

Economic Analysis of Law Review

Economic Incentives of Legal Fees to Public Attorneys Under the Brazilian Civil Procedural Code

Incentivos Econômicos Legais aos Honorários dos Advogados Públicos sob a Égide do Código Processual Civil Brasileiro

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RESUMO

Entre as alterações legais inseridas pelo Código de Processo Civil brasileiro publicado no ano de 2015 está um dispositivo que determina que os valores compensatórios por honorários advocatícios serão destinados aos advogados públicos quando algum ente governamental for a parte vencedora em um processo. O presente artigo investiga os incentivos criados por este dispositivo à atuação de advogados públicos utilizando o referencial teórico da Análise Econômica do Direito. Entre as conclusões preliminares, infere-se que o dispositivo investigado gera incentivos fracos e negligenciáveis sobre o comportamento de advogados públicos da esfera federal, e incentivos fortes para que procuradores municipais e estaduais atuem para maximizar os seus ganhos individuais, ainda que de forma contrária aos interesses coletivos.

Palavras-chave: Honorários sucumbenciais; Análise econômica do Processo Civil; Advocacia Pública.

JEL: K40

ABSTRACT

Among the legal changes brought by the Brazilian Civil Procedure Code of 2015, there is a section that ruled that the attorneys' fees shall be paid to public attorneys when any governmental entities are the winning party in a lawsuit. The present article analyses the incentives that such rule created to the public attorneys' performance, based on the theory of the Economic Analyses of Law. Among the preliminary conclusions, is the inference that such rule created low and negligible incentives to the performance of federal government's public attorneys and created high and significant incentives to municipal and state public attorneys, who are encouraged to perform in a way to maximize their individual gains, even when it is contrary to the public's interest.

Keywords: Attorney's Fee; Economic Analysis of the Civil Procedure; Public Attorneys.

R: 17/12/18 **A:** 09/06/20 **P:** 31/12/21

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1. Introduction

For the longest of time, Brazilian public attorneys were compensated through monthly salaries and, in general, received high-paying salaries when compared to Brazilian standards. Historically, the amounts are determined by the employer, who can be either a municipality, a state government, a public enterprise, or a Federal Department or a Federal Agency. In addition, the hiring process and career promotions are based upon highly competitive knowledge exams, and once admitted, public attorneys gain the privilege of stability.

In 2015, the Brazilian Congress enacted a new Civil Procedure Code which included a provision addressing the payment of legal fees. The Code provided that whenever the Government is the winning party of a lawsuit, the attorney fees and cost of litigation are paid to public attorneys, rather than to the government. On the other hand, if the Government is the party who loses the lawsuit, the Government is responsible for paying the attorney fees and cost of litigation and no reduction is made from the public attorneys' salary. Another relevant peculiarity brought by Brazil's new Civil Procedure Code is that the attorney fees and cost of litigation when paid by private litigants are awarded to the public attorney to share its amount with all public attorneys from that administrative jurisdiction that won the lawsuit.

This rule was object of constitutional review by the Brazilian Supreme Court, which decided that the rule enacted by 2015 Civil Procedure Code was not unconstitutional, asserting that the rule would create incentives to increase the productivity of public attorneys when defending public interest. This statement, however, is challenged by this paper, presenting some economic incentives created by the rule which may arise due to inefficient behavior of public attorneys.

Considering that the revoked Brazilian Civil Procedure Code also required private litigants to pay attorney fees and cost of litigation to government when the government was the winning party in civil actions the present paper will demonstrate that the new Civil Procedure Code did not change the existing incentives to private parties, but rather changed the incentives to public attorneys.

This paper aims at describing the set of incentives created by the new rule. It evaluates whether the new Brazilian Civil Procedure Code leads to behaviors that are aligned with the public interest. It analyzes the hypothesis that the new rule may increase public attorneys' productivity, due to the possibility of an increase in their gains. It analyses the possibility of creating incentives in filling negative expected values lawsuits (NEV) or in providing inadequate legal advice to increase judicial litigation. It also analyses how these effects shall be more intense among municipal and state's public attorneys, and less intense among federal government's public attorneys.

The article first briefly describes Brazil's judicial rules applicable to when the government is a party to a lawsuit. The second section describes the general aspects and duties of public attorneys, and the fundamentals of the Brazilian Supreme Court constitutional review of the investigated rule. These explanations are crucial to present the hypothesis.

The third section describes basic concepts of the economic analysis of litigation, such as the rationality of the agents, the decision to litigate, and agency costs in the client-attorney relationship, especially concerning government and public attorneys.

The fourth section describes the economic incentive model created by the rule that attorney fees and cost of litigation originating from civil litigation are due to public attorneys. It first presents the litigation that shall be expected to arise from the incentives for public attorneys' advising role;

then it presents the expected incentives to public attorneys' civil litigation roles; and, finally, the impact of the size of the office.

