}\).

In spite of e-mediation’s relatively recent introduction in Brazil, expectations are rising about its efficacy, and demand is growing due to promotion from recent legal changes and from high expectations drawn from other successful e-mediation programs outside of Brazil. The Law of Mediation (Lei 13,140/2015) created a few mechanisms destined to strengthen extrajudicial mediation practice, and that

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43 Art. 515, III, NCPC. (Presidência da República, (2015). LEI No. 13.105, DE 16 DE MARÇO DE 2015. Brasília: Subchefia para Assuntos Jurídicos.)
44 In this perspective, negotiation is looks forward to strengthen the relations buyer-seller. One may say that “If customers do not trust a particular site or service then most likely over time they will scale back their use. Also, they will probably share their negative experience with others, many of whom will have little no direct experience with the site.” (Rule, C. and Friendler, L. (2005). The appropriate role of dispute resolution in building trust online. Artificial Intelligence and Law, 13(2), p.196.)
45 Dra. Luzia. [online] Available at: http://www.draluzia.com/ [Accessed 11 Jan. 2017].
46 Milanez, G. (2016). Vamos Conciliar. [online] Vamosconciliar.com. Available at: http://www.vamosconciliar.com/ [Accessed 30 Dec. 2016].
47 Juspro.com.br. (2016). JUSPRO – Justiça sem processo. [online] Available at: http://www.juspro.com.br/ [Accessed 30 Dec. 2016].
48 Juster. (2016). Resolução de Conflitos. [online] Available at: http://juster.com.br/ [Accessed 30 Dec. 2016].
49 The mediator has no power to issue a decision or impose an outcome on disputing parties. In other words, decision-making authority rests with the parties over both process and substantive issues.” (A. Haloush, H. and H. Malkawi, B. (2008). Internet Characteristics and Online Alternative Dispute Resolution. Harvard Negotiation Law Review, 13(327), p. 336.)
50 See note 47.
51 Ebner, N. (2012). e-Mediation. Online Dispute Resolution: Theory and Practice, p. 17.
52 Confidentiality may be relativized if the parts consent to disclosing information of their processes for future use, as established in article 30 of law 13,140/2015.
53 Ideal to the common good and to the establishment of long-term relationships. The cooperation as understood based on the game theory and in other conceptions such as Nash equilibrium or the prisoners dilemma influence this way of understanding and dealing with human relationships which may embrace conflict resolution in Brazil. (Manual de Mediação Judicial. (2015) 5th edition [ebook] Brasília: Conselho Nacional de Justiça, pp. 55-64)
law harmonized perfectly with e-mediation. Exemplifying the 22nd article; IV item of the Law of Mediation specifically permits the use of contractual provisions that require mediation as a first alternative to solve any conflicts that may arise, thus strongly urging potentially unwilling parties to fulfill their contractual obligations, even going so far as to establish penalties for non-compliance.

Even if there is no contractual provision requiring the use of mediation, if someone is invited to take part in a session of mediation and subsequently refuses to attend it, The suitor must necessarily pay 50% of the costs and or the total amount of the attorney's fees if he or she eventually wins the case in a future arbitral or judicial process. This goes farther than most mediation acts in places other than Brazil, but it should be noted that such a condition does not damage the principle of disputants’ autonomy, because it does not force the parties into an accord, it only requires them to be present for the first meeting, even if only to communicate their disinterest in continuing the mediation.

Another issue that is driving the increase in e-mediation in Brazil comes from the expansion of cross-border transactions, which generate cases that involve parties scattered around the globe. The practice of e-mediation is a perfect fit for these types of issues because the parties need not be in the same place to participate in an e-mediation, and issues of jurisdiction matter less in cases where the parties must agree on the outcome. The expansion of global eCommerce guarantees an increase in the volumes of conflicts that transcend the geographic frontiers of each country, requiring the development of resolution mechanisms able to handle these new kinds of disputes. “ODR is not tied to geography or jurisdiction”. In addition, “parties gain access to mediator expertise beyond that which might be available in any given geographical region”. In this sense, e-mediation fits perfectly into areas where global commerce is evolving.

From this perspective, the expansion of e-mediation in Brazil is a direct result of both legislation promoting mediation and of external influences, such as the expansion of eCommerce and cross-border consumer transactions. The e-mediation initiatives cited here are still in the initial stages, but they are growing fast. This fast growth has already generated significant challenges, which we will explore in the next section of this article.

III. ODR Challenges faced in Brazil

The promulgation of a new law is not sufficient, in and of itself, to generate the changes in society and commerce. Adequate conditions are necessary if the law is to produce its intended effects. Thus, although meaningful and an important milestone in the expansion of conflict resolution in Brazil, the legislative reforms produced during 2015 will only be effective in promoting ODR if several obstacles are simultaneously overcome. A few of them are described below:

a) Brazilian culture

The first overall challenge is the litigation culture that still dominates in Brazil. The judicial model of issue resolution is still quite strong in the way Brazilian people understand their rights and paths to resolution of their demands. A justice’s decision is still preferred to consensual accords between the parties. This represents a major obstacle to the expansion of ODR.

Such a fact can be observed in data extracted from State Special Justice reports. These offices, which have been part of the Brazilian legal system since 1995, “are competent to conciliate, process, decide and execute civil cases with limited complexity and crimes of minor damaging potential”. That is, they are granted limited authority to resolve conflicts that both a) involve lower tiers of social repercussions and b) have a higher likelihood of being solved by negotiation inter partis.

The settlement meeting, guided by a conciliator, is held as the first stage of demand processing by a Special Justice Court. If a consensus is not reached, the parties must present their issue to a judge who will decide the matter. However, according to statistics provided by

54 Art. 22, Law 13.140/2015. The contractual forecast of mediation must have at least: I – minimum and maximum time for the first mediation meeting from the date of the invitation received; II – place of the first meeting of mediation; III – criteria of choosing the mediator or the team of mediation; IV – penalty in case of unattendance from the invited party for the first meeting.

55 Art. 21st, Law of Mediation. “The extrajudicial mediation procedure invitation may be presented by any means of communication and must present the negotiation scope, the day and placement of the first meeting. Detached paragraph. The invitation is to be considered dismissed if unanswered in the term of 30 days counting on the day of its receiving”.

56 Article 22nd §2nd, IV, Law of Mediation “The first meeting unattended provides the party with 50% of the costs and attorney's fees if the party is to win the case in posterior arbitral or judicial procedure – insofar as it involves the scope of the mediation to which it was invited.”

57 Art. 2nd, Law of Mediation is to be guided by the following principles: I - the mediator’s impartiality; II – isonomy between the parties; III – orality; IV – informality; V – autonomous will of the parties; VI – guidance towards consensus; VII – confidentiality; VIII – good-faith.

58 The ever quicker and thoroughly scattered insertion of technology in various activities around the globe is already real. ODR is not different – if we observe Asia, Oceania, America and Europe we may find several initiatives in the most emblematic stages. The world, indeed, drifts along the path of making its conflicts resolution praxis something hastier, more intelligent and technological.

59 “A technology-empowered consumer in Brazil can purchase an item from a seller in France to a market in China”. (Rule, C. (2016). Technology and the Future of Dispute Resolution. Dispute Resolution Magazine, 21(2), p.4.)

60 Ebner, N. (2012), e-Mediation. Online Dispute Resolution Theory and Practice.

61 “A rule to be considered socially efficient whenever it finds adequate conditions in reality to produce effects” (Translated from Portuguese). Ferraz Jr., T. (1994). A validade das normas jurídicas. Complexidade, Direito e Sociedade. [online] 15 (28), p. 86. Available at: https://periodicos.ufsc.br/index.php/sequencia/article/view/15875/14364 [Accessed 5 Jan. 2017]).

62 Presidência da República, (1995). LEI No. 9.099, DE 26 DE SETEMBRO DE 1995. Brasilia: Casa Civil Subchefia para Assuntos Jurídicos.

63 Justiça em Números. (2016). 1st ed. [ebook] Brasília: CNJ, p.81
the National Justice Council\textsuperscript{64} in 2015: “the Special Justice cognizance stages present only a percentage of 16\% of conciliatory results”\textsuperscript{65}. Therefore, in spite of the existence of a State institution destined to provide the parties an opportunity to resolve their problems via dialogue and conciliation, the vast majority of cases still are resolved by an evaluative, judicial process.

Despite such low percentages of conciliatory results, CNJ has optimistic projections for the future, mostly due to the NCPCs enforceability which “foresees the realization of a previous audience of mediation and conciliation as a mandatory stage, previous to the conformation of the litigious case as a general commandment to all Civil Law Processes”\textsuperscript{66}. Such a norm envisages the solution of most conflicts via mutual agreement between the parties, thus avoiding litigation as the default resolution option. It is also expected that promotion of these new conflict resolution methods will change social attitudes around which resolution path is most desirable.

In a litigious society the introduction of ODR may face initial resistance and skepticism, and that skepticism will only be overcome if ODR mechanisms can consistently display greater efficiency and satisfaction than court-based processes. The government is very interested in promoting ODR as the default resolution option for civil cases, so it is likely that the government will promulgate norms to stimulate more interest and support of ODR processes. The benefits that ODR may introduce to the parties when compared to litigation may also eventually win over other players within the judiciary. Once the preference, satisfaction, efficacy, and savings data are validated, no one will want to miss out on those benefits.

Leading Brazilian thinkers are already asking these questions and promoting the social change required for Brazilians to embrace ODR. As one article recently noted, “we need a cultural turn toward the dispute resolution field… In our culture, we are used to the idea that it is good and most of the time necessary that our conflicts be settled by a decision maker, and we seek enforceable redress. Now it is time for a cultural turn”\textsuperscript{67}.

