THE JUDICIAL REACTION AGAINST THE PUBLIC UTILITIES USING: CONSUMER LAW IN TELECOMMUNICATIONS' DEMAND IN BRAZIL

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Paper presented in the 2008 Joint Meeting of the Law and Society Association (LSA) and the Canadian Law and Society Association (CLSA), in Montreal (May 29 to June 01).

ABSTRACT

The public utilities privatizations, which were carried on many Latin American countries in the nineties, had many political different reactions. In Brazil, it became visible the judicial consumer reaction against the new regulatory model in most public utilities. There were some factors that allowed the judicial system to be flooded with the network industries lawsuits. The hypothesis of the paper is that one of the causes was the absence of a suitable legal and institutional framework to channel the consumer demands. On the other side, some new types of judicial procedures (like class actions, on one side, and special claim courts, otherwise) gave the strength to the Brazilian judicial power to raise as a central player in order to decide and directly determine the legal details of the public utilities production and distribution.

Keywords: Judicialization. Public policies. Consumer law. Telecommunications. Brazil.

RESUMO

As privatizações das empresas estatais de serviços públicos, ocorridas em muitos países da América Latina nos anos 90, foram recebidas com diferentes reações. No Brasil, ficou clara a reação judicial dos consumidores contra o novo modelo regulatório em muitas empresas privatizadas. Alguns fatores permitem explicar porque o judiciário brasileiro foi inundado por ações judiciais contra as empresas de serviços públicos. O artigo traz a hipótese de que uma das causas foi a ausência de um quadro institucional e jurídico para canalizar as demandas dos consumidores. De outro lado, alguns tipos novos de procedimentos judiciais (como as ações civis públicas, de um lado; e os juizados especiais cíveis, de outro) ofertaram capacidade ao Poder

Judiciário brasileiro para se afirmar como um ator central para decidir e diretamente determinar detalhes jurídicos da produção e distribuição desses serviços públicos de telecomunicações.

Palavras-chave: Judicialização. Políticas públicas. Direito do consumidor. Telecomunicações. Brasil.

1. INTRODUCTION

The Brazilian new constitutional order, declared in October 31 of 1988, represented much more than a political transition. It was based in a constitutional framework that gave political power that made possible different behavior from many emergent state institutions. In this sense, the power of constitutional text can be understood by the degree of legitimacy imposed to new political actors as they struggle to reinterpret the meaning of many statutes and regulatory legal concepts. The clearer example of this empowerment can be seen in the new state and federal prosecution powers and functions in Brazil.

The constitutional text of 1988 had almost fifty-two amendments in twenty years. These modifications also derived from the political and judicial struggles. The fight towards the definition of the content the constitutional meaning has an intense importance in the political life. Those conceptual definitions, taken from the legal texts. Those meanings can be used either as obstacles or as combat tools in the defense of perceived social interests. It is clear that the statutes and the regulatory rules, related to them, play a key role in the settlement of the social actors' strategies.

As NANCY REICHMAN (1997) shows, there are two types of theoretical possibilities to depict the relation between the political power and the law within the sociological analysis of the contemporary regulation phenomenon. The first possibility is to comprehend law as a product build from political relationships somewhat outside from the regulatory scenario. An example of this solution could be perceived in the norms that sustain both punishments (as fines) and benefits (tariffs exemption or public funding to certain activities). Those norms are then understood as direct products of the political clashes that were to be enforced by the governmental agencies. They are related to the law environment, but they are not created by it. The law serves as a way to consolidate the political victories of the winners. The second way to understand the regulatory phenomenon through the sociological lenses is proposed by ROBERT KAGAN (1990). In his point of view, the norms have a

double function. It can be used to advance and transform social life and it has a "status quo" function as well. In his own words: law is both shield and sword. That definition is very interesting because it recognizes the active role of the legal actors (lawyers, administrators, judges and others) and it also opens analytical possibilities to the classic object of the Sociology of Law: the disjunction between the legal directives and the social practices. It is compatible with the scope of this paper which is to understand the relationship between the recently privatized Brazilian telecommunications enterprises and the judicial pressure directed to change some market practices. The courts pressure comes from two kinds of lawsuits: representative class actions and special claim courts' lawsuits. There are two empirical sources in this paper. The first is the social and normative system of the regulatory legal frame. The second is the objections directed against it, represented by the judicial process.

The first part of this paper examines both the privatization and upheaval of a competitive market to the telecommunications public utilities offerings. It will be described the formation of a specific agency as a piece on a major plan to erect a new logic to be applied in the public goods supply. That adaptation of the Brazilian state only can be understood as related to an international scenario of stimulus to major alterations in the public services. The conclusion of the first part is that the consumer role was neglected during the transition between the once state-based supplies to the new market-oriented scenario. That problem can be depicted by the legal terminological dispute over the role of persons who actually consume those once state-owned public utilities services: are they consumers or users? If they fall into the first category, the relationship is primarily private, but with a lot of prerogatives granted to the consumer by the pertinent federal statute (Federal Statute n. 8.078, of 1990, named as Consumer Code). If they are really public service users, they won't receive any additional prerogative, since the Brazilian parliament has not approved any law to grant special protection to them. That absence of political action happens despite the approval of a constitutional amendment in 1998, which proclaimed that such norm was to be sanctioned in ninety days. That constitutes a typical example of legal gap. During that juridical debate, the regulation enacted by the new agency paid little attention to the consumers needs in a pure contradiction of both the political speeches from its directors and the statute basic text that permitted the privatization, and the creation of the agency.

The second part of the paper deals with the possibility of understanding of that flood of

telecommunications lawsuits in a theoretical frame. There is a work in progress hypothesis that claims about a democratic deficit in the regulation production system in the Brazilian telecommunications sector. That hypothesis helps to explain why the judiciary branch was transformed in the citizens' last resource against the enterprises and the telecom federal agency itself. So one can infer that this separation of the privatized sector from the consumer concerns was a determinant factor that explains why such regulatory rules were so fiercely attacked in the courts. They suffered, from its origin, from as lack of social legitimacy as contrasted to the current interpretations of both the federal statutes and even the constitutional text. The last part of the paper is dedicated to describe one kind of quasi-judicial solution that was created in the Rio de Janeiro State, in Brazil. It consists of a pre-settlement made in the same space of the special claim courts. It didn't have the force to suppress the flood of lawsuits, but it helped to dim the problem. The other solution would be to create a different kind of class action to provide that adaptation of the regulatory rules to the whole normative framework.

2. STATE REFORM IN BRAZIL: THE PRIVATIZATION AND THE CREATION OF REGULATORY AGENCIES

Just after the approval of the new constitution in 1988, the administration of President Fernando Henrique Cardoso, which begun in 1995, installed a huge plan of state reform (BRASIL: Presidência da República, 1995). Of course such transition was on route before that. But the highest point of the reformist period was in his two presidential mandates that ranged from 1995 to 2002. As BOSCHI & SOARES DE LIMA showed (2002), those changes had to be understood in two synergic perspectives. The first is related to the Brazilian integration among the economic and political scenario, both by the transition to a democratic regime and from a liberalization of the national economic patterns. The second perspective had to do with the internal political demands. Those demands had to be controlled to guarantee the success of the economy stabilization. That control relied heavily in the privatization as a tool to release resources to the market and to strengthen the financial sector. The privatization also made possible to induct large modifications in some economic sectors such as telecommunications (DALMAZO, 2002; DANTAS, 2002). The reforms were negotiated in a context that overcame the federal legislative. They urged a political articulation of the executive and legislative branch with the

private sector business associations (TAVARES DE ALMEIDA, 1999; TAVARES DE ALMEIDA & MOYA, 1997). Of course part of the political reaction against the privatization policy was made in the judicial field, using a lot of lawsuits against it. Since the Brazilian Judiciary is very slow to judge them, there are still 230 lawsuits spread in the five federal court of appeals, regionally divided in all the country. The claims are very diverse. They involve the annulations of the selling auctions, and the re-evaluation of the price by which the enterprises where sold, combined with a compensation claim to the federal treasure. The newspapers brought testimonials of retired and active magistrates of the Higher Court ("Supremo Tribunal Federal"), who all said that such judicial processes will not prosper, since the former administration obtained previous legal decisions that allowed the auctions (UMA DÉCADA, Newspaper, Valor Econômico, 23 Oct. 2006, p. A5). And more, despite the pressure, the participation of the federal government in these companies was sold and a new panorama for the once state-owned public goods supply appeared (OLIVEIRA, 2005).

