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Taxing Access to Justice: Legal Analysis of Judicial Fees in Brazil and the Dialectics of Legal Aid in Comparative Perspective

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Abstract

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Keywords: *Access to Justice, Comparative Law, Court Costs, European Court of Human Rights, InterAmerican Human Rights, Judicial Fee, Law and Economics, Legal Aid, Tax Law*

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1. Introduction

Few legal problems reveal the inner contradictions of the modern democratic state as clearly as the cost of going to court. In theory, judicial protection is a constitutional guarantee, available to all regardless of means. In practice, the tribunal is a marketplace with an entrance fee and the question of who is exempt from that fee has no clear answer, in Brazil or anywhere else.[1]

This article is written from the vantage point of someone who has spent fifteen years in Brazilian public service and several of them over cases in the Federal Judiciary. From that position, the abstract debate about court fees and legal aid does not remain abstract for long. In Brazil, many requests for legal aid are filed without a shred of documentary evidence, routinely granted because the alternative, questioning each request, would be administratively unworkable. It takes the form of a minimum court fee that has not been adjusted since 2000, rendering its deterrent function meaningless. This caused a fiscal deficit of over BRL 13 billion in the Federal Judiciary, quietly absorbed by the general budget while policy debates circle endlessly around the same nonsolutions.

This article examines the problem along four analytical dimensions: tax law, international human rights law, economic analysis of law, and comparative law. Each illuminates a different facet of the same underlying tension between a judiciary that must be financed to function and a constitution that demands it be accessible to all. No single dimension is sufficient on its own, and the article attempts to show how they interact and sometimes constrain one another.

The analysis proceeds as follows. Part II sets out the methodology. Part III, the Discussion, presents the analytical framework across four sub-areas: the constitutional characterization of court costs as a tax species; legal aid in Brazilian law and under the Inter-American human rights system; the economic analysis of court fee design and its constitutional limits; and a comparative study of five foreign jurisdictions and the relevant ECtHR jurisprudence. Part IV draws up the Results, with critical findings that emerge from that analysis, together with the reform proposals they support. Part V concludes.

2. Methodology

This article employs two complementary methods. The analytical method is used to ascribe precise legal meaning to the institutions examined, the constitutional characterization of judicial fees as a tax species and the scope of the legal aid guarantee under Brazilian law. The comparative method places Brazilian solutions alongside those of five selected foreign legal orders, with the goal of extracting structural lessons while remaining attentive to the limits of cross-contextual transposition.

The five comparator jurisdictions were selected according to four explicit criteria. First, legal tradition: the United States and the United Kingdom represent common law systems, while Germany and Portugal represent civil law traditions historically connected to the Brazilian legal order. Second, fee-shifting architecture: the United States applies the American Rule, while the three European systems apply loser-pays, generating distinct incentive structures. Third, legal aid design: the United States relies primarily on formal fee-exemption (In Forma Pauperis), while Germany, UK and Portugal maintain income-tested, state-funded systems that differ structurally from each other. Fourth, international human rights obligations: the United Kingdom, Germany, and Portugal are signatories to the European Convention on Human Rights, making the ECtHR's proportionality standard directly applicable to their court fee regimes.

The study draws on primary legal sources—constitutional provisions, legislation, binding precedents from the STF, IACtHR, the ECtHR, and the U.S. Supreme Court, supplemented by secondary doctrinal literature and empirical data from the CNJ. The article's scope is doctrinal and institutional, not empirical in the social-scientific sense. Where relevant, practical observations from the bench serve as empirical illustration rather than systematic data.

3. Discussion

3.1. The Legal Nature of Court Costs in the Brazilian Tax System

Under the 1988 Federal Constitution, fees (taxas) are a species of tax whose triggering event is the actual or potential use of a specific and divisible public service made available to the taxpayer, or the effective exercise of the state's regulatory power.[3] Doctrine classifies fees as linked taxes (tributos vinculados), because their imposition presupposes a state activity directed at a specific taxpayer in contrast to regular taxes (impostos), which do not require any specific counterpart service.[4] Court costs in Brazil, as the STF established in ADI 1378 MC, constitute the price of a specific and divisible service, the provision of adjudication.[7]

The genus of court costs yields three species: (a) judicial fees (taxas judiciárias), directed at financing judicial services; (b) court costs in the strict sense (custas), covering procedural expenses; and (c) notarial fees (emolumentos), covering extrajudicial acts.[8] Because fees are specific and divisible, the amounts charged must be proportionate to the cost of the service rendered, satisfying a criterion of commutative justice.[5] The fee's tax base must therefore reflect the cost of the service provided, a requirement that doctrine terms referibility.[6]

A constitutional tension emerges at this point. Article 145, § 2 of CF/88 prohibits fees from sharing the same tax base as regular taxes, precisely to preserve the distinction between the two species.[11] The STF mitigated this prohibition through Binding Precedent No. 29, permitting the adoption of elements of a tax's base in calculating a fee's value, provided there is no complete identity between the two bases.[12] This compromise invites an objection that deserves direct engagement: if the tax base of court costs is the value of the claim, then the state is measuring a dimension of the litigant's economic situation rather than the cost of the judicial service itself, which would be characteristic of regular taxes (impostos), not taxes (taxas).

In my view, this objection underestimates the practical impossibility of calculating the actual cost of judicial services with any useful precision. Consider the variables involved: the time of a judge and court staff performing functions that vary dramatically depending on procedural complexity; the cost of electronic case management systems or the physical maintenance of paper records; expert witness fees that arise unpredictably; and the entirely contingent duration of proceedings depending on the number of appeals, procedural incidents, and enforcement stages. Unlike a notarial act with a fixed procedure and predictable duration, a judicial proceeding cannot be costed in advance with sufficient reliability to generate a meaningful fee schedule. The value of the claim, by contrast, is objectively ascertainable at the moment of filing, bears an indirect but real relationship to the social importance of the dispute, and provides legal certainty to both parties. The STF's recognition of minimum and maximum thresholds [15], reflected in Binding Precedent No. 667, ensures that the value-of-claim parameter does not become an unlimited proxy for wealth. Within those thresholds, the tax base is a constitutionally defensible approximation, not a category error.

One additional constitutional principle (linkage) governs the destination of fee revenues, considering that they must be directed exclusively to financing the judicial service that generates them. The STF has been consistent in suspending legislation that sought to redirect fee revenues toward extraneous purposes.[16] This linkage between revenue and service reinforces the constitutionality of the fee species while constraining legislative opportunism.

3.2. Legal Aid as an Instrument of Access to Justice

Access to justice was first elevated to constitutional status in Brazil by the 1946 Federal Constitution.[17] The current constitution entrenches it in art. 5, LXXIV: 'the State shall provide full and free legal assistance to those who demonstrate insufficient resources.'[18] The provision encompasses two distinct mechanisms: legal assistance (the provision of counsel through the Public Defender's Office or court-appointed attorneys) and legal aid proper (exemption from court costs, procedural expenses, and attorneys' fees).[19] This article addresses only the latter.

The 2015 Code of Civil Procedure expanded the legal aid regime in important respects. It extended coverage to legal persons and foreign nationals, included notarial and expert witness fees within the scope of the exemption, and affirmed a relative presumption of veracity in favor of a natural person's declaration of indigence.[21] The reform was motivated by laudable goals. Its practical consequences, however, have been more ambiguous.

In practice, the overwhelming majority of requests for legal aid are filed without any supporting documentation - no income statement, no bank statement, no tax return. Lawyers submit declarations of indigence as a routine formality, relying entirely on the statutory presumption of veracity. The burden of questioning these declarations falls on a judge who must already manage a caseload of thousands of active proceedings. Realistically scrutinizing each request is simply not feasible as a matter of workload management, which means the default outcome is granted. Only when there are obvious contradictions in the record, for example, a plaintiff identified elsewhere in the same document as a practicing specialist physician, a corporate party claiming indigency etc., does it become practical to require supplemental documentation.

The consequence is a perverse institutional dynamic in which the presumption of veracity, designed to protect genuinely indigent parties from bureaucratic obstacles, effectively functions as a de facto universal exemption for anyone represented by counsel who knows to file the declaration. This not only distorts the fiscal situation of the judiciary but also undermines the principle of equality considering that parties with means obtain the same exemption as those who genuinely cannot pay. Worse, it contributes directly to the volume of litigation that the judiciary struggles to manage, because the absence of any cost-sharing removes one of the few mechanisms that might prompt parties to consider whether adjudication is the most rational use of everyone's time and resources.[25]

The constitutional solution is straightforward in principle because it aims to replace the presumption with objective criteria tied to verifiable income data, drawing on existing administrative systems such as the Cadastro Único or the income declaration available through the Revenue Service. Senate Bill No. 2,339/2022 proposes exactly this approach.[24]

The significance of this reform extends beyond domestic law. The Inter-American human rights system provides a normative framework that reinforces, and in some respects exceeds, the constitutional guarantee. Advisory Opinion OC-11/90 of the IACtHR established that financial barriers to the exhaustion of domestic remedies constitute discrimination based on social conditions prohibited by Article 1(1) of the ACHR.[26] States bear a positive obligation to remove those barriers, not merely to refrain from creating them.[29]

The most directly relevant precedent is the Case of Cantos v. Argentina (November 28, 2002). Mr. José María Cantos filed suit against the Argentine Revenue Department and, after more than a decade of proceedings, was ordered by the Argentine Supreme Court to pay fees and attorneys' fees totaling approximately USD 140 million.[30] The IACtHR held that these obligations violated Articles 8(1) and 25 of the ACHR,[31] establishing the principle that states may not impose limitations that 'impair the very essence of the right of judicial access.'[33] For Brazil, a signatory to the ACHR since 1992, these principles carry direct normative force.[34]

3.3. Economic Analysis of Law: A Framework and Its Constitutional Limits

The law and economics movement emerged from Ronald Coase's analysis of the problem of social cost [37] and Guido Calabresi's work on risk distribution in tort law.[38] Richard Posner systematized these insights into a comprehensive theory: the central claim of Economic Analysis of Law is that legal rules can and should be evaluated by their effects on the efficient allocation of resources.[36]

Posner's wealth-maximization criterion is the analytical tool I find most useful and most dangerous in equal measures. The operational efficiency standard is present in Kaldor-Hicks which states that a legal change is efficient if the aggregate gains to winners exceed the losses to losers, whether or not compensