# Judicial Delegation of Administrative Acts During the Execution Phase or Execution Process

## The Application of the Constitutional Principle of Efficiency, Under the Inspiration of Recent Portuguese Law Reforms

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**Abstract**

*The Constitutional Amendment 45/2004 emphasized the need for efficiency in both administrative and judicial judgments in Brazil and introduced the right of a trial within reasonable time (Art. 5, item LXXVIII) in the 1988 Federal Constitution. Although more judges are needed to comply with this constitutional requirement, no statutory regulation was enacted to date to conform to it, particularly to allow judges to delegate administrative and enforcement functions to civil servants. However, given that fundamental rights have immediate applicability, the principle of efficiency must be implemented regardless of further regulation. In Portugal, judges are not required to order executive acts, which are conferred to an enforcement agent. A similar system should be adopted in Brazil, leaving judges time for decision-making. An efficient judicial service is essential to strengthen the image of the Judiciary and depends on this type of reforms.*

**Keywords:** Brazilian constitutional principle of efficiency, enforcement agents in Portugal, delegation of judicial procedural administrative and enforcement acts, enforcement proceedings.

### A. Introduction

Sluggish, inefficient and ineffective execution has a detrimental effect on the economy, since delays in payment make it less dynamic and give rise to liquidity problems for the creditor, who is obliged to take out unnecessary loans.[1] In Brazil, the situation is serious concerning the execution phase or process, during which

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1 'Simplificação da acção executiva – regulamentação', retrieved on 19 March 2011 from <www.dgpj.mj.pt/sections/politica-legislativa/anexos/reforma-da-accao/perguntas-e-respostas 4090/downloadFile/file/RAE.PR.Regulamentacao.pdf?nocache=1242141550.87>.

the backlog, for the year 2009, was 67% in Labor Law, 81% in Federal Law and 90% in State Law:[2]

> The indicators reflect the situation of the organization at a specific moment, which is extremely opportune, especially if we bear in mind our present-day world of constant change. Once a difficulty has been detected by a performance indicator, it is possible to correct the routine, thereby avoiding greater damage.[3]

Experiencing the same difficulty, in the 1990s, Portugal conducted a review of its Civil Procedures Code by way of Executive Orders 329-A/1995 and 180/1996, as Brazil would do some years later with Laws 11,232/2005 and 11,382/2006, with a view to reforming execution proceedings by way of Executive Orders 38/2003, 199/2003 and 226/2008.

The present article aims to show how judicial delegation of administrative acts in the execution phase or process – as inspired by the recent Portuguese experience with reformed legislation – could be applied in this country without violating local statutes and even providing a more concrete basis for constitutional orders at national level in Brazil.

## B. Efficient Processes in Brazilian Constitutional Law

Efficiency is an action, state or quality that produces an effect[4] by way of the rational employment of available resources[5]: "It is, consequently, an expression that contains a strong component of economy, aiming not simply to produce a result, but always the best result".[6] According to Becker,[7] economic value was first attributed to time in the Middle Ages, with the variation in the price of commodities being proportionate to the distance the vendor traveled from one borough to another:

> There can be no denying, however, that greater importance came to be attached to time and the way it was counted only with the arrival of capitalism. See Benjamin Franklin's telling motto (1706-1790): 'time is money', which ushered in a whole 'philosophy' of taking the fullest advantage of time in 1757, in his famous essay, 'The Way to Wealth', with which he concluded

2 *Relatório Anual 2010*, CNJ, Brasília, 2011, pp. 75, 79, retrieved on 19 March 2011 from <www.cnj.jus.br/images/relatorios-anuais/cnj/relatorio_anual_cnj_2010.pdf>.

3 E.G. Nogueira, 'Juiz-gestor – gestão judiciária e eficiência da Justiça', *Revista da AJURIS*, Vol. 36, No. 113, 2009, p. 139.

4 A.B. de H. Ferreira, *Novo dicionário da língua portuguesa*, (2nd. rev. exp. Edn), Nova Fronteira, Rio de Janeiro, 1997, p. 620.

5 R.R. Friede, 'Por um Poder Judiciário eficiente', *Revista da Procuradoria Geral do Estado do Rio Grande do Norte*, Vol. 5, 1996, p. 75.

6 *Ibid.*

7 L.A. Becker, 'Eficiência e democracia na reforma do Estado e do processo', *Revista de Processo*, Vol. 102, 2001, p. 265.

> *Poor Richard's Almanack*. This 'philosophy' was confirmed by the author himself in 1784, in his famous *Autobiography*, in which he stated that the sixth of the thirteen greatest human virtues is industry, in the following words: '6. *Industry. – Lose no time: be always employ'd in something useful; cut off all unnecessary actions* [...] The value accorded to time somehow came through the 19th century on the back of Bentham's utilitarianism (1748-1832) [...] It arrived in the 20th century in the aggressive form of Taylorism. For Frederick Taylor (1856-1915), in industry, any ends beyond those of production and efficiency should be set aside [...] Taylor was, above all, a great proponent of efficiency, which he saw as being directly and necessarily linked to productivity, speed (the elimination of unnecessary, failed or slow movements) and prosperity [...] The demand for efficiency spread, through Franklin, Bentham (to a lesser degree) and Taylor, across the whole Anglo-Saxon world'.[8]

Nowadays it is TQC (total quality control) that strives to achieve the supposedly scientific administration of time, for the sake of efficiency[9]:

> TQC places the emphasis entirely on *quality*, which is seen in terms of conforming to specifications in relation to needs or certain uses [...] To attain this quality, controls are developed for standard procedures, that is: the control of time [...] in TQC the bywords are always quality, method (controls and procedures), technology and consumption. But nothing prevents these from being combined with ideas of efficiency (which always underlie quality) and 'modernity'.[10]

So far as quality standards are concerned, these stem directly from the demands of efficiency that lie at the root of TQC[11]:

> We are, of course, talking about ISO 9000, whose basic aim is to certify quality management and ensure quality, as justified by the globalization of the economy [...] ISO 9000 connects efficiency with productivity – as in Taylorism and TQC. In fact, efficiency is deemed a *productivity measure* in the *process*, in the following sense: the more efficient the process, the fewer resources it uses to achieve the greatest productivity.[12]

Efficiency was already implicit in the principle of due legal process, outlined in Article 5, LIV, of the 1988 Constitution of the Federative Republic of Brazil; and explicitly, but with a different slant (geared towards the common good, the satisfaction of the public interest), it is referred to in connection with Administrative

8 *Ibid.*, pp. 265-267.
9 *Ibid.*, p. 267.
10 *Ibid.*, pp. 268-269.
11 *Ibid.*, p. 270.
12 *Ibid.*

Reform (Constitutional Amendment 19/1998) in the caption of Article 37[13] of the 1988 Constitution – and likewise, without explicitly using the word efficiency, in Article 267, in the current Constitution of the Portuguese Republic,[14] whose Article 81-c, in turn, requires the state, in matters pertaining to the economy and society, to ensure, as a matter of priority, the *full use of productive efforts*, *purposefully* pursuing *efficiency* in the public sector.[15]

Efficiency was stressed, in Brazilian procedures (both judicial and administrative), on the occasion of the Judicial Reform (Constitutional Amendment 45/2004), which added Subsection LXXVIII ('in judicial and administrative matters, all are assured a reasonable duration of process and *the means to ensure speedy proceedings*') to Article 5 of the 1988 Constitution, (an article) whose catalogue of fundamental rights has remained unaltered since it was first drafted.[16]