The text of BOSCHI & SOARES DE LIMA (2002) states clearly that the changes happened among the three axes of widespread political relationships (economic policies, social policies, and political participation standards). They were possible due to the modification of relationship between the public sector and the private sector in the recent period. As they showed, the new regulation form has no direct connection with the historical corporative relations that marked the building of the Brazilian modern state since the President Getulio Vargas administration, in the thirties of the last century. On the other side, these new institutional arrangements did not have the sufficient strength to break with the past. Traditionally, in Brazil, the executive branch always was the engine of the economic modernization. But that was accompanied by some big democratic flaws due to its political centrality. To the authors, one can locate the possibility of a new corporative arrangement. That theoretical solution could give a fully understanding of the recent political situation. But this possibility can not be confirmed by then due to the lack of empirical data to support it. One thing they can not deny: the actual importance of the judicial branch in the political scenario. There is a large array of data that confirm this sentence (TAYLOR, 2007, 2008). Unfortunately, there is a little amount of research about the relationship between the public policies in the recently privatized sectors and the judiciary.

The great problem on the regulation of most of the privatized sectors was the absence of an

institutional framework to establish and continuously check the policies development. The federal agencies were either uncreated or recently founded. Additionally, most of the employees had just temporary work contracts. That was just one the various factors, which brought difficult to create a strong technical base for the policies, and resulted in a dimmed internal culture in those institutions. Even the stability of the agencies directive boards, which was derived from the many basic statutes, turned to be relative in the actual political struggle. Finally, the many forms of economic and political retaliation of the central government still today pose a very real threat to the technical independence of these new agencies. The most forceful instrument was the possibility to cut the budgets of the agencies by the federal Ministry of Planning, Budget, and Management ("Ministério do Planejamento, Orçamento e Gestão"). One can understand that this problem is confluent to a political tradition where most of the power is centered in the Presidential Cabinet. How could the telecommunications agency regulatory rules be enforced to protect the consumers in that context? The enforcement of the agency was very fragile to produce actual protection to them.

2.1. A GENERAL MODEL TO ECONOMIC AND SOCIAL REGULATION

In the mid-nineties of the last century, as happened in most parts of the world, Brazil established policies to institutionalize independent regulatory agencies. It was an imported model of regulation, transplanted in order to empower the state assessment of the private business in a large array of sectors. The first agencies were dedicated to infrastructure fields. The national regulatory agency dedicated to telecommunications area was founded by the force of Federal Statute n. 9.472, passed by the National Congress in July 16 of 1997. It was named "Agência Nacional de Telecomunicações", whose acronym is ANATEL. Its future internal structure and major guidelines was defined by a Presidential Decree n. 2.338, in October 07 of 1997 (PIRES & PICCININI, 1999). This agency was one of first due to the fact that the telecom sector was changing at a fast pace. A special state institution was defined to be established few years later, when the cellular communications market was liberalized. The Federal Statute, which dealt with this matter, n. 9.625, passed in July 19 of 1996 foresaw this necessity in order to regulate the new economic activity of mobile phones. That statute was named "minimal statute" and it was passed at the same moment of a major change in the constitutional text, which guaranteed

the overture of the telecommunications market to private enterprises. Someone can say that the whole group of constitutional amendments, passed in 1995, marked more a liberalization plan that the actual building of a regulatory framework. But such legal alterations open a highway to the privatization of a lot of state-owned companies. In the telecommunications area, the process started with the services that required a lot of investments to be built. At first, they were the cellphone networks. Later, the government organized the auctions to conduct the public sale of the majority of the federal share in the companies. After the telecommunications market, the same pattern was reproduced to other economic sectors, like oil, gas, electricity, and much more, with obvious regard to their special trends. Then a lot of new agencies were created. After the infrastructure sectors, different economic areas were then re-organized with specific federal and state agencies to control then. This kind of regulation was spread to social regulation areas, like cultural investment, sanitary protection, private medical care, and even medicine distribution. The table below details the existing federal agencies:

Name and acronym	**Provisory Bills (MP), Federal Statutes (Lei) and Presidential Decrees (DEC)**
Agência Nacional de Telecomunicações (ANATEL) / National Telecommunications Agency	Created by the LEI n. 9.295, July 19, 1996; and LEI n. 9.472, July 17, 1997. Detailed by the DEC n. 2.338, Oct. 07, 1997, modified DEC n. 3.873, July 18, 2001, and DEC n. 3.986, Oct. 29, 2001, and DEC n. 4.037, Nov. 29, 2001.
Agência Nacional do Petróleo, Gás e Biocombustíveis (ANP) / National Agency for Oil, Gas and Biosources fuels	Created by the MP n. 2.056, Aug. 11, 2000, converted as LEI n. 9.478, Aug. 06, 1997, modified by the MP n. 2.127-006, Jan. 26, 2001. Detailed by the DEC n. 2.455, Jan. 14, 1998.
Agência Nacional de Aviação Civil (ANAC) / National Agency of Civil Aviation	Created by the LEI n. 11.182, Sep. 27, 2005.
Agência Nacional de Energia Elétrica (ANEEL) / National Agency of Electrical Energies	First glance by the MP n. 1.531-018, Apr. 29, 1998 (reorganization of Eletrobras Corp.), converted at the LEI n. 9.648, May 27, 1998; Finally created by the LEI n. 9.427, Dec. 26, 1996. Detailed by the DEC n. 2.335, Oct. 06, 1997, modified by the DEC n. 2.364, Nov. 05, 1997, then modified by the DEC n. 4.970, Jan. 30, 2004.
Agência Nacional de Vigilância Sanitária (ANVISA) / National Agency for Sanitary Protection	Created by the MP n. 1.791, Dec. 30, 1998, converted as LEI n. 9.782, Jan. 26, 1999, modified by the MP n. 1.814-001, Mar. 25, 1999; renumbered as MP n. 1.912-005, June 29, 1999, and after MP n. 2.000-012, Jan. 13, 2000, then MP n. 2.039-019, July 28, 2000, then MP n. 2.134-025, Dec. 28, 2000, and MP n. 2.190-033, July 26, 2001. Detailed by the DEC n. 3.571, Aug. 21, 2000, modified by the DEC n. 3.677, Nov. 30, 2000.

Source: Data extracted from the Brazilian Federal Senate legal database (http://www.senado.gov.br), organized by the author.

Name and acronym	Provisory Bills (MP), Federal Statutes (Lei) and Presidential Decrees (DEC)
Agência Nacional de Saúde Suplementar (ANS) / National Agency for Private Medical Care Regulation	Created by the MP n. 1.928, Nov. 25, 1999, converted as LEI n. 9.961, Jan. 28, 2000, modified by the MP n. 148, Dec. 15, 2003. Modified by the DEC n. 3.327, Jan. 05, 2000.
Agência Nacional de Águas (ANA) / National Agency for Water Resources	Created by the LEI n. 9.984, July 17, 2000, modified by the MP n. 124, Jul. 11, 2003, renumbered as MP n. 128, Sep. 01. 2003, then MP n. 165, Feb. 11, 2004, then MP n. 170, Mar. 04, 2004. Detailed by the DEC n. 3.692, Dec. 19, 2000.
Agência Nacional de Transportes Aquaviárias (ANTAQ) / National Agency for Hidric Transportation	Created by the LEI n. 10.233, June 05, 2001, modified by the MP n. 2.201, Aug. 24, 2001. Detailed by the DEC n. 4.122, Feb. 13, 2002.
Agência Nacional de Transportes Terrestres (ANTT) / National Agency for Terrestrian Transportation	Created by the LEI n. 10.233, June 05, 2001, modified by the MP n. 2.201, Aug. 24, 2001. Detailed by the DEC n. 4.130, Feb. 13, 2002.
Agência Nacional do Cinema (ANCINE) / National Film Agency	Created by the MP n. 2.219, Sep. 04, 2001. Detailed by the DEC n. 4.121, Feb. 07, 2002, modified by the DEC n. 4.330, Aug. 12, 2002, then by the DEC n. 4.237, May 17, 2002 and by the DEC n. 4.456, Nov. 04, 2002.
Câmara de Regulação do Mercado de Medicamentos (CMED) / National Regulation Board for Medicine Market	Created by the LEI n. 10.742, Oct. 06, 2003.

Source: Data collected from the Brazilian Federal Senate legal database (http://www.senado.gov.br), organized by the author.

It can be seen that the federal government used a lot of Provisory Bills ("Medidas Provisórias", or MP) to establish most of the agencies. That is one of the elements, which demonstrates the relative power of the President in the Brazilian legislative process. It is a form of Decree, which has the same rank of a federal statute passed by the congress. The only recent limitation is that they actually have to be reviewed and approved by the congress in three months. A whole state reform plan was at stake in that political moment. The privatization was one line of action, parallel to the institutionalization of a new regulatory basis for the country. That situation derived in the formation of a general model of federal agency, with some characteristics that can be summarized in the following table:

Basic characteristics of some Brazilian regulatory agencies.

<table>
<tr><th></th><th>ANEEL</th><th>ANATEL</th><th>ANP</th></tr>
<tr><td>Decision autonomy</td><td colspan="3">Typical bureaucracy with formal legal-based autonomy. In the recent tradition most of the decisions of the regulatory agencies have been respected. The Brazilian law fixes a not so clear division between the organization of the policies (central government) and detail (agencies).</td></tr>
<tr><td>Financial back-up</td><td colspan="3">The Brazilian law previews independent funding for them, but actually the have strong dependence of the public funds controlled by the central government.</td></tr>
<tr><td rowspan="2">Board of directors mandates and stability</td><td>Limited mandate with rigid criterion for dismissal of board members. Period of the mandates do not overlap each other. No possibility of re-conduction to the position.</td><td colspan="2">Limited mandate with rigid criterion for dismissal of board members. Period of the mandates do not overlap each other.</td></tr>
<tr><td colspan="3">Actually, the central government can use a lot of tactics to force the resignation of a board member.</td></tr>
<tr><td>Transparency of decisions and accountability</td><td>Public audiences, Ombudsman, and Advisory board.</td><td>Public audiences, Ombudsman, Advisory board, and Management Contract signed with the central government.</td><td>Public audiences, Electronic recording of deliberative meetings with its divulgations.</td></tr>
</table>

Source: Adapted from PIRES & PICCININI (1999, p. 232), with personal modifications.

All the regulatory agencies have to cooperate with the Brazilian anti-trust institutions ("Conselho Administrativo de Defesa Econômica" and "Secretaria de Direito Econômico do Ministério da Justiça") and with the Brazilian securities exchange commission ("Comissão de Valores Mobiliários"). Also, they have to help the consumer protection institutions and to help other regulatory agencies, especially those maintained by the federated states. Such cooperation is scarce. It is not part of the daily routine. So it is only seen when there are such huge problems that demand special attention from the public or from other state institutions like the National Congress or its special Account Tribunal of the Union (a French style "cour de comptes", in Brazil). So the most important task of those new agencies was to produce a subjective sensation of respect to the rule of law in the post-reform scenario. That was very necessary to attract foreign investors to the privatized corporations, as stated one attorney who acted as a legal counselor to the Communications' Ministry

in that period:

> In the recent Brazilian case, the autonomy granted to the regulatory agencies seemed to be driven, at least in the beginning, by the purpose of offering security to foreign investors as they were attracted to buy the former state companies shares. As happens in any similar process, the future challenge is to erect a system of checks and balances that hold a democratic daily operation, with close reference to the general interests and the legal order" (SUNDFELD, 2002, p. 24).

Some features of the general model are replicated in most agencies. But there are some differences also. Those differences, that change form a specific agency to another, are related both with the peculiarities of the economic sectors and the formation of a regulatory culture within each agency. The same trait appeared in another countries, such United Kingdom and United States of America, where can be depicted a variation in regulatory styles (VOGEL, 1986). These differences can also be understood as related to special features that mark the relationship between the state, the market players, and the society. They also can lead some clues to how the different societies perceive the way to judicially settle problems, form example (KAGAN & AXELRAD, 2000).

In Brazil, there are today two recent treads involving the regulatory agencies and the executive branch, after the new President was nominated in 2003. The first is the objective to dim even more the autonomy of the regulatory federal agencies by passing a general regulation statute (COUTINHO et alli, 2004). The second one was inherited from the preceding administration and is related to the expansion of the social regulation areas, especially to the cultural sectors. That idea perished in part. The cinema agency was created (ANCINE), but another agency, designed to control the whole audiovisual content was not approved, after a strong debate in the congress and within the society. It was the unborn national agency of audiovisual regulation ("Agência Nacional do Audiovisual", or ANCINAV). Even the legal counselor of the Communications Ministry produced a legal note against it, and then published it on an academic journal (RODRIGUES JÚNIOR, 2006).

The first trend reflected in the presidential campagin, from which President Lula was re-elected. It was major topic in the debates and publicity. Unfortunately, the political debate at that time could not evolve to detail the formal modes of relationship between the state, the market, and the society. The politicians made speeches that had not the force to get detached from the common sense of the minimal or maximum state dilemma regarding privatization. Analyses about regulation were

obviously not produced in relation to the campaign. The President Luis Inácio Lula da Silva, from the leftist Workers' Party ("Partidos dos Trabalhadores", or PT), when asked about privatizations by journalists from one big Brazilian newspaper ("O Globo"), replied with some policies proposed by the federal administration in order to control the regulatory agencies. In his view, the absence of control, which marked the last government, has coming to an end in his administration (O Globo, Oct. 11 of 2006, p. 12). The opposite candidate, Geraldo Alckmin, from the Social-Democratic Party (PSDB), after the same question about privatizations, replied that they were a great advance for the country:

> I am stating clearly on this matter: the EMBRAER [airplane privatized industry] once had four thousand employees. Now, it has twelve thousand. In the recent past people had to declare a telephone line possession as a valuable asset. Nowadays, the country has ninety to hundred million cell-phone terminals, without talking about the wired line terminals. Once, Public enterprises had a lot of debts. The government had to cover their losses. Today they generate an enormous quantity of tax revenues and development. We always defended that policy [privatization]. [...] I will not neither sell the Banco do Brasil [major Brazilian public and federal bank], nor the Caixa Econômica [federal bank, which deals mostly with real estate lends]. I will not sell the Correios [Brazilian Postal Service]. [...] My priority is not sell assets. The privatization was important. My priority is to make concessions thought contracts and investment arrangements between the government and public-private partnerships. (O Globo, Oct. 18, 2006, p. 12).

And still talking about the regulatory agencies, the opposition candidate mentioned: "We have a great deal of difference towards against the Workers Party ("PT"). Why? They seek to made the agencies fragile. The regulatory framework was made fragile, also. They created a lot of threats to the rule of law when they supported invasions of the rural landless movements and when they stimulated those kinds of behaviors" (O Globo, Oct. 18, 2006, p. 12). That speech must be understood as part of the problem, in which the opposition candidate got involved in the presidential campaign. The once-opposition stood against the privatization of many public enterprises carried out by the later President Fernando Henrique Cardoso. A large section of the campaign of the Workers' Party focused that privatization as a big mistake made by the later administration. Of course the reelecting government did not make any movements to retake the privatized enterprises, by the revocation of such concessions. But in terms of rhetoric, they won that battle, since they were re-elected therefore.

2.2. THE LOGIC BEHIND THE PRIVATIZATION AND COMPETITION

The recent expansion of the American regulatory model to a lot of countries is quite visible nowadays. There are many kinds of national agencies created taking in account the American typical regulatory agency model. That expansion has been notably perceived in the European and Latin American countries (MARTÍNEZ, 2002). In those scenarios, such changes are closely related to the prvatization of public utilities state enterprises. The preceding model adopted by them – in which the US was a noteworthy exception – was based in infrastructure sectors built and managed by state institutions and companies. There was a clear tendency of changing in the public policies in the beginning of the eighties in the past century. The combination between privatization needs and state reorganization formed the basis for the importation of the idea of regulatory framework, in which the American-type agencies were in the center. So it is easy to see some kind of Americanization in the public utilities policies in governmental plans. One conclusion is that in the recent past, i.e. just before the seelling of the public companies, the decision mechanisms were very different than after. The answer could be that the means necessary to control such privatized companies in a competitive scenario demanded a new kind of state intervention. Although, such answer is far form complete. It is obvious that there were other issues among such choice. In addition, one important motivation was to provide stronger contractual guarantees to the new owners. That needed to be effectively better in terms of protection when compared with formal mechanisms unleashed by other solutions:

How price and service quality are determined	Strategy for regulating monopoly	Detailed description and examples
Market solution	Private contracts	Customers contract directly with private infrastructure supplier
	Concession contracts	Governments contract with private infrastructure supplier on the consumers' behalf: (a) competitively bid concession; and (b) negotiated concession
	Hybrids	Intermediate models, which mix some characteristics from the concession contracts and front the regulatory discretion: (a) contracts supervised by special courts (France); (b) Discretion with specific limits (Latin America).
	Discretionary regulation	Government regulators set the prices and services standards for private infrastructure suppliers: (a) price-cap regulation (Britain) and Cost-of-Service regulation (United States)
Political solution	Public enterprises	Government or nonprofit agency assumes the primary responsibility for supplying infrastructure services

Source: GÓMEZ-IBÁNEZ (2003, p. 11, p. 33).