Another cultural issue is that unlike the USA or Europe, the Brazilian people do not, as a rule, trust private service provider platforms. If ODR is to overcome that resistance, the quality of ODR platforms must be high, and the virtual environment and user experience must be well designed -- not clumsy or uncomfortable. Users will stay away unless the ODR services communicate safety, efficiency, and ease of use.

b) The education of online mediators

Regarding e-mediation, an important challenge to be faced relates to the education of professionals who intend to serve as mediators. An ODR mediator must be as neutral and as impartial as possible; he or she must be able to communicate with respectful and constructive language; be competent to guide a dialogue and develop rapport; and be interested in the considerations developed by the parties. All of these requirements must be achieved through effective training and ongoing quality monitoring if the potential of e-mediation is to be realized.

The former Secretary of the Judiciary Reforms, Flávio Caetano, affirmed that Brazil will make use of a “veritable army” of about 17,000 mediators in order to respond to the existing demand for millions of resolutions. This is the first step in this challenge: the education of the mediator\textsuperscript{68}.

The required qualifications to be a judicial mediator are rigid. Art. 1 of the Law of Mediation lays them out in great specificity: civil capacity; to be graduated from a course of study for at least two years before the application; education from a training program for mediators that is recognized by governmental entities; training must contain, according to the 1st Annex of the Resolution 125/2010 of the CNJ, (i) theoretical module (at least 40 hours in-class); and (ii) a practical supervised module (60-100 hours).

In contrast, anyone can work as an extrajudicial mediator if he or she demonstrates (art. 9th of the Law of Mediation): civil capacity; trust of mediator is essential. Even if everything else goes perfectly, low quality mediators may doom the effort to failure.

Therefore, in order to facilitate the expansion of e-mediation throughout Brazil, the continuous education of those intending to play the role of mediator is essential. Even if everything else goes perfectly, low quality mediators may doom the effort to failure.

\textsuperscript{64} Ibid.

\textsuperscript{65} Ibid.

\textsuperscript{66} Justiça em Números. (2016). 1st ed. [ebook] Brasília. CNJ, p. 45.

\textsuperscript{67} Almeida Montingelli Zanferdini, F. and Tomaz de Oliveira, R. (2015). Online Dispute Resolution in Brazil: Are We Ready for this Cultural Turn? Revista Paradigma, 24(1), p. 77.

\textsuperscript{68} Brazil will have a “true army” with more than 17 thousand mediators from 2015. Jota. Available http://jota.info/justica/brasil-tera-verdadeiro-exercito-de-mais-de-17-mil-mediadores-a-partir-de-2015 ~ 29062015, Accessed in 11 Jan 2017.

\textsuperscript{69} In the First Journey of Mediation of the Federal Justice Council, the line number 47 was approved. Its text interprets the “education of the extrajudicial mediator: “The reference to the education of the extrajudicial mediator in the ninth article of the Law of Mediation makes mandatory previous experience, vocation, the trust of the parties and capacity to mediate as well as knowledge of the principles of mediation; therefore it does not suffice the education in other knowledge areas which relate to the merit of the conflict only.”

\textsuperscript{70} Fernandes, W. (2015). Conciliation and Mediation Future in Brazil is promising, expert’s evaluation. Agência CNJ de Notícias. Available at: http://www.cnj.jus.br/noticias/cnj/81029-futuro-da-conciliacao-e-mediacao-no-brasil-e-promissor-avalia-especialista [Accessed 5 Jan. 2017].
c) Enforceability

One major challenge to the expansion of ODR is the lack of mechanisms to ensure adherence to the terms accorded by the parties. Study after study has shown that parties don’t want agreements, they want outcomes. If e-mediation delivers millions of agreements that are promptly ignored by the parties, it will have been a waste of time. According to Maxime Hanriot, “the lack of enforceable outcomes constitutes a major hurdle for the development of ODR, and considerably decreases the level of trust of the potential parties to an ODR scheme”71.

Despite Brazilian legislation that provides a certain binding strength to the outcomes achieved in e-negotiation and e-mediation (because yes, under the legislation negotiation and mediation outcomes can conform to executive titles, meaning the outcomes are enforceable by a court), there remains a concern that parties will not take negotiation and mediation outcomes as seriously as they take judicial decisions. In Brazil, the competency to execute executive titles is held only by the State, so the State is perceived to have the ultimate enforcement power.

According to data provided by the CNJ, in the Judiciary “half of the almost 74 million cases, in course, processed at the end of 2015 were executive”72. Another liable indication is the executive congestion index, which is of 86.6%, i.e., 13.4 processes, among each one hundred that reached executive stages in 2015 received a solution by the Judiciary. This sense that binding judicial outcomes are the only really enforceable resolutions will be a major obstacle to wider adoption of ODR if the public is not disabused of the notion early and often.

d) Technological challenges

Amongst the technological challenges to the usage of ODR in Brazil, it is interesting to highlight:

(i) the cost of implementation of machine learning processes.

(ii) a lack of common data standards in the Brazilian legal environment: there is no XML standard regarding systems, document species, databases, websites, etc. across all Brazilian courts. For example, each Brazilian State Court has its own PJE (Electronic Judicial Process). That creates enormous difficulties in terms of organization, coherence, and case exchange between systems. For ODR to realize its potential, we may need to convene working groups to standardize the data structures and remove inconsistency. This can take a long time and be quite expensive.

(iii) finding qualified developers who can build ODR tools to our exacting specifications is a major challenge. Development talent is scarce and expensive. The focus in academic computer science programs in universities and in the private employment markets is not on ODR approaches, meaning the pool of qualified developers is likely to be small.

(iv) the necessary hardware infrastructure to support ODR platforms is unexplored in the Brazilian market. Additional exploration is required to ensure the infrastructure exists to deliver these ambitious plans at scale, and to ensure that all Brazilian consumer data is not shared outside of Brazil.

Conclusion

One may say that Brazil presents a quite promising environment for the development and exploration of ODR. The Brazilian market is large, there is significant support from the judiciary, new laws are creating momentum and visibility, and there is a large backlog of cases that demand resolution. The challenges we have presented in this article are significant barriers to overcome, but we believe the social and economic benefits coming from the deployment of ODR services in Brazil will generate enough enthusiasm for us to be able to do so. In the short and medium term Brazilian ODR may significantly diminish the volume and the costs of litigation and, therefore, reduce the Custo-Brasil – Brazilian Cost – of delivering fast and fair resolutions to Brazilian citizens while expanding access to justice.

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71 Online Dispute Resolution (ODR) As a Solution to Cross Border Consumer Disputes: The Enforcement of Outcomes. (2015). McGill Journal of Dispute Resolution, 2(1).
72 Justiça em Números. (2016). 1st edition. [ebook] Brasilia: CNJ, p. 61
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The Impact of Attorneys on Judicial Decisions: Empirical Evidence from Civil Cases
Caio Castelliano de Vasconcelos, Eduardo Watanabe and Waldir Leônico Netto

Abstract
This article analyses the impact of attorneys on the outcome of judicial decisions in civil cases. We currently have little quantitative information about the effect of attorneys on the outcome of civil cases due to (i) the nonrandom pairing of attorneys and cases and (ii) the difficulty in accurately defining what a favorable decision in a civil case is. The Office of the Solicitor General of the Union in Brazil presents a unique research opportunity, since it assigns cases among its attorneys on a random basis and has standardized rules to record outcomes of civil cases. We analyzed the work performed by 386 Federal Attorneys and their impact on 30,821 judicial decisions. Significant win-rate differences among attorneys were detected in half of the 70 teams surveyed. The fact that attorneys achieve different outcomes, despite working in the same type of cases, indicates how judicial decisions can be affected by the work of an attorney in the civil area. No statistical correlation between attorney experience and outcome of civil cases was detected.

Keywords: Impact of attorneys. Judicial Decisions. Outcome of civil cases. Empirical evidence. Random assignment.

1. Introduction
In ideal circumstances, court cases should be decided based solely on their merits, analyzing evidence introduced by the parties and the law applicable to the case. However, litigation does not proceed separately from external social factors. Several factors may help to explain a litigation outcome, such as judge or jury bias, regional influence and the nature and resources of plaintiffs and defendants.  

Attorneys also play a key role in the outcome of court proceedings. The lawyer functions as a source of information for the court. It is he who first points out the facts and the law in question. The legal representative makes a legal analysis of the litigation, showing how the legal rules can be applied to the concrete situation. The subsidies brought by lawyers serve as a source for the final understanding of the case. Since 1791, the Sixth Amendment of the U.S. Constitution provides that “in all criminal prosecutions, the accused shall…have the assistance of counsel for his defense”. Nowadays, the right to counsel has been widely recognized in virtually all modern civilized countries.

A fair judgment depends on the work done by lawyers. A legal counselor is essential for an effective defense not just in criminal matters but also in civil cases. Most people live a life without engaging in a criminal problem. However, with the multiplication of economic relations involving people and organizations, it is increasingly common for individuals to participate in a civil suit at some point of their lives. At this point, they will need professional counseling.

However, analyzing the impact of attorneys on case outcomes is not a simple endeavor. The attorney often selects personally the cases he will take, making it difficult to determine whether the results are attributable to that attorney or simply to the characteristics of his cases. Due to attorney matching, an attorney may have a high trial success rate that has nothing to do with his skill. Because of this case-selection effect, it is usually impossible to isolate and measure the magnitude of the effect of the attorney on the outcome of the case.

In the civil area, researches using reliable methodology are rare. After reexamining the quantitative literature about how much difference legal representation makes in the outcome of civil cases, Greiner and Pattanayak concluded that we know almost nothing about the effect of representation in civil proceedings.

