

Small Claims: The Building Blocks of Access to Justice

Pequenos Litígios: A Base do Acesso à Justiça

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DOI: 10.33167/2184-0644.CPP2019.VVN1/pp.93-108

ABSTRACT

Special Courts in Brazil are a blend between, on the one hand, a need to guarantee access to justice and, on the other, a need for an efficient legal system. This essay argues that we can still return small claims courts to their original purpose: satisfying the individual litigant, and, therefore, (re)constructing the legitimization of our legal system. This article compares small claims courts in Brazil and in the United States, making the user of the law the key to empowering our legal system. Individuals have been driven away from small claims courts, both in Brazil and in the United States, mostly because of the strong predominance of businesses. As a solution, conflicts between individuals should regain value in small claims courts. Small adjustments can be made to adapt Special Courts in Brazil to the needs of the individual; in turn, citizens will garner a greater trust in the legal system.

Keywords: small claims court, access to justice, Law 9.099/95, legitimacy

RESUMO

Os juizados especiais no Brasil enfrentam atualmente o embate entre a necessidade de garantir o acesso à justiça e a busca pela eficiência do judiciário. Este trabalho sustenta que ainda é possível retomar o propósito original dos juizados especiais: a satisfação do liti-

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gante individual e, desse modo, a (re)construção da legitimidade do nosso sistema jurídico. Por isso, este trabalho desenvolve uma comparação entre os juizados especiais brasileiros e americanos, com o objetivo de estabelecer que o usuário do sistema jurídico é a chave para o seu empoderamento. Tanto no Brasil quanto nos Estados Unidos, os indivíduos têm sido afastados dos juizados especiais devido à predominância de corporações. Como solução, propõe-se a valorização dos conflitos entre indivíduos.

Palavras-chave: juizados especiais, acesso à justiça, Lei 9.099/95, legitimidade

1. Introduction

What is the significance of small conflicts in a complex society? Let us take an example:

It's a Friday morning, 6:30 AM. Luciana's alarm clock blares next to her ear and she instantly jumps out of bed. Quickly, she grabs a 10 real bill from the counter of her small kitchen and shoves it in her pocket. Rubbing her eyes to try to stay awake, she walks the full kilometer from her house to the bus stop, so she can get to her workplace – a small dentist's office where she works as a secretary – at 8 AM, in time to pick up the first phone calls.

As she sits down in the bus, Luciana instantly doses off. She has not gotten a decent night's sleep in the past year, due to her upstairs neighbor's noisy activities during the night. Luciana has repeatedly asked her neighbor to refrain from throwing parties in the middle of the week, but she has had little success.

Faced with this injustice, Luciana considers going to court. However, she soon realizes how much of a nuisance that would be: she has no legal education, and would wait years for the matter to be resolved, anyway.

Luciana stares ahead at the bumpy road and lets out a quiet sigh of exasperation as she comes to terms with this small, yet painful, injustice.

Luciana is a fictional character, but she represents the reality of many citizens in Brazil. Her commonplace injustice could be taken to a small claims court; instead, it will become the root of her disbelief in her country's legal system.

To quell this distrust in the legal system, small claims courts were created in Brazil to guarantee a larger access to justice for low-income citizens. This original purpose has been distorted due to the increasing specialization of small claims courts in Consumer Law, the unequal powers between litigants and the strong presence of companies in the small claims system (Mello & Meirelles, 2010). Why does this have an effect on the legitimacy of the legal system for its users? Can this absence of trust in the legal system be reversed?

This paper suggests a comprehensive analysis of the role of small claims courts in the context of the need for a greater legitimization of the Brazilian legal system. To understand the functions of a small claims court as an instrument for preventing feelings of injustice, this article articulates small claims courts in Brazil with the United States' equivalent, albeit respecting the singularities of each legal system.

To ensure that the users of the law believe in its social function of justice, it is imperative that small, daily conflicts are not marginalized. The American and Brazilian legal systems, despite all their differences, face many similar challenges in effectively guaranteeing access to justice in small claims courts. Specifically, small claims courts have been at a standstill regarding what should be their main purpose: to prioritize the individual litigant, given that a legal system needs to have its user as its main driving force (Nader, 1984).

Part 1 of the paper advances the user theory of law as an approach for the legitimization of a legal system. Subsequently, Part 2 gives a brief explanation of the evolution of small claims courts in Brazil and their current situation. Part 3 provides an empirical juxtaposition of small claims courts in Brazil and in the United States. Building on the differences and similarities between the two different systems, Part 4 of this article discusses the legitimacy of small claims courts in Brazil and in the United States, with an emphasis on litigant satisfaction during the small claims process.

Finally, this essay concludes that, today, simple measures — such as training judges, having accessible court hours and providing litigants with more information about the Special Courts process — can be presented in order to return small claims courts to their original function as an instrument of access to justice, operated by the common citizen, thus contributing to the legitimization of the legal system.

2. The User Theory of Law

Effective access to justice depends on understanding the law as an instrument of justice. In this sense, the law operates within a complex system of interactions between institutions and interests. According to Professor Laura Nader's user theory of law, embracing the law as an interactive model allows us to acknowledge the plaintiff's role in making the legal system democratic (Nader, 1984).

Indeed, the plaintiff is driven by the justice motive. The justice motive can be described as feelings of right and wrong that lead to a sense of satisfaction with the resolution of a given conflict (Nader, 2005). Therefore, when the user of the law is driven by the justice motive, he is mostly seeking to resolve the conflict in a manner in which he feels he participated in the process, rather than feeling he

was subjected to an imposed solution to the conflict that does little to redress his complaints.

This ongoing debate supports the idea that a legal system should have the main purpose of making its users feel capacitated to promote concrete changes in their everyday reality. A user of the law that feels his claims are of little or no importance to the legal system will inevitably feel like a lesser part of a representative government, which can lead to a general sense of injustice — a term coined by Edmond Cahn that describes the disappointment of a consumer of the law. This sense of injustice, in turn, can lead to a failure of the legitimization of a legal system (Cahn, 1959).

In Brazil and the United States, both industrialized societies, legal procedures between two strangers are increasingly frequent. Consequently, when facing disputes between parties of unequal power, the common citizen's role as a plaintiff atrophies when compared to large corporations (Nader, 1984). This dilemma indicates that one of the flaws in the small courts system is the failure to guarantee equality between parties.

However, if an individual does not believe in the power that the law has to resolve his grievances, he will soon become disenchanted with the system and will no longer want to participate in the molding of the very institutions on which he is supposed to rely. A plaintiff who firmly believes that his demands are of little or no importance to the legal system will garner distrust in the law that can lead to broad consequences of delegitimization of the legal system.

In the following sections, this article will analyze the performance of the legal system from a perspective that ensures small claims courts can address cases in a quick, but, most importantly, fair manner.

Additionally, in order to assure long-term access to justice by satisfying the user of the law, it is necessary to combat the notion that higher litigation rates are a sign of social malfunction. On the contrary, an active legal system is a consequence of improved well-being in a society. In fact, citizens tend to use courts when they are economically well endowed.

There is a clear relationship between higher litigation rates and human development in Brazil. The states in which new cases per 100,000 residents are lowest are the states with the lowest HDI indices, such as Piauí, Pará, Maranhão and Alagoas. States with a higher HDI index, such as Rio Grande do Sul, have superior rates of new cases per 100,000 residents (Curado Silveira, 2016).

Therefore, high litigation rates should not always be viewed as an immediate warning sign. In fact, it could be a result of positive change: citizens participating in the resolution of conflicts and in the administration of justice.

3. The Context of Small Claims Courts in Brazil

The creation of small claims courts in Brazil is intimately tied to the Access to Justice movement. In its original form, this movement initiated a discussion about the need to make justice less formal and to introduce alternative methods of dispute resolution (Matta Chasin, 2012). A strong access to justice movement arose in 1980, combating the restricted access to justice that lower income citizens faced. As a part of this movement, in 1988, Cappelletti and Garth proposed the creation of small claims courts.

Since its origin, small claims courts in Brazil were inspired by the United States' system of small claims courts. In Brazil, they emerged to serve as a mechanism to reach a suppressed demand for the legal system, preventing what Professor Kazuo Watanabe calls "contained litigation" — the lack of access to justice for citizens from lower classes, due to the high costs of litigation (Andrighi, 1996).

However, due to the increasing delay and overcrowding in ordinary courts, the Access to Justice movement adjusted in the 1990s, instead of providing entrance into the legal system for low income citizens, the predominant issue became easing the heavy volume of cases in courts (Matta Chasin, 2012).

Therefore, beginning in the 1990s, the Access to Justice movement also became a plan for judicial reform in Brazil. In many ways, the movement for access to justice became fundamentally geared towards efficiency, and small claims courts converted into a tool for an optimization of the smooth functioning of the legal system (Matta Chasin, 2012).

Additionally, a greater significance was given to the relationship between court efficiency and the country's economy. As a result, from a structural perspective, the Access to Justice movement in the 1990s became a solution to the call for an autonomous and efficient judicial system (Matta Chasin, 2012).

The guarantee of access to justice and the importance of resolving citizens' everyday claims transitioned into a discourse used for the legitimization of Judicial reform, with the specific intent of stressing the perceived necessity of decongesting courts. As a result, small claims courts were given a marginal role in the legal system, since cases under its jurisdiction were seen as less important from an economic perspective. Small claims courts suddenly became a way of mitigating the high volume of cases in ordinary courts, so that these courts could resolve only the issues that were worth the highest monetary value — the latter were seen as conflicts of critical importance to the economy (Matta Chasin, 2012).

Small claims courts were first launched in Brazil in between the first and second waves of the access to justice with a law in 1984 that created the "Special Courts for Small Claims". Therefore, ever since the emergence of small claims courts in Brazil, there has been an inherent tension between making courts ac-

cessible to citizens of lower economic standing, and reducing the case volume in overcrowded courts (Matta Chasin, 2012).

These historic factors, at the root of the creation of small claims courts in Brazil, contribute to perpetuating the debate regarding the creation of courts with less bureaucracy than ordinary courts, to increase efficiency, while, at the same time, to broaden access to the legal system (Matta Chasin, 2012).

In this context, Congress passed the current statute that governs small claims courts in Brazil, the Special Courts Law (Lei dos Juizados Especiais 9.099/95). Despite the events that took place in the 1990s and the move for Judiciary efficiency, Law 9.099/95 was created with the intent of making access to justice universal to all Brazilian citizens. The discourse for the creation of this law was never about alleviating the courts of their case overload. Instead, the goal was to guarantee access to justice for those who were not able to pay judicial fees and had less complex claims. The original idea was to have a parallel court system to resolve individual's common and frequent conflicts, with reduced bureaucracy (Carvalho Xavier, 2016).

As a matter of fact, small claims courts were already envisaged in the Federal Constitution of 1988. As Article 98 of the Constitution states:

Article 98. The Union, in the Federal District and in the territories, and the states shall create:

I – special courts, filled by togated judges, or by togated and lay judges, with powers for conciliation, judgment, and execution of civil suits of lesser complexity, and criminal offenses of lower offensive potential, by oral and summary proceedings, allowing, in the cases established in law, the settlement and judgment of appeals by panels of judges in the first instance. (...)

In accordance with this constitutional provision, Law 9.099/95 establishes two criteria for the jurisdiction of Special Courts. The first, already foreseen in Article 98 of the Constitution, is qualitative: small claims courts should judge claims of “lesser complexity”. Law 9.099/95 specifically determines that these cases are: eviction orders and civil repossession suits. The second is quantitative: Special Courts will have jurisdiction over cases worth less than 40 minimum wages (calculated at the time of the initiation of the legal action⁽¹⁾).

1. Art. 3. The Special Civil Court has jurisdiction to conciliate, prosecute and adjudicate the less complex civil cases, as follows:

I – Causes whose value does not exceed forty times the minimum wage;

II – Those listed in art. 275, item II, of the Code of Civil Procedure;

III – The eviction action for own use;

IV – The repossession actions on real estate of a value not exceeding that set forth in item I of this article.

Additionally, Law 9.099/95 is based on five fundamental pillars: oral communication, simplicity, informality, economy of procedure and celerity^[2]. Conciliation and mediation are central and obligatory parts of the small claims process^[3]. Contrary to the civil procedure in other courts, the parties cannot waive the right to a conciliation or mediation hearing in Special Courts.

Considering the historical context of Special Courts in Brazil, it is plausible to state that there is a pressing dilemma regarding the initial purpose of Law 9.099/95 –to answer small claims and prevent the social consequences of citizens not having their claims heard by the legal system — and the current function of small claims courts as a mechanism to mitigate the high volume of cases in Federal and State Courts, due to the delay in the delivery of justice and the increase of judicial actions (Carvalho Xavier, 2016).

4. A Comparison between Small Claims Courts in Brazil and in the United States

An accurate comparison of small claims courts in Brazil and in the United States should avoid simulating the functions of small claims courts as if they were in two identical legal systems. Although small claims courts in the United States largely influenced small claims courts in Brazil, it would be inaccurate to say they were simply imported into the Brazilian legal system. In fact, it is necessary to recognize the inherent differences between the two legal systems and the complex manner in which institutions interact with the characteristics of each legal system.

To begin with, the United States has adopted a responsive legal system — it can respond to citizens' demands with greater ease because a judge is permitted to consider the broader consequences of his individual decision, as opposed to the Brazilian legal system, in which a judge must remain strictly impartial and apply the law to the specific case (Mello & Meirelles, 2010).

In Brazil, judges are trained to focus on principles rather than consequences. There is a significantly greater focus on the written law, not on legislative intent or on the results of a given decision. Furthermore, the absence of a centrality on *stare decisis* makes it easier for judges in Brazil to decide without considering the larger impacts that their decision will have on the overall system (Taylor, 2005). How-

2. Art. 2. The process will be guided by the criteria of orality, simplicity, informality, procedural economy and celerity, seeking, whenever possible, conciliation or transaction.

3. Art. 17. If both parties initially attend, the conciliation session will be opened immediately, with no need for prior registration of the request and citation.
Single paragraph. If there are opposing requests, the formal defense may be waived and both will be considered in the same judgement.

ever, Law 9.099/95 innovatively attempts at binding decisions in Special Courts to the social function of the law and the consequences of a decision^[4].

Having noted the basic differences between the two legal systems, we now turn to the distinctions between legal procedures in small claims courts and how this contributes to litigant satisfaction. Assuming that the American and Brazilian legal systems have different ways of interacting with the consumer of the law (in other words, the individual that uses the law: the plaintiff), the small claims process can contribute to different results in litigant satisfaction in each country.

Let's say that Luciana, the fictional character previously introduced, had decided to file a claim in a small claims court instead of remaining silent. In the United States, Luciana would walk into the small claims court and be provided with information about the small claims procedure by the court clerk. This is done over the counter or through a booklet or another type of printed material. However, clerks are strictly prohibited from giving legal advice. There are consequences to this restriction: the individual plaintiff might not get enough information. Since the line between legal advice and information about the small claims process is often blurry, the clerk will avoid getting into the specifics of the plaintiff's case (Elwell & Carlson, 1990).

To file a claim in an American small claims court, Luciana would need to fill out a relatively simple form. Forty-one percent of plaintiffs interviewed in a study in Iowa small claims courts said that they were able to file a claim in fifteen minutes or less; 80 percent said they were able to file their claim within a half hour (Elwell & Carlson, 1990).

Alternatively, in Brazil, Luciana would, most likely, arrive in the Special Civil Court closest to her place of residency. With the help of employees of the Special Civil Court, Luciana would write the writ of summons to be presented to the court, or she could choose to present her request orally^[5]. She would then present

4. Art. 6. In each case, the Judge shall adopt the decision that he/she considers most just and equitable, taking into account the social purposes of the law and the requirements of the common good.

5. Of the request:

Art. 14. The proceedings will be initiated with the submission of the written or oral request to the Court Registry.

§ 1. The request will contain, simply and in accessible language:

I – name, qualification and address of the parties;

II – the facts and the fundamentals, succinctly;

III – the object and its value.

§ 2. When it is not possible to determine from the outset the extent of the obligation, it is lawful to formulate a generic application.

§ 3 The oral request shall be made in writing by the Court Registry. The system of printed files or forms may be used.

Art. 15. The requests mentioned in art. 3 of this Law may be alternative or cumulative; in the latter case, provided that related and the sum does not exceed the limit set in that device.

all documents that relate to her claim, in addition to all possible witnesses and their addresses.

Regarding attorney assistance, in the United States Luciana would most likely belong to the 41 percent of plaintiffs that sought some form of legal assistance. Attorney representation can largely influence a case in an Iowa small claims court: both plaintiffs and defendants would have better outcomes when they were represented. Represented plaintiffs won 98 percent of their cases, whereas unrepresented plaintiffs won 95 percent. The defendants who had representation won 13 percent of the cases, compared to the unrepresented defendants who won only 3 percent (Elwell & Carlson, 1990).

Similarly, in Brazil, since her case is worth less than 20^[6] minimum wages, Luciana would be able to litigate without a lawyer. Luciana is filing a claim against another individual, so it is most likely that a lawyer will not accompany her. Were she proposing a claim against a corporation, Luciana would probably opt for legal assistance, according to a study conducted by the National Council for Justice (CNJ) (Da Silva, 2015).

As for the costs of filing a claim, in the United States, Luciana would have to pay a filing fee plus the costs of servicing the defendant. Luciana could service her neighbor through the small claims court (mailed service) or she could choose a personal service — a private investigator or sheriff, for example (Elwell & Carlson, 1990). In North Carolina, the filing fee is US\$ 96, and US\$ 30 for servicing each defendant, meaning that Luciana would pay a total of US \$126 for filing her claim (Legal Aid of North Carolina, Inc., 2015). On the other hand, in Brazil, Luciana would be able to file her claim for no cost^[7].

If Luciana were filing her claim in the United States, she would probably be one of the 40 percent of plaintiffs who reported that they settled their claims prior to trial. However, small claims courts in the United States do not have a formal process to encourage Luciana and her neighbor to settle before a trial. This would avoid putting pressure on the parties, since as most individual litigants are not cognizant of their rights, and could agree to settle without examining all their

Art. 16. After the request, regardless of distribution and assessment, the Court Registry will designate the conciliation session, to be held within fifteen days.

Art. 17. If both parties initially attend, the conciliation session will be opened immediately, with no need for prior registration of the request and citation.

Single paragraph. If there are opposing requests, the formal defense may be waived, and both will be considered in the same judgement.

6. Art. 9. In cases worth up to twenty minimum wages, the parties will appear in person and may be assisted by a lawyer; in higher value cases, assistance is compulsory.

7. Art. 54. Access to the Special Court shall in the first instance of jurisdiction be independent of the payment of costs, fees or expenses.

options (Elwell & Carlson, 1990). In Brazil, conciliation is the primary goal of the small claims process, and it is mandatory for the parties to attempt a settlement, which is why the court provides conciliators.

When the time for the hearing arrives, Luciana will spend about half an hour at an American small claims court trial. The amount of time for hearings in the United States is adjusted according to the circumstances of the case, but one third of the hearings were only half-hour trials. The average time between filing and trial was forty days (Elwell & Carlson, 1990).

During trial in an American small claims court, Luciana needs to prove why she is entitled to an order requesting the defendant to move out or how much the defendant owes her for damages caused by the noise in the middle of the night. In turn, Luciana's neighbor needs to prove why she should not move out or why she does not owe Luciana anything (Elwell & Carlson, 1990).

In an American small claims court, witnesses can be brought to trial and, if they fail to show up, they can be subpoenaed. However, even if Luciana's neighbor does not show up to trial, Luciana will still be required to prove her case. If the plaintiff does not prove the case, the Magistrate will dismiss the case. At the end of the trial or up to 10 days after the hearing, the Magistrate will deliver his judgment (Elwell & Carlson, 1990).

In a Special Court in Brazil, Luciana would wait an average of 168 days between filing her claims and the hearing. At the time of the hearing, the judge would briefly present Luciana and her neighbor with the advantages of conciliation. If the parties do decide to conciliate, the Judge then validates the agreement in his sentence. On the other hand, if the parties decide not to participate in conciliation, they will have the option of choosing arbitration.

As for the types of litigants and claims submitted in small claims courts, both the American and Brazilian small claims courts face the same dilemma: the majority of claims have businesses as parties, diverting small claims courts from their original purpose of solving individual citizen's quotidian problems.

In Iowa, the predominant plaintiffs were businesses (62 percent). Individuals represented only 14 percent of the total. Moreover, a litigant survey showed a high number of repeat players in small claims courts. In fact, 79 percent of plaintiffs had used small claims courts before (Elwell & Carlson, 1990). The high rate of repeat plaintiffs in small claims courts could indicate that there is an asymmetry between parties in terms of knowledge about the small claims process.

Similarly, in recent years the Special Courts in Brazil have become extremely specialized in Consumer Law and have stopped answering to other types of conflicts, such as disputes between neighbors (Mello & Meirelles, 2010). Today, most plaintiffs are still individuals, but the most common type of case in Special Courts

are of individuals against a company. This shows how businesses are advancing into the small claims system, defying the idea that conflicts between individuals should prevail in small claims courts. However, in all state capitals of the country, there are still cases where both parties are individuals (Da Silva, 2015).

Having analyzed the main procedural differences in Brazil and in the United States, particular recognition is due to a fundamental actor: the person who decides the case. In the United States, judges have a vast influence on the level of formality and the pace of the trial. Therefore, they are largely responsible for litigant satisfaction. Considering that small claims courts in the United States vary in structure and procedure depending on the state, this comparison will focus on small claims courts in Iowa.

In Iowa, 44 percent of judges had been hearing small claims cases for five or fewer years. It is not a requirement for a judicial magistrate to be licensed to practice law in Iowa, but 66 percent of the judicial magistrates interviewed had a license to practice law. In order to become a Magistrate in an Iowa small claims court, the judges attend a training session (Elwell & Carlson, 1990).

When both parties had an attorney, the judges were more passive in comparison to cases in which only one or neither of the parties had an attorney. In these situations, the judge acted as an investigator rather than a passive observer. Additionally, small claims judges refrained from using legal language and made an effort to explain the risks of the case to the parties in layman's terms. However, a certain degree of formality was maintained — most likely to lend legitimacy to the small claims proceedings (Elwell & Carlson, 1990).

In Keokuk County (Iowa), 47 percent of the judges ruled from the bench. Should judges not decide at the end of the trial, they are permitted to take the case under advisement, and decide up to ten days after the trial. Even though they are granted extra time, some judges rushed through the trial, which can leave litigants feeling that the case was not completely resolved (Elwell & Carlson, 1990). In most instances, ruling at the time of the trial can have a positive result on litigant satisfaction, because the judge is able to, personally, explain to the parties the reasoning behind his/her judgment, and what their options are (Elwell & Carlson, 1990).

As explored above, the small claims court process in Brazil and in the United States share many similarities. However, small details — the judge's involvement with the case, the types of claims brought to small claims courts and legal representation — can impact heavily on the litigant's satisfaction. Having examined the legal process in both legal systems, the subsequent section focuses on the legitimacy of small claims courts in Brazil and in the United States, based on the perception of the user of the law.

5. The Legitimacy Crisis of Small Claims Courts

In the United States, small claims courts have been able to simplify the filing process and eliminate bureaucracy, when compared to the “traditional” court system. In Iowa, most litigants did not complain about an overly complicated process, and difficult or bureaucratic forms. Additionally, the claims in small courts went to trial in a reasonable amount of time after being filed, as previously mentioned. Costs were also lower than in a normal district court (Elwell & Carlson, 1990). In this sense, the small claims movement in the United States was largely successful in eliminating the delays and expenses that made the ordinary litigation inaccessible to the poor.

Notwithstanding, we should be cautious in concluding that now all citizens have access to justice. In Brazil, civil justice is increasingly available to the lower-middle class who, previously, did not have a mechanism to bring their claims to the judicial system. On the other hand, unemployed *favela* residents still do not have a sufficient level of education to seek out the small claims courts system, or, even if they do, the economic burden imposed by the bureaucratic procedures is still more than they can afford. Consequently, a large class of citizens still lives on the outskirts of the legal system (Moulton, 1969).

Additionally, the biggest beneficiaries of small claims courts turned out to be business interests and government agencies. Small claims courts in California are increasingly being used to enforce commercial contracts. There is now a large class of business plaintiffs, a phenomenon that creates a complex issue for small claims courts: these agents quickly become familiar with small claims courts and turn into experts of the system, leaving the first-time defendant at a disadvantage (Moulton, 1969).

This is where the role of the judge becomes crucial. Originally, a judge was supposed to act as counsel for both sides in a small claims court. However, when the litigants are of unequal power, the judges need to make an extra effort to elucidate both sides of the story. The business plaintiff will most likely be better at arguing his case and justifying his claim. The result of this inequality significantly increases the need for a judge who is willing to compensate differences in legal education between parties.

In these situations, the role of the judge should be to help the inexperienced defendant. A passive judge would only contribute to widening the inequality between the business plaintiff and the individual defendant (Moulton, 1969).

Furthermore, legal education in Brazil and in the United States has led to the idea that large claims are more important than the small claims, even though small claims are much more common than the large ones. Legal education focuses largely on a synthesis of landmark cases. Additionally, legal professionals adopt

an attitude that sees large cases as the ones out of which they can make a living. Cases with higher stakes often have a more significant impact on the economy, and, therefore, are considered more important than small claims (Kosmin, 1976).

In conclusion, small claims courts in the United States are predominantly used by businesses, which has led to unequal power between litigants. The citizens who could most benefit from small claims court — those from lower classes — show little interest in improving the small claims court system. Therefore, it is necessary to encourage lower class citizens to use small claims courts as a mechanism for having their claims heard (Kosmin, 1976).

In Brazil, Special Courts for small claims have a strong predominance of consumer claims, such as complaints against public utility companies, banks and big chain stores. In a Special Court in Niterói, a city in the state of Rio de Janeiro, the majority of claims were against six specific companies. In November of 2007, the ten most recurring defendants in this court were telephone companies, electric power supply companies, and banks. This data demonstrates how companies fail to guarantee consumer rights and the role Special Courts play in ensuring the accountability system's functionality (Mello & Meirelles, 2010).

Another threat related to the specialization of Special Courts in Consumer Law is that a new kind of case has arisen: the *“expressinho”*. These cases are claims for compensations for material and moral damages caused by inefficient services, and have become a standard procedure against a small number of companies. Though these cases should not be disregarded, many judges rule without paying much attention to the peculiarities of the case, contributing to litigant dissatisfaction (Mello & Meirelles, 2010).

Therefore, neighborhood conflicts have become rare in Special Courts, although the original design of Special Courts was to make these the main category of claims. Instead, they ended up marginalized and are still not fully included in the legal system (Mello & Meirelles, 2010).

Furthermore, corporate interests are largely responsible for distorting the original purpose of Special Courts (guaranteeing access to justice). Judges, lawyers and public prosecutors lobbied for a formal system in Special Courts, which prevailed over efforts for a wider democratization of these courts. This has led to a feeling of distrust in Special Courts by the individual litigant (Mello & Meirelles, 2010).

Although complex, the issue of small claims courts in Brazil and in the United States is straightforward: small claims courts need to adopt measures to salvage their legitimacy in the eyes of the user of the law. First, the business interests must be unobtrusive in small claims courts. Second, claims between individuals, such as neighborhood conflicts, must regain predominance in small claims courts. Fi-

nally, legal education regarding small claims courts must stress the importance of cases of lower value.

6. Conclusion

A core finding of this analysis is that small claims courts are an important tool for the legitimization of the legal system. In order to implement effective access to justice, courts must be understood by the user of the law as a place in which they can resolve the mundane conflicts that cause unease in social relations.

Special Courts in Brazil, secured by the Federal Constitution of 1988, were created with the intent of guaranteeing access to justice for citizens whose legal claims were marginalized due to an economic and/or educational disparity. In the United States, small claims courts have the same purpose. However, in both countries, there is a present crisis regarding the absence of relevance granted to small claims courts, both by the legal system as well as by the potential users of small claims courts. This creates a continuing view of the legal system as overly complicated and expensive, affecting its legitimacy.

Therefore, Luciana, who was introduced at the beginning of this essay, is faced with two hostile options: (i) she can decide not to take her claim to a Special Court, or (ii) she can litigate, and end up dissatisfied with the small claims process and the legal system.

The question then becomes: how can this outcome be changed? Could Luciana receive a third alternative, one that addresses her claim? Indeed, this transformation is not only possible, but also necessary.

First, Luciana has to have access to information. Professor Kazuo Watanabe suggests a “parallel service” to work concurrently with Special Courts to guarantee that the users of small claims courts have enough information about the filing and legal proceedings. This service can be composed of volunteers or staff from the Special Court (Watanabe, 1988). If we go one step further, it is possible to implement a “friend of the defendant/plaintiff” system, offered by the court to help the plaintiff or defendant prepare his/her case and answer any questions they might have (Moulton, 1969). It is conceivable to have students from law schools as volunteers in Special Courts for this purpose.

The judge is a fundamental part of guaranteeing litigant satisfaction. It is necessary to train lay judges that act in Special Courts in Brazil, perhaps immediately prior to the investiture in their positions, to make an effort to diminish inequality between parties by acting to clarify and conduct the process in a manner that helps the inexperienced parties question witnesses and present their cases. Additionally, legal forms can be written in a manner that is easy to understand and interactive to fill out.

There is also a need to recapture the individual litigant. This can be done through government campaigns to make citizens aware of the existence of Special Courts, and the types of claims they can bring to Special Courts. In this sense, the individual litigant will most likely have more access to Special Courts if these are available in hours that are convenient for the working person. In New York City, over 70,000 claims were tried and settled by judges and arbitrators each year in courts that had evening hours or were open on weekends, so implementing these on a larger scale could be feasible (Moulton, 1969). Indeed, Law 9.099/95 expressly authorizes this in article 12.^[8]

This paper has thus far argued that the small claims court system in both Brazil and the United States has a number of problems that make it difficult for the ordinary citizen to access. However, small changes can have a big impact on how the consumer of the law feels at the end of the judicial process. If Luciana is left feeling that her claims are important to the legal system, and that the justification for the decision in her case was fair, she will become an indispensable building block in the composition of access to justice in her country's legal system. If, like Luciana, there are millions of other citizens feeling that justice has been done, people at all levels of society will compile a sense of trust in the Judiciary's ability to resolve conflicts.

Therefore, on closer inspection, it is important for individuals to trust in the Judiciary's ability to solve their injustices because this creates a feeling that the continuation of courts is necessary to uphold a democratic society. The legitimization of the Judiciary system avoids the rejection of democratic institutions, and increases the user of the law's belief in these institutions as protectors of rights.

References

- Andrighi, N. (1996). Procedimentos e competência dos juizados especiais. *Revista dos Estudantes de Direito da Universidade de Brasília*, 2, 42-46.
- Cahn, E. (1959). The consumers of injustice. *Social Research*, 26(2), 175-194.
- Carvalho Xavier, A. C. (2016). Juizados especiais e o novo CPC. *Revista CEJ*, 7, 7-22
- Curado Silveira, R. (2016). Gestão judiciária: o que gritam os números da justiça. *Conselho Nacional de Justiça: fundamentos, processo e gestão*, 347-991(81), 338-360.
- Da Silva, P. E. A. et al. (coord.) (2015). Perfil do acesso à justiça nos juizados especiais cíveis. *Conselho Nacional de Justiça*.
- Elwell, S. E., & Carlson, C.D. (1990). The Iowa small claims court: An empirical analysis. *Iowa Law Review*, 75, 434-527.

8. Art. 12. Procedural acts shall be public and may take place at night, as provided by the rules of judicial organization.

- Kalantry, S., Eisenberg, T., Robinson, N. (2013). Litigation as a measure of well-being. *DePaul Law Review*, 62(247), 247-292.
- Kosmin, L. G. (1976). The small claims court dilemma. *Houstoun Law Review*, 13(5), 934-982.
- Legal Aid of North Carolina, Inc. (2015). A guide to small claims court. Retrieved from <http://www.legalaidnc.org/get-help/Documents/small-claims-guide/guide-to-small-claims-court.pdf>.
- Matta Chasin, A. C. (2012). O juizado especial cível e a reforma do judiciário no Brasil. *Teoria&Pesquisa – Revista de Ciência Política*, 21(1), 97-114.
- Mello, M. P., & Meirelles, D. R. S. (2010). Juizados especiais: Entre a legalidade e a legitimidade – Análise prospectiva dos juizados especiais da comarca de Niterói, 1997-2005. *Revista Direito GV*, 6(3), 371-398.
- Moulton, B. A. (1969). The persecution and intimidation of the low-income litigant as performed by the small claims court in California. *Stanford Law Review*, 21(6), 1657-1684.
- Nader, L. (1984). A user theory of law – Fourth annual Alfred P. Murrah lecture. *SMU Law Review*, 38, 951-963.
- Nader, L. (2005). *The life of the law: Anthropological projects*. Berkeley and Los Angeles, CA: University of California Press.
- Taylor, M. M. (2005). Citizens against the States: The riddle of high impact, low functionality courts in Brazil. *Brazilian Journal of Political Economy*, 25(4), 418-438.
- Watanabe, K. (1988). Acesso à justiça e sociedade moderna. In Grinover, Ada Pellegrini et al. *Participação e Processo*. São Paulo: RT, p. 128-135.