But even in the United States of America, the independent regulatory agency model was at stake during the past few years. Of course, that happened due to different problems. One of the causes was the historic action of some social groups in defense of collective interests among such agencies. Such way of fighting for rights imposed pattern of intervention in the public policies formulation that made them an arena of disputes where only the most backed-up interests could won. (MELO, 2001). Actually, that trend grew problematic recently, either due to the declining force of the public interest advocacy, as to the difficult to manage the complexity of so many disparate individual interests in dispute. What can not be neglected is that the central panorama of the public policies production in the United States always involved – directly – a lot of judicial disputes. In comparison to Brazil – and most Latin American countries – such panorama of mass litigation in order to somehow influence the production of public policies is new. It can be seen with two major types of judicial demands. The first type is the Brazilian class action lawsuits, which consists of a demand based on a collective or diffuse interest. The second type is based on individual lawsuits filled by citizens against most public utilities companies. Such double perspective granted, for some Brazilian authors, the diagnosis of an Americanization in the process of public policies production, especially when having the Judiciary in

account (MELO, 2001; MATHEWS, 2007).

3. THE RELATIONSHIP BETWEEN SOCIETY AND REGULATORY AGENCY

As described by BOSCHI & SOARES DE LIMA (2002), one can consider the possibility of three historical lines to understand the changes in the relationships between the state institutions and the private interests in Brazil: (a) economical policies; (b) social policies; and (c) political participation. One of the dilemmas showed by those authors is the shrinking of the citizens to the only role of the consumers (2002, p. 212). The same problem is perceived by AUTIN & RIBOT (2004), in the French case, where the bureaucratic tradition had resisted so much to the openness for the public participation in the public policies, despite of the new imported regulatory forms, such as agencies.

A central tread in the telecommunication policies, as in other industries, has been how to grant a formal possibility of participation and deliberation in the public policies rules of ANATEL. An International research on this theme indicates that it is important not only to hear their opinion, but it is important to find mechanisms to take their point of view in actual process of rule production. There are few studies from the Brazilian case in most industries, especially analyzing the real process of participation in the formulation of the rules. Most works on that topic focuses just on the normative panorama, defending different interpretations of the existing laws. Very few are empirical-based. Nevertheless, no one really analyzed even one or more rule production processes from the beginning to its end, tracking the qualitative trends of the case. One empirical study was produced by Mattos (2005). He classified the normative production of the most important basic regulation of the telecommunications services. His research relyed basically on the regulatory agency database. So it was blind to the real motivations and actual positions in the process. One important conclusion of his work is that the process has formal openness to the participation. Unfortunately, the absence of a parallel qualitative analysis induced that the production of rules in the ANATEL was democratic. But the central answer to make such statement should have been based, after all, on the deliberative process, and not only on the formal possibility of participation. Of course the conclusion raised by the research was not naïve. He could understand, from the data collected, that the industries interests

had more chance to prevail, just because they had organized associations and were better funded than the consumer's representatives.

3.1 THE DEMOCRACY IN THE FORMATION OF THE REGULATORY FRAMEWORK RULES

There are two administrative mechanisms designed to grant participation form the general public on the regulation norms: (a) public consultancy; and (b) public hearing. There is a different way which grants the possibility to change the regulatory framework as well: the judicial process. In this topic, it is important to describe what those administrative models of general participation are and why its insufficiency made necessary the Judiciary intervention stimulated by the population. The general public disappointment could be channeled through the Legislative Branch also. For a huge sum of motives the Legislative was unable to produce a desirable response in such problem.

On the administrative openness to participation, the case of ANATEL is an example. The first mechanism, named public consultancy, has to be done by legal imposition (article 42 of the Federal Statute n. 9.472, of 1997). The second mechanism is optional. It depends on the discretion of the authority who is managing the administrative process of rule creation (MATTOS, 2005). A historical database of the public hearings and consultancies has to be built to verify the production of the most important regulation in the telecommunications industry in the past ten years. However, on the normative scope it is important to understand that there is no obligation of the regulatory agency to respond every word directed in the process, even if it is labeled as a contribution. What really prevails is named as a technical consensus, deliberated by the understanding of the ANATEL Directorship Board. At a radical point of view is an attempt to translate technical options, meshed with public policies options, as a regulation. The regulation is understood as a technical product in the view of the employees of ANATEL. And also, the regulation is part of the law at some sense. So it is part of a major and complex set: the legal system. And sometimes, one can understand such technical rule as opposed to higher echelons norms. That divergence opens a flank to judicial review of the regulation. To summarize, it can be seen three ways to produce regulatory framework changes in Brazil. The National Congress intervention was feeble to really produce results. The administrative mechanisms were good to provide participation. But they were not able to grant a real dense allocation of the new

rules among the legal system. And, finally, the most effectively way to intervene was made possible by the judicial review and contract protection of the consumers, both provided by the Judiciary.

To understand that unexpected solution, it is important to take notice that the legal debate is based on conceptual perspectives. But such perspectives are closely related to the social context, a central assumption that is derived from the Law and Society tradition, which is very helpful to explain the disputes among the players within the Judiciary. Of course, the comprehension of the juridical problems is not solved by the extraction of a semantic universal interpretation, in the linguistics terms. It is obvious that language is part of the solution, since law is expressed, as most human actions are. But the solution resides in the Philosophical standards of a given society, which translates the abstracts legal meanings in the form of usable quasi consensus. When lawyers fills a suit to argue against the application of some rule against his client, he is really stating that such concept could not be used in that specific situation. In a collective demand, one class action can argue that one specific norm must be considered excluded from the normative application because it is directly against a superior norm or principle. Such responses are conceptual and involve a knowledge based more on legal argumentation than on semantics (BAŃKOWSKI, 2001). It is very important to regard that some legal concepts have a very different meaning on its original social context. Such meanings will be reinterpreted when one is dealing with legal transplants. The administrative models of regulatory agencies are a very elucidating and international example. To the so called technical boards of bureaucracies like regulatory agencies, such perspective is frightening. That is very true to engineers and orthodox economists alike. The notion that the legal meanings are somewhat dependable on social and philosophical debate is something at least inconvenient. To take a direct example from telecommunications, the academic and practical training of a network engineer makes possible for him to build and maintain data exchange networks that have open or close principles, in the sense described by LESSIG (2002). To technical standards, both networks are just the same with little differences. But for legal standards, the differences are enormous. In conclusion, it is very important to understand how the adaptation of the new regulation framework ignored its assembly with the legal system, especially with the norms of consumer's protection. The clue to answer that question is that the regulation framework was formed with a priority attention to technical needs of the infrastructure providers. That behavior was not new. Just happened as the same way as before the privatization,

when the system was managed as a large public enterprise monopoly.

A study published by the World Bank, produced by MUZZINI (2005), states that the regulatory agencies need independence to fulfill their regulatory capacity in order to protect the consumer interests. The analogy is the trational image of the judge. He fully needs independence, and that means no coercion at all, to be able to produce a most distant and just decision, in abstract terms. Such statement is keenly correct in an abstract sense. But it must be taken into place that the regulatory agencies are still being in the process of assimilation within the civil law tradition. The building of such interpretative consensus will take time and efforts to be raised. A lot of judicial and political disputes will be settled before reaching such social understanding. In the actual moment, the consumer's interests can be damaged by the lack of independence of the regulatory agencies in order to stand against strong economic organized interest, such as those of the major suppliers. In that scenario, a mindless defense of independence, which can be read as dimming the openness to general public democratic accountability, may turn easier the oppression of the weaker by the stronger. Depending on the context, such legal re-engineering can lead to the opposite side that is proposed by the World Bank research. It is obvious that there are middle-points that must be built without ignoring the necessary and inexpugnable tensions. As a public policy is formed the question raised is how to balance the scales to grant independence without loosing accountability. As the Brazilian Legislative Branch does not come to an acceptable answer, the response is daily given in the courts by the Judicial Branch. Preliminary evidence that can be extracted from such mass litigation movement is that the regulatory agency lacks substantial protection and was able to channel to consumers to its system, despite of its strong discourses about the protection of the consumers. The same World Bank report summarizes three models for representation of consumer's interests within the regulatory agencies:

	Positive points (pros)	Negative points (cons)
In-house Consumer Affairs Bureau	Easy access to reliable information on the regulatory process. Synergies between consumer representation and regulatory functions. In-house consumer affair bureaus are well placed to solicit information that can be used to inform the representative function.	Limited scope of actions to challenge regulatory decisions due to lack of independence from the regulatory agency itself.
Board Representation of the Consumer's Interests	Powerful channel of information for consumer groups (if there is no duty of confidentiality). Very fluid exchange of views between consumers and regulators, if consumers input becomes an integral part of the decision-making process	Inadequacy of representation, if the board members in charge of consumers' representation are captured by special interest groups and/or they are not fully accountable to the consumer constituency. Too many conflicting interests within the regulatory body may result in stalemate of their regulatory process.
Partly or Wholly External Advisory Board	Capacity to challenge regulatory decisions, due to the body's independence from the regulatory agency itself.	Inadequacy of representation, if the advisory body is captured by the most influential consumer group.

Source: MUZZINI (2005, p. 10).

In the case of ANATEL, it has an External Advisory Board ("Conselho Consultivo"), which is composed by representatives of the Executive and Legislative Branch, and from various groups of interest (industry, consumers, academics, etc). This Board has no deliberative power in the process, granted by law. It can only recommend directions. But it is fully previewed in the Federal Law, which created the regulatory agency, and that is rare enough to be seen as an important matter. Its possible role as a major channel is potential, but nonetheless an incognita, since the Board is not perceived as a real space of action. The ANATEL tried a lot of different parallel possibilities to stimulate participation, such as open to the general public and permanent commissions. All of them turned to be chimerical. In the practical sense the most used path was to take the road to the Judicial Branch, and that lead to an exponential growth of the litigation against public utilities enterprises.

4. THE CONFLITCS OVER TELECOMMUNICATIONS SERVICES

A typical statement about regulated network industries says that they share a specific characteristic. Their inherent technical complexity poses a thread or even holds back most of the possibility to have a democratic debate about theirs functionality. The telecommunications industry is no different (MELO, 2001). Said that, we can especulate that a state of abscence or little participiation in the formation of the regulatory detailed framework has a potential to produce a sensation of being helpless to most consumers of such services. Those consumers have a lot of options to spill their dissatisfaction.

Channel for consumer demand and its kind	**Access to the channel**			**Channel suplly**	**Channel effectivenness**
	Person	**Phone**	**'Net**		
(1) Complaint to the Prosecutor's Office (A) / (J)	X			Hard	Low
(2) Complaint to ANATEL (A)	X	X	X	Easy	Low
(3) Conplaint to PROCON (A)	X			Hard	Medium
(4) Complaint to the media (newspapers, sites, etc) (C)			X	Easy	Low
(5) Complaint to the company customer service (hotline, Internet) (C)		X	X	Easy	Low
(6) Complaint to the company customer service (shop) (C)	X			Hard	Médio
(7) Non-judicial settlement by ADR (C) / (J)	X			Hard	High
(8) Settlement on special claim courts (J)	X			Easy	High
(9) Settlement on ordinary judicial system (J)	X			Easy	High

Note: (A) Administrative resolution system (public and governmental); (C) Corporate resolution system (private); (J) Judicial resolution system (public and jurisdictional).

Even with so many options, it must be observed that is most probably to receive a desired result from the judicial resolution systems. The three last ones. In such options, the companies are really obligated to respond directly to the consumer, which is not always the case in the previous

systems. That is very true, especially in the case of the regulatory agency consumer protection system. The technical changes also contribute to add complexity to the demands. Sometimes, the problems raised can not be properly solved by the companies, since they just are following the regulation. And the key point is that the actual regulation is not compatible with the Consumer Protection Code, a superior hierarchy norm, which is enforced through the Federal Statute n. 8.078, of Sep. 11 of 1990. The spreading of the consumer interest's defense in Latin America is very recent. In the case of the public utilities, specially privatizes telecommunication services, it reached very impressive numbers. On one side, it is noteworthy for the social meaning of some specific class actions, or collective social protests, against some companies. On the other hand, the phenomenon is clearly perceived in some countries by the large numbers of lawsuits filled against telecommunications enterprises. For Sybil Rhodes, the mass litigation process is directed related to the privatization recent history. In her research, comparing Chile, Argentina and Brazil, she concluded that the slow pace and the larger participation of the consumers in the whole process determined that the Brazilian disputes went through more rational standards. Of course, that is also with less radicalism. The Brazilian political system could absorb in institutional terms the conflicts, either by means of the Judiciary, or by means of the regulatory agency and the companies' consumer services systems. The basis of the Rhodes model resides on the democratization as a central standard to maintain the dynamics of the conflicts. But such model only becomes fully useful when contrasted with empirical data about the disputes (NONET & SELZNICK, 2001). Such disputes are not just guided by individual interests. They are also directed by collective motivations, expressed in a legal system, which forms a kind of legal culture. In the Brazilian case, the context of the formation of a subjective understanding about the role of the citizenship, encompassing also the consumer rights, can not be neglected. Unfortunately, her model paid no attention to that detail, which is very important to fully understand why the telecommunications regulation, after the Brazilian privatization, was placed at stake. A lot of specific cases motivated the filling of lawsuits in Brazil. Most of them affect basically telephony, mobile and fixed:

Consumer claim and kind of process	Basic Argument
Provide detail of companies bills (I)	The tariffs were calculated in terms of pulses (an abstract measure, which varied depending of the time and duration of the call).
Redefinition of local and long distance (C)	Such definition is necessary in order to calculate the tariff to charge the call. The problem was that there were towns split as they were now in two different regions. So it was needed to use a long distance access code to make a call, after the privatization.
Extension of the validity of the mobile pre-paid credits (I)	The Consumer Code stated that a service that was not provided could not be charged. Some consumers considered that they paid some amount of money to spend in calls. If they do not make the calls, they could not have the mobile terminal de-activated.
Declaration of the illegality of a basic signature payment in fixed lines (I)	For the very same argument stated in the case of the pre-paid mobile phones. The fixed lines have a basic signature tariffs and a number of pulses / minutes in calls. After using this limit, the consumer receives extra charges. The companies argued that the basic signature covered the basic functioning of the terminal, which is to receive ordinary and made emergency calls.
Shrink the time to charge a call (C)	The time to charge was of three months to the company. Such period was defended as needed to aggregate information from interconnection calls.

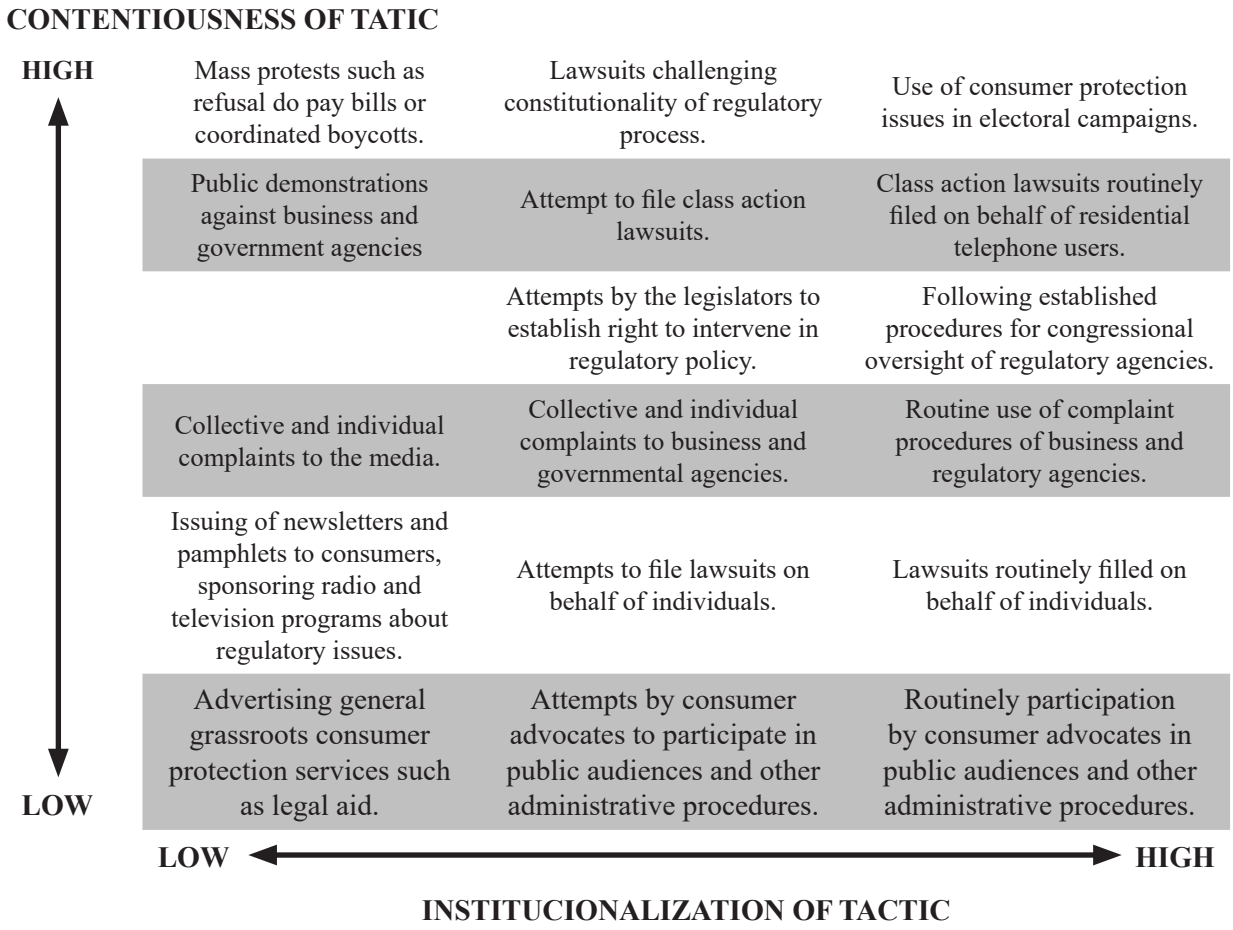
Note: (I) Individual lawsuits (ordinary or special claim court); (C) Collective (class action).