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2 See T. Eisenberg, Litigation models and trial outcomes in civil rights and prisoner cases. Cornell Law Faculty Publications 77 pp. 1567-1602.

3 See Huang, K. C., K. P. Chen, & C. C. Lin “Does the type of criminal defense counsel affect case outcomes?: A natural experiment in Taiwan,” International Review of Law and Economics 113.

4 See J. Anderson, P. Heaton, How much difference does the lawyer make? The effect of defense counsel on murder case outcomes. Yale Law Journal 122 p. 154-217.

5 See J. B. Shinall, Slipping Away from Justice: The Effect of Attorney Skill on Trial Outcomes. Vanderbilt Law Review 63 pp. 267-306.

6 See D. J. Greiner, C. W. Pattanayak, Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make? The Yale Law Journal 121 pp. 2118-2214.
The objective of this work is to analyze the impact of attorneys on civil cases outcomes. In this sense, the Office of the Solicitor General of the Union - SGU (Procuradoria-Geral da União - PGU) in Brazil offers a unique research opportunity, which can be characterized as a natural experiment, since cases are assigned to Federal Attorneys in a naturally random basis, i.e., without the need for an artificially-created random assignment by part of the investigators. We investigate if attorneys that work on the same type of cases (randomly assigned) achieve different outcomes. As it will be demonstrated, in many cases judicial decisions varied depending on the attorney who worked on the civil case, which shows how judges can be sensitive to differences in the work done by those professionals.

This article will proceed in the following order. Section 2 brings the theoretical framework of the issue. Section 3 describes the organization where the research was conducted, presents the data used and the statistical analysis applied. Section 4 reports its findings. Section 5 discusses the results. Section 6 concludes.

2. Theoretical framework

The impact of attorneys on judicial decisions has been studied at least since 1974, when Marc Galanter published his classic paper Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, explaining that powerful parties have more chances to achieve a favorable judicial decision than parties without so many resources⁷. One aspect analyzed by him was the fact that powerful parties can hire better and more specialized lawyers.

Galanter’s analysis, however, was purely theoretical. During the last decades, many empirical legal studies adopted a quantitative approach, often using the outcome of cases as performance indicator. Although a few surveys have been conducted in countries that use the civil law system, almost all research on lawyers’ performance has focused on countries that use the common law system, especially in the United States (Huang, Chen and Lin, 2010).

Hinkle⁸ found no impact of attorneys on American federal appellate courts, where judges have relatively low caseloads and substantial staff assistance. However, in district courts — where judges have less time and resources and depend more on the information brought by expert lawyers — the impact was detected. He concludes that the impact of lawyer expertise on judicial decision would be minimized in institutional contexts where a judge has significant access to neutral information (such as research provided by law clerks), depending less on the information brought by lawyers.

Empirical tests examining the decisions of United States Supreme Court justices support that the salience of the issue before the Court is another aspect that can moderate the influence of a lawyer on the judicial decision⁹. In nonsalient cases the judges have less-intense preferences and therefore are open to the persuasion of lawyers. In salient cases, by contrast, the content of legal policy matters much more to the judges. As a result, they are less amenable to legal argument and adhere more strictly to their personal policy preferences.

Combining the two analyses above, conducted in the United States, we can conclude that the influence of lawyers on the decision-making is not the same in any context - some courts and cases seem to be more susceptible to that. The influence on the judicial decision would be maximum when the lawyer is acting in a case that is not so controversial, before a court that has a high case load and little staff assistance. In the same line, the influence would be minimal when the case is very important and the court have more time and staff support.

In Israel, it was investigated the difference in performance between private lawyers and political lawyers in disputes over the demolition of Palestinian homes between 1990 and 1995 before the Israeli High Court of Justice¹⁰. Political advocates were those whose main, if not exclusive, activity was to dedicate themselves to the cause of the Palestinians, and whose ultimate goal is a change in the policy of demolishing houses, not just the individual case. The results of political lawyers were significantly higher than those of private lawyers, what can be explained mainly as a result of the ability of political lawyers to make better agreements for their clients, avoiding the demolition of their houses.

Another study conducted outside the United States analyzed the outcome of 1209 appeals filed between 1969 and 2003 before the House of Lords of the United Kingdom (sort of High Court attached to the British Parliament) ¹¹. The experience of lawyers was pointed out as having statistically significant influence on the appellant’s chances of victories: if an appellant has a choice between two lawyers, one of whom has argued in 10 cases before the lords and the other has only one, his chances of winning will be 24% higher if he contracts the first.

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⁷ See Galanter, Marc. Why the” haves” come out ahead: Speculations on the limits of legal change. Law and society review, p. 95-160.
⁸ See Hinkle, Rachael K. Does Advocacy Matter? Examining the Impact of Attorney Expertise in Federal Courts. Doctoral thesis. University of Toledo.
⁹ See McAtee, Andrea; McGuire, Kevin T. Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the US Supreme Court? Law & Society Review, v. 41, n. 2, p. 259-278.
¹⁰ See Dotan, Yoav. Public Lawyers and Private Clients: An Empirical Observation on the Relative Success Rates of Cause Lawyers. Law & Policy, v. 21, n. 4, p. 401-425.
¹¹ See Hanretty, Chris. Haves and Have Nots before the Law Lords. Political Studies.
In Canada, it was studied the impact of lawyer capability on the decision making of the Supreme Court of Canada (SCC) 12. Prior litigation experience and litigation team size have a statistically significant and positive relationship with the SCC’s decisions in non-reference-question cases from 1988 to 2000. Moreover, this relationship persists even after controlling for party capability, issue area, and judicial policy preferences.

The main methodological question raised by this type of research is: How can one isolate attorney influence from other factors that affect a legal decision, especially with regard to the type of case? To overcome this problem, Ho and Rubin 13 argue that research design is more important than the method of analysis. According to these authors, the design of a legal empirical research seeking causal inference should create similar groups of cases and submit them to different lawyers, so that any difference in the outcome of cases can plausibly be attributed to the lawyer (like experiments conducted by pharmaceutical industry, that submit similar group of patients to different medicines - a real one and a placebo – and then compare the outcome of each group of patients).

Following this logic, the first step is to identify groups of similar cases. The literature suggests two possible research designs to find groups of comparable cases. One of them, cited by Clermont and Eisenberg14, is to gather information about each case and use such data as independent variables in a multivariate regression to identify which groups of cases are similar to each other.

Abramowicz, Ayres and Listokin 15 criticize this option and claim that studies based solely on information available may omit important hidden variables. The authors indicate the random experiment as the best research design to ensure similarity between groups, since randomization ensures that all variables are similar. For Greiner 16, when it comes to causal inference, a randomized experiment is the “gold standard” since it would have the power to balance even hidden variables, imperceptible to the analyst. Abrams and Yoon (2007, p. 1154) apply this reasoning to the performance of lawyers stating that “when work assignments are not random, it is difficult, if not impossible, to know whether to attribute differences in performance to individual ability or the work assignment”.

In short, researches that use case outcomes as a performance measure should identify environments where distribution of cases is performed randomly. This, however, is not an easy task, since work is not distributed in that manner in many legal units 17, which stands as the first great difficulty in conducting empirical quantitative studies on performance of lawyers. Practically all studies regarding the impact of lawyers that used a random design were conducted in the United States, in the criminal area.

The outcome of judicial decisions was compared in 51 different federal districts in the United States18. In these districts, the distribution of cases between private lawyers and federal public defenders was done at random. It was identified that defendants represented by federal public defenders received fewer convictions and, when convicted, received shorter sentences than those defended by court-appointed lawyers.

In a very similar study, it was analyzed the difference between the performance of state public defenders and lawyers appointed by the Philadelphia state court19. The distribution of cases between the two groups also occurred randomly, specifically in cases of prosecution for the crime of murder. The group represented by public defenders had 19% fewer convictions, 62% fewer death sentences and convictions with 24% less time in prison.

In a rare research conducted outside the United States that used a random approach, Huang, Chen and Lin20 tested whether there has been a systematic difference in trial outcomes between criminal defendants with different types of defense counsel in Taiwan. Those who cannot afford to hire a private lawyer in Taiwan are referred to public defenders or to a court-appointed office at random. Data from 3709 criminal trials conducted between 2004 and 2007 show that both groups are equally effective, with defendants represented by federal public defenders received fewer convictions and, when convicted, received shorter sentences than those defended by court-appointed lawyers.