The conclusion presents the limitations of the model, due to the non-monetary incentives such as status, prestige, professional profile of public attorneys, and cultural matters which may influence the investigated behavior.

2. General Aspects of Litigation in Public Issues in Brazilian Procedural System

In order to explain the incentives generated from the new Brazilian Civil Procedure Code, it is important to mention that Brazil is a federal country, with its territory politically composed of the Union, considered the federal government and embracing the whole territory, the States, and the Municipalities³. Although the Constitution of the Federal Republic of Brazil expressly determines the administrative autonomy of each instance, the Union retains the majority of the legislative powers. The remainder of such powers is conferred to the states and the municipalities. Therefore, the Union as the legitimate owner of the power to legislate in matters of civil procedure⁴, enacted a uniform civil procedure code in 2015⁵ to substitute the previous code enacted in 1974.

The Judicial Branch is divided between State Courts and Federal Courts. State Courts are courts of general jurisdiction. Federal Courts have exclusive jurisdiction over cases in which the federal government, federal agencies, and federal enterprises are a party. The harmonization of federal law interpretation is performed by the Superior Tribunal de Justiça (Superior Justice Court) and the harmonization of constitutional interpretation is performed by the Supremo Tribunal Federal (Supreme Federal Court), both issuing binding precedents to be applied by federal and state courts.

The above description demonstrates that due to the administrative independence of the judicial agencies, every administrative division has its own attorney's office. Despite the independence, they all are subject to the same civil procedure code, the same sparse legislation over procedural rules that are enacted by the Union, and the binding interpretation issued by the Superior Tribunal de Justiça and Supremo Tribunal Federal.

2.1 General Aspects of Law Enforcement in Public Issues and Tax Matters

In public matters, the law enforcement by the Brazilian Judicial Branch varies according to the type of litigation and to whether the government is the defendant or the plaintiff. If the government is the defendant or is the plaintiff in cases that do not involve payments of debts and fines⁶, the rules applicable to private parties also apply to the government.

However, the rules are considerably different when the government is the plaintiff demanding the payment of monetary values. Law enforcement on pecuniary public issues mostly requires the Judiciary to play its role. Although there are some exceptions, the general rule is the

³ Article 18. The political and administrative organization of the Federative Republic of Brazil comprises the Union, the states, the Federal District and the municipalities, all of them autonomous, as this Constitution provides.

⁴ Article 22. The Union has the exclusive power to legislate on:

I – civil, commercial, criminal, procedural, electoral, agrarian, maritime, aeronautical, space and labor law;

⁵ Law n. 13.105/2015.

⁶ Law n. 13.105/2015.

government can only administratively apply minor restrictions as sanctions to force debtors to pay debts and fines, such as diminishing credit scores or prohibiting the hiring by or selling of goods to the government. Forced expropriation of assets or property require Judicial expropriation procedure, after an administrative debit valuation procedure⁷.

The administrative procedures are generally held in governmental departments, with some basic rules bounded by municipal, state, or federal law, and by specific rules enacted through administrative regulation, whether by the head of the Executive Branch, as the Mayor of a Municipality, the State Governor or the President, or by the directive committee of independent agencies or public enterprises⁸.

When the government is a party in a judicial collection suit, the defendant is required to provide a collateral of the debt by presenting properties or assets on the defense. This collateral may determine the unavailability of the guaranteed property while the process is not definitely decided⁹. If the case is decided in favor of the defendant, the property or the assets are then returned to the defendant or released from its unavailability without any compensation to the defendant¹⁰.

It is, therefore, possible to conclude that being a defendant against the government in a collection action to pay a debt or fine can be very burdensome due to the obligation to guarantee the debt before a decision is made and not receiving any monetary compensation in case a defendant is found not in debt before the government.

2.2 Litigation and Attorney Compensation Costs for Government Litigation According to Brazil's 2015 Civil Procedure Code

Brazil's 2015 Civil Procedure Code determines that the losing party in a civil litigation suit must pay for all legal fees and costs, which includes the winning party's lawyer's fees¹¹. When the government is the plaintiff in a demand for taxes or fines, the compensation fee is fixed by 20% of the amount of the cause¹². When the Union is the defendant, the amount varies from 20% of the value paid by the losing party for causes of value below 200 national minimum monthly wage, to 3% of the value paid by the party who loses for causes of value greater than 100,000 national minimum monthly wage¹³.

The duty to pay legal fees does not represent any changes from the previous Civil Procedure Code. However, the new Civil Procedural Code introduced the rule that establishes legal fees from the losing party shall be paid to public attorneys in lawsuits where the government is the winning party. The new Civil Procedural Code also innovates by establishing that, in a case where the government loses the lawsuit, the government itself, not the public attorney, shall be responsible for paying the legal fees¹⁴.

⁷ Article 7 of Law n. 6.830/1980

⁸ Law n. 5712/1966

⁹ Which means after appeals are decided.