Consumer claim and kind of process	Basic Argument
Extension of the validity of the pulses in fixed lines (I)	The pulses / minutes not used in the previous month were lost. Another argument, based in the Consumer Code, was that this could not happen since the service was not provided.
Obligation to keep personal system of consumer care (C)	The Prosecutor Office filled class actions in order for most companies to maintain helpdesks and counters for consumer care. Most of the companies were migrating to hotline and Internet services.
Demand against the charges of unwanted services (mobile and fixed lines) (I)	That could be a usual problem. But the Consumer Code stated that the wrong charge needs to be refunded in double.
Divergence about the tariffs' revision rates (C)	That had to be with the concession contracts and its modes of economic adjustment. The Prosecutor's Office argued that the rates of the past were now too good and in favor of the companies and against the consumers. So service was more costly than it need to be.
Quality of the mobile services (covering) (C)	Such class actions were proposed by State Prosecutor's Offices and Townships governments alike. They all complained against the quality of the mobile signal in some regions. The companies argued that such service had a mild regulation, which not obligated them to provide universal provision in terms of quantity and quality alike/

Note: (I) Individual lawsuits (ordinary of special claim court); (C) Collective (class action).

Brazil is organized as a federation of states. There is a federal judicial system, whose function over matters that have the competence of the Union government or in which the Union itself is being sued. Also, there are state judicial systems in every state which is part of the federate republic. It is more usual to a telephone to be sued in one of the various state systems, since the relationship between a consumer and such company is understood as a private affair. But when the analysis comes to collective demands, it happens to be a little more troublesome to determine whether the lawsuit had to be filled in the federal or in one of the states systems. But most cases ended within the state system alike, after the decision by the Superior Court of Justice. One thing is also important to understand such transformations. It is closely related to the contemporary changes that are taking place in the Latin American legal culture and can be perceived in the new roles played by the ordinary citizens after the privatization, combined with some future trends.

Obviously, some new trends in telecommunications services like cable television and Internet connection are motivating lawsuits. Nonetheless, the traditional telephony services lead the statistics. In other countries, the conflicts showed different patterns. In Argentina, for example, there were large mass protests against the privatized companies in the begging of the new type of provision. This kind of reaction occupies a space of higher radicalism combined with low institutionalization. The Brazilian case shows a quick progression from a fairly institutionalized basis to a possible reach of a high participative construction of public policies regarding public utilities. The next figure shows Rhodes model:



Source: RHODES (2006, p. 21).

The classification created by Rhodes allows defining Brazil as a country in which the consumers' tactics are highly institutionalized. The radicalism of the activities is growing, since the National Congress has maintained debates about the increase of control over regulatory authorities.

4.1. THREE ROLES PLAYED BY THE CITIZENS

We can perceive three roles of citizenship, regarding to the public sphere that hold particular significance to that research. The first is the basic notion of political citizenship, by which is possible to understand a broad civic operation relation with the state. The second is the recent notion of consumer that grew amidst the necessity of protecting the weaker parties in consumer private contracts. It has evolved to encompass the provision of public utilities and even other public goods that are paid by tariffs. The third role is related to the participation in the management and provision of public services, paid by tariffs or universally granted, even without payment. Upon reaching such situation,

one can see a complex relation between society and state in the organization of those services.

Over the preliminary concept is important to start mentioning that Latin American recent debates over most privatized public utilities – and also telecommunications – usually neglect an important matter that is the how to classify a citizen in its legal relationship with such kinds of companies. That problem is directly linked with the role that the legal system is recognized to the ordinary citizen, in a historic perspective, among the public sector. There is a long tradition of reinforcement of the public interest concept, against the individual rights in the Latin American tradition. It would become no surprise to understand that some authors would try to transposes such historic point of view to the post-privatized paradigm. This phenomenon is not typical of underdeveloped countries. It is related to a key feature of the civil law tradition, especially in the French formulation of the administrative law concepts. Brazil, and most of the Latin American countries, imported with adaptations such categories. Along with the notion of the public interest primacy, against the individual right, the citizen's are labeled as "administré" (in Portuguese is "administrado"), which can be translated as administrated. The word is derived from the passive form of the verb "to administer". In technical terms, the meaning would be that someone posing demands or requesting services to the state would be labeled not as a person (an equal, in Kantian terms), but rather as an unequal or the object of the management. That difference grows larger when we think about doctrines like national security and about the dictatorships that were endemic in Latin America during the last century. The very notion of political citizenship – perceived as the possibility to intervene in the public sphere by means of competitive elections and to have liberal liberties to express ideas and so on – was a recent and not so consolidated historical product, unfortunately. The democratization emerged as a great possibility for many countries of the regions to deepen their possibilities of political participation. Such situation is very visible both in Brazil and Chile.

In recent years emerged a doctrine about consumer relationships and contracts. Is is not just a doctrine. The Brazilian Constitution has an article, which states clearly that the consumer protection is one of the pillars of all economic activities. The most impressive use of such doctrine was to unbalance the notion of formal equilibrium ("pacta sunt servanda") between both parties in favor of the consumer, perceived as the weakest one. But the relationship between the state and one party, even in providing a public utility like telephony service, was difficult to be seen as a typical private

contract. But the Brazilian Consumer Statute previewed such possibility and imposed the labeling of citizens as consumers when they received services paid by tariffs. The central problem here is that this step – in the case of public utilities and most public activities – is not the final line. That point is just the start to go deeper in the democratization of such structures by means of innovative modes of participation to the general public. The Brazilian case is very illustrative of how that such point was yet been not crossed to really produce an integration of participatory means in order to further a system of democratic deliberation in the public sector. The constitutional anchor and the clearly statute text made gave the possibility for prosecutors, consumer associations, and individual consumers to flood the judicial system with demands against public utilities enterprises (WERNECK VIANNA & BURGOS, 2003).

The third role is related to the traditional services provided by the state. One can figure out how new participatory and democratic deliberation could be introduced in police departments, for instance. That is the very frontier of such revolution. The Brazilian Constitution of 1988 had a lot of articles mentioning the necessity to produce statutes on the protection and participation of public service users. Those constitutional remarks were made in 1998. Eight years after the approval of the Consumer Code, that dates back from 1990. It would sound irrational to shrink rights granted by the Code due to the absence of further enacting of laws previewed by the Constitution amendment. It stated that the same very legislative branch had one hundred and twenty days to approve a statute about the protection of the public services users. Of course, it did not. The means of participation were described in a previous section. They are useful. Nonetheless, most opinions from the general public and from the consumers associations had been ignored all over the time by the regulatory agencies. Unfortunately, the recourse to the courts was the last effective option that really lasted. And it was used to the extreme.

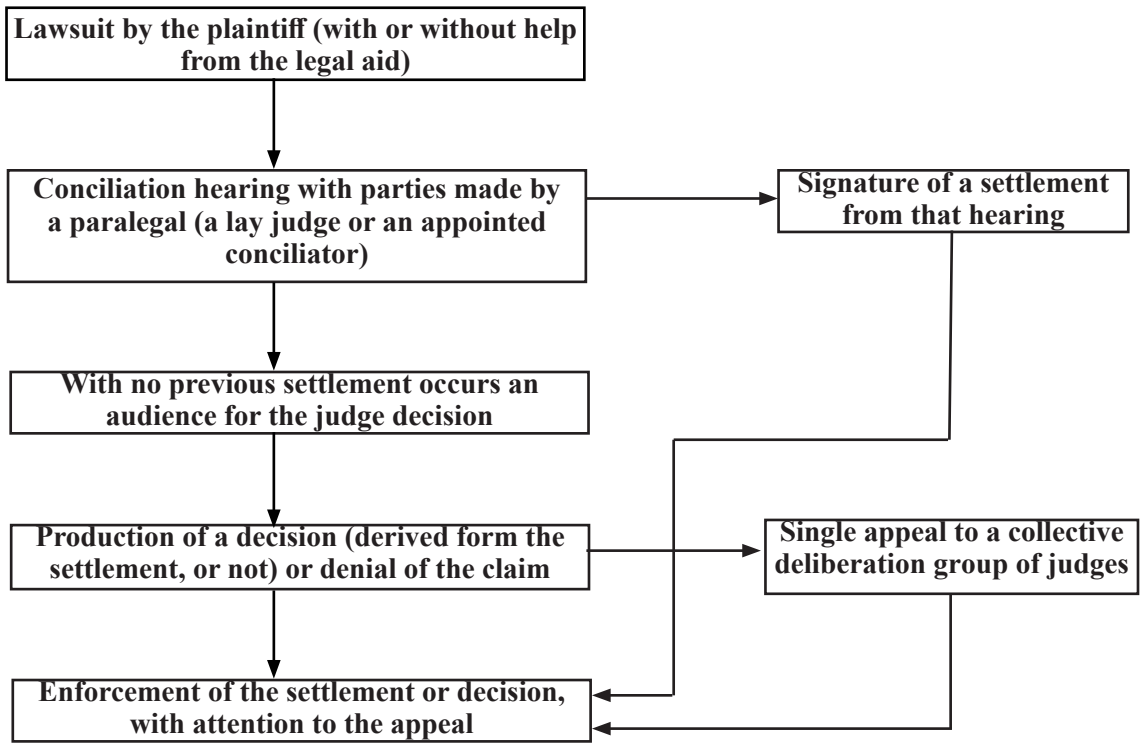
4.2. THE DIFFICULT TASK TO PROTECT THE CITIZENS AND JURISDICTION OVERLOAD

It was explained that the most certain way to receive a result in consumer dispute against a public utilities enterprise is to fill a lawsuit in the ordinary or in the special claim courts system. But former has one advantage in comparison to the latter system. The consumer can receive better judicial

reparation. But the special claim courts have an easier access. Depending on the value demanded, the consumer has no need of lawyers, which makes the judicial process cheaper. And even with legal assistance, there are no fees to fill a suit. What is concluded by most Brazilian analyses is that the special claim courts have showed themselves as an inevitable resource in the movement of access to justice (WERNECK VIANNA et alli, 1999). One aspect that was not quite analyzed is that such jurisdiction sponsors disputes that are perceived just as small value. But those small disputes usually repeat – especially in some cases as those, which are been described here – and take an enormous scale. That leads to the conclusion that those interests in collision are not as small in importance as they could appear at first sight. One possible hypothesis is that the mass-scaled disputes had a great deal of influence in producing the modification of the regulatory framework, as they led to the compliance in behavior of the public utilities companies in large array of issues. The phenomenon that explains why not yet sued parties' tend to change their behavior before it happens is described in the socio-legal literature as deterrence (BRAITHWAITE, 2002; AYRES & BRAITHWAITE, 1992). It is typical of economic regulation scenarios. In the case analyzed, if deterrence really happened, it could be concluded that the Brazilian telecommunications regulatory framework changed to reflect an acceptable new behavior of the enterprises, just after the enormous pressure driven by the consumers. And such pressure came by the means of mass litigation. If such hypothesis is true, it can be empirically proved that the judicial power has definitely contributed to rearrange the norms that regulate many of the telecommunications services in Brazil. One possible evidence of that compliance resides on the funding by the two large telephone enterprises (TELEMAR, then OI Corp.; and BRASIL TELECOM Corp.) of quasi-judicial solutions managed by the state Judicial system. It was at some degree strange: the enterprises covered costs of customer service counters inside special claim courts building to facilitate the enforcement of the judicial decisions. The paper will return to this topic later.

The special claim courts in Brazil have origin in the small claim courts and in the pioneer experience of the Rio Grande do Sul state judges, gathered by their association (AJURIS) (WERNECK VIANNA et alli, 1999). That experience was adopted by the Ministry of Justice and then replicated as one of the measures to stimulate the dimming of the bureaucracy among the whole nation judicial system. That novelty was recognized in the text of the new Brazilian Constitution, passed by the Assembly in 1988, despite the criticism of the Brazilian Bar Association. In 1995, the Nation Congress

passed a new Federal Statute, n. 9.099, 26 Sep., that changed the character of the small claim courts to the actual system, which was the renamed as special claim courts. That makes sense since criminal special jurisdictions were created and they do not deal with pecuniary values at first. The legal institutionalization led to the many state tribunals to promote the expansion of this kind of system. In recent years the experience was brought even to the federal jurisdiction, which deals basically with retirement allowances and montages, all managed by federal institutions. In a small period of time, the prospective idea behind the pioneer project of AJURIS was proved real: there were a lot of social disputes, settled without a clear frame of reference, which could not reach the judicial arena due to its costs. One type of such social disputes was the consumer relationships and contracts. The judicial process in the special claim courts has simple rites, with little recourses for both parties. The system of evidence is also simplified and there is a limit in terms of values that can be demanded, calculated as the sum of twenty minimum wages (nowadays: R$ 415.00 x 20 = R$ 8.300,00 or US$ 4,975.00):



Source: Adapted from BRASIL: Ministério da Justiça (2006, p. 27-45).

The data analysis depicted from the special claim courts established in the Rio de Janeiro State system demonstrates clearly that the telecommunications companies lead as the larger corporate defendant parties in that State, among very diversified service providers. The same happens in other state jurisdictions as Sao Paulo and Brasilia, the country's capital. The table below summarizes data collected from the Commission on Special Claim Courts ("Comissão de Juizados Especiais", COJES) of the Rio de Janeiro State Tribunal ("Tribunal de Justiça do Estado do Rio de Janeiro"). It details the number of lawsuits filled, categorizaed by the economic sector of the defendent, when it was an enterprise. The basic data was collected from the Commission, but the categorization is made by the author. The numbers are impressive and it showed a little vegetative growth after three years. Unfortunately, the last two years data (2006 and 2007) are incomplete due to a series of problems. That will be repaired soon and so the historical series will be completed.

Defendant type (corporate)	**2003**	**2004**	**2005**
Telecommunications services companies	84,168	90,174	98,626
Telecommunications infrastructure and extra-services (cable)	5,132	4,983	5803
Other public utilities companies	39,747	39,818	41,199
General and health insurance companies	6,223	8,272	7843
Finantial and banking companies	45,068	55,229	55,763
Air and ground transportation companies	1,181	1,334	1610
Educational services	789	632	529
Social communications companies (newspaper and media	5,775	4,890	3,578
Financial services to real states, cars and etc ("consórcios")	603	200	139
Commercial companies of general assets and services	13,557	14,987	22,284
Subtotal number of lawsuits filled	**202,243**	**220,519**	**237,374**
Other defendants	125,574	115,794	120,667
Total number of lawsuits filled	**327,817**	**336,313**	**358,041**

Source: Collected from http://www.tj.rj.gov.br, and then adapted.

From among the whole judicial movement, distributed along the various regions of the state, the enterprises occupied always more than sixty per cent of the lawsuits as defendants, in comparison

to individuals. There is a little tendency of increasing in that quantity at the future, while the category "other defendants", which basically includes individual persons show some stability. The lawsuits had their distribution based on the defendant typical products or services through ten sectors of economic activities. The first is the telecommunications service. In these activities where included fixed lines telephone companies (TELEMAR, which changed its name to OI, VESPER, and others) and mobile telephone companies as well. The services of trunking (NEXTEL) and long distance calls (EMBRATEL, and INTELIG) where also gathered here. That is the far expressive sector among the whole number of lawsuits. The second sector is close related to the first. It gathers equipment and infrastructure providers (ERICSSON, MOTOROLA, NOKIA, GRADIENTE, etc) and cable television operators (NET, DIRECT-TV, and SKY-TV). Even Internet broadband companies are integrated in this category as VELOX. Also, this category sums a number of lawsuits directly filled against technical and repairs services that are related to telecommunications services. All such activities share a common supervision from the federal regulatory agency. The equipments have certification rules, enforced by the agency, and the maintenance and repair services need prior registry.

The third group of defendant includes others public utilities companies. It joins gathers the light and power distribution companies (LIGHT, and AMPLA), canned gas (CEG), and treated water (CEDAE, ÁGUAS DE NITERÓI, PROLAGOS, etc). It also encompasses the privatized roads, maintained through contracted concessions. Together with the two first groups (related to telecommunications activities) they all are subject to the new legal framework of the regulatory agencies.

The fourth and fifth groups deal with insurance and financial institutions, respectively. Both activities are very close and are often offered by companies of the same corporation group. The enterprises involved in personal mass transportation services are in sixth group. It congregates either airline, as coach companies. Recently, there has been a social claim to enforce more harshly the regulatory rules applied to the mass transportation sectors, especially to the airplane transport. At the seventh category are allocated the educational companies. They provide an array of services that vary from language courses to graduate studies in private universities.

The eighth group is formed by media companies that offer newspapers and magazines. The offering of paid cable television is considered as telecommunications service by the Brazilian law,

so it was integrated in the second group as therefore mentioned. One peculiarity is the ninth group, which deal with “consórcios”. This word has no translation to English, as far we know. It is a kind of financial acquisition of an asset (a car, a real state, etc), which has some type of lottery. Since people do not receive the asset in the beginning of the payment, but in the final or during, in won the lottery, the rates as significantly lower than normal. But it is still a financial service and is regulated like them. The last category sums the companies of general commerce. They include large department stores and small shops. A classificatory problem here is that most large department stores have their own financial systems. But it would be impossible to separate them in order to aggregate such services in the financial and banking category.

The obvious conclusion is that the telecommunications dominates the special courts system in Rio de Janeiro state. The same phenomenon happens in other states, according to similar researches. The data released by the court is insufficient to determine exactly what were the issues debated in all the process. In interview with judges, it could be mapped some themes that dominated the agenda of the courts. Only a qualitative analyzes of the decisions, still in production, will be able to clarify the content of the complaints.

It must be noted that from the universe of the ten most sued enterprises, the bigger telecommunications group of the state retains three positions, since it owns three companies: TELEMAR (for fixed telephone lines), OI (for mobile telephones, and VELOX (for Internet high-speed connection). Of course, in a newspaper declaration, the corporation stated that the numbers are impressive but they are illusory, since they have hundreds of thousands of clients (IRRITAÇÃO AINDA, p. 26). But the numbers had force to make the states courts pursue alternatives. They saw their special claim courts system flooded by the litigation derived from a reduced number of defendants. In Rio de Janeiro state, the Tribunal built a quasi-judicial solution to improve the precious conciliation of most conflicts involving telecommunications and other public utilities. It was called “express project” (“Projeto Expressinho”). They involve through accords with two public utilities enterprises: TELEMAR/OI, and AMPLA (light and power distribution). The quantitative numbers of the initiative are not so expressive, especially if compared to the whole litigation of those companies. Doing basic statistics, one can calculate the monthly movement of the project equal as fifteen per cent of the whole special claim courts system. But in the qualitative point of view, the project can be

understood as an interesting trial for the problems related to the network industries litigation. Despite of its current low efficacy in terms of quantity, the project also demonstrates the social importance of the telecommunications services to the daily operation of the modern life. That importance imposes that anything which menaces such provision has fairly potential to be converted in a pledge before the courts.

5. THE JUDICIALIZATION OF CONSUMER RELATIONS AND THE TELECOMMUNICATIONS PUBLIC POLICIES

The concept of judicialization, as defined by TATE & VALLINDER (1999), can be used to explain the current changes in some political patterns among the modern democracies. Those authors mention that the judicial power became more intervenient in the political and social life. Of course, that occupation of space occurs with losses to the traditional political and social practices. It is not just the representative production of norms by the formal elected bodies that suffer, but also the detailed production of public policies. They explain that such expansion happens in two ways. The first form of judicialization occurs with the assimilation of the judicial forms, practices, and symbols by other political spheres. An example is a type of tribunalization of political decisions in many democracies, where legislative committees and administrative procedures become dominated by the logic of decision sponsored from the jurisdiction basic form. The second form of judicialization is simpler. It happens when the judicial power decides on themes that usually where voted or carried on by the political system, either by the executive arm as by the legislative branch. All forms of judicialization are related at some degree to the growing importance of constitutional judicial review. Such judicial control of all actions of the other power, based on the constitutional force, can be enforced in a concentrate manner or in a disperse way. It may be competence of just one court to produce the constitutional judicial review, the former form, or that competence may be spread through various jurisdictions.

This expansion of the judicial power has different effects in the central countries and the peripheral ones, like Brazil and most Latin America. Such differences are intertwined with the status experienced in terms of civil and political liberties, and especially social rights. Those countries are

shaped by their recent and still unconcluded democratization and the enormous lack of symmetry between individuals. These combined trends sums in a state that imposes many difficulties of public action to the ordinary citizen in defense of his rights. Those citizens are pressed by two fronts. In one of them, they have a Constitution, which grants access to a vast array of social rights, and need to be enforced. In the other, they have a social reality that is clearly unpropitious to fulfill them. To add some drama, the traditional political solutions, and varied types of social arrangements, all seem to have no efficacy to solve such contemporary equation deal between duties and social rights. But the Brazilian constitutional movement after the promulgation of the 1988 Constitution includes much more refined complexities that overcome a simple discourse for the acquisition of social rights. It also encompasses the democratic control of the public provision of those social benefits.

6. CONCLUSION: UNSOLVED PROBLEMS AND THE LEGAL CULTURE

The judicial resolution of conflicts is not cheap. But the central question of this article surpasses the judicial disputes theme. The judicial arena is a visible externality of a larger fight for social control of public utilities provision and regulation. Usually, that arena would be focused basically on the executive and/or the legislative branch. The contemporary novelty in Brazil and all Latin America is the emergence of the courts as spaces which can be used to intervene in the public policies. That emergence is also related with some fragility and feeble performance of the both other political powers, obviously. But the international literature is clear to point that such situation would happen anyhow anchored with the constitutional review. One easy way to point that the courts are really being perceived as stronger enforcers of norms to guide regulatory practices is that the conciliation compulsory phase was not created under the sphere of the regulatory agency and of the enterprises. It was erected under the rule of the State Tribunal of Rio de Janeiro, as related before. The costs involved in the maintenance and expansion of the judicial resolution are high, as can be seen in the data collect by the Brazilian National Council of Justice, which is nowadays in charge of organizing the managerial statistics of the whole system. The data is from 2004. It can be viewed that the total cost of the Rio de Janeiro state judicial system is almost the same in percent terms as the national

average: 05 % (five per cent) of the state budget. In comparison to the whole national expenditures, the judicial systems of the states divided per capita, in average, costs annually R$ 68.57 (US$ 41.00). Alternatively, it cost 1.13 % of the Gross Domestic Product of its state, in average:

State of the Brazilian Federation (2004)	Total cost of the state judicial system as a percent of the state budget	Total cost of the state judicial system as a percent of the state gross product	Total expenditures of the state judicial system divided per capita by the state population
Distrito Federal	0.09 %	1.75 %	R$ 347.21
Rio de Janeiro	5.05 %	0.64 %	R$ 91.32
São Paulo	4.23 %	0.50 %	R$ 69.88
Average (Brasil)	5.04 %	1.13 %	R$ 68.57

Source: Built with data from BRASIL: CNJ (2004).

The judicial system is becoming more and more expensive. Another evidence of the growth is the quantity of judges allocated in the states judicial systems of the Brazilian federation. The data shows that the special claim courts systems, at the states are rapidly increasing and absorbing a creating a great demand for qualified personnel. But it also demonstrates that some states relied more on such dispute resolution mode than others:

Judges allocated in the state judicial system	Whole system	Special courts	%
Distrito Federal	253	43	16.9 %
Rio de Janeiro	954	94	9.8 %
São Paulo	1.693	35	2.0 %

Source: Built with data from BRASIL: CNJ (2004).

Despite those expenditures, there are still high rates of congestion in the states special claim courts systems. The demand for justice is perceptible bigger than the capacity to deliver it. Increasing the expenditures probably will not solve the problem, since it will open more space for far more demand. The more recent solution resides in establishing compulsory pre-lawsuit conciliation. That quasi-judicial solution was waved especially to punish repeteated defendants, notably the public utilities companies, as described in this article. But that possible solution brings two dilemmas. The

first is related to the notion of negotiation that is always inflicted in these transactions. If there is little intervention of a neutral third party, as a judge, the possibility of negotiating a good deal to the stronger party increases; despite of the fairness of the result. It is easy to observe that negotiations conducted without one lawyer to assist one party almost always delivers a better result to the assisted one. There is also a chance that the negotiation evolves to a fixed accord, enforced by the judge, who may be concerned to solve such great number of demands in the quicker way. In that sense, the quasi-judicial enforcement would be transformed in the last customer counter of the defendant company. The second dilemma is directly derived from the first. It is related to the potential harm that can happen from the close relationship between the courts and the public utilities companies. If the neutral jurisdiction cooperates to maintain an activity that is clearly affected from its competence, may such cooperation risk its independent view. If there is a chance of such possibility, that thread must be examinied carefully. A practical conclusion is that a unregulated space of consumer protection is tryng to be filled by the jurisdictional solution. That may have started with the absence of the regulatory agency or with the demand for care and protection from the consumers. Or may be both. What really matters now is to figure out how the administrative regulation will be adapted to adjust the conduct of the enterprises to the consumers point of view, enforced by the judicial power.

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