Abrams and Yoon21 pursued this further and investigated which attorneys’ characteristics could affect case outcomes. Analyzing the dataset provided by the Clark County Office of the Public Defender in Nevada, which randomly assigns criminal cases among

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12 See Szmer, John; Johnson, Susan W.; Sarver, Tammy A. Does the lawyer matter? Influencing outcomes on the Supreme Court of Canada. Law & Society Review, v. 41, n. 2, p. 279-304.
13 See Ho, Daniel E.; Rubin, Donald B. Credible causal inference for empirical legal studies. Annual Review of Law and Social Science, v. 7, p. 17-40.
14 See Clermont, Kevin M.; Eisenberg, Theodore. Do case outcomes really reveal anything about the legal system? Win rates and removal jurisdiction. Cornell L. Rev., v. 83, p. 581.
15 See Abramowicz, Michael; Ayres, Ian; Listokin, Yair. Randomizing Law. University of Pennsylvania Law Review, v. 159, n. 4.
16 See Greiner, D. J. "Causal Inference in Civil Rights Litigation,"122 Harvard Law Review 533.
17 See Abrams, D. S., & A. H. Yoon "The luck of the draw: Using random case assignment to investigate attorney ability," 74 The University of Chicago Law Review 1145.
18 Iyengar, R. “An analysis of the performance of federal indigent defense counsel.” 13187 NBER Working Paper Series, Working Paper.
19 Anderson, J., & P. Heaton “How much difference does the lawyer make? The effect of defense counsel on murder case outcomes,” 122 Yale Law Journal, 154.
20 Huang, K. C., K. P. Chen, & C. C. Lin “Does the type of criminal defense counsel affect case outcomes?: A natural experiment in Taiwan,” 30 International Review of Law and Economics 113.
21 Abrams, D. S., & A. H. Yoon “The luck of the draw: Using random case assignment to investigate attorney ability,” 74 The University of Chicago Law Review 1145.
public defenders, they found that defendants with more experienced attorneys obtain lower sentences than defendants with less experienced attorneys, while they did not find that the attorney’s legal educational background affects case outcomes.22

In the civil area, researches using reliable methodology are rare. Therefore, we currently have little quantitative information about the effect of attorneys on the outcomes of civil cases. Greiner and Pattanayak23 discovered that in spite of this issue having been studied multiple times “almost all such studies suffer from methodological problems so severe as to render their conclusions untrustworthy, which (we hasten to emphasize) is different from wrong.”24

This finding is surprising if we remind ourselves that civil cases are much more present in day-to-day lives than criminal proceedings. In the United States of America, civil cases account for 48% of the total incoming cases in the state courts. In 2013, approximately 14 million civil cases were filed in Brazil, corresponding to 84% of all new lawsuits in the country.25 If civil litigation is so prevalent, what are the reasons for the paucity of knowledge about the impact of attorneys on the outcomes of civil cases?

In the criminal area, the outcome of cases is most evident: the defendant is either convicted or is acquitted; when convicted, the penalty is set mostly in the form of incarceration time. This clarity, however, is not as common in the civil area. According to Schwab and Eisenberg, there are many definitions of success in the civil area, which can range from a pure economic analysis to more subjective approaches.26 An economic analysis would involve the calculation of how much has been invested in the case and what his payback is. On the other hand, the subjective analysis seems to be related to the expectations the parties have of the case, which makes it quite difficult to identify the winners and losers in a litigation. Abrams and Yoon (2007, p. 1155) illustrate this perception with the following example: “If Firm A sues Firm B for $100 million and they settle for $30 million, is this a victory for Firm A or Firm B?”27

Another important reason that renders it difficult to analyze the impact of attorneys on outcomes of civil cases is the difficulty of accessing the outcome itself. In the United States, where most studies are conducted, most civil cases are settled, which, in turn, eliminates the necessity of a judicial decision and significantly reduces access to information, since many settlements are not published.

The difficulty of identifying situations in which cases are randomly assigned, in addition to the challenge of clearly defining and accessing outcomes of civil cases, seems to be relevant for the phenomenon pointed out by Greiner and Pattanayak, by which the lack of credible quantitative information regarding the effect of representation in civil proceedings is extremely low.

In this context, the Office of the Solicitor General of the Union (SGU), which is responsible for defending the Brazilian Government in civil cases, presents a unique research opportunity, since most of its cases are assigned to lawyers on a random basis. SGU has internal regulations which allow one to conclude whether a court decision was favorable or not. Furthermore, few cases are ever settled.

3. Research

3.1. The Office of the Solicitor General of the Union (SGU)

In Brazil, all legal issues involving the Federal Government are under the responsibility of the Office of the Attorney General of the Union - AGU (Advocacia-Geral da União - AGU). Within AGU structure, the division responsible for defending the Federal Government in judicial cases is the Office of the Solicitor General of the Union - SGU (Procuradoria-Geral da União), which has 69 units spread over the country and manages three million lawsuits nationwide. Within SGU, each legal act must necessarily be signed by one of its Federal Attorneys. In the year 2015 alone, judicial decisions rendered accounted for almost five billion dollars against the Federal Government.

In Brazil, lawsuits against the Federal Government must be filed in a federal court (each Brazilian state has one or more federal courts). Due to a legal mandate, all Brazilian courts are required to assign cases to judges on a random basis – the distribution of cases is done automatically, with the help of an IT system, and does not consider the complexity, the value or the plaintiff of the case. As a result, the Office of the Solicitor General of the Union, which handles most of the Federal cases, has a unique research opportunity to study the impact of representation on the outcomes of civil cases.

In the Office of the Solicitor General of the Union, the lack of credible quantitative information regarding the effect of representation in civil proceedings is extremely low.28

22. See D. S. Abrams, A. H. Yoon, The luck of the draw: Using random case assignment to investigate attorney ability. The University of Chicago Law Review 74 (4) pp. 1145-1177.
23. Greiner, D. J., & C. W. Pattanayak “Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?,” 121 The Yale Law Journal 2118.
24. Ibid, p. 2123.
25. See National Center for State Courts (2015) ‘Court Statistics Project’ www.courtstatistics.org, access in 03.Aug. 2017.
26. See Brazil, Conselho Nacional de Justiça. Justiça em números 2014: ano-base 2013. Brasília: Conselho Nacional de Justiça.
27. See S. J. Schwab, T. Eisenberg, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant. Cornell Law Review 73 pp. 719-784.
28. See J. B. Grossman, H. M. Kritzer, S. Macaulay, Do the “haves” still come out ahead? Resource Inequalities in Ideological Courts: The Case of the Israeli High Court of Justice Law & Society Review 33 (4) pp.1059-1080.
29. Ibid, p. 1155.
30. Greiner, D. J., & C. W. Pattanayak “Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?,” 121 The Yale Law Journal 2118.
case. Accordingly, when a lawsuit is filed, it is randomly assigned to a federal judge, what ensures a balance in the distribution of cases among the judges of the same federal court.

After a first glance, the judge sends the case to the SGU’s local unit. The case distribution division of the SGU unit assign the case to Federal Attorneys in a mechanical fashion, similarly to the proceeding used in courts. This case assignment among attorneys is random, balancing a number of factors that could affect the court decision: the difficulty of the cases, the judge who will decide the case, the lawyer of the opposing party, and practically all other variables linked to the lawsuit, including hidden variables. It is this system that promotes a balance in the distribution of cases among attorneys of the same unit. If attorneys work on similar cases, their judicial outcomes (outcomes associated with their cases) are comparable and the difference in outcomes can be attributed to the lawyer (and not to the cases, once they are similar).

In small units, all attorneys are assigned all types of cases (there is a single attorney team). In larger units, attorney teams are formed by case type, in order to promote some degree of specialization. In this situation, one more step is needed: when the case enters in the SGU Unit, the case distribution division identify the case type and the appropriate attorney team. After this identification, the case is assigned to the federal attorney of the specialized team randomly and directly. Therefore, within each team, lawsuits are distributed randomly. It is worth noting that we can compare the judicial outcomes of attorneys who belong to the same team, but we cannot compare judicial outcomes of attorneys of different teams, because each team works on different type of cases, that are not comparable.

There is a natural stimulus for this mechanical assignment of cases: firstly, it ensures equality in the workload of the lawyers of a given team, and secondly, it spares the group head the task of assigning cases. It should be observed that the case assignment procedure at the court is independent from the one at the SGU.

After receiving a case, the Federal Attorney prepares the defense and submit that to the judge, who renders a judgment. The organization has detailed internal rules governing the way judgment outcomes are recorded and controls the correct registration of this data, which is used for various purposes, including the definition of the units’ annual goals. When a court decision is rendered, its outcome is recorded by the support team in the SGU IT System as follows: favorable (judicial decision totally in favor of the Federal Government), unfavorable (judicial decision totally against the Federal Government) or partially favorable (judicial decision concede some request to the Federal Government and some request to the other part). The win rate of a Federal Attorney is the percentage of favorable decisions of his cases (if he worked on 100 cases and achieved 40 favorable decisions, his win rate is 40%). The main concepts described above are shown in Figure 1:

Figure 1 – Case assignment system – Hypothetical Example

![Diagram showing case assignment system](source: authors)
In the hypothetical example above, the SGU Unit has two teams. Team 1 works on tax cases. The assignment of tax cases to Federal Attorneys of Team 1 is random. For example: first tax case to Attorney 1, second tax case to Attorney 2, third tax case to Attorney 3, fourth case to Attorney 1 and so on. At the first moment, they can receive cases with different difficulties and values, but these factors tend to balance along the time, allowing a comparison among their win rates (in the example, Attorney 1 achieved 57% of favorable decisions while Attorney 3 got just 24%). The same proceeding occurs with Team 2, that works on liability cases. We should remember that a direct comparison between attorneys of teams 1 and 2 is not possible, because they work on different types of cases.

3.2. Data
The data released by the SGU were the 93,263 defenses made by 953 Federal Attorneys across the country during the year 2011. At the beginning of this study, 190 teams were identified.

The first step in analyzing data was to identify the number of defenses made by each attorney. Some attorneys presented a low number of defenses, which may indicate a short passage in a unit or even a registration error. We deemed it inappropriate to assess the impact of the attorney’s performance from a minuscule number of activities. Thus, all attorneys who presented fewer than 20 defenses were eliminated from the dataset.

In sequence, we associate defenses with judicial decisions. Only cases with decisions classified in one of the three basic outcomes (favorable, unfavorable and partially favorable) were considered. As other outcomes do not allow verifying the impact of the attorney in the court decision, such cases were eliminated from the database.

The next step of the research was to calculate the win rate per Federal Attorney, i.e., the percentage of favorable decisions connected to their defenses. As we considered defenses produced in 2011 with judgments rendered by February 2014, we had a sufficient time base to access attorneys’ performance outcomes. However, in some groups only 20% or 30% of cases have had a court decision rendered. To overcome this problem, a new limit has been set: we considered only attorneys with 15 or more judged cases. In addition, in order to ensure greater comparability among professionals, we considered only teams with at least three attorneys.

After completion of all these steps, several teams were reduced or disappeared from the analysis. The final database is composed of the following numbers: 70 teams, 386 Federal Attorneys and 30,821 defenses with judicial decision.

3.3. Checking the similarity of cases in each team
The procedure used until this point should have been sufficient to identify teams of attorneys that work in cases with the same characteristics, since most SGU units use random assignment of cases within their teams. However, it is necessary to verify if the randomization mechanism is really working, checking the main assumption of a natural experiment: whether cases (units upon which a treatment operates) were really randomly assigned among attorneys (treatment) of each team.

The credibility of this step depends on whether relevant control variables (also called pretreatment covariates) have been collected and whether sufficient balance has been achieved between the treatments. Greiner explains that the control variables are those prior to treatment and that it is important to distinguish the control variables (not affected by treatment) of the outcome variables (affected by treatment).

In this verification, the control variable used was the judge appointed to the case. This is a valid control variable because it is not affected by treatment: the judge’s appointment predates the attorney assignment to the case. It follows that if an attorney has a higher concentration of cases from a particular judge than another attorney of his team, their outcomes cannot be compared. The balance would be the confirmation that the processes were randomly assigned.

Therefore, a study into the balance of judges in relation to attorneys within each team was performed. An analysis was made, using k-means, as to whether each group of attorneys would have its homogeneity improved if divided into subgroups according to the judges of their cases. This was done by determining the number of subgroups (k) that minimizes the standard error of the gap statistic. Computationally, the procedure is performed via bootstrapping, which resamples the data and performs k-means clustering with all possible values of k in an attempt to achieve the lowest gap possible. The smallest gap is observed if k equals to one. This means that there is no advantage in further breaking apart that group, i.e., the group should be indeed treated as one unit. Since the variable used to perform this grouping method is the magistrate judging each case, we can extend this conclusion to mean that the attorneys within a team are uniformly receiving cases from the same judges.

31 See D. E. Ho, D. B. Rubin, Credible causal inference for empirical legal studies. Annual Review of Law and Social Science 7 pp. 17-40.
32 See D. J. Greiner, Causal Inference in Civil Rights Litigation. Harvard Law Review 122 (2) pp. 533-598.
33 K-means is an iterative statistical method aiming to group observations into clusters. Specifically, k groups are defined so that its members are closer to their group mean than they are to the mean of any other group.
34 See R. Tibshirani, G. Walthier, T. Hastie, Estimating the number of clusters in a dataset via the Gap statistic. Journal of the Royal Statistical Society: Series B (Statistical Methodology) 63 (2) pp. 411-423.
35 See R. Tibshirani, G. Walthier, T. Hastie, Estimating the number of clusters in a dataset via the Gap statistic. Journal of the Royal Statistical Society: Series B (Statistical Methodology) 63 (2) pp. 411-423.
After applying this methodology, results show that 95.26% of teams can be in fact considered homogeneous, which reinforces the hypothesis of random distribution of cases within the teams. One can note that the procedure adopted does not constitute a hypothesis test, but the findings are consistent with conference call conversations with the heads of SGU units, meaning that cases are randomly assigned within each team of Federal Attorneys.

3.4. The differences among win rates: statistical analysis

Once identified the win rate of each attorney and checked the similarity of cases in each team, we decided to verify if the differences in the outcome of attorneys of a same group were statistically significant, i.e., whether they were not simple coincidences. Each court decision presents a binary result: a favorable decision or not (which includes unfavorable and partially favorable decisions). Given this dichotomous variable, we opted for the use of logistic regression to access the significance of the results.

Logistic regression is a statistical technique designed to predict the likelihood of the occurrence of an event. In this study, we calculated the probability of an attorney reaching a favorable decision. After that, we compared these probabilities among attorneys of the same team in order to determine if there were statistically significant differences among them. Logistic regression captures the observed data and sets a mathematical model that goes beyond empirical observations. As the parameters of this model are adjusted by the least squares method, they tend not to be biased.

Then we checked if the model as a whole presents solid quality adjustment (goodness of fit). Afterwards, we verified whether the model better predicts the probability of favorable decisions of each attorney than the simple average of the group, and if this improvement is statistically significant. In this sense, we performed an analysis of variance.

3.5. Correlation between attorney experience and win rate

The next step of the research was to investigate a factor that could explain the differences in attorneys’ outcomes. Undoubtedly, experience is the most researched predictor of attorney performance. On the one hand, several studies, including those that used the random distribution of cases as research design, indicate the existence of a positive correlation between the attorney’s experience and case outcome36. Other studies, however, did not identify this relationship37. Wright & Peeples found a nonlinear relationship: the first years of experience have a positive impact on the results of judgments, but the following years have a negative impact38.

As is common in many public organizations, seniority plays a central role at SGU. In every promotion cycle, half of the vacancies are based on the years since attorneys have joined the organization. Regarding transfers from a unit to another, this is almost the only criterion used. While great importance is given to seniority at SGU, it is not known whether it affects attorneys’ outcomes.

To make a fair comparison of attorneys' outcomes, we cannot consider the mere observed outcome of all professionals in the country. As they are part of different units and work on different cases, comparing their percentage of favorable decisions would be unfair. Thus, we decided to standardize the results of the attorneys. Firstly, we considered the mean of each team as zero standard deviation and then we calculated the positive and negative differences between the mean and the attorney outcome in terms of standard deviations (standardized outcome). Once the weighted outcome of each attorney was calculated, we tested possible correlation of this index with the attorney’s experience, measured in terms of years since joining the organization (the same criterion used by Abrams and Yoon, 2007). For this test, we considered only the teams that showed a statistically significant difference (<0.05) in outcomes among their members.

4. Results

Table 1 presents the results of the 70 teams surveyed: it shows if the difference between the attorneys with the lowest and the highest percentage of favorable decisions in each team is statistically significant (Column Difference Sig.), the model significance to each of the teams (Column Model Sig.), and the chances the attorney with the highest percentage has in obtaining a favorable decision in relation to the attorney with the lowest percentage (Column Max Odds):

Table 1 shows statistical significance in the results and respective models of approximately half of the 70 groups. If we consider the sig. <0.05 standard level, 30 groups (43%) present a significant difference among the outcomes of their attorneys, a number that increases to 41 groups (59%) if we consider the sig. <0.10 level. Interestingly, there was a statistically significant difference in groups of various sizes (in groups from 3 to 29 attorneys), from all regions of the country and which were in units of all types (Regional Units, State Units and Local Units), even if we consider the stricter sig. <0.05 level.

36 See Abrams and Yoon (note 15), Yiengar (note 5) and R. T. Boylan, C. X. Long, Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors. Journal of Law and Economics 48 (2) pp. 627-651.
37 See R. K. Hinkle, Does Advocacy Matter? Examining the Impact of Attorney Expertise in Federal Courts. Doctoral thesis, University of Toledo, 2007 and S. F. Norberg, N. S. Compo, Report on an Empirical Study of District Variations, and the Roles of Judges, Trustees and Debtors’ Attorneys in Chapter 13 Bankruptcy Cases. American Bankruptcy Law Journal 81 pp. 101-158.
38 See R. F. Wright, R. A. Peeples, Criminal Defense Lawyer Moneyball: A Demonstration Project. Washington and Lee Law Review 70 (2) pp. 1221-1267.
### Table 1 – Significance of the Differences in Attorneys’ outcomes per team in 2011

| Team | Number of Attorneys | Minimum % of favorable decisions | Maximum % of favorable decisions | Difference Sig. | Model Sig. | Max Odds |
|------|---------------------|----------------------------------|----------------------------------|------------------|-----------|---------|
| 1    | 4                   | 22%                              | 71%                              | <0.001           | <0.001    | 8.750   |
| 2    | 6                   | 25%                              | 56%                              | <0.001           | <0.001    | 3.771   |
| 3    | 3                   | 6%                               | 34%                              | <0.001           | 0.002     | 8.469   |
| 4    | 7                   | 20%                              | 48%                              | <0.001           | <0.001    | 3.630   |
| 5    | 7                   | 36%                              | 57%                              | <0.001           | <0.001    | 2.322   |
| 6    | 5                   | 4%                               | 17%                              | <0.001           | <0.001    | 4.975   |
| 7    | 7                   | 22%                              | 54%                              | 0.001            | 0.002     | 4.211   |
| 8    | 23                  | 53%                              | 83%                              | 0.001            | 0.002     | 4.204   |
| 9    | 7                   | 27%                              | 37%                              | 0.001            | 0.001     | 1.607   |
| 10   | 4                   | 10%                              | 48%                              | 0.002            | 0.010     | 8.143   |
| 11   | 11                  | 33%                              | 71%                              | 0.002            | 0.004     | 5.000   |
| 12   | 6                   | 2%                               | 22%                              | 0.002            | 0.023     | 10.980  |
| 13   | 29                  | 34%                              | 70%                              | 0.003            | 0.004     | 4.433   |
| 14   | 3                   | 22%                              | 47%                              | 0.003            | 0.004     | 3.135   |
| 15   | 4                   | 9%                               | 32%                              | 0.003            | 0.003     | 4.603   |
| 16   | 14                  | 33%                              | 78%                              | 0.004            | 0.006     | 7.000   |
| 17   | 3                   | 10%                              | 26%                              | 0.004            | 0.004     | 3.205   |
| 18   | 4                   | 15%                              | 52%                              | 0.010            | 0.017     | 6.233   |
| 19   | 6                   | 28%                              | 68%                              | 0.012            | 0.017     | 5.633   |
| 20   | 7                   | 19%                              | 29%                              | 0.013            | 0.013     | 1.766   |
| 21   | 7                   | 23%                              | 38%                              | 0.017            | 0.020     | 2.048   |
| 22   | 3                   | 21%                              | 57%                              | 0.018            | 0.024     | 4.875   |
| 23   | 3                   | 37%                              | 56%                              | 0.021            | 0.023     | 2.233   |
| 24   | 4                   | 27%                              | 42%                              | 0.024            | 0.027     | 2.018   |
| 25   | 8                   | 24%                              | 49%                              | 0.027            | 0.034     | 3.017   |
| 26   | 7                   | 56%                              | 83%                              | 0.030            | 0.039     | 4.000   |
| 27   | 3                   | 21%                              | 46%                              | 0.033            | 0.040     | 3.228   |
| 28   | 7                   | 33%                              | 64%                              | 0.038            | 0.043     | 3.500   |
| 29   | 4                   | 23%                              | 33%                              | 0.040            | 0.042     | 1.682   |
| 30   | 6                   | 18%                              | 24%                              | 0.043            | 0.045     | 1.447   |
| 31   | 5                   | 42%                              | 73%                              | 0.046            | 0.051     | 3.667   |
| 32   | 4                   | 40%                              | 70%                              | 0.050            | 0.055     | 3.429   |
| 33   | 10                  | 43%                              | 64%                              | 0.053            | 0.055     | 2.333   |
| 34   | 5                   | 23%                              | 31%                              | 0.053            | 0.052     | 1.509   |
| 35   | 3                   | 56%                              | 77%                              | 0.063            | 0.070     | 2.649   |
| 36   | 3                   | 20%                              | 30%                              | 0.077            | 0.081     | 1.802   |
| 37   | 5                   | 19%                              | 44%                              | 0.078            | 0.082     | 3.422   |
| 38   | 5                   | 47%                              | 72%                              | 0.080            | 0.084     | 2.917   |
| 39   | 5                   | 44%                              | 68%                              | 0.086            | 0.091     | 2.656   |
| 40   | 6                   | 11%                              | 26%                              | 0.089            | 0.096     | 2.769   |
| 41   | 4                   | 24%                              | 36%                              | 0.095            | 0.100     | 1.746   |
| 42   | 5                   | 14%                              | 37%                              | 0.097            | 0.110     | 3.500   |
| 43   | 6                   | 25%                              | 41%                              | 0.110            | 0.109     | 2.095   |
| 44   | 7                   | 19%                              | 26%                              | 0.121            | 0.125     | 1.520   |
| 45   | 4                   | 35%                              | 50%                              | 0.124            | 0.125     | 1.846   |
| 46   | 6                   | 33%                              | 45%                              | 0.134            | 0.137     | 1.696   |
| 47   | 6                   | 30%                              | 48%                              | 0.140            | 0.145     | 2.187   |
| 48   | 4                   | 48%                              | 68%                              | 0.162            | 0.170     | 2.311   |
| 49   | 4                   | 11%                              | 16%                              | 0.166            | 0.172     | 1.552   |
The 30 groups in which significant (<0.05) differences were found congregate 212 of the 386 surveyed attorneys (55%), which means that a little over half of SGU attorneys are part of teams in which statistical differences outcomes were found, in a model also statistically significant (sig. <0.05). Considering the sig. <0.10 level, the 41 groups congregate 267 attorneys (69%), in a model also statistically significant (sig. <0.10).

The correlations between the weighted outcome and experience are statistically insignificant, according to Pearson's product-moment correlation test. In other words, attorney seniority does not seem to work as a predictor of performance in the researched organization. This conclusion contradicts most of the literature written so far on the subject and, arguably, common sense.

5. Discussion

Different judges are expected to render similar judgments in similar cases. This is the philosophical basis of Justice. Therefore, attorneys working on similar cases are expected to achieve similar outcomes. In the organization surveyed, additional factors induce attorneys to reach similar judicial decisions.

Each Federal Attorney works in dozens of cases per year. The vast majority of lawsuits filed against the Federal Government are not unprecedented cases and the judges usually follow the precedents set by superior courts. In this context, a competent or mediocre performance by Federal Attorneys should produce low impact on the final case outcome.

The Federal Attorneys are submitted to an extremely rigorous selection process. Generally, less than 1% of applicants are approved, and this small group tend to have a very homogenous professional profile. After entering public service, there are no economic stimulus for an attorney to perform better than his colleagues. The remuneration of all Federal Attorneys is fixed - do not vary in accordance to the individual success rate. Wage differences are small (basically motivated for seniority reasons) and job security is high. Finally, all attorneys work within the same organization environment - the physical structure, support team and access to systems are almost identical. Therefore, it is no surprise that half of the 70 teams presented no significant differences in the outcome of their attorneys.

The surprise is finding significant differences in attorneys' outcomes in the other half of the 70 groups. If virtually all factors induce homogeneous attorney behavior, what are the possible causes for such heterogeneous outcomes? A first hypothesis can be linked to the existing stability in public service, where dismissal for poor performance is virtually nonexistent. This could induce some people to perform poorly, making their results fall below their peers. There is a possibility that the quality of the work done is so poor
that it affects the outcomes even of cases that should be decided in a similar way. This can happen because cases can be decided based not only on the rules of law, but also on the specific facts involving the situation. If legal professionals do not work on the facts properly, they tend to lose the case. On the other hand, it is possible that, despite incentives to the contrary, other professionals still maintain high internal motivation, always seeking the best outcomes, which can result in a high win rate.

We suspect, however, that the impact of attorneys on the outcome of civil cases is higher than that found in this study. The methodology used in this survey focused only on the general outcome of the judicial decision, i.e., if it was favorable or not. However, in many civil cases, the main concern of attorneys is to reduce the monetary award (as sometimes the main concern of a criminal attorney is to reduce incarceration time). In order to measure this effect, it would be necessary to compare the initial amount requested by the plaintiff with the final amount paid by the Federal Government. Unfortunately, these more refined data are not reliably registered, which makes this investigation difficult. In any event, if differences in outcomes of attorneys have been detected using more general data (overall outcome of the judicial decision), these differences would probably become more evident if more refined data were used (such as the reduction in the value paid).

One must remember that this study analyzed attorneys with similar profiles. If it were feasible to investigate attorneys with different backgrounds working in the same kind of cases (like many criminal studies did, comparing private and public defenders), it is possible that a broader variety of outcomes would be found.

One hypothesis to explain the absence of a relation between a attorney’s experience and his outcome can be the trade-off between experience and motivation. Usually, during the first years in the organization, motivation is high, but experience is low. Over the years, the experience increases, but motivation diminishes.

6. Conclusion

This article made an empirical investigation about the impact of attorneys on outcome of civil cases. In accordance with what was presented, attorneys can achieve different outcomes, despite working on the same type of cases. This conclusion leads us to some questions about the work done by attorneys and judges.

From the attorney’s point of view, why it is important to know that some lawyers make more difference than others? Because this is a strong evidence that their work has some effect. If lawyers working on similar cases always achieve the same outcomes, their work seem not to be taken into account.

In law firms, like SGU, it is essential to know that some lawyers make more difference than others for multiple reasons. The case assignment process can be adapted in order to choose the best counselor for each type of case, improving the chances to achieve a favorable decision for the client. Lawyers who achieve the highest win rates could explain to their colleagues what are the legal strategies, information and thesis they are applying, so that the whole firm could achieve a better result. The selection of lawyers can be affected: based on the lawyers’ records, the firm can identify the most suitable professional profile for his cases and hire those who have proper skills and attitudes.

From the judges’ point of view, why it is important to know that some lawyers make more difference than others? Because it shows how judges can be sensitive to differences in the work done by those professionals. If the judges were impervious to the work done by attorneys, similar cases should bring to very similar judges’ decisions. The influence detected, however, is mild. Approximately half of the 70 teams surveyed exhibited no significant differences in the outcome of their attorneys. This means that judges decided similar cases in the same way, regardless of the lawyer. In those cases, judges seems to decide based solely on case’s merits, without the influence of lawyers.

However, we caution against broad generalizations. The answer to the question whether counsel affects case outcomes is by nature jurisdiction-based. The fact that counsel affects judicial decisions in one country does not necessarily mean that the same is true in another country. Nevertheless, the results of our study provide certain references for further research, considering it is one of the first to analyze the impact of attorneys on outcomes of civil cases using a solid methodological framework.

The scarcity of empirical studies analyzing the impact of attorneys on the outcome of civil cases evidences the gap to be filled in the construction of scientific knowledge in this field. Identifying the underlying characteristics of high performance attorneys in civil area remains a challenge for future legal empirical research.

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Book Review:  
The Impeachment of Chief Justice David Brock – Judicial Independence and Civic Populism 

John Cerullo and David C. Steelman, US: Lexington Books, 2018 ISBN 9781498565899. Reviewed by Markus Zimmer, IJCA Executive Editor

Abstract: This article reviews The Impeachment of Chief Justice David Brock – Judicial Independence and Civic Populism, published in 2018 by Lexington Books, co-authored by John Cerullo and David C. Steelman. The book is an historic chronicle and analysis of events in the increasingly fractious relationship between the legislative and judicial powers of state government in the last four decades in the U.S. state of New Hampshire that culminated in an effort by the Senate Judiciary Committee to impeach Chief Justice David A. Brock. The narrative identifies, traces and documents the meandering sources of that effort against a national movement emphasizing enhanced institutional independence within state judicial systems by shedding the traditional constraints and controls over state courts exercised by elected bodies. Simultaneously, it scrutinizes growing resistance within populist pockets of the New Hampshire State Legislature in particular and the state’s population in general against the presumptive hubris of the state judiciary to arrogate unto itself far-reaching decision-making authority and to demonstrate in its internal affairs a clear disregard of and even contempt for basic canons of judicial ethics. These tendencies are viewed as particularly egregious in the Supreme Court of New Hampshire as it migrates from adjudicating narrowly defined issues of law and fact on appeal to drafting judgments mandating, for example, broad public education funding initiatives grounded in its own views of what constitute fundamental human rights and the social policies that flow from them. Other misbehavior touching on judicial conduct prohibitions culminated in a variety of disciplinary proposals, including impeaching Chief Justice David Brock, and other initiatives seeking to rein in the excesses of the state judiciary.

KEYWORDS: judicial impeachment, judicial independence, legislative-judicial tension, judicial accountability, judicial reform and populism, state courts, New Hampshire chief justice, Philippines chief justice, legislative oversight of judiciary, legislative oversight of courts

One of the core axioms of mainstream democratic theories of government is the supremacy of the rule of law. The axiom rests on the presumption that the laws of a democratic polity are anchored in constitutions whose originating principles recognize human frailty. That recognition prompts the incorporation into constitutions of structural safeguards in the functional framework of government, safeguards designed to minimize the mischief toward which such frailty historically inclines. A key structural safeguard compartmentalizes government power into a tripartite construct among whose elements such power is distributed. Each element serves three functions: first, as the accountable custodian of specific powers it is authorized to exercise; second, as the sentinel charged with ensuring that the other elements neither abuse nor exceed the exercise of their specified powers; and third, as a co-guardian serving jointly with the other two elements to collectively preserve, protect and defend the government and the people. Ideally, the relationships between the three reflect the appropriate balance of tension, cooperation and mutual respect. Contingent on the relative levels of maturity, integrity, professionalism, decorum, wisdom and ideological allegiances of the players, the functionality of those relationships will vary along a scale that traverses the extremes from constructive and beneficial to dysfunctional and damaging.

In the United States, the relationship between the legislative and the judicial elements has gravitated in recent years toward the dysfunctional extreme of the scale. On the federal level, the vetting of candidates for lifetime judicial appointments by the U.S. Senate has been politicized to the point that bipartisan cooperation to identify and confirm the most promising men and women of character, integrity, wisdom, moderation and respect for the rule of law has been largely abandoned. That model of vetting has been substituted for by a rigorous search process for and the promotion of young ideologues who lean predictably to the right or to the left, their sponsorship and marketing financed by substantial dark money, anonymously funneled, whose origins are scrambled through complex legal constructs. In this new morass, the value of character, integrity and moral fiber are subordinated. Mendacious media campaigns, also financed by dark money, hurl irresponsible charges that candidates advanced by one party are “extreme judges…hostile to religious liberty…and to our constitutional rights.”

On the state level, national campaigns inject dark money, anonymously funneled, into nefarious campaigns to discredit sitting judges whose rulings deviate from the prescribed norms, values and judicial roles of the preponderant majority dogma. In the first four months of 2018, the Brennen Center for Justice, affiliated with the NYU School of Law reported in “Legislative Assaults on State Courts – 2018,” that legislators in circa 16 states either had drafted or were considering legislation targeting both the institutional
independence of state court systems and the judicial independence of judges and justices. Specific legislative initiatives called for limiting supreme court jurisdiction (Kansas); impeaching four supreme court justices (Pennsylvania); increasing legislative participation in judicial selection (Oklahoma); mandating entry into courthouses for persons carrying weapons (Iowa); transferring court rule- and procedure-drafting authority from the judiciary to the legislature (New Mexico); authorizing the legislature to brand any decision by any federal court as unconstitutional (Idaho); and authorizing registered voters to determine whether federal laws are constitutional (Missouri).

The context of such initiatives is often more complex and byzantine than a cursory review reveals, but grappling the issues and comprehending the often inordinate and intertwined levels of emotional, political and legal conundra in which such initiatives end up being swathed is not the bread and butter of even the best journalism in the U.S. It is more focused by necessity on snapshot exposure, stitched together over time. For those of us in pursuit of a more profound understanding, we depend on those willing to engage in extended and detailed research, carefully analyzing and reconstructing chains of events, then weaving them into multi-dimensional historical narratives that chronicle the milestones and, if well done, meticulously mortar together the large and the small, the more and the less evocative, filling in the inevitable gaps by painstakingly immersing themselves into the minutiae of detail and, where accessible, extended interviews with behind-the-scenes stakeholders.

The duo co-authoring this scholarly inquiry into the impeachment of Chief Justice Brock complement each other in important ways. David Steelman’s career has been one of nearly total immersion into the governance, operational and administrative domains of myriad state court systems as a senior-level official and researcher at the National Center for State Courts. His experience also includes occasional forays into foreign judicial systems as an advisor and consultant. John Cerullo is an emeritus professor of history and former core faculty member of the Justice Studies Program at the University of New Hampshire. Together they have produced a work that succeeds well as a vehicle facilitating access to the jungle of political intrigue of power-writhing in inter-branch competition. The journey one embarks on with this work is less like a cruise and more like a moderately rigorous trek, but attending to the detail and processing the occasionally dense academic text reaps a level of understanding that nicely landscapes the actual drama. Unlike many efforts to characterize the sometimes-caustic interplay between unelected judges and elected politicians, which reveal authors’ biases and predilections, Cerullo and Steelman assiduously seek throughout the narrative to fairly reflect the facts and to objectively frame the competing arguments as they emerge over time.

The work is organized into helpful segments that begin with an examination of New Hampshire’s civil culture that, reaching back into the latter decades of the 18th century, reflects a proud tradition of personal independence and local self-government exercised by elected representatives directly accountable to the people. The logic of having the operating framework of unelected judges overseen by accountable politicians makes sense at one level. By the 20th Century, however, a new version of civic logic emerged in which allegiance to the rule of law and the administration of justice began to trump what came to be viewed as subtle and not so subtle political intrusion in the adjudicative process, intrusion anchored in suspect motives and interests often disingenuously spun as the will of the people.

The narrative tracks the genesis of exacerbating tension between the peoples’ politicians and their judges through a judicially-spawned scandal and a confrontation involving severe funding inequities among school districts comprising the state’s public education system. Resolving those inequities migrated from the legislative hall, where they presumptively were addressed as a local resources issue, to the courtroom, transmuting themselves along the way into basic inherent rights issues. The court-imposed resolution, invoking remedies neither anticipated by nor acceptable to the legislative bodies, compounded the inter-branch mistrust and rancor. The resulting frenzy prompted the New Hampshire House to support overwhelmingly a proposal authorizing its judiciary committee to review the attorney general’s investigative report and to determine by its own investigation whether sufficient inculpating evidence existed to merit drafting and filing with the Senate articles of impeachment against Chief Justice Brock and/ or any of the associate justices. By the time the formal charges were lodged with the Senate, they had been narrowed to focus exclusively on Brock. As the impeachment trial progressed, considerable time elapsed as senators deliberated myriad procedural issues, wrangled over what evidentiary standards should govern the proceedings, and struggled with defining precisely what competing policy objectives of an impeachment process take priority.

The trial’s conclusion left unaddressed underlying issues in the ongoing inter-branch conflict. These spawned new and ultimately unsuccessful legislative initiatives intended to constrain or counteract what populists viewed as a self-indulgent stew of judicial activism laced with hubris luxuriating on the bedrock of unaccountable independence. Such initiatives ran the gamut from appointing laypersons to judicial positions to eliminating supreme court oversight and regulation of the bar to vacating mandatory membership requirements in a bar or other professional organization for practicing lawyers. More responsible reform proposals advocated a greater role for elected officials in proposing and endorsing the rules governing court process and procedure, in ensuring enhanced judicial accountability based on more rigorous merit selection and independent performance assessment. To its credit, the judiciary responded in more measured and conciliatory fashion, acknowledging the need and agreeing to jointly pursue appropriate reforms, thereby deflating the rancor and malevolence defining inter-branch relations and spawning a new era of cooperation.

The narrative’s value as an historical account is enhanced by its portrayal of the eventual changing dynamic of interbranch relations, culminating in the softening of embedded political culture of mutual contempt and intrasigence. Acknowledging the extreme polarity that divides us as a nation, as a world, we might take pause and follow the trail New Hampshire painfully blazed.
Book Review: 
**The Performance of International Courts and Tribunals.**

Theresa Squatrito, Oran R. Young, Andreas Follesdal and Geir Ulfstein. *The Performance of International Courts and Tribunals.* Cambridge University Press, 2018. Pp. 433, ISBN: 978-1-108-42569-8. Reviewed by Samira Alliou, PhD Candidate, Strasbourg University, France.

Writing about the performance of international courts and tribunals is a daunting task. Excepting the article on “Measuring the Judicial Performance of the European Court of Human Rights” written by Elisabeth Lambert, the few scholars have only analyzed specific questions relating either to the design or the effects of introducing New Public Management on international courts.

Eighteen authors contributed to this volume; it emerged from an exchange continued over several workshops on the effectiveness and performance of international courts and tribunals. Titled *The Performance of International Courts and Tribunals,* the book opens with an introduction to the Framework for Evaluating the Performance of International Courts and Tribunals. In this first chapter, the authors explain which criteria they have chosen in order to provide common analytical tools for comparison across international courts. Moreover, they demonstrate why they consider several levels of performance to “gain a comprehensive understanding of the performance of international courts” (page 15). The contributors have distinguished among “the micro-, meso, and macro-levels, corresponding roughly to the level of the individual case, the level of the issue areas or governance arrangements to which cases belong, and the level of the overarching system in which cases arise” (page 15). They conclude by explaining the variant patterns in performance; this led the authors to search for the determinants of the performance. In other words, if “they think of performance as the dependent variable, they want to direct attention to the search for independent variables that allow them to explain or account for variance in the dependent variable” (page 18).