¹⁰ Article 9 of Law n. 6830/1980.

¹¹ Article 85 of Law n. 13.105/2015

¹² Article 30, II, of Law 13.327/2016

¹³ Article 85, 3rd paragraph, of Law n. 13.105/2015

¹⁴ Article 85, 19th paragraph, of Law n. n. 13.105/2015

2.3 Settlement Possibilities in Governmental Litigation

Each government level has large discretion to enact rules regulating settlements in lawsuits where the government is a party. However, the unified federal rule sets the minimum value and conditions that shall be observed¹⁵.

The general law for settlement in suits where the government is the plaintiff demanding taxes and monetary debts allows private parties and public attorneys to split the payment in a maximum of 60 monthly installments and with a reduction of late payment fee¹⁶. However, Congress often enacts laws with temporary rules of settlements for specific debts, as it was done by Law n. 13.606/2018, which allowed public attorneys to settle under special conditions to split payment of farmers' tax debts in a maximum of 180 monthly installments without interest. Similar situations occur with State Governments and Municipalities.

Settlement possibilities are restricted when the government is the defendant. In such cases, settlements require consent from the public attorney, also from a representative of the prosecutor's office, and also from a judge. If the settlement provides for the transfer of property from the government to a private party, consent from the Legislative branch is also mandatory¹⁷. Every settlement requires a reimbursement of expenses for lawyer's representation equal to 10% of the settlement's value¹⁸. When acting as a defendant in a settlement, the government assumes the responsibilities and the public attorneys do not receive any compensation.

2.4. The Sharing of Lawyers' Representation Compensation Fees Among Public Attorneys

The attorneys fee and cost of litigation received when the government is the winning party is divided among all public attorneys that belong to the same administrative jurisdiction, including the public attorneys that have already retired. The pay varies according to each level of government, attorneys seniority in office and the amount of time of retirement.

In the federal government, attorneys in their first year of service receive 50% of the standard value and the amount increases annually, reaching the standard value in five years. For retired attorneys, the standard value is received in the first year of retirement, and the share is reduced annually until it reaches the minimum of 30% of the standard value in 9 years, keeping the percentage of the share for older retired attorneys¹⁹.

3. The Role of Public Attorneys in Brazil's Judicial System and the Compensation Fees

Brazil's Federal Constitution of 1988, on articles 131 to 133, established that the services rendered by public attorneys are essential to the administration of Justice. Those articles also determine that public attorneys are to represent public entities, such as the Federal Union, States

¹⁵ Article 15 of Complementary Law n. 101/2000

¹⁶ Law n. 10.522/2002

¹⁷ Complementary Law n. 73/1993

¹⁸ Article 30 of Law n. 13.327/2016

¹⁹ Article 30 of Law n. 13.327/2016

and Municipalities, administratively and judicially. Public attorneys are also in charge of providing legal advice to governmental entities and to the Executive branch.²⁰

A high level of discretion and protection from political interference are set in their activities, functional liability and salary. As explained by Di Pietro (2016), public attorneys are to defend not the institutions themselves, but the public's interests. So therefore, public attorneys defend public entities in pursuing public interests, not the interests of the individuals representing public entities.

On their duties, public attorneys are legitimately responsible for representing the Federal Union in civil action in the public interest²¹, the Federal Union in actions against official misconduct²², and are to hold accountable those who practice malicious acts against the public administration²³. Besides those roles, Public attorneys are also in charge of providing legal counseling to representatives of governmental entities when dealing with internal control and management.

Public entities are required to consult with public attorneys to make sure their conduct abides by the law. These public authorities may consult public attorneys to know if their future, past or current conduct are legal. As a consultant, public attorneys research and interpret the law and provide counseling to public authorities so the public's interest, not the authorities interests, prevails.

Finally, public attorneys perform their advisory role by reviewing all contracts entered into by the government. Those contracts are required by law to be revised and analyzed by public attorneys, who then provide legal advice as to the legality of the transaction. The Executive branch may also request the opinion of a public attorney to verify the legality of public policies and regulation for decision-makers.

One interesting issue about the role of public attorneys is that, according to Brazil's Supreme Court²⁴, public attorneys are not liable for mistakes committed when providing legal opinion or legal advice, even if a wrong legal opinion is used by authorities to justify illegal acts or policies that cause damages. Only when it is proved that a legal opinion was willfully given with the intent to legitimate illegal acts, such as for corruption purposes or gross mistakes, will a public attorney be held accountable for the wrong advice. However, because it is usually very hard to prove that an opinion was willfully drafted with such malicious intent, it is very unusual for a public attorney to be held liable for giving wrong advice.

²⁰ Article 131. The Advocacy-General of the Union is the institution which, either directly or through a subordinated agency, represents the Union judicially or extrajudicially and it is responsible, under the terms of the supplementary law which provides for its organization and operation, for the activities of judicial consultation and assistance to the Executive Power.

Article 132. The prosecutors of the states and of the Federal District, organized in a career, admission into which shall depend on a civil service entrance examination of tests and presentation of academic and professional credentials, with the participation of the Brazilian Bar Association in all of its stages, shall exercise judicial representation and judicial consultation for their respective federated units.

Article 133. The lawyer is indispensable to the administration of justice and is inviolable for his acts or manifestations in the exercise of his profession, within the limits of the law.

²¹ Article 5 of Law n. 7347/85

²² Article 17 of Law n. 8429/92

²³ Article n. 19 of Law n. 12846/13s

²⁴ Decision n. MS 24.631-6/DF,

3.1 Public Attorneys Career and Remuneration

The regulation of public attorneys is defined by the entity to which the public attorney represents. So, therefore, the federal government, the state government or a municipality will determine in its regulation the rules that apply to the public attorney's role. Some aspects are common to all public attorneys, some other aspects differ according to the branch.

The admittance requirement of public attorneys is the same for all entities, since Brazil's Federal Constitution determines that public attorneys are required to take a knowledge public test and show clear criminal and civil records. Also, no matter if a public attorney works for the Federal Union, for the State, or for a Municipality, all public attorneys, once admitted, acquire job stability, which is a benefit that secures employment to the public attorney throughout their lives. This means that a public attorney may not be fired or laid-off unless they have committed a serious fault (i.e.: corruption, use of drugs or alcohol while working, etc.)²⁵. Also, public attorneys progress in their career according to seniority, knowledge in specific areas, and/or nomination for higher positions through political influence²⁶.

As per public attorney's remuneration, Brazil's Federal Constitution determines that public attorneys are compensated with what is called subsidy. Their initial remuneration varies according to the entity which they defend and/or represent. The amount of the remuneration of a federal public attorney may vary in accordance to the career position, but public attorneys are among those who receive the highest compensations in civil service. Besides the subsidy, after the New Civil Procedure Code was enacted, public attorneys receive an additional to the subsidy mentioned above, the litigation compensatory fee, which is divided among all 12,500 federal public attorneys²⁷, in the Federal Government, or among the public attorneys of the State or the Municipality.

According to the federal government, from February 2017 to June 2018, the government received a total of R\$ 906 million for attorney's compensation fees, which resulted in R\$ 4,500.00 being paid to each federal public attorney monthly (CASTANHO, 2018). A different scenario is seen in municipalities. Brazil has 5,570 municipalities and only 317 of them have more than 100,000 habitants (IBGE, 2020). Small municipalities generally have few public attorneys and their salaries are generally lower than their federal and state peers.

Regarding attorney's fees, the value that public attorneys receive varies according to different factors, such as the nature of the suit, the locality where the suit is being processed, and the number of public attorneys on duty in a certain entity. Although the variation on the amount of remuneration received by public attorneys is great, it is possible to conclude that the legal fees received by public attorneys can greatly impact and shape the behavior of public attorneys representing the government and public entities on litigation and/or counseling activities, as it is presented below.

3.2. Brazil's Supreme Court Decision About the Investigated Procedural Rule

After the Civil Procedure Code of 2015 was enacted, there has been great discussions over whether public attorneys receiving the legal attorney fees from the losing party is allowed by Brazil's Federal Constitution.

²⁵ Articles 131, second paragraph, and 132, *caput*.

²⁶ Complementary Law n. 73/1993

²⁷ Article 30 of Law 13.327/2016

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According to the Federal Constitution, public attorneys are entitled to receive a monthly compensation called subsidy. There was a minority understanding that the payment of attorney's fees to public attorneys would violate that constitutional provision²⁸. Those in defense of such understanding argued that only private attorneys would have the right to receive attorney's fees, and that such privilege would not contemplate public attorneys, since public attorneys would only be allowed to be compensated through subsidy.

Due to this unsettled controversy, the Union's general-attorney filed a suit to obtain a declaration of unconstitutionality²⁹, pledging Brazil's Supreme Court (Supremo Tribunal Federal) to pronounce and determine whether the rule stating that the attorney's fees should be paid to public attorneys violates the Constitution.

Such controversy was settled on June 22, 2020, when Justice Alexandre de Moraes followed by a concurrent decision from Justice Luis Roberto Barroso and a dissenting opinion from Justice Marco Aurelio, determined that the payment of the attorney fees from the losing party to public attorneys does not violate the Federal Constitution.

In a dissenting opinion, Justice Marco Aurelio argued that the attorney's fees, since its origins, were created to compensate the winning party for the legal fees such parties had to pay in order to defend one's right before the court. In other words, the attorney's fees would be paid to benefit the winning party, not the winning party's lawyer. The court's understanding was that the winning party should not have to spend money with attorney's fees to defend one's right. Justice Marco Aurelio argued that the legislator of the New Civil Procedure Code did not take into consideration the basic concept of the attorney's fees and therefore, concluded that the New Civil Procedure Code was based on the wrong rationale when establishing that attorney's fees should be a form of compensation for the services performed by the public attorney.

Justice Marco Aurelio de Mello also argued that public attorneys are subject to a different type of regime, according to which their compensation is made through subsidy and other types of compensation would be incompatible with such regime and would be a violation of the Federal Constitution.

The court came to a decision, based on Justice Alexandre de Moraes and Justice Luis Roberto Barroso's opinion, ruling that the payment of the legal fees by the losing party is compatible with such section of the Constitution because the attorney's fees, just like the subsidy, are a compensation for the services performed by the public attorney within a process. Both justices stated that attorney's fees are compatible with the subsidies because they both are forms of compensation for the legal services performed in a lawsuit. The Court also argued that this interpretation is in accordance with the regulation of the Ordem dos Advogados do Brasil (Brazilian Bar Association), according to which the legal services rendered entitles an attorney to receive attorney's fees from the losing party³⁰. So therefore, because public attorneys are also

²⁸ Article 39. The Union, the states, the Federal District and the municipalities shall institute a board of administration policy and personnel remuneration policy, composed of public employees appointed by the respective Branches. Paragraph 4. A member of one of the Branches, the holder of an elective office, the ministers of State, and the members of State and Local Cabinets shall be remunerated exclusively by means of a compensation consisting of one sole item, the addition of any extra benefits, additional pay, bonus, award, representation allowance, or other type of remuneration being forbidden, with due regard, in any of the cases, for the provisions of article 37, items X and XI. Paragraph 8. The remuneration of public employees organized in a career may be established under the terms of paragraph 4.

²⁹ ADI n. 6053/DF

³⁰ Article 22 of Law 8.906/1994

subscribed to Ordem dos Advogados do Brasil, the same rights that are applicable to private attorneys are also applicable to public attorneys.

According to Justice Alexandre de Mores mentioned Article 39, § 4th of Brazil's Federal Constitution does not prohibit public attorneys from receiving other forms of payment besides the subsidy and adds that, should the other forms of compensation be prohibited, the Constitution would have determined such prohibition explicitly, just like it did with judges and prosecuting attorneys. Justice Alexandre de Moraes concluded that by determining that only private attorneys are allowed to receive attorney's fees would violate the constitutional principle of equality.

Finally, Justice Alexandre de Moraes added that the new law established by the New Civil Procedural Code is in accordance with the constitutional principle of efficiency³¹, because it encourages public attorneys to perform at their best when representing the Executive branch and defending its interests. By doing so, the new determination made by the Civil Procedural Code of 2015 encourages public attorneys to better defend the public's interest.

Despite Justice Alexandre de Mores' legal opinion, there are some economic considerations that must be made with regards to his reasoning concerning the efficiency of the accomplishment of the public interest. There are aspects which indicate that the rule may, create no impact on federal attorneys and, even encourage those who work for municipalities to act against the public's interest, maximizing their personal gains by increasing litigation and providing low quality legal advice. The reasons for these concerns are presented below.

4. Economic Aspects Derived from the Decision to Litigate or to Settle

Before analyzing the incentives that arise from the new rule that mandates the transfer of attorney's fees to public attorneys, it is important to highlight the economic aspects involved in the decision of whether to litigate or to settle. It is equally important to mention the principal-agent problem in the lawyers-client relationship in governmental litigation.

4.1. Basic Assumptions: Rational Behavior, Scarcity and Methodological Individualism

The first assumption to be made is that legal rules influence the way people behave. Rules are established to regulate how those who are subject to such rules perform in business, work, consume goods and deal with social conflicts. In a public work context, changes in remuneration rules may cause increases in productivity, promote higher or lower attendance and dedication or, in some cases, affect the allocation of efforts that workers may make in different activities of the job.

A legal analysis does not provide a behavioral model that explains or predicts the results of changes in rules. It aims to investigate the validity of the rules and the legality of behavior of those who attempt to perform an activity prescribed by law.

One of the scholars attempts to explain the way people respond to legal rules is the Law and Economics approach to legal analysis. It consists of applying concepts and tools of Economics,

³¹ Article 37 of Brazil's Federal Constitution

generally Microeconomics, to elaborate predictions of the effects of laws on markets and individual choices.

Some Economics assumptions are widely used, besides the large changes and evolution of the field, and are useful to explain the outcomes of the rules studied in this paper: rationality, scarcity and methodological individualism.

Rationally, it is assumed that people have preferences, and they will make choices and act accordingly with them. It is inferred that people would try to avoid outcomes that they dislike and seek results that provide more of the utilities they like, in a utility maximizing behavior. This assumption does not neglect the fact that, sometimes, people act in a way that should look irrational for an external observer. Also, it is known that people have biases and backgrounds that may interfere with their decisions. However, in a work context in which decisions are related to individual monetary gains, people will generally act in a way that increases their salaries (FRIEDMAN, 1996, p. 3-4; MANKIWI, 2008, p. 6-7).