The Judicial Reform, mindful of efficiency of process, went further than the American Convention on Human Rights (São José. Costa Rica Pact, Decree 678/1992) in Articles 7-5, 8-1 and 25-1, which mentions only reasonable duration or the effectiveness of the process. EC 45/2004 thus enshrined in law "another normative and highly relevant aspect of the aforementioned principle of due legal process generically outlined in Subsection LIV of the present Art. 5", "a statutory amendment that fell short of guaranteeing access to Justice":[17]

> [O]ne may question the importance of enshrining a principle such as this in constitutional law, characterized as it is by little in the way of concrete legal grounds despite great axiological import. The questioning does not proceed, firstly, because, addressing the new rule of law, above all else, to the Legislature, the Executive and *the Judiciary itself*, the three branches of government are obliged to *give concrete expression to the expectation* of speedy judicial and administrative proceedings. Secondly, because, dealing as it does with a *constitutional guarantee*, subsection LXXVIII is likely to foster the emergence of a *new legal culture* involving a demand, on the part of operators of the Law and the general public, that *the right to speedy processes and procedures* be upheld.[18]

13 In the opinion of Rosenblatt (P. Rosenblatt, 'Gerenciamento de risco na execução fiscal', *Revista do Centro de Estudos Jurídicos da Procuradoria Geral do Estado de Pernambuco*, Vol. 3, No. 3, 2010, pp. 57-58), the constitutional principle of efficiency referred to in the caption of Art. 37 of the 1988 Constitution also covers risk management in tax administration, which implies *inter alia* rolling back a litigious culture.

14 A. de Moraes, *Constituição do Brasil interpretada e legislação constitucional*, (6th edn), Atlas, São Paulo, 2006, pp. 456-457 and 821-827.

15 'Constituição da República Portuguesa', Retrieved on 3 April 2011 from <www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx>.

16 F.A.L. Koehler, 'Em busca de critérios para a conceituação do tempo razoável de duração do processo', *in* A.S. Jardim & P.S.M.C. de Amorim (Eds.), *Comentários pontuais às reformas processuais civil e penal*, Lumen Juris, Rio de Janeiro, 2011, p. 37, n. 1.

17 A.C. da C. Machado, *Código de Processo Civil interpretado*, Manole, Barueri, 2006, p. 52.

18 *Ibid.*, pp. 52-53.

As foreseen by Machado,[19] Brazilian courts wasted no time in steeping themselves in this novel spirit of the constitution.

In a recent ruling, Brazil's Higher Court of Justice applied the principle of efficiency to sanction clearly dilatory act on the part of the judgment debtor:

> SPECIAL APPEAL – [...] – LIMITED EXECUTION OF LEGAL FEES – REQUEST FOR EXPEDITION OF TAX PAYMENT FORM – SUSPENSION OF THE TWO-WEEK DEADLINE FOR PAYMENT – NON-OCCURRENCE – IN CASH – CLEAR INTENTION TO DELAY ON THE PART OF THE DEBTOR – *IN CONTRAVENTION OF THE PRINCIPLES OF SPEED* AND *EFFICIENCY OF EXECUTION*, TO THE BENEFIT OF THE CREDITOR – SUM DEPOSITED LATE – FINE OF 10% – IN CASH – SPECIAL APPEAL GRANTED [...]
>
> II – The alterations in the Civil Procedures Code resulting from the publication of Law nº 11,382/2006 aimed to speed up execution, to the benefit of the creditor.
>
> III – Art. 475-J of the CPC prescribes an objective command to the debtor to pay the sum owed within two weeks, on pain of incurring a fine of 10% of the value cited in the judgment.
>
> IV – In a specific case, the request for expedition of the tax payment lodged by the respondent, Petrobras, goes against the principles of speed and effectiveness of execution, which inspired the lawmaker to reform the Civil Procedures Code, since it is well-known that the expedition of a tax payment guide does not depend on any formality, the *intention* of the respondent being characterized as *clearly dilatory*, as *is impermissible*.
>
> V – Special Appeal Granted.
>
> (Special Appeal no. 1080694/RJ (2008/0176018-0), 3rd Panel of the STJ, Rel. Massami Uyeda. j. 12 August 2010, unopposed, DJe 25 October 2010)

According to the Federal Regional Court of the 1st Region, the annulment of the procedural act of execution for reason of mere failure to observe procedure would contravene the principle of efficiency:

> [...] 2 – procedural acts may not be annulled for *merely procedural reasons* (the FN will be duly represented in the appropriate circuit court), without solid or relevant arguments, occasioning *violation of the constitutional principles of efficiency* and effectiveness of the process of law, leading to sluggishness that offends due process [...].

19 *Ibid.*

> (Internal Appeal in Interlocutory Appeal no. 0059141-67.2009. 4.01.0000/ MT, 7th Panel of the TRF of the 1st Region, Rel. Luciano Tolentino Amaral. j. 23 February 2010, e-DJF1 5 March 2010, p. 227)

The Minas Gerais State Court of Justice understood that reformed Brazilian execution proceedings legislation put the principle of efficiency into concrete practice:

> [...] I – The ruling that accepts stays of execution of an extra-judicial nature without specifying their effects is not equivalent to the concession of a *supersede as* bond. *Stays of execution generally do not have supersede bonds, owing to the general rule laid out in Art. 739-A of the CPC, because this effect depends on an express and well-grounded judicial declaration*. II – The *procedural reform occurring by force of Law nº 11,382, of 2006* determines that the executed debtor shall be summonsed for the purpose of, within a period of 3 days, effecting payment of the debt and, should this not transpire, the Court Official shall proceed immediately to seizure of assets and their evaluation (Art. 652, CPC). III – Based on the *principles of efficient* and *speedy provision of legal services* and compliance of the judgment debtor with his or her credit obligations, there is no provision in the CPC to the effect that the debtor shall *make assets available for seizure*, as occurred *previously*, *Art. 652, in its original form*, stating that 'the debtor be summonsed to, within a period of 24 hours, pay or designate assets for seizure'. IV – *After Law 11,383/2006 (reform of CPC), it is no longer a case of designation of assets for seizure by the debtor*. There is a *duty to declare assets liable to seizure on the part of the judgment debtor (Art. 652, § 3 of the CPC)*. V – In the event of free declaration of assets for seizure on the part of the judgment debtor, the judgment creditor must make this clear and, so long as there is express agreement, the seizure shall be carried out.
>
> (Civil Interlocutory Appeal no. 0246158-49.2010.8.13.0000, 11th Civil Chamber of the TJMG, Rel. Marcos Lincoln. j. 24 November 2010, unopposed, Publ. 10 December 2010

This principle (of efficiency) that gives preference to the seizure of monies was also upheld by the Regional Federal Court of the 2nd Region:

> [...] I – This is a case of an internal appeal against a ruling handed down in an interlocutory appeal that upheld the ruling that issued an injunction for online seizure of constant sums in the bank account of the judgment debtor during the execution proceedings on the basis of a judgment note.
>
> II – The provision included in Art. 620 of the CPC determines that execution be carried out in the manner that is least onerous for the debtor, when there are various means by which it may be carried out. In order of preference, established by civil procedures law, the seizure applies to monies, in cash or in the form of a deposit or an investment in a financial institution. O e. STJ

