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# JUDICIAL REVIEW OF CONTRACTS UNDER PANDEMIC: SOCIAL TRAGEDY AND INVITATION TO ALTERNATIVE DISPUTE RESOLUTION MEANS

# *REVISÃO JUDICIAL DOS CONTRATOS EM FUNÇÃO DA PANDEMIA: TRAGÉDIA SOCIAL E CONVITE AOS MEIOS ALTERNATIVOS DE RESOLUÇÃO DE CONTROVÉRSIAS*

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## ABSTRACT

**Objectives:** The article seeks to discuss the judicial review of contracts in an environment qualified by demands arising from the new coronavirus pandemic. Based on an epistemological dialogue qualified by the economic analysis of Law, consequentialism and the dual process brain, the article intends to assess whether the judicial review of contracts proves to be efficient to resolve the demands that arose during the new coronavirus pandemic, of way to reflect how a better allocation of economic resources to society.

**Methodology:** The research, which adopts a deductive and dialectical approach, uses the technique of bibliographic and documental research. Its Its methodological objective is exploratory and propositional.

**Results:** The article will demonstrate, based on the theoretical frameworks of economic analysis of Law, consequentialism and the dual process brain, that the State should indicate and facilitate paths for the self-composition of the parties, and not promote the coercive review of contracts by by means of judicial determinations, as this posture has generated a huge asymmetry, given that only a few benefit from these revisions to the detriment of society as a whole.

**Contributions:** The article presents an innovative theoretical tool, qualified by an interesting epistemological dialogue, not yet explored in the national academic debate. The present study, therefore, may be of great value in guiding the reduction of the asymmetry generated by the coercive revision of contracts.


**Keywords:** Contracts; Alternative means; Pandemic; Dispute resolution; Judicial review.


## *RESUMO*

***Objetivos:*** *O artigo busca discutir a revisão judicial dos contratos em um ambiente qualificado por demandas surgidas em época de pandemia do novo coronavirus. Com base em um diálogo epistemológico qualificado pela análise econômica do Direito, pelo consequencialismo e o pelo dual process brain, o artigo pretende aferir se a revisão judicial dos contratos revela-se eficiente para resolver as demandas surgidas em época de pandemia do novo coronavirus, de forma a refletir como uma melhor alocação dos recursos econômicos para a sociedade.*

***Metodologia:*** *A pesquisa, que adota uma abordagem dedutiva e dialética, utiliza a técnica de pesquisa bibliográfica e documental. Seu Seu objetivo metodológico é exploratório e propositivo.*



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***Resultados:*** *O artigo demonstrará, com amparo nos referenciais teóricos da análise econômica do Direito, do consequencialismo e o do dual process brain, que o Estado deve indicar e facilitar caminhos para a auto composição das partes, e não promover a revisão coercitiva dos contratos por meio de determinações judiciais, pois, tal postura vem gerando uma enorme assimetria, haja vista que somente alguns se beneficiam dessas revisões em detrimento de toda a sociedade.*

***Contribuições:*** *O artigo apresenta um ferramental teórico inovador, qualificado por interessante diálogo epistemológico, ainda não explorado no debate acadêmico nacional. O presente estudo, por isso, poderá ser de grande valia para orientar a redução da assimetria gerada pela revisão coercitiva dos contratos.*

***Palavras-chave:*** *Contratos; Meios alternativos; Pandemia; Resolução de controvérsias; Revisão judicial.*

## 1 INTRODUCTION

The pandemic resulting from the new coronavirus has been causing serious economic consequences, mainly due to the severe restrictions imposed by the Public Power to curb its progress.

In this new economic scenario, several lawsuits for contractual review were filed.

With this, some questions arise, which reveal themselves as important research problems to be elucidated, which are: considering the high number of existing judicial demands and the increase that occurred during the pandemic, would the Judiciary be delivering a just and timely jurisdictional provision, through reflective and not merely intuitive decisions? Would the judicial review of contracts be the best solution to the economic problems arising from the new coronavirus pandemic? Could alternative means of conflict resolution prove to be a way to remove negative externalities, reflecting in a better allocation of resources to society, with regard to contractual review?

The moment currently experienced, with all the reflexes resulting from the decisions adopted in an attempt to reduce the externalities caused by the pandemic


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of the new coronavirus, especially with regard to judicial review of contracts, justifies the conduct of this research.

Therefore, in this research we will seek to verify the issue of judicial review of contracts and their consequences for society at a time of pandemic of the new coronavirus, with the aim of assessing whether such form of conflict resolution proves to be efficient and, thus, it reflects in a better allocation of economic resources to society.

The research will be carried out with the use of dialectical and deductive approaches, having as reference system an epistemological dialogue qualified by the economic analysis of Law, by consequentialism and by the dual process brain.

With regard to the method of procedure, in the present research the bibliographic method will be used, with the accomplishment of searches in books, scientific journals, court jurisprudence and specialized websites on the subject.

## 2 THE COVID-19 PANDEMIC: A NEW CONTEXT IN PRIVATE LEGAL RELATIONS

The virus called Covid-19 is the cause of unimaginable transformations, with misfortunes and significant changes in modern society. According to the teachings of Cateli and Ferreira (2020, p. 58), "[...] this virus presents a peculiar situation never before faced by humanity, showing that it is essential to think about the question, to prepare possible answers, alternative routes and solutions for the new reality faced" (our own translation).

The solutions and alternative routes involve, without a doubt, the legal aspects of the problem, especially those related to the judicial review of private contracts, object of the present investigation. In this context, there is no way to stop reflecting on labor relations, because the rupture of labor contracts and the absence of workers' monthly earnings is what, as a rule, motivate revision actions.


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The economic and labor crisis caused by COVID-19 is having evident effects on the level of employment and, therefore, on the situation of the people who work and, reflexively, on the performance of private contracts.

The International Labor Organization (ILO) reviewed the available data and economic analyzes in a report of 18 March 2020, warning that the pandemic could dramatically increase global unemployment[1]. Based on the different hypotheses for the consequences of COVID-19 on the growth of the world Gross Domestic Product (GDP), its estimates indicate an increase in global unemployment between 5.3 million ("prudent" hypothesis) and 24.7 million ("extreme" hypothesis) ") (ILO, 2020, n/p). Job losses undoubtedly entail large losses of income for workers.

At that moment, it becomes very important to deal then with the possibilities of revising private contracts, because it is observed that the pandemic will trigger and is already triggering an excessive number of judicial demands for the review of these contracts.

In this sense, it must be considered that the contracts must fulfill their social function[2], as expressly provided for in articles 421 and 2,035 of the Civil Code. Such devices show the possibility of revision when the contract meets the interests of only the parties and, mainly, the interest of only one of the parties, considering that, currently, the contract is seen as part of a larger reality, which transcends the mere interest of the contractors, and also as one of the factors that change the social reality (PEREIRA, 2006, p. 13).

It remains to be seen the consequences of judicial reviews of private contracts for society, which will be further investigated.

[1] This and other reports with frequent updates on the subject can be found on the ILO website at: https://www.ilo.org/global/standards.

[2] Messias and Souza (2015, p. 166-167) state that the social function of contracts "[...] can be understood as a triple function, economic-social-environmental, and the contract will fulfill its social function if it meets, in an egalitarian and solidary manner, to the wishes of the contracting parties, generating the production of goods and services, and the circulation of wealth, in accordance with the values of free initiative and obeying the limits determined by the social wishes, since the post-modernism must also be understood as an instrument for the realization and protection of fundamental rights, aiming to enable the existence of a dignified life, through the realization of social justice, reflecting not only the economic factor, but also the social and environmental factors " (our own translation).


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## 3 JUDICIAL REVIEWS OF CONTRACTS IN FUNCTION OF PANDEMIC: AN ANALYSIS BASED ON JUDGMENTS OF THE SÃO PAULO STATE COURT OF JUSTICE

It is not new that in Brazil there is a culture of judicialization, which encompasses the most diverse situations, from private relations to public policies, which puts the Judiciary in the spotlight, gaining enormous importance, given the social consequences of its decisions.

With the recognition of the new coronavirus pandemic, this culture of judicialization of private contracts was strictly followed, as expected, leading the Judiciary to play an important role in making decisions for society and the possibility of interfering in private pacts.

In view of this, some recent judgments of the São Paulo State Court of Justice (TJSP) are analyzed below, which dealt with the review of contracts due to the pandemic of the new coronavirus, while also making considerations regarding its consequences for the society.

Firstly, for initial considerations, it is worth bringing up the judgment in the case of an interlocutory appeal that reversed a first-degree decision, determining the suspension of payment of bank financing:

> *Agravo de instrumento ordinária de revisão contratual* - request for granting of provisional emergency relief for the purpose of postponing the settlement of monthly installments of financing - rejection at source - insurgency - partial acceptance - presence of the authorizing legal requirements required by art. 300 of the CPC in the face of the crisis faced due to the pandemic decree by the new coronavirus, it is assumed that there are financial difficulties that make it impossible for the party, provisionally, to pay the installments in the agreed manner - the suspension of payment of the financing for the term of six months without incurring additional charges. reformed decision partially provided appeal (SÃO PAULO, 2020d, p. 2, our own translation).

It appears from the judgment that the court presumed the existence of financial difficulties that prevented the payment of the installments, a presumption without much likelihood, determining the suspension of the payment of the installments for a period of 6 months, without incurring additional charges.


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In the case in question, when analyzing the demand in isolation, alien to society, the court understood that the best decision would be to suspend the payment of the financing installments, after all, presumed by the existence of financial difficulties of a person, in isolation, in relation to an institution without taking into account the other people who make up the company.

It seems evident that this decision has a social cost, since, when deciding in this way, the court indicated to society that there is this possibility of judicial review, which creates an incentive structure for filing many other demands, raising the cost to the Judiciary itself.

Said decision also signals to financial institutions that the contracts can be revised with the imposition of suspension of the payment of the installments, without any additional cost for those who requested the revision.

In other words, without return on the borrowed capital, financial institutions will have to increase the interest rates on their next loans, in order to compensate for the losses experienced in these revised contracts, not only due to the suspension of payments, but also due to of the cost of the process, which you will experience with each demand for judicial review, such costs involve lawyers to monitor the demand, legal costs and also succumbence fees.

Given these propositions, it seems a logical consequence that the judicial decision in question, rendered in an attempt to solve a person's problem, is likely to incur costs for all other members of society, who will henceforth pay more to obtain bank loans or even they will not be able to obtain such loans, given that, if the Judiciary determines that capital does not return to financial institutions, there is a probable lack of resources for new loans and, as everything that is scarce, still has a high value.

Having made these initial considerations, we pass on the analysis of other judgments, such as the following two, which take care of the suspension of payment of vehicle financing used for school transportation:

> *TUTELA DE URGÊNCIA.* Obligation to do. Vehicle financing contract. Car purchased to provide school transport services. Request for suspension of


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> payments, based on the supervening pandemic caused by Covid-19. Admissibility, in this case. Probability of the right to judicial intervention to rebalance contracted obligations. Presence of the requirements required by article 300 of the CPC. REFORMED DECISION. RESOURCE PROVIDED (SÃO PAULO, 2021, p. 2, our own translation).

> *AGRAVO DE INSTRUMENTO* - Revision action of vehicle financing contract with urgent injunction request - Decision that rejects request for urgent relief for suspension and freezing until the end of the pandemic COVID-19 or return to professional activity and face-to-face classes of overdue installments vehicle financing maturities - Claim to be the financed vehicle used in the school transport activity that finds elements of verisimilitude - Undoubtedly the direct reflection of the pandemic in the aggravating activity - Waterable damage - Irreversibility of the non-existent guardianship - If the authorizing requirements for the granting of emergency protection are fulfilled (art 300 of the CPC) its approval is strictly measured - The time limit of the deferred early guardianship is the reestablishment of the school transport activity with the return to face-to-face classes, so taking care of the aggravating factor of presenting in 30 days, in the action records , statement by the school in this regard, penalty for revoking the guardianship granted - Modified decision. Resource provided, with determination (SÃO PAULO, 2020c, p. 2, our own translation).

It appears from these judgments that there is a clear signal for those jurisdicted who have bank financing for vehicles used for school transportation, that is, who do not need to pay the installments. Just file a revision action requesting the suspension of the installments and waiting for the pandemic to end.

This signaling creates a negative incentive structure for financial institutions, which may no longer provide resources for vehicle financing for other people who are considering starting a new business, which could even generate new jobs. Such a situation thus causes a harmful social cost.

It was not uncommon to see in the past few days, in the face of the pandemic, many school vehicles being used as alternatives to maintain the income of their owners for other purposes demanded by society, like many who started to freight goods sold through the unlimited e-commerce.

It is assumed that this revision of the contract, imposed by the Judiciary, with the simple solution of suspension of payment, takes the debtors to a situation of convenience, discouraging new entrepreneurial initiatives, such as the one reported above, which proves to be a true example solution for overcoming the economic crisis triggered by the new coronavirus pandemic.


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In another judgment, the TJSP determines the suspension of the collection of financing installments for equipment intended for agricultural exploration:

> *AGRAVO DE INSTRUMENTO.* Action to review the financing contract for the purchase of equipment for agricultural exploration. Allegation of the impossibility of redemption installments of this financing, due to the coronavirus pandemic, which caused a reduction in its revenues. Likelihood of the alleged. Risks of notable irreparable damage that will necessarily result from the foreclosure of the collateral, protest of credit securities or the negation of the name of the financier. The pretension to abolish interest, which should only occur with the merit solution. Previous provisional guardianship denied in first degree. Insubsistence. RESOURCE PROVIDED (SÃO PAULO, 2020a, p. 2, our own translation).

See that said decision is an invitation for all other rural producers to seek the revision of the contract through the Judiciary, whose consequences will be harmful to society.

Not even student funding escaped intervention by the Judiciary:

> *Ação de obrigação de fazer*. Student financing contract under the FIES Higher Education Financing Fund. FIES Installment Payment Guarantee Agreement signed with the defendant. Defendant who no longer bears the financing installments. Collection directed to the author. Request for advance protection so that the defendant is compelled to assume the payments and prevent new charges. Early guardianship denied. Instrument appeal. Intelligence of article 300 of the CPC. Documents that give verisimilitude to the author's allegations. Document proving compliance with the requirements of the warranty contract. Defendant who is responsible for paying the financing installments. 'Periculum in mora'. Possibility of suspension of payments, due to the pandemic, which cannot impose the charge on the plaintiff. Requirements fulfilled. Urgent guardianship granted. Reformed decision. RESOURCE PROVIDED (SÃO PAULO, 2020b, p. 2, our own translation).

In a poor country like Brazil, where resources for education are extremely scarce, the determination to suspend payments of the student financing portion may further aggravate the situation, which has been far from desirable for a long time.

These judicial decisions, among other contexts, do not take into account that both parts of the demand were affected by the pandemic, so that the suspension of the installments in several contracts may aggravate, in addition to the already high


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default rate, the economic situation of the country, making financial resources even scarcer.

It should be noted that the unpredictable circumstance used as a legal basis for the review of contracts by the Judiciary (decree of state of public calamity) generated an imbalance for both parties. Certainly, financial institutions are much less vulnerable. However, they are not in an excessive advantage capable of justifying the judicial review of the contracts.

There is no denying that the new coronavirus pandemic has had a catastrophic impact on the majority of the population. However, there is no possibility for the Judiciary to review contracts that, as it turns out, do not have any indication of defect or irregularity, being fully valid.

In this context, the review of contracts should be subject to renegotiation between the parties, and not a judicial imposition, which would generate much less externalities for society.

With these considerations in mind, the social consequences of judicial review of contracts will be measured in a more assertive manner and through examples.

## 4 JUDICIAL DECISIONS: CONSEQUENTIALISM AND NEUROSCIENCE

It can be said that the Law is a system that influences and is influenced by the social institutions existing in the community in which it is applied. For this reason, defenders of the evolutionary theory of societies admit that the set of socially predisposed rules serves the organization of intersubjective relations[3] and, at a given moment, is enshrined as a Right.

It must be clear that, in view of this, State regulation should always aim at the best allocation of resources by and for society, and not for certain groups or people (TIMM, 2009, p. 04).

[3] Intersubjective relations favor the advance "[...] from insufficient dogma to adequate epistemology, which asks the reasons for the Law, or to praxis attentive to the values and responsibility that are present in intersubjectivity" (PEPÊ; HIDALGO, 2013, p. 299, our own translation).


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In other words, when faced with more than one possibility, one should choose one that allocates resources in a way that provides greater advantage to society, analyzing the costs and benefits of the consequence, opting for that conduct that will reflect on lower cost and greater social benefit.

The brazilian positive ordering itself imposes on the judge that, when applying the law, he must attend "the social ends to which it is directed and the requirements of the common good"[4] (our own translation). It is not for any other reason that Carmo and Messias (2017, p. 199) affirm that "[...] judicial decisions must be implemented through a structured process that can be verified and intersubjective justification" (our own translation).

It is in this sense that it is emphasized and started to address that judicial decisions, especially in relation to the review of private contracts, must take into account their consequences, which is why they must be taken with great reflection, and not immediately.

## 4.1 SOCIAL CONSEQUENCES OF COURT DECISIONS

The legal system and institutions must provide security and predictability to economic and social operations, protecting the expectations of economic agents, which corresponds to an important institutional and social role, in order to minimize communication problems between the parties, safeguard assets and expectations of each of the agents, create protection against opportunistic behavior and generate mechanisms for compensation and risk allocation (TIMM, 2015, p. 213-214).

It is in this context that the discussion of the practical consequences of a particular action or decision is also called pragmatism, and is studied in the field of moral philosophy. Consequentialism, in this area, is conceived as the characteristic of the pragmatist matrix that prioritizes the consequences of the act, theory or concept (GABARDO; SOUZA, 2020, p. 102).

[4] Artigo 5º da LINDB (Lei de Introdução às Normas do Direito Brasileiro).


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It is from this perspective that the present investigation analyzes the question about the revision of private contracts in times of pandemic, considering their social reflexes, aligned with the general principles of the contract, above all its social function and objective good faith.

In this sense, Mucelin and D'Aquino (2020, p. 40) teach that "[...] we live in the moment of history when the solution to the challenge presented will not be found individually. The only possible path to be followed is that of empathy, social and fraternity " (our own translation).

In order to bring better reflection to the investigation, it is worth presenting two remarkable situations, which involved the institute of contractual review through judicial decisions, to verify the externalities and the costs arising.

First, a real case is presented, addressed by Luciano Benetti Timm (2009, p. 33), namely, the fact that, in 1994, the advent of the Real Plan provided the national currency with parity with the dollar. As a result, many consumers, in search of the lowest interest rates offered by the North American market, assumed the exchange risk and contracted vehicle leasing operations with readjustments linked to the US currency.

In 1999, due to the government policy of the Brazilian State, the national currency (the Real) suffered a large devaluation, resulting in increases of more than 150% in the installments of these operations.

This situation even reached the Judiciary Branch, before which the Superior Court of Justice, when interpreting the law, divided the loss caused by the exchange rate variation between consumers and financial institutions.

Faced with such an event, the question is: Is this interpretation given to the law by the STJ in line with the best result for society?

The economic analysis of the Law shows reservations about it. This is because, the judicial decision was efficient only for the few consumers involved, to the detriment of the whole society.

After this decision, even if legally permitted, this type of leasing contract has disappeared from the market, which currently prevents all other consumers, who are


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willing to assume the risks of exchange rate variations, from contracting leasing operations with extremely low interest rates.

In the same sense, an emblematic case was the correlation of the increase in the values of home insurance policies on the coast of the United States, after the passage and destruction caused by Hurricane Katrina, an opportunity in which there was interference by the Judiciary to compel insurers to honor damages that were not expressly provided for in insurance policies.

Hurricane Katrina broke through the dikes that protected New Orleans, causing the waters of Lake Pontchartrain to flood over 80% of the city. About 200 thousand properties were underwater. Only after several weeks, the water was totally pumped out of the city (JUSBRASIL, 2007, n.p.).

Most businesses and homeowners in the storm-stricken area had insurance that covered wind damage. While some companies have also purchased flood insurance, few homeowners have done so (BAYOT, 2005, n.p.).

Through judicial decisions that determined the revision of the policies, the insurers were forced to honor the damages caused by floods to the homeowners, whose policies only guaranteed coverage against gales.

As a result, the huge losses caused by Hurricane Katrina and others in 2004 and 2005 led the home insurance industry to a panicked escape from the United States coast. In Florida, which has been hit by eight major hurricanes in two years, insurers have refused to renew hundreds of thousands of home policies to reduce their exposure to damages.

Residents, who still faced the damage caused by hurricanes, also began to face significant increases in insurance prices (ADAMS, 2006, n.p.).

Thus, it appears that the contractual review aimed at protecting the part considered punctually as vulnerable, can generate social repercussions of great repercussion, capable of reaching all other private contractual relations that relate to the theme, but not only, also having repercussions in general, therefore, it presents a perception of fragility to the pacts, which can generate externalities and transaction costs beyond the normal.


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This is not a supplier against a consumer, but a consumer against a consumer, given that the protection provided by the contractual review to a small portion of consumers, can result in negative externalities for all other consumers. Timm (2018, p. 37), in this regard, points out that:

> The arbitrator or judge must also consider the economic consequences of his decision. Sometimes, favoring one of the parties in the process can bring serious problems to the chain, for that silent majority that is fulfilling its contracts and that did not enter into court - as we know, in fact, after experiences of the revision actions (our own translation).

In effect, fulfilling its social function, the contract must provide society with security and predictability to economic and social operations, protecting the expectations of all, and not just of a small part of the agents, so that the solidarity and the distribution of wealth, foreseen in the Federal Constitution, are provided by the tax system, thus maintaining the institutional role of contracts strong.

## 4.2 DUAL PROCESS BRAIN: POSSIBILITY OF REDUCING JUDICIAL ERRORS

The role of the Judiciary, in delivering the provision of jurisdiction to citizens, has been the subject of much research, in this vein the question arises that links the mind of the judge to the result of the judgment.

Do not forget that obtaining a fair judicial provision is umbilically linked to an impartial action by the magistrate.

It means to say that a fair jurisdictional performance results from an equitable and neutral action of the magistrate when judging the case submitted to him. In other words, a fair jurisdictional performance arises as a result of an action free of favoritism or prejudice of any kind on the part of the magistrate when judging a case.

Such fair, equitable and neutral action must be present throughout the decision-making process, that is, during the entire decision-making process. Therefore, the impartial magistrate must allow an equitable production of evidence and, in a neutral and equidistant manner, must decide in favor of the truth of the


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facts, which must be extracted through an objective analysis of the evidence produced by the parties in the judicial process (SEREJO, 2011, p. 37).

It is for no other reason that the Code of Ethics of the Judiciary, in its Article 8, states that:

> Art. 8 The impartial magistrate is one who seeks in the evidence the truth of the facts, with objectivity and foundation, maintaining throughout the process an equivalent distance from the parties, and avoids any type of behavior that may reflect favoritism, predisposition or prejudice (SEREJO, 2011, p. 35, our own translation).

However, when the subject is the magistrate's impartiality, an unsettling question arises, namely: As the magistrate is a human being and, as such, having internalized beliefs and values through his family and cultural education throughout his existence, how should he act to prevent such personal beliefs and values from interfering in the necessary neutrality that should characterize the decision-making process in the context of the judgment of a case?

Neuroscience can offer an answer to such questioning, through the Theory of Two Ways of Thinking (Dual Process Brain), which, according to Evans and Frankish (2009, p. 331), is composed of system 1 and system 2.

According to Wolkart (2018, p. 495), "[...] for evolutionary reasons, our brain has developed with two systems of functioning of thought, which act in parallel and complementary: the intuitive system, called the system 1, and the reflective system, called the 2 system" (our own translation).

The system 1, or a fast or intuitive system, operates immediately, involuntarily and with minimal or no effort. It encompasses the first cognitive reactions that emerge quickly and immediately after the stimulus from the environment. So, cognitive responses resulting from an immediate and effortless reaction of the mind to a stimulus from the environment, are linked to the system 1.

They are innate reactions of human beings and other animals, such as avoiding danger, reading a word on a sign, understanding a non-complex sentence, etc. These system 1 responses result from intuitions or impressions, or even "[...]


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mental activities become quick and automatic through prolonged practice" (KAHNEMAN, 2012, p. 26, our own translation).

Thus, for example, the use of ready decision models for cases considered to be similar, results from a system reaction 1.

When faced with a new lawsuit, whose subject matter of the dispute is similar to an already prepared model of decision, system 1 of the magistrate's mind causes him to quickly locate and use that model.

The use of pre-elaborated models can lead to greater speed in the provision of jurisdiction, this is true, however, such use, if carried out only on the basis of system 1, may lead to judicial error.

If the decision-making process is limited to the automatic action of system 1, the magistrate will be more exposed to making mistakes when making the decision, errors that will negatively impact the judicial provision, since this will be delivered unfairly, demanding the filing of appeals, which will also impact its timing, in addition to economically impacting the recurring party.

A possible solution would be, then, even having pre-elaborated decision models, the magistrate does not automatically decide from the stimuli of the environment, that is, immediately after having contact with the subject of the process and before properly analyzing the evidence initially presented by the author, even in cases that require the analysis of preliminary orders, since such an immediate and automatic reaction to stimuli from the environment may lead the magistrate to make wrong decisions, granting or not the preliminary order.

Thus, the magistrate, upon receiving the process, must resist the immediate cognitive stimuli that will arise from that first contact, which will activate system 1 and, therefore, activate quick and automatic responses resulting from his personal intuitions and impressions, or even resulting from the prolonged practice of the exercise of the judiciary.

By resisting immediate cognitive stimuli, without making an automatic decision on the first contact he has with the process, the magistrate will allow his personal intuitions or impressions, or even his prolonged work practice, to activate the system 2.


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The system 2, or a slow or reflective system, operates mediately, voluntarily and with mental effort from the agent. It encompasses the cognitive reactions that arise through stimulation arising from personal intuitions and impressions, or even resulting from the agent's prolonged work practice. So, cognitive responses resulting from a mediated (weighted) reaction and with an effort of the mind to a stimulus coming from system 1, are linked to system 2. These are more complex reactions, which require concentration to make choices (KAHNEMAN, 2012, p. 28-29).

Such concentration, resulting from system 2, is necessary so that the magistrate can, through corroborating the existing evidence in the case file, choose (decide) impartially.

As a rule, if the magistrate, from his intuition or personal impression, or even from his prolonged professional experience (system 1), concentrates on corroborating the existing evidence in the process (system 2), instead of deciding quickly from them (system 1), he can make a decision (choice - system 2) with less chance of error, in order to contribute to the delivery of a fair and timely jurisdictional provision.

Therefore, there is a chance of minimizing judicial errors when a decision is rendered based on systems 1 and 2, since these systems "[...] act in conjunction, so that even the reflective system works influenced by information quickly. offered by the intuitive system "(WOLKART, 2018, p. 495, our own translation).

It is stated that, as a rule, from the use of systems 1 and 2, the magistrate will be able to reduce the chances of error when making his decisions, because, like any rule, there is an exception here, that is, the magistrate, even using the systems 1 and 2, you can make decisions based on your personal beliefs or beliefs (system 2), that is, you can use stimuli resulting from your intuition (system 1) to access your personal beliefs and beliefs and decide based only on them.

Personal beliefs and convictions are part of system 2 (KAHNEMAN, 2012, p. 29), so, if the magistrate decides based on them alone, without due corroboration of the evidence in the case file, the chances of judicial errors grow again, since such personal beliefs and convictions can be rejected by the evidence produced by the parties.


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Therefore, neuroscience, through due processes, contributes to the understanding that the minimization of errors in the scope of judicial decisions, may be linked to magistrates who pronounce their decisions from systems 1 and 2 (reflective decision), and not only from system 1 (intuitive) or system 2 (based on beliefs).

## 5 AN INVITATION TO STRENGTHEN ALTERNATIVE DISPUTE SETTLEMENT MEANS

The new coronavirus pandemic has been showing, day after day, that State intervention in private relations, even though it is sometimes necessary for the pursuit of the common good, does not always present the best social result, given that it can burden some groups of people. interest to the detriment of others, which is not desirable.

Given this, it is possible to verify that the resolution of conflicts by the interveners themselves can present much more positive results. Firstly, the increase in procedural speed can be brought up[5], since alternative methods of resolving private demands can provide a reduction in the number of cases to be processed through the common channels (NEVES; MESSIAS, 2018, p. 2142). Consequently, there would be greater efficiency, with emphasis on the reduction of State expenses to the Judiciary, taking into account the reduction of expenses with structure and personnel, in view of the smaller number of cases that would be distributed.

For a better analysis, it is opportune to present real data of the Brazilian scenario in 2018. The report “Justice in numbers”, released by the National Council of Justice in 2019 (CNJ, 2019, p. 79), shows that the Brazilian Judiciary has finalized the 2018 with 78.7 million cases pending, that is, practically one pending by an economically active person.

[5] Messias and Carmo (2019, p. 5) assert that “[...] the effectiveness of the jurisdictional provision is revealed in the satisfaction of the parties' claim in a process, which is closely linked to the procedural speed, as there is no use in delivering to the parties the intended right if, at the time of delivery, it is no longer possible to enjoy such right” (our own translation).


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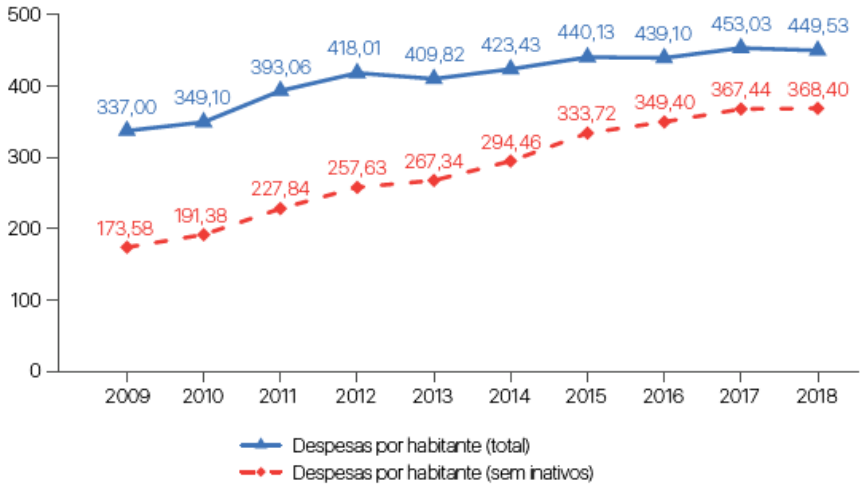
The same report (CNJ, 2019, p. 62) shows that, in 2018, the total expenses of the Judiciary totaled R$ 93.7 billion, an amount equivalent to R$ 449.53 per inhabitant, which corresponds to 1, 4% of the country's Gross Domestic Product, or 2.6% of the total expenditures of the Union, the states, the Federal District and the municipalities, as shown in the graph below:

**Figure 01:** graph of the Judiciary's expenses per inhabitant




**Source:** CNJ, 2019, p. 62

The data presented show that the cost of each process in progress is around R$ 1,190.60 per year (based on 2018), an amount higher than a minimum wage.

With regard to processing, the report (CNJ, 2019, p. 158) shows that the average time in the state court is 4 years and 11 months, as shown below:


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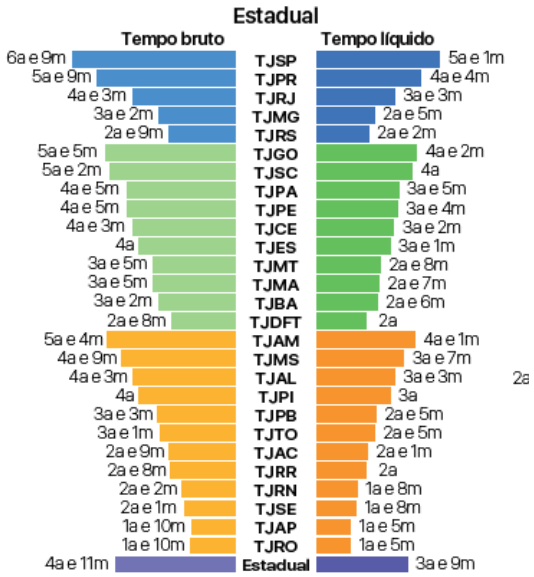
**Figure 02:** average procedural time in state courts




Source: CNJ, 2019, p. 158

In view of the figures presented, it is evident that the Judiciary Power is not able to give adequate and reasonable flow to judicial demands.

In order to exemplify how alternative means can change this scenario and present significant improvements, it is worth bringing up the latest figures released by the Consumidor.gov.br platform, which uses an electronic platform to bring the conflicting parties together in the search for the best solution.

A survey conducted by the National Consumer Secretariat (SENACON) in November 2019 found that the platform solved, up to the date of its realization, 80% of 2 million registered complaints, which means that this alternative method of conflict resolution has avoided the potential legalization of 1.6 million claims (SENACON, 2019, p. 01).

Taking into account the unit cost of each case per year (R$ 1,190.60), as well as the average processing time in the state court (4 years and 11 months), there is a potential savings of R$ 9.3 billion over the 5-year period (considering that the Consumidor.gov.br platform was officially launched in June 2014), that is, approximately 1.9 billion per year.

Likewise, by reducing the number of lawsuits, the average time taken to process cases would tend to decrease, which, under economic aspects, would be positive for the whole of society.

Still with regard to the social economic context, taking into account the best allocation of resources to society, it is worth pointing out and analyzing the 15 factors used by Forbes Magazine in the disclosure of the ranking of the best countries for investment, namely: property; innovation; fees; technology; corruption; infrastructure; market size; political risk; quality of life; workforce; individual freedom; freedom of trade; monetary freedom; bureaucracy; and investor protection (FORBES, 2019, p. 01).

Based on these factors, it is possible to ascertain that the use of alternative means of resolving private conflicts is capable of directly having a positive impact on the factors of innovation, technology, infrastructure, market size, quality of life and bureaucracy and, indirectly, in all others, given the result to be presented by the better performance of the Judiciary and alternative dispute resolution means, which could improve Brazil's position in the world ranking (which in 2019 occupied only 73rd place), attracting a greater volume of foreign investment.

Another important analysis reflects positively on suppliers who, in the case in question, are mainly financial institutions. Report commissioned by the Pontifical Catholic University of Rio Grande do Sul, called “Judicial demands and slowness of civil justice”, whose research team was coordinated by Professors Hermílio Santos Filho and Luciano Benetti Timm, pointed out that among the main motivations of the jurisdicted to litigate there are the low costs combined with the low risk and the search for a gain:

> Judiciary users are rational agents who have their motivations to litigate far beyond simple cultural inertia. But these motivations can be quite different from one agent to another. Those motivations that emerged in the interviews can be grouped into at least four different types: absence or low level of costs, including here also the low risk; the pursuit of a gain; search for the Judiciary as a means, for example, to postpone responsibilities (instrumental use); and the perception of having been injured morally, financially or physically. Among all these motivations, the combination of low costs with low risk exposure stands out, in the perception of the various groups of respondents (PUCRS, 2011, p. 07, our own translation).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In Brazil, the majority of the population has access to the benefits of free justice, which suspends the collection of legal fees and attorney fees in the event of a failure in the demand, no doubt motivating the court to appeal to the Judiciary. In addition, the judge seeks gains whenever he has the opportunity, even though his chance of winning the demand is insignificant, given the multiplicity of understandings of the first instance magistrates facing the same legal issue. The same, to a lesser extent, can also be said about the higher courts.

Given this, with the signaling of the courts regarding the possibility of judicial review of the most diverse types of private contracts, there is no doubt that this is a real social tragedy, through decisions taken without the necessary reflection, which raise the cost social, reason why the historic opportunity offered by the pandemic of the new coronavirus for the State to invest in alternative means of conflict resolution is of enormous importance.

## 6 FINAL CONSIDERATIONS

Judicial decisions should be guided by a more reflective reasoning, through due processes, so that the Law operator, when making decisions, does not see only a tree in an isolated way, but the fullness of the forest.

However, some historical moments, among them the pandemic of the new coronavirus, as verified in the present research, reveal that this is not the reality experienced, because, for example, various actions of contractual reviews have been decided by the Judiciary in an intuitive and non-reflective, in order to punctually favor a consumer to the detriment of the whole society.

It is evident that the simple revision of private contracts by judicial determination in the midst of the pandemic scenario, now experienced, does not reflect the best solution for society, given that it has merely immediate effects, without considering the long-term consequences.

In addition, the culture of judicialization in Brazil, highly linked to its low cost, has contributed to the non-fulfillment of the right to obtain a fair and timely judicial


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provision, since, due to the great labor demand, magistrates end up using, exacerbated manner, pre-elaborated decision models, applying the same decision to similar cases based on an intuitive cognition, which, in most cases, compromises the adequate corroboration of the evidence contained in the case files.

In view of this, it is economically viable for the supplier to quickly resolve consumer dissatisfaction by the alternative means, as the Brazilian scenario is inviting to bring demand and the result is unknown.

In this context and in view of the complexity of judicial decision-making, it is valid to argue that the best way to avoid negative externalities for society, in the search for the way that best conditions resources, is the strengthening of multiport methods for resolving disputes. controversies, which allows the parties to behave in the best way, without negative social reflexes of great impact, maintaining private pacts with observance of objective good faith.

It is also imperative to mention the positive economic aspects that can be generated for the country due to the development of trust and good faith, through multiport conflict resolution methods.

It is in this sense that, taking into account the negative reflexes left by the new coronavirus pandemic, there is an invitation to the need for strengthening and investments by the Brazilian State in alternative methods of conflict resolution, which, without a doubt, would result fewer negative externalities and better allocation of resources by and for society.

It is then up to the State, in order to mitigate the narrated social tragedy caused by inconsequential judicial decisions, to point out and facilitate ways for the parties to self-compose, and not to promote the coercive review of contracts through the Judiciary, a posture that has been generating a enormous asymmetry, given that only a few benefit from these reviews to the detriment of the whole society.


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