In a job in which workers have many activities and are able to choose how much time and effort they will dedicate to each activity, it is assumed that most people would choose to focus on the tasks with the greatest potential to increase their gains and neglect the tasks that do not offer monetary rewards. This assumption may also be applied to bureaucrats which are subject to variable income.

The second economic consideration is the scarcity of resources. By scarcity, it is assumed that resources are finite and there will always be tradeoffs in life. As an example, by choosing to spend cash while buying a car one automatically renounces the possibility of using that money to buy everything else, like travelling or buying a boat (BUTLER; DRAHOZAL; SHEPHERD, 2016, p. 5).

In the labor market, one of the resources traded is time, and employees are hired to spend their time and efforts performing the activities designated by employers. In a scarcity context, the time spent working cannot be used for leisure or other activities, and it is traded by salary. On works with variable remuneration, in which some activities are rewarded with extra gains while others are not, it is expected that the employees would choose to spend more time and efforts in a way which would increase their gains.

The same assumption could be made to bureaucrats who earn a fixed amount and receive extra compensation as a result of some of their duties. As a result of different incentives, it is expected that extra efforts would be made in activities which result in increases in remuneration, while less efforts, just enough to fulfill the occupational duties, would be made on those that do not increase the income (LEMOS; MINZER, 2014).

The last assumption is methodological individualism, which means that most people respond in similar ways to similar incentives and contexts. In this sense, it is possible to predict the aggregate behavior of people by economic models if the incentives to the individuals are known (HODGSON, 2007; GICO JUNIOR, 2010).

As a simplistic example, it is predictable that most people would prefer to buy the less expensive option of equal products in a digital marketplace in which there are two retail sellers. Equally, the prediction that most people would turn the air conditioner (A/C) on in a temperature of 38° C (100° F) is highly accurate, even if we consider that there are few persons who dislike A/C environments.

These assumptions may make it possible to make some predictions about the outcomes of the change in public attorneys' compensations. Before making statements about public attorneys' behavior, some considerations are presented below concerning the decision to litigate, the client-attorney relationship and the government-public attorney relationship.

4.2. Litigation Costs, Expected Value, and the Decision to Litigate or to Settle

In the rational behavior model of microeconomics, people have preferences and will act in a way to maximize those preferences based on a cost-benefit analysis they make according to the information they have. By applying a rational behavior concept to civil litigation, one can predict that a plaintiff will decide to litigate based on whether the prospective returns are higher than the costs. On the other hand, a defendant will choose to litigate if the cost of litigation is low (BONE, 2003, p. 20-25).

Following these premises, plaintiffs calculate the expected value of litigation, which is the value one has the right to receive multiplied by the probability of winning the suit. Both factors are subjectively determined according to the plaintiff's personal beliefs about her rights, about the risks involved, and according to evidence the parties have to support their claim. The costs of litigation are subtracted from this value and include Court litigation fees, taxes, attorney's fees, and the cost opportunity of the value invested. If the costs of litigation are higher than the value of litigation, it will be a Negative Expected Value (NEV); if the costs are lower than the value to receive from the litigation it will be a Positive Expected Value (PEV) (KOBAYASHI, 2015).

For the defendant, the value of litigation will be the amount to be paid to the plaintiff plus the costs of litigation. Generally, if the expected value to the plaintiff is lower than the expected value to the defendant, a settlement probably will occur, depending on the bargaining abilities of both parties (KOBAYASHI, 2015).

With these assumptions and the information provided previously about the aspects of civil procedure in Brazil, it is possible to identify some considerations of expected value for government, public attorneys and private parties in litigation.

The procedural rules applicable when the plaintiff is a private party are similar to the rules that are applicable to private litigation. The difference is that the government is more willing to appeal to the highest courts, since it is not required to pay court fees or taxes. Therefore, litigation costs for a private party shall be higher. Settlements are rare due to the previously mentioned restrictive rules to settlements.

When the government is the Plaintiff, due to the fact that the government bears all the costs and risks of litigation and public attorneys bear only the time they spend in a lawsuit, the utility of a judicial claim is not equal, this aspect leads to agency problems as described below. Some claims that may be NEV for the government due to the high probability of defeat may be a PEV for public attorneys due to low costs and risks in suing. Considering that a public attorneys' time and workforce are limited resources, and due to the low cost of litigation, when the government is the plaintiff the value of litigation is usually positive for public attorneys.

Private defendants, when disputing payments of taxes, debts or fines will face a high cost of litigation since they will be obliged to present a collateral to the debt before presenting their defense. Besides court fees and attorneys' compensation, the defendant shall make a deposit or dispose of property while the lawsuit is pending to guarantee the claim, and sometimes this will

mean great opportunity costs. Therefore, one shall expect private parties to seek a settlement when they are the defendant against the government, unless the chances of winning are substantially high.

These aspects are related to the economic model of the incentives created by the legal compensation rule to public attorneys below.

4.3. Agency Costs in Government Litigation

According to the rational behavior model, lawyers and public attorneys are rational agents. As rational agents, they have their own preferences and will seek to maximize such preferences. Such personal preferences, however, do not always correspond to the parties' preferences. In situations where there is an asymmetry of information³² and where the parties lack control over the acts of their representatives, the agents may perform their duties aiming at achieving their own goals, instead of the party's goals (MILLER, 1987).

In Economics, an agency problem is considered a cost because it represents losses that occur due to conflicting interests between the agents and the clients. These costs and losses that are imposed due to conflicting interests, lack of control of the agent and asymmetric information about the technical aspects of litigation are examples of agency costs.

An example would be a lawyer-client relationship. Due to the asymmetric information between the lawyer, who has the information about the risks and costs but seeks to maximize her own preferences, and the client, who bears the costs of litigation and knows little about the costs involved, the attorney may maximize her gains by charging more hours than it is necessary, or recommending investigations and appeals that would probably be unsuccessful (RIBSTEIN, 1998).

Agency problems also occur with public servants and bureaucrats, whose behavior will depend on the incentives set by the institutional framework to which they are subject. A set of rules, that doesn't include rules regulating public servants, is prone to create a working environment of persons seeking their own interest instead of acting to achieve the public's interests, and therefore, an agency problem also occurs (LEMOS; MINZER, 2014).

Considering that public attorneys are public servants who represent the government, general economic theory predicts that they are prone to act as agents and seek their own interests, especially if there are institutional gains by doing so. As previously mentioned, public attorneys in Brazil are highly independent. They are selected after passing a very competitive knowledge test and have the privilege of job stability throughout their lives. Political control is limited to the nominations among the staff (by the Executive branch) and career remuneration (set by law, enacted by the Legislative branch). It is possible, that monetary incentives to increase production, as proposed by the rule herein investigated, may also create incentives to perform duties in a way that does not benefit the public's interest.

³² Asymmetrical information occurs when one side has important information about the of the transaction which is not possessed by the other side (BUTLER; DRAHOZAL; SHEPHERD, 2016, p. 622).

5. Incentives to Public Attorneys Derived from Lawyers' Compensation Costs

Considering the information presented in the preceding sections, it is possible to predict the expected behavior of public attorneys while performing advisorial duties and litigation representation.

The incentives generated by the new rule in relation to the transfer of the attorney fees and cost of litigation to public attorneys will vary according to factors such as whether the cause is adversarial or counselling; whether the government is the plaintiff or the defendant; whether the attorney performs an advisor role; and according to the size of the office—that is, the number of public attorneys who share the amount received.

5.1. Expected Incentives for Public Attorneys on Representative Role in Litigation

According to Lemos and Minzer (2014), in situations with monetary incentives to enforce fines as fees, it is expected that public servants would try to increase the budget, preferring to apply penalties even in situations that could be solved by regulation, arbitration, or guidance. The same situation may occur with public attorneys.

The rule's incentives to public attorneys differ, depending on the situation and whether the government is the plaintiff or the defendant. When the government is the plaintiff, public attorneys receive compensation fees in both situations: either if the government is the winning party or if the case is settled. The costs for filing lawsuits are low since no court fees are applied and, if the case is decided in favor of the defendant, the government pays the lawyers' compensation fees with no reduction on public attorneys' remuneration. Among the costs to public attorneys are the opportunity costs of not working on another case, besides cultural or reputational aspects (WOLKART, 2019, p. 471-483).

In this sense, some litigation in which the probability of success is low and would be a NEV suit to the government, due to the obligation of paying the lawyers compensation fees to the private party, may be proposed. Because public attorneys do not bear any costs other than their time, and some suits may be filed by "copy and paste" texts, demand just few minutes, even lawsuits which has very low probability of success may be worth it, if the value of the time spent is lower than the net benefit of suing (WOLKART, 2019, p. 471-483).

Considering that the cost of litigation is high for private defendants, especially due to the collateral, public attorneys know that there will be chances of settlement even in lawsuits highly favorable to the defendant, increasing their gains with lawyers' compensation fees. At least, it is expected that some cases will be settled even in a probable prospective defeat for the government. Therefore, it is expected that the rule enacted by the new Civil Procedure Code increases the number of NEV lawsuits.

When the government is the defendant, public attorneys also gain lawyers' compensation fees when the government wins the case. In this scenario, it is expected that public attorneys will spend more time and resources in lawsuits than it is optimal, neglecting other activities which are their duty. This scenario may result in a not optimal level of litigation, in which a quantity of government resources and public attorneys' efforts may not be adequate to the economic results they produce.

The possible result is a situation in which public attorneys will prefer the increase in the number of lawsuits in order to increase their gains as it will be demonstrated in the next subsection. However, some considerations on the effects of the distribution rules of the compensation fees among public attorneys may reduce the impact of the rule investigated, as presented below.