> allows seizure of cash in a current account, understanding the latter to be first in the legal order of preference.
>
> III – According to the *principles* of reasonableness and *efficiency* that should guide State action, *the order to seize monies should be given primacy*, as a way of *preventing innocuous expropriation provisions* and ensuring a speedy and effective process.
>
> IV – Internal appeal in which judgment was upheld.
>
> (Appeal no. 2010.02.01.000039-3/RJ, 7th Panel of the TRF of the 2nd Region, Rel. Sérgio Feltrin Correa. j. 9 June 2010, unopposed, e-DJF2R 6 July 2010)

Or the use of the computerized seizure system, as the Paraná State Court of Justice puts it:

> INTERLOCUTORY APPEAL. RECOVERY ACTION. EXECUTION OF RULING. SEARCH FOR ASSETS. *USE OF THE* RENAJUD *ON-LINE VEHICLES SYSTEM*. MECHANISM ENSURING SPEEDY PROCEEDINGS *CONSTITUTIONAL GUARANTEE ART. 5, LXXVIII, FEDERAL CONSTITUTION*.
>
> The *more recent alterations to civil procedures*, especially the *use of computers*, are recommendations that aim to *optimize the process* by giving it an *efficiency*, which is the duty of the justice, in an attempt to ensure a speedy process, in accordance with Art. 125, II Civil Procedures Code. APPEAL GRANTED.
>
> (Interlocutory Appeal no. 0722269-7, 9th Civil Chamber of the TJPR, Rel. Rosana Amara Girardi Fachin. j. 2 December 2010, unopposed, DJe 13 December 2010)

The Federal Regional Court of the 3rd Region, on the grounds of the principle of efficiency, refused to allow the unjustified production of evidence in stays of execution:

> [...] 3. A well-grounded judicial ruling should be overturned in an equally well-grounded manner, demonstrating that it is capable of justifying the request for probative continuance, since the party has no absolute right to require proof, the deferral of which always depends on an examination by the court of its pertinence and utility, since *judicial power is governed by principles such as* speediness and *efficiency*, *giving content to the assurance of due legal process*, in such a way as to *ensure* that *useless or unjustified services* are not deferred, thereby slowing down the process, including the judgment on pleadings, where the legal requirements have been met. 4. Appeal denied.
>
> (Legal Appeal in Interlocutory Appeal no. 0010331-70.2010.4.03.0000/SP, 3rd Panel of the TRF of the 3rd Região, Rel. Carlos Muta. j. 13 January 2011, unopposed, DE 21 January 2011)

The Court of the Federal District and Territories, in turn, pointed out that the principle of *favor debitoris* (in Art. 620 of the CPC/BR) needs to be interpreted in conformity with the constitutional principle of efficiency:

> [...] 5. Exemption from seizure of salary does not cover the remainder of the salary deposited in savings accounts, since this remainder ceases to enjoy the status of sustenance funds and comes to represent a credit on the part of the debtor, which may be seized. 6. The sum of up to 40 minimum wages deposited in a savings bank is absolutely exempt from seizure (CPC 649 X). 7. As laid out in *Art. 620 of the CPC* this should be understood in accordance with the *principles of the Civil Procedures Code*, which aims to provide *greater efficiency* and agility of execution, and with the *constitutional principle* of speediness and effectiveness of provision of legal services. 8. It is not reasonable that the party charged with judging an execution, for more than ten years, in order to effect payment of credit, be obliged to receive it in small installments, with only the return on sums invested by the debtor, when the latter can afford to pay the debt more speedily, without detriment to his or her means of sustenance. 9. The fixed sum charged by way of legal fees is reduced to include the special partial costs of the respondent. 10. The appeal was partially upheld, with the release of a sum to the value of forty minimum salaries at the time of the writ of execution being issued, deposited in a savings account, plus the respective returns on the investment, and the reduction of legal fees from R$ 4,000 to R$ 3,000.
>
> (Process no. 2008.01.1.031615-2 (459913), 2nd Civil Panel of the TJDFT, Rel. Sérgio Rocha. unopposed, DJe 10 November 2010)

The Rio de Janeiro Court of Justice followed this guidance:

> [...] the seizure of income does not involve any illegality. The *principle of the least onerous situation for the judgment debtor* should *be compatible with the principle of efficiency of execution*. A reasonable rate of 5%, the appellant not having shown his or her business to have ceased to be a viable concern. Rule nº 100 of this Court of Justice. Appeal denied.
>
> (Interlocutory Appeal no. 0039211-92.2010.8.19.0000, 11th Civil Chamber of the TJRJ, Rel. Antônio Iloizio B. Bastos. j. 24 August 2010)

In the Brazilian legal system, therefore, prevalence is given, by way of the principle of efficiency, to the interests of the creditor (referred to in Art. 612 of the CPC/BR), as can be inferred from the following ruling of the Santa Catarina State Court of Justice:

> [...] Art. 11, subsection I, of Law nº 6.830/80, states that attachment and seizure should apply first and foremost to monies. Apart from this, considering the *principle of result*, according to which *every execution proceeding should*

> *be carried out in the interest of the creditor (CPC, Art. 612)*, liable to seizure in the form of Provision nº 5/6 of the Inspector-General of Justice (regulation of the 'Bacen Jud' System), and *Articles 5, LXXVIII* (reasonable duration of proceedings) *and 37 (principle of efficiency), of the Federal Constitution*. Thus, failure to summons the debtor poses no impediment to the measure, since diligence has failed to be observed, for reason of failure to locate a judgment debtor whose whereabouts is unknown.
>
> (Interlocutory Appeal no. 2010.047008-8, 2nd Chamber of Public Law of the TJSC, Rel. Ricardo Roesler. Publ. 8 November 2010)

As Koehler[20] shows in his analysis of the fundamental right to reasonable duration of process, the constitutional status of principle confers upon its (1) supremacy, (2) immediate incidence, (3) a binding character and (4) the possibility of serving as a constitutional control, thereby (a) encouraging research and studies of legal doctrine, (b) the use of the principle as a grounds for decision-making, (c) the work of the Judiciary in concrete realization of the constitutional provision, (d) the unconstitutionality of laws that infringe this provision and even (e) the possibility of compensation for damages incurred by the failure to observe the principle.

It is worth pointing out that the efficiency discussed here should not be confused with the Feliciano's 'efficientism',[21] which ('efficientism') refers to a legal system "that is concerned to produce rulings at an ever faster pace, producing numbers, results and reports, but, which, in the final analysis, does not bring about social justice".

The concept of efficiency addressed here does indeed approximate to that outlined in Article 37 of the Ibero-American Judges' Statute, produced at the 6th Ibero-American Summit of Chief Justices of Supreme Courts and Higher Courts of Justice, in Santa Cruz de Tenerife, Canary Islands, Spain, 23-25 May 2001:

> Art. 37. *Service and respect for the parties*. In the context of a constitutional and democratic State of Law and *in pursuit of their legal function*, judges should *transcend the field of exercising said function*, seeking to ensure that justice be done *efficiently*, with quality, accessibility and transparency, duly respecting the dignity of the individual requiring the service.[22]

In addition to the efficiency referred to in the Charter of the Rights of People before the Justice System in Ibero-American Law (Cancun Declaration, resulting from the 7th Ibero-American Summit of Chief Justices of Supreme Courts Higher

20 Koehler, 2011, p. 38.

21 G.G. Feliciano, 'Um olhar sobre o novo Código de Processo Civil (PLS no 166/2010) na perspectiva das prerrogativas da magistratura nacional', *Juris Plenum*, Vol. 38, 2011, p. 33.

22 *Código Ibero-americano de Ética Judicial*, CJF, Brasília, 2008, Retrieved on 7 April 2011 from <www.cidej.org/c/document_library/get_file?uuid=5b142f88-73ce-47f2-beb5-d82c7d75db81&groupId=10124>, p. 57.

Courts of Justice, Mexico, 27-29 November 2002), which established access on the part of the population to efficient justice as a *fundamental* right.[23]

### C. The Eminently Administrative Nature of the Execution Phase or Process

Freitas[24] rejects conceptions that tend to place forced execution outside the field of jurisdiction and, because it is fundamentally carried out by way of material acts that do not apply to the res judicata, categorizes this as an administrative function. In the view of the Portuguese procedural lawyer, the work of the court, even when effected through an enforcement agent, aims to uphold a right and thus constitutes a legal function.[25]

The different legal systems of Portugal and Brazil are furnished with strict coercive instruments to use against the judgment debtor:

> In other legal systems, the threat may be, not only that of a financial sanction, but also a *personal* sanction (detention); as occurs in Anglo-Saxon law with *contempt of Court*, consequent violation of a court *injunction* (cf. CHIARLONI, *Misure coercitive* cit., pp. 235-236), and German law (§§ 888 ZPO and 890 ZPO), where the judge has a choice between two sanctions, which can be applied successively and repeated, regardless of proof of the guilt of the debtor (as it is not a question of criminal charges, but of coercive measures) and with a maximum of six months, in the case of the latter (BROX-WALKER, *ZVR* cit., pp. 590-591; BRUNS-PETERS, *ZVR* cit., p.292. According to others, detention can only take place after a financial sanction or when this appears at an early stage to be manifestly insufficient; JAUERNIG, *ZVKR* cit., p. 119).[26]

However, measures that indirectly coerce the debtor, with a financial or personal sanction, to comply with the obligation are not procedural in nature but substantive, and can be found sparingly in the Portuguese Civil and Civil Procedures Codes (Art. 829-A of CC/PT and Art. 933, 941, 805 and 833 of CPC/PT[27]) and in Brazilian Civil Procedures (Arts. 461, 461-A and 733) – even in the Draft (of the Brazilian Civil Procedures Code) 166/2010 in the Senate (number 8,046/2010 in the Chamber of Deputies), in which execution "serves basically to effect expropriation of the assets of the judgment debtor in favor of the judgment creditor".[28]

So, excepting orders of this nature, the process proceeds to execution without threats towards the debtor beyond those involving his or her assets, with a view to expropriating them, as a way of upholding the rights of the legally titled creditor. In this respect, if greater simplicity of the execution phase (or process), in

23 *Ibid.*, p. 60.
24 J.L. de Freitas, *A acção executiva depois da reforma da reforma*, (5th edn), Coimbra, Coimbra, 2009, p. 16, n. 26.
25 *Ibid.*, p. 16, n. 26.
26 *Ibid.*, p. 19, n. 32.
27 *Ibid.*, p. 18.
28 L.G. Marinoni & D. Mitidieri, *O Projeto do CPC: críticas e propostas*, RT, São Paulo, 2010, p. 149.

some way, diminishes its relevance, it does not however lead it to supplant the discovery phase (or process), to which it was previously linked:

> The *typical final scope* of the author does not diverge, in its essence, when passing from judgment to execution: when the creditor requests judgment of the debtor, in view of a confirmed or evident violation of a norm [...], the ultimate end it pursues is to uphold or reinstate the right, in view of which the act of settlement is instrumental. The act of condemnation thus appears as a *stage* on the way towards upholding the guarantee (MANDRIOLI, *L'azione esecutiva* cit., pp. 167 ff. 'Execution is the *ultima ratio* of a judiciary guarantee': BRUNS-PETERS, *ZVR* cit., p.1), a stage in which the previous restitution of the right leads to the attachment of the content of the subsequent execution order (GARBAGNATI, *Il concorso* cit., p. 115). These remarks once led SATTA to deny the act of condemnation any autonomous function as an injunction: it is restricted to establishing the logical precepts underlying future execution proceedings (*Premesse generali* cit., ps. 371-373). This is going too far: the two acts *are connected to one another* functionally, but *without subordination* of one to the other.[29]

However, in the execution phase or process, the principles of equality of arms and of the adversarial system do not show the same reach found in the discovery phase or process, since the settlement (the Portuguese word '*acertamento*' deriving from the Italian '*accertamento*', meaning 'make or become certain') of the fact, the legal situation or the right, which is the point this (discovery) phase or process aims to reach, is the starting point of that phase or process of execution.[30]

The participation of the judgment debtor is thus, circumscribed, in Portuguese, as well as in Brazilian execution proceedings[31] (1) by the substitution of seized assets, (2) the assignment of assets for seizure, (3) a hearing on the method of sale and the base-value of goods for sale and (4) the control of the regularity or legality of procedural acts.

The right of the judgment debtor to contest the judgment is fundamentally assured *ex post factum*, by the possibility of opposition (1) to the procedural acts already performed (seizure, in particular) and (2) execution itself, opposition being, in this case, a formally autonomous negative (albeit functionally subordinate) constitutive act in relation to the act of execution.[32]

Thus, in the execution phase or process, equality of arms is restricted to the use of the *general* instruments of civil process (*all* the means of opposition – available to *both* parties – to the acts of execution proceedings, including appeals and claims), and the adversarial system occasionally exhibits the dialectical structure that it possesses in the discovery phase.[33]

29 Freitas, 2009, p. 20.
30 *Ibid.*, pp. 20-21.
31 *Ibid.*, p. 22.
32 *Ibid.*, pp. 22-23.
33 *Ibid.*

## D. The Enforcement Agent in Portuguese Execution

In Portuguese law prior to the reform of execution proceedings, as is still the case in Brazil, Spain and Italy, the judge was responsible for directing the whole execution process, which meant that he or she handed down numerous orders, which, for the most part, did not constitute acts involving the exercise of judicial power.[34]

Reformed Portuguese execution proceedings confer on the judge only the functions of (1) oversight, when there is litigation pending execution (Art. 809-1-*b* of the CPC/PT), and (2) control, conferring on him or her in certain cases the right to issue a preliminary order (a form of control that is here prior to the acts of execution: Arts. 809-1-*a* and 812-D of the CPC/PT) and intervening to clear up doubts (Art. 809-1-*d* of the CPC/PT), to ensure that fundamental rights or confidential matters are protected (Articles 840-3, 848-3, 850-1 and 861-A-1 of the CPC/PT) and to ensure that the ends of the execution are achieved (Arts. 862-A, nos. 3 and 4, 886-C-3, 893-1, 901-A, nos. 1 and 2, and 905-2 of the CPC/PT).[35]

The Portuguese legal system is thus similar to that of others in Europe:[36]

> In some legal systems, the court may only intervene in cases of *litigation*, thereby exercising a *tutelary* function. The extreme example is Sweden, where the *Public Forced Collection Service* is responsible for execution, this being an administrative, non-judicial organ. However, in other European Union countries there is an enforcement agent (*huissier* in France, Belgium, Luxemburg, the Netherlands and Greece; *sheriff officer* in Scotland) who, although he or she is an appointed official and, as such, is duty-bound to exercise the role when called upon to do so, is contracted by the judgment creditor and, in some cases (the seizure of movable property or credits), acts extra-judicially, without, as in France, risk of appeal to the Department of Justice, when the debtor does not provide information on his or her bank account or employer, and the power to set up a public auction, when the executed debtor does not, within a period of one month, sell movable property seized (as the judgment debtor normally does not do); thereby responding, not only to the judgment creditor, but also to the judgment debtor and third parties. Germany and Austria also have an enforcement agent (*Gerichtsvollzieher*); but this is a court official paid out of the public purse, although the responsibilities deriving from his or her intervention are held, ultimately, by the executed debtor, when assets are present, and, under exceptional circumstances, by the execution creditor, in the case of unlawful execution; when the execution is based on a judgment, the judge only intervenes in cases of litigation, but, when the execution is based on another order, the judge also plays the role of *prior con-*

34 *Ibid.*, p. 24.

35 *Ibid.*, pp. 25, 74, 77; *Also see* F.A. Ferreira, *Curso de processo de execução*, (13th edn), Almedina, Coimbra, 2010, p. 142.

36 Ferreira, 2010, p. 132.

> *trol*, issuing the *execution form*, without which execution proceedings cannot ensue.[37]

The Portuguese enforcement agent is part liberal professional, part civil servant, with the status of a paralegal and powers of authority in the execution proceedings, who performs tasks on behalf of a judge and may ask a formal employee under his or her (the enforcement agent's) responsibility to intervene to provide services that do not involve execution (*i.e.* that do not imply the exercise of the power of authority), complaints to the judge being permitted regarding acts of commission or omission on the part of this official (Art. 809-1-*c* of the CPC/PT)[38]:

> As with the *huissier de justice*, in France, the function of the enforcement agent is hybrid in nature, as it combines in one office both the characteristics of a *creditor's agent* and those of a *public official*.[39]

This agent is appointed, as a rule, by the judgment creditor in his or her petition (Arts. 808-3 and 810-1-*c* of the CPC/PT), with effectiveness resolutely conditional on the acceptance or refusal of the agent (Art. 810-12 of the CPC/PT); not appointed by the judgment creditor (or when the appointment is not made by this individual), but by the secretary, no longer freely chosen from among those registered at any Portuguese circuit court, but according to the order supplied by the Chamber of Solicitors (Art. 811-A-1 of the CPC/PT).[40]

The enforcement officer has the right to receive remuneration for services rendered and to be reimbursed for duly proven expenses, and may demand staggered payment of sums for services and expenses that must be deposited in a client-account (Arts. 11 and 15 of Administrative Rule 331-B/2009); tasks are freely established by the enforcement agent, and the percentages that apply are freely established by the acts and procedures in effect, up to the maximum stipulated in Annexes I and II of Administrative Rule 331-B/2009; in the event of the requirement of the provision not being satisfied, the enforcement agent may resign (Art. 111-2 of the Statute of the Chamber of Solicitors); on completion of the process, the enforcement agent has a right to additional remuneration varying according to the sum recovered or guaranteed and the procedural phase during which the sum was recovered or guaranteed (Art. 20 of Administrative Rule 331-B/2009); these sums are paid by the judgment creditor, but are an integral part of the costs that he or she (the judgment creditor) has the right to receive from the judgment debtor, the remuneration owed to the enforcement agent and reimbursement for the latter's expenses, along with debts with third parties deriving from the execution sale (Art. 447-D, nos. 1, 2-*c* and 3, of the CPC/PT,

37 Freitas, 2009, p. 24, n. 54.
38 Freitas, 2009, pp. 26-27.
39 Ferreira, 2010, p. 140.
40 Freitas, 2009, p. 26.

Art. 25, nos. 1 and 2-*c*, *d*, of the Regulations regarding Procedural Costs and Art. 13-2 of Administrative Rule 331-B/2009).[41]

In the event of funds not being available,

> [T]he judgment creditor may request judicial support, with a view to assignment and payment of the compensation of counsel, the staggered payment of this and the appointment of an enforcement agent [Art. 16º., nº. 1, section b), e) and g), of the LADT [Access to Law and Courts Act]].[42]

If there is no enforcement agent registered in the circuit court handling the case or if he or she is unable to carry out this function (and in every case where the execution has been requested by the State), the judgment creditor may require that due process be carried out by a court official, so long as the rules of distribution are observed (Arts. 209 and 215-219 of the CPC/PT):[43]

> The court official in principle performs the same functions as the enforcement agent; but there are some acts that only the latter is permitted or obliged to perform, as can be seen, for example, in Art. 808, nos. 8 and 10 (provision of services by third parties), in Art. 807-3-*b* (to the computerized register of writs of execution), Art. 905-2 (sale by private negotiation), Art. 839-1 (the function of the receiver), Arts. 839-3, 848-4, 857-3, 860-1-*a* and 861-2 (custody of monies covered by the act of seizure) and Arts. 897, 905-4 and 906-4 (custody of the proceeds of sale). But not, for example, in Arts. 856-1, 861-A-5 and 862-1: the right of seizure, when there is no payment (of the right to credit) or sale, remains in the hands of the enforcement agent or court official [all the articles cited form part of the Portuguese CPC].[44]

The enforcement agent court official is the clerk of court at the section where the writ of execution is being processed (Art. 1 of Administrative Rule 946/2003) and it is the responsibility of other external services sections to ensure the provision of activities of this nature (external services) attributed to the enforcement agent – Article 18-*d* of the Regulation of the Organization and Functioning of Courts of Justice Act, in DL 148/2004[45]:

> However, attached proceedings and incidental proceedings of a declaratory nature (such as a request for cancellation of a previous summons, successors' claims, opposition to execution and seizure, interpleas, or creditors' claims), in so far as *they do not respect procedural acts of an executory nature*, do not lie within the remit of the enforcement agent; these procedures, including notifications, fall to the secretary, who is likewise responsible for issuing notifica-

41 Ferreira, 2010, pp. 137-138.
42 *Ibid.*, p. 135.
43 Freitas, 2009, pp. 26-27, n. 58.
44 *Ibid.*, p. 27, n. 58.
45 Ferreira, 2010, p. 135.

> tions of appeals. The secretary is also responsible for relating the activity of the court with that of the enforcement agent, informing the latter of any and every procedural occurrence that may have an impact on the way he or she exercises the function.[46]

When acting as an enforcement agent, the clerk of court may delegate the execution of acts to another court official from the same section (Art. 4 of Administrative Rule 946/2003).[47] The provision of due execution services, such as ordering seizure, sale or payment, or even cancelling a suit, thus ceased to be an attribute of Portuguese judges and came to be the responsibility of the enforcement agent.[48]

Judicial authorization is no longer required even for consultation of declarations and items protected by financial confidentiality or subject to secrecy laws (Art. 833-3 of the CPC/PT), the division of a seized building (Art. 842-A of the CPC/PT) and the levying of seizure (Art. 847 of the CPC/PT), it being likewise the responsibility of the enforcement agent to carry out acts indispensable to the conservation of the right to seized credit or to directly request the assistance of the police when the act of seizure meets with unexpected resistance (Art. 840 of the CPC/PT).[49]

With the advent of DL 226/2008, which extended the dejuridification of the execution process, to the point where the overall power of control conferred on Portuguese judges by Article 809 of the CPC/PT ceased to exist, along with the power to remove the enforcement agent on just grounds, without prejudice unless (1) he or she has been fined for the formulation of questions manifestly not explained to the court (Art. 809-2 of the CPC/PT) or (2) the State is deemed responsible for unlawful acts that the enforcement agent has committed in the course of his or her duties.[50]

The law (1) grants the judgment creditor the right to freely discharge the enforcement agent and (2) grants a (supposedly independent) disciplinary organ of the Chamber of Solicitors (Efficacy of Execution Commission – Articles 69-B a to F of the Statute of the Chamber of Solicitors) the power of just dismissal (Art. 808-6 of the CPC/PT).[51]

According to Freitas,[52] this right (to free dismissal of the enforcement agent by the judgment creditor)

> [T]hreatens to undermine the mixed character [of liberal professional and civil servant] of the former [the enforcement agent], giving undue emphasis to the characteristics of a mandated contract, to offer more the specialty of exclusive concession to the principal of the right to revocation (cf. Art. 1170 CC [Portuguese]).

46 *Ibid.*, pp. 135-136.
47 *Ibid.*, p. 137.
48 Freitas, 2009, p. 25.
49 *Ibid.*, p. 25, nn. 54-A, B.
50 *Ibid.*, pp. 26, 28; *Also see* Ferreira, 2010, p. 142.
51 Freitas, 2009, p. 27, n. 59.
52 *Ibid.*, p. 27, n. 59.

Ferreira[53] believes that it would have been best to have attributed the execution process to the sections of the process of the court secretary responsible for execution, "with the clerk of court who is in charge of issuing the orders necessary for the smooth functioning of the process, always open to complaint to the respective judge", and (with) the creation, if this is justified by the volume of cases, of sections of execution in this secretary; in the event of the volume (of cases) being even greater, courts specializing in execution should be set up, linked only by execution section with justices practicing acts of a jurisdictional nature concerning executions alone.

The execution judge was introduced into the Portuguese legal system by DL 38/2003, under the inspiration of French law.[54] However, when the 2003 Civil Procedures Reform Act became law, on 15 September of the that year, no execution judge had yet been appointed,

> [D]emonstrating the lack of sensitivity and fear of the public component of the reform on the part of the Ministry of Justice, in overlooking the fact that judges with a broad jurisdiction, namely those from circuits with a greater volume of work, were unable to keep up with the pace that executions should have, because of the enforcement agents.[55]

Execution judges were deemed unnecessary because

> [I]t was argued that many execution procedures were brought to conclusion out of court, either because there was no preliminary order or because there was understood to be no opposition to the execution or seizure and no interpleas or claims of credit emerged.[56]

They installed the 'pipette quota', of less than a dozen execution judges over the first five years of the 2003 Reform, with others being appointed recently by DL 25/2009.[57]

With DL 226/2008, the functions of the enforcement agent came to be exercised not only by solicitors but also by lawyers, with the latter, according to Ferreira,[58] "being at the beginning of their careers and without professional preparation or a vocation to perform the role"; as for court officials,

> [A]ble to perform the aforementioned functions, they are accepted in principle for only two years, when chosen by individuals who enter into execution proceedings for credits not resulting from their professional activity (Art. 19 of the DL no. 226/2008)

53 Ferreira, 2010, p. 133.
54 *Ibid.*, p. 143.
55 *Ibid.*
56 *Ibid.*, p. 144.
57 *Ibid.*
58 *Ibid.*, p. 134.

but "in these two years, and even within the limitations imposed, they have proved, once again, that *they are best prepared to carry out the functions of enforcement agent*".[59]

In this regard, according to Ferreira,[60] the Portuguese social media have already announced that

> [T]he government is preparing a new reform of execution proceedings, no longer aiming to dejuridify the process, as in the previous ones of 2003 and 2008, but rather to juridify it, bearing in mind, among other reasons, the *backlog of 1.2 million executions* and *8,000 people taking action against execution solicitors*. There will in the future be more intervention in executions on the part of judges, who will recover the power to dismiss enforcement agents, while court officials will take on the functions of enforcement agents in execution proceedings involving sums of up to 10,000 euros, including salaries, so long as the credit is not the result of remuneration for free-lance work. Five hundred thousand cases will thus be moved to the courts, and will no longer involve the lawyers and solicitors who have hitherto carried out the functions of enforcement agents. This means that secretaries will now be exclusively responsible for execution and hundreds of new court officials will be appointed.

### E. Brazilian Execution Proceedings Reform and Judicial Delegation of Administrative Acts in the Execution Phase or Process

Article 7 of Constitutional Amendment 45/2004 impelled the National Congress to install, immediately upon its publication, a special mixed commission (1) to draw up, within 180 days, the necessary bills to regulate the material covered by it and (2) to bring about changes in federal legislation with a view to providing broader access to justice and speedier resolution of cases.

After EC 45/2004, there were, through Laws 11,232/2005 and 11,382/2006, two execution proceedings reforms:

> With Law 11,232, the judgment execution ceased to exist and was replaced by a simple process incident involving judgment being handed down [...] This was therefore in keeping with the constitutional guarantee of the effectiveness of court procedures and prompt access to justice (CF, Art. 5, Subsections XXXV and LXXVIII), which abolished the archaic dichotomy that established judicial conviction and judgment execution as entirely separate processes. As a logical consequence of the new system and also in keeping with the aforementioned constitutional principles, incidental actions related to judgments *quod computet* and stays of execution likewise ceased to exist. Book II of the CPC, after Law 11,232/2005, came to govern only forced execution of debt

59 *Ibid.*
60 *Ibid.*, p. 7.

> instruments. Only judgments against the Public Treasury and against someone owing alimony remain, for reasons peculiar to the nature of the such obligations, the object of autonomous execution proceedings, ruled on in Book II (Arts. 730-731 and 732-735, respectively). Law 11,382, of 06.12.2006, inspired by the same *assurances* of *efficacy and economy* in court proceedings, then extended the reform to the execution of the debt instrument, the only one that truly justifies the existence of execution proceedings that are completely devoid of judicial cognition.[61]

As Oliveira[62] noted, the reforms aimed to provide the process with the means capable of making it an effective legal tool, as a way of ensuring that the process produce substantive rulings within a reasonable time frame.

The essential nature of legal services and the respect they owe to various fundamental guarantees (*i.e.* access to justice, due process and, more recently, processing cases within a reasonable time frame and according to rules that ensure speedy procedures) mean that the reforms are linked to prompt and efficient provision of substantive rulings[63]:

> The reformist view [in Law 11,232/2005] is undoubtedly guided by the idea that entitlement cannot be established, if, on rare occasions, in the execution phase, assets belonging to the debtor are found that are liable to be used to satisfy the rights of the creditor, in such a way that, for the present system, there is no time to lose as of the rendition of judgment to the effect that the debtor should pay a certain sum.[64]

In the presentation of the motives underlying the bill that gave rise to Law 11,382/2006, the then Minister of Justice, Márcio Thomaz Bastos, argued *inter alia* that the bill sought to limit the formality to that which is 'strictly necessary'.[65] Likewise, the

> [T]he new Civil Procedures Code Bill, drawn up by the Jurists Commission set up by Act nº 379/2009 of the Speaker of the Federal Senate and changed in Senate Bill No. 166/2010 (authored by Senator José Sarney), emerged with the *initial purpose of addressing the principle contained in Article 5, LXXVIII, of the CRFB*

the greatest novelty in this Bill being

61 H. Theodoro Junior, *A reforma da execução do título extrajudicial*, Forense, Rio de Janeiro, 2007, pp. 2-3.

62 B.D.R. de Oliveira, 'Execução provisória na sistemática introduzida pela Lei nº. 11.232/2005: incidência da multa prevista no art. 475-J do CPC para o caso de contumácia', *in* A.S. Jardim & P.S.M.C. de Amorim (Eds.), *Comentários pontuais às reformas processuais civil e penal*, Lumen Juris, Rio de Janeiro, 2011, pp. 1-2.