The book’s authors develop an integrated framework for the study of international courts. By contrast with previous academic approaches, these contributors explore factors that may explain a variety of models by offering a comprehensive comparative approach covering the full array of international courts and tribunals. Because all permanent bodies, both the international judicial bodies and the ad hoc judicial bodies, are included in the review, the authors are in a position to assess the extent to which each court has its own unique performance factors.

Because the research questions “why some international courts perform better than others and which factors affect the outcomes of these courts and tribunals?” the authors felt obligated to cover courts originating from different regions, developed and developing, and from different traditions. Attention also would focus on significant variations among international courts regarding not only their mandates, but also the practices they have adopted and the effects of their rulings. We have good reason to believe that factors such as these may have implications for the role regional law plays in the development of international law and global governance.

This book is divided into three parts. The first part consists of a set of chapters providing broad assessments of the roles of international courts in a number of distinct issue areas: trade, investment, human rights and international criminal law. The second part deals with the identification of factors relevant to understanding the performance of courts. The third part summarizes key findings and discusses future directions for research on the performance of international courts.

In the first part, chapters 2 and 3 cover the court performance within the multilateral trade regime and the Performance of Investment Treaty Arbitration (ITA) with a focus on the World Trade Organization Dispute Settlement Mechanism (WTO DSM). The contributions focus on the adjudication of international economic law. The main argument of the authors is that the WTO DSM is most often capable of facilitating the resolution of conflicts relating to market access. Another main argument of the authors is that the dispute settlement mechanism has an informal role in clarifying international trade law. The authors argue that the performance of the WTO DSM process is weakened by its inability to ensure access to justice. According to them, overrepresentation of the most powerful economies is problematic in the WTO DSM because disparities in legal capacity obstruct equal access. They add that the overrepresentation of powerful economies in the DSM also has repercussions for outcome performance. In these

1. E. Lambert Abdelgawad, « La mesure de la performance judiciaire de la Cour Européenne des droits de l’homme : une politique managériale à tout prix », Revue Française d’Administration Publique (Special Issue, Feb. 2017).
2. Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach,* Oxford University Press, 2014.
3. Brandeis Institute of International Judges, “The authority of international courts and tribunals: challenges and prospects”, 2016.
4. C. J. Carrubba and M. J. Gabel, *International Courts and the performance of international agreements: a general theory with evidence from the European Union,* Cambridge: Cambridge University Press, 2015, 251 pp.
5. M. Dakolias, “Court Performance around the world a comparative perspective”, World Bank Technical Paper n°430.
chapters, in addition to the mechanisms previously mentioned, other dispute settlement processes embedded within preferential trade agreements are reviewed. Thus, these chapters cover unconventional “courts” in contrast with more conventional courts.

In the chapter dedicated to the performance of regional human rights courts (chap. 4), Dinah Shelton evaluates the performance of the European, Interamerican and African Courts of Human Rights. The author discusses how internal and external structural factors affect the performance of regional human rights courts. Her main argument is that “the regional human rights courts perform better than member states expect but not as well as victims would hope”. According to her, their process performance suffers from restricted access, lengthy proceedings, and the courts’ incapacity to address numerous and serious violations. Nonetheless, she argues all three courts generally perform well in terms of generating compliance with their decisions.

Chapter 5 analyzes the outcome performance of international criminal courts and tribunals. The author’s main argument is that “of interest here is one particularly controversial aspect of international criminal tribunals’ outcome performance: whether they contribute to the development of international humanitarian law and international criminal law. Nobuo Hayashi reveals that the normative contribution of international criminal courts to international humanitarian law and international criminal law has been more mixed than is often asserted.

In the second part of the book, the authors seek to identify factors relevant to understanding the performance of courts by emphasizing important determinants of international courts’ performance in previous studies. By this original research, the authors contribute to the understanding of whether, how and why international organizations perform as they do. The strong point is that the variation of these chapters illustrates how the concept of performance can be empirically applied across the dimensions, levels and issues areas pertaining to international law and courts.

Another issue discussed in part II (chap. 6) is related to the deterrence ability of the international criminal court. The contributors of this part, H. Jo, M. Radtke and B. A. Simmons, focus on outcome performance in order to argue that the international criminal court’s performance should be assessed in terms of its capacity to deter crimes that are subject to its jurisdiction. Jo, Radtke and Simmons formulate, “two kinds of evidence to access the outcome performance of the international criminal court: whether there is evidence that the international criminal court or domestic law have had deterrent effect and whether it has had an impact on domestic law”.

The link between institutional fragmentation and international court performance is explored in chapter 7. Benjamin Faude considers how the proliferation of international courts challenges the commonly held assumption that international courts do not interact with one another. His main argument is that “forum shopping may occur as a result of institutional fragmentation and that this can generate a return to politicized resolution of interstate conflicts”.

Process performance has also been studied by Jeffrey L. Dunoff and Marck A. Pollack who broaden the theoretical and methodological approaches traditionally used in evaluating court performance by introducing practice theory to evaluate judicial performance (chap. 8). Their main argument is that “to understand performance of international courts, it is necessary to assess the performances of judges”. According to them, judicial performances are also created by judges themselves in the practices they adopt. From that point, they consider that “judicial practices exist throughout a dispute’s lifecycle and include multiple performances of judges”. In order to underpin their argument, they try to highlight the evidentiary and fact-finding practices of the International Court of Justice, offering contrasts to other international courts and link these practices to the outcome performance of the court.

The way international courts try to influence their own performance by focusing on strategies of socialization is an important issue explored in this book (chap. 9). Nicole de Silva’s main argument is that international courts can formulate policies and practices aimed directly at socializing actors into the norms, rules and procedures that underpin the performance of international courts. She presents a framework for conceptualizing international courts socialization strategies and their influence on the actual and perceived performance of international courts by showing how international courts can formulate socialization strategies in response to challenges to their actual and perceived performance. In doing so, she highlights a realm of international court decision-making and activity that has not been studied much to date. The analysis of international courts’ reported policies and practices demonstrates that these socialization strategies are an important instrument by which international courts aim to shape their performance and actors perceptions of it.

Factors relating to compliance are also discussed. (chap. 10). Chiara Giorgetti reviews the compliance mechanisms international courts use and discusses the political, sociological, and other factors that affect compliance. She argues that compliance with court judgments is meaningful in determining whether a court is effective and performs as intended. She focuses her analysis on three international courts: the International Court of Justice, the European Court of Human Rights, tribunals under the auspices of the International Convention for the Settlement of Investment Disputes, and the United Nations Claims Commission. The objective is to offer an assessment of a variety of mechanisms that reflect the full range of existing compliance mechanisms as well as to evaluate their operability in “real life”. The author argues that these formal mechanisms of compliance contribute to judgment compliance to varying degrees, noting that several legal factors affect compliance. The author also explains that political constraints and features of the state, such as its domestic judicial system, contribute to compliance with international courts judgments.

In chapter 11, Steinar Andresen asks what the analysis of international court performance can learn from the literature on international regimes. He discusses how previous literature reveals particular methodological challenges in assessments of international courts.
performance. Another argument is that “it is pertinent to focus on problem structure, asking to what extent international courts are able to deal effectively with difficult issues”. In addition, he suggests that “the performance of regional human rights courts is linked to how long they have existed, their participatory scope and the severity of challenges facing them”.

In the third part of the book, key findings are summarized, and future directions are discussed for research on the performance of international courts. Chapter 12 focuses on methodological considerations for future research on international court performance. Here, Theresa Squatrito discusses the operationalization and measurement and their advantages and disadvantages. In addition to that, the author invokes some options for methods that researchers might use to evaluate and explain international court performance. She explores five methods (experimental designs, meta-analysis, qualitative comparative analysis, counterfactual analysis, and multimethod research) and how they might be useful for future research on the performance of international courts. In this chapter, it is interesting to see how the author highlights lesser known methodological options without replacing more conventional qualitative case studies or quantitative analysis based on observational data.

Chapter 13 concludes the book by considering basic questions about the performance of international courts: how well have they performed and does performance vary by issue area? What are the determinants of performance in this realm? What can we expect regarding trends in performance during the foreseeable future?

Overall, this is an important, instructive and interesting book, in large part for the case studies covered. The case studies are entertaining as well as enlightening. Virtually any reader is likely to learn something new from the cases. It is a bit risky for the authors to analyze so many different courts, but the benefit is that there is a high degree of coherence among the case studies, a rarity in edited volumes with authors from multiple backgrounds. The Performance of International Courts and Tribunals is a remarkable book that will enable scholars and practitioners to better understand the role that international courts and tribunals play from a variety of perspectives. The authors infuse their textbook with a wealth of knowledge and analysis regarding the roles of international courts and tribunals rather than merely producing definitive conclusions regarding their performance. This stimulates the growing need to take international courts seriously on the intersection of this vitally important area of law. This volume will play an important role in understanding the roles that judicial institutions currently play in international society.

There are some noteworthy gaps in the book’s coverage. One significant weakness is its failure to offer definitive answers regarding the determinants of the performance, leaving the reader only with a critical assessment of the evidence relating to the relative importance of a variety of specific factors. Second, the extreme diversity makes it difficult to engage in systematic comparisons regarding the performance of international courts and tribunals in the four issue domains. Third, the textbook devotes insufficient attention to the cutting-edge issue of the analysis of the judgments that courts render.

To conclude, one of the most interesting lessons to draw from “The Performance of International Courts and Tribunals” is that there is a broad range of issues relating to the performance of international courts that remain to be examined. We should keep in mind that reform efforts always often involve trying to figure out how a court can perform better. The cases studies at the heart to The Performance of International Courts and Tribunals don’t give an entirely clear answer to that question, but that may be because there is no clear answer.