5.2. Expected Incentives for Advisor Role of Public Attorneys

Considering that public attorneys increase their gains with litigation but do not increase their gains when performing good advisory work, it is possible that they will seek to give legal advice that will increase the number of lawsuits as a consequence of the possibility of increasing the budget, instead of solving problems by guidance (LEMOS; MINZER, 2014).

An agency problem shall occur, with gains to the agent that behaves against the principal interest (i.e., against public interest), due to asymmetric information and low level of control of a public attorney's behavior.

Asymmetric information results from the privileged position and information held by public attorneys who provide legal advice to authorities of the Executive Branch that are likely to not have information about the situation (otherwise it would not be asking for legal advice). The lack of control occurs due to the legal regime of high level of independence and job stability conferred by law to public attorneys and to the fact that public attorneys are not liable for the consequences of their legal advice.

Because the rule under analysis creates incentives for public attorneys to increase litigation (even if it is against the public's interest) in order to increase their personal gains, it may occur changes of allocation of personal resources (i.e. time and efforts) of public attorneys on legal advice as an investment.

The predicted effects, however, may be limited on some instances or offices, depending on the number of participants sharing the amount of legal compensation fees collected, as explained below.

5.3. The Size of Public Attorneys' Offices and the Problem of Collective Action

Another specific issue that may influence public attorneys' behavior is the size of the office and the number of participants that share the gains. The economics of collective action premises that the greater the number of participants, the higher the costs to gather all the participants in the action, due to the increased transaction costs to reach an agreement and the higher costs to control the participants and avoid the free-rider problem (OLSON, 1971, p. 53-65).

Following this rationale, when the number of participants increases, the individual contribution to the final goal decreases and the transaction costs and costs of control increase. When it reaches the point where the individual gains for gathering the action and the control of individual contribution is lower than the costs to the individual to contribute, it is expected that the participants will seek to just receive gains without contributing in a free-rider behavior (OLSON, 1971, p. 53-65).

As previously stated, the number of federal public attorneys is high (around 12,500). It is expected that any efforts taken by a single public attorney to receive a greater value would represent a very small share of the value received by each public attorney (which includes the attorney that performed the act). For this reason, it is also expected that, in the federal government and in most populous states, individually, few public attorneys would act towards increasing their own gains.

In summary, it is predicted that the rule of payment of compensation fees to public attorneys creates no (or minimum) incentives on the behavior of the federal government, with no increase in productivity or changes in the way the work is performed. It represents a mere increase in public attorneys gains with no substantial impact on the work performed.

On the other hand, small municipalities generally have a small number of public attorneys. In this situation, the costs of controlling each other and reaching an agreement to act to increase their gains is low, and the individual's gains on their own acts is high due to the small number of participants to share with the value received.

It is expected that public attorneys of municipalities and small states will receive incentives to increase productivity, but not necessarily to perform their duties in accordance with the public interest since they have incentives to increase NEV litigation and provide low quality legal advice.

5.4. Limitations of the Economic Model on Cultural Aspects and Work Environment

It is necessary to mention that the economic model developed in this paper has limitations. Cultural aspects and offices' organizations, reputation, moral aspects, work environment and social recognition are also valuable to public attorneys. Besides the fact that the model isolated the variable of remuneration incentives as well as the difficulty in predicting the impact of other incentives without empirical data, it is important to make a few comments on culture and work environment.

On the cultural and moral aspects, small municipalities may also have greater reputation incentives due to the fact that it is easier to be known and recognized socially by a bad action. In this case, a public attorney who often files NEV suits may meet the victims of his or her actions in church, at the gym, or at a soccer game, and it may make social life hard. Work environment and the way the work is organized may also have the impact of reducing economic incentives created by the rule here in analysis since it may create incentives to public attorneys to perform their duties in a different way.

6. Conclusion

This paper presented the economic incentives created by a rule enacted by Brazil's Civil Procedural Code of 2015, which determined that attorney fees and judicial costs received by the government when the government is the winning party shall be paid to the public attorneys, not to the government.

Public attorneys do not assume the risks of litigation. Public attorneys receive the legal fee when winning the litigation, while the government supports the costs and the compensation fee when losing the litigation.

A key aspect of the rule is that the amount collected as legal fee is divided among all the attorneys of the office. For this reason, depending on the size of the office, the attorney who works on the action receives a slight amount of the acquired fee, which makes the gaining of the shared amount a mere increase on the subsidy with little impact on the productivity and the behavior of the public attorneys.

On this regard, the argument of the Supreme Court Ministro Alexandre de Moraes of the increase of efficiency and productivity does not apply.

However, there are incentives for public attorneys of small municipalities to allocate resources to increase litigation to an inefficient level, even in inadequate legal counseling. In this situation, the investigated rule creates incentives which are contrary to the public interest.

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