63 Theodoro Junior, 2007, p. VII.

64 Oliveira, 2011, p. 3.

65 Theodoro Junior, 2007, pp. 3-4.

> [...] *the subordination of the proceedings to the need for substantive law* (Article 107, V – which is equivalent, for example, to the 'principle of *formal adaptation*' – Article 265-A of the Portuguese Civil Process Code), leading to a *concept of fairness*, i.e., *justice as a strict function of the oversight of substantive law*

this was thus "an important improvement in the Brazilian procedural system, *breaking with a certain formalist, mechanical and positivistic view* of procedures that still imbued the Buzaid Code", winning over the justices at national level in terms of *the effectiveness of processes, the flexibility of procedures* and *the ethical discourse*.[66] *In the execution phase or process*, it is nominally the responsibility of the *legal organ to assist the creditor in meeting his or her obligation* regarding the debt instrument, in accordance with Senate Bill 166/2010 (numbered 8,046/2010 in the Chamber of Deputies), in Chapter I of Title I of Book III, *a procedural duty to collaborate*, which is not limited to the parties and *includes the justice him- or herself*.[67]

*Obiter dictum*, in Portuguese law also "the amendment of 9 brings privileged aspects of a substantive nature to the detriment of questions of a merely formal nature (Art. 265-A of the CPC)", with the justice being permitted to adapt the process to the case, dispensing with acts that he or she deems inappropriate and performing those that more adequately meet the ends of the process.[68]

However, as Theodoro Júnior argues,[69]

> *The normative efforts of the legislator* [...] *are not enough* to ensure the success of the legislative program [...] A grand renovation project cannot and should not be ignored or betrayed by *those who are charged with implementing it* in search of the modern oversight to which the society of our time has a right.

In this respect, in accordance with the Ibero-American Code of Judicial Ethics:

> Article 29. A *well-trained judge* is one who is versed in current law and has developed technical skills and *the ethical attitudes required to apply them correctly*.[70]

Acting on various fronts, EC 45/2004, by way of Subsection XIII, adding to Article 93 of the 1988 Constitution, established the right to having a number of judges at a court that is proportional to the true demand for justice and to the

66 Feliciano, 2011, pp. 26-28.
67 Marinoni & Mitidieri, 2010, pp. 149-150.
68 A. Neto, *Código de Processo Civil anotado*, (22nd edn), Ediforum, Lisbon, 2009, pp. 406-407.
69 Theodoro Junior, 2007, pp. VII-VIII.
70 *Código Ibero-americano de Ética Judicial*, CJF, Brasília, 2008, Retrieved on 7 April 2011 from <www.cidej.org/c/document_library/get_file?uuid=5b142f88-73ce-47f2-beb5-d82c7d75db81&groupId=10124>, p. 39.

population served. Dias,[71] writing shortly after the advent of the norm, envisaged that the Brazilian state would not be capable of promptly upholding this right:

> The efficiency of the public legal service provided by the state should be seen from two separate angles: in terms of *legality* – external conformity to the law (= legal order) – and in terms of *legitimacy* – being in the public interest. In this light, it can be seen that, in Germany, where the Civil Process Code (ZPO) dates back to 1877, a judge can only be responsible for a maximum of around 500 to 1,000 cases and is thus able to provide judicial oversight within a reasonable time frame [...]Rationalizing the organization of the legal system, with *a number of judges adequate to the number of cases and inhabitants* in the court circuits created, with, for example, one judge per 5,000 inhabitants, as is the case in Germany, technically structuring the legal organs, with a number of public servants compatible with the volume of services provided, in addition to adequate technological resources – computers and stenotypes, for example – means ensuring that the people have speedy access to justice, within a reasonable time frame, *this being the new Constitutional recommendations made to the state*, in the normative content of Arts. 5, subsection LXXVIII and 92 [*sic*], subsection XIII, *even though we are convinced that these shall remain summarily ignored* [...].

The disproportion between the emerging demand for work and the staff structure available for dealing with it means that it is still, according to Silva,[72] "utopian to imagine or even envisage legislative provisions that might *pari passu* correct this disproportion". Although courts lack judges, the infra-constitutional legislative remains amiss in terms of delegation, by the justice, of procedural acts of an administrative nature, given the narrow reach of the disposition in paragraph 4 of Article 162 of the CPC/BR ("Merely ordinary acts, such as completion of the record and obligatory examination, do not require a court order, and should be carried out on the initiative of the court official and reviewed by a judge when necessary."), as added by Law 8,952/1994. One article, in its place, should be enough in the Brazilian Civil Process Code:

> Art. Records shall be brought before the judge only to decide on legal hypotheses contained within them or at the request of the interested party. Single paragraph. All procedural acts of an administrative character are deemed to be delegated *ex lege*.

The default lies in the Brazilian Civil Process Code Bill to be passed by the Chamber of Deputies.

71 R.B.de C. Dias, 'A Reforma do Judiciário e os princípios do devido processo legal e da eficiência', *Revista do Instituto dos Advogados de Minas Gerais*, Vol. 11, 2005, pp. 45-58, at 50-51.

72 I.B. da Silva, 'A motivação dos juízes e servidores como técnica de eficiência', *Revista do CEJ*, Vol. 24, 2004, p. 44.

As Bueno was well aware,[73] the framers of the constitution aimed to address the most varied situations in order to ensure that cases are brought to conclusion with the minimum of court work "in terms of *reducing* the quantity of this activity, and *reducing* the number of procedural acts":

> What the principle expressly laid out in subsection LX[X]VIII of Art. 5 is thus aiming at is that the activity of the court and the methods employed by it be *rationalized*, *optimized*, and made more *efficient* (which, moreover, is in accordance with the organization of all state activity, as can be seen in Art. 37, *caption*, of the Federal Constitution and the 'principle of efficiency' expressly laid out there), obviously without undermining the ability to achieve its broader objectives. For this very reason, there can be no reason not to refer to this facet of the constitutional provision under examination as a 'principle of efficiency of court activity'.[74]

Over fifteen years ago, Friede[75] was already warning that

> Judges – by imposing an archaic procedural legislation completely divorced from contemporary reality – are constantly being distracted from their prime function (which is that of judging, by rendition of judgments and previous decisions) by administrative (notarial management) tasks or by simple through-put of cases (through the so-called purely-expedient-order), in principle, totally alien to their vital function and which could be better (and a lato sensu lower cost for the whole community) exercised by another kind of functionary (a kind of judicial assistant), thereby allowing justices to devote all their working hours to their true constitutional duties

However, it is not always necessary to reform the law to adapt the process to a new reality:

> The methodological phase of instrumentalism that we are currently going through, in addition to the ideas operating through the third wave of renewal of access to justice, as espoused by Mário Cappelletti, requires *legal operatives* and legislators to adopt a method for constructing processes that produces effective results and is prepared to overcome any and every obstacle to access to justice, in a *constant effort to effectively think through the process* and, *when necessary*, by way of a reform plan that adapts the process to new realities.[76]

73 C.S. Bueno, *Curso sistematizado de direito processual civil: teoria geral do direito processual civil*, Vol. 1, Saraiva, São Paulo, 2010, p. 177.

74 *Ibid.*

75 Friede, 1996, p. 75.

76 R.P. de Queiroz, 'A dimensão do princípio do contraditório no art. 285-A do CPC', *in* A.S. Jardim & P.S.M.C. de Amorom (Eds.), *Comentários pontuais às reformas processuais civil e penal*, Lumen Juris, Rio de Janeiro, 2011, p. 165.

In fact, as outlined in the first paragraph of Article 5 of the 1988 Constitution, which makes defining norms and fundamental rights and guarantees immediate applicability, the principle of efficiency "does not depend on the law to be implemented in all its senses":[77]

> The principle in question here authorizes – indeed, *imposes* – a new way of thinking about civil process law, *even in cases where there is no express law that addresses this and makes it concrete*. Examples of this new way of thinking about civil process law include expedients such as 'on line' seizure and seizure of corporate assets (execution techniques that had been widely applied on a day to day basis in courts even prior to their coming under the regulation contained in Law n. 11.382/2006 Arts. 655, VII, and 655-A of the Civil Process Code).[78]

Neither should we forget the *True Reform of the Judiciary*, via Subsection XIV of Article 93 of the 1988 Constitution, establishing that *civil servants* may be *delegated* to perform *acts of administration* of a *merely expedient nature with no deliberative character*, *in accordance with the principle of efficiency*:[79]

> In view of this, there can be no denying the need to (re)think the legal operation of the state from a *structural* point of the view that a number of novelties introduced by Constitutional Amendment n. 45/2004 should be pointed out. These established various opportunities for putting its own provisions in subsection LXXVIII of Art. 5 into concrete practice. By way merely of illustration, it is worth mentioning the following provisions [...] (c) *the performance of merely administrative acts with no deliberative content may be delegated by the justices to civil servants* (Art. 93, XIV).[80]

When the attention of the civil procedures lawyer turns to the human, organizational and bureaucratic nature of the judiciary,

> [I]t is impossible to lose sight of the fact that Subsection LXXVIII of Art. 5 of the Federal Constitution clearly *reflects* the fact that, in the field of Public Administration, this has been made explicit in the *caption* of Art. 37 of the Federal Constitution, with Constitutional Amendment no. 19/1998.[81]

The demand for effective reform of civil procedures is thus a *projection* of the demand for efficiency in the reform of the state apparatus.[82]

Opting to delegate procedural acts of an administrative nature may not lead the judge to have recourse to the Science of Administration:

77 Bueno, 2010, p. 176.
78 *Ibid.*, p. 178.
79 Moraes, 2006, p. 456.
80 Bueno, 2010, p. 179.
81 *Ibid.*, p. 180.
82 Becker, 2001, p. 287.

> The judge is manager of his or her court and should promote efficiency and efficacy in the services provided [...] Administration originated in the public sector. In the 17th century, the post of minister (*minus*) emerged in contrast to that of magistrate (*magis*). Decisions were taken by a minister who was the executor. Thereafter, the time came when justices administered their own sectors and courts, becoming a Manager-Judge. *There is a need for justices to learn the lessons of administration in order to better manage the provision of legal services*.[83]

Courts must use a system that allows for breaks in routine to be perceived and encourages changes that improve the court.[84]

The PDCA cycle of '*plan*, *do*, *check and act*' is recommended, as it is one of the most commonly used systems:[85]

> The first step is planning, which involves establishing objectives and selecting the method, indicators and resources. The second step is execution. *Execution should not be concerned only with carrying out the process, as it also involves education and training of those responsible for this process*. The third step is evaluation, which is conducted using performance indicators, and the final step involves correcting processes for which the indicators proved unsatisfactory.[86]

In the case of the second step in the cycle (the '*do*' or '*execute*' phase), it should be noted that the Ibero-American Code of Judicial Ethics, in Article 32, considers it the duty of a judge to facilitate and encourage the training of other members of the judicial team.[87]

Nogueira[88] provides an example of the use of this cycle:

> [W]here there is significant number of unnecessary referral of cases for completion by the judge that when they require only notarial attention or could be delegated to another execution process, the PDCA can be applied. The aim of the team is to reduce the number of unnecessary completions, using the PDCA. The following steps are observed: *a) Planning: establishing aims, goals, methods and indicators: – aim: to reduce the number of unnecessary completions; – goal: to reduce by 50% the number of unnecessary completions in one year; – method: training and standardization of whole team; – resources: meetings and order of service; – performance indicator: Number of unnecessary completions (NUC) divided by number of completions, collected monthly. b) Execution: holding sensitization meeting with team, training of team by the clerk of court regarding*

83 Nogueira, 2009, pp. 132-133.
84 *Ibid.*, p. 135.
85 *Ibid.*
86 *Ibid.*, p. 136.
87 *Código Ibero-americano de Ética Judicial*, CJF, Brasília, 2008, Retrieved on 7 April 2011 from <www.cidej.org/c/document_library/get_file?uuid=5b142f88-73ce-47f2-beb5-d82c7d75db81&groupId=10124>, p. 39.
88 Nogueira, 2009, p. 136.

> *official hypotheses relating to the process, as established in the Statutory Consolidation; listing the main moot cases and putting them up on the office wall or distributing the list to each civil servant; drawing up an order of service standardizing other notarial cases. c) Evaluation: members of the chambers map cases that do not conform, identifying causes and the person responsible. Performance indicators are applied and results are presented at a monthly meeting of the team. d) Corrective action: actions not in conformity with norms are presented and training is reinforced with the inclusion of cases on the list or modification of order of service*.

On the other hand, the motivation of the civil servant should not be overlooked when efficiency is achieved and this should not be rewarded by due remuneration alone:

> Motivation [...] depends on the *view that a person has of the institution* in combination with a *personal benefit*. And what is the role of the organization in providing motivation? Showing the individual *the value he or she has for the organization* and *the social importance of the role he or she plays* [...] generally, civil servants are unaware or forget the fact that their job is intrinsically linked to the end result [...] *judges' decisions are overvalued* [...] To achieve *effectiveness*, the work of the *whole* team is *indispensable*. Making *every* member of the team aware of the *importance of the task* and according them *due value* are decisive factors in generating motivation.[89]

In this regard,

> [J]ust as it is an important feature of modern management techniques, the delegation of power greatly helps to generate motivation, as it gives each the authority to make decisions regarding issues that he or she is competent to decide upon.[90]

The judicial service is not only effective but also *efficient*, and strengthens the *image* of the justice system and produces greater *satisfaction* among users, also reflecting the *motivation* of staff. Users whose expectations of efficiency are met, in turn, confer *legitimacy* on the Judiciary and, through their elected political representatives, ensure its *independence*.[91]

## F. Conclusion

In view of the Portuguese experience with enforcement agents and the Brazilian constitutional procedural principle of efficiency, it is imperative, in Brazil, that all

89 *Ibid.*, p. 142.
90 Silva, 2004, p. 44.
91 Nogueira, 2009, p. 144; *cf.* tb. Dias, 2005, pp. 45-46; *cf.* tb. R.deS. Araújo, 'O princípio de eficiência e a necessidade de planejamento', *Revista do Tribunal Regional Federal da 1a. Região*, Vol. 22, No. 10, 2010, p. 56.

acts of an administrative nature, during the execution phase or process, be delegated to judicial civil servants, thereby allowing justices to use their time more for decision-making, without jeopardizing office administration. With fewer justices needed for execution, it would be unnecessary to increase their numbers for reason of the vast quantity of administrative procedures requiring their attention. A reduction in the costs of the judicial system would in turn facilitate the recruitment and remuneration of staff, who, when accorded due value and adequately remunerated, are motivated to remain in the judicial service and to perform better.

Efficiency as well as effectiveness of service increases the satisfaction of users, who consequently have higher regard for the legitimacy of the Judiciary and, through their elected political representatives, ensure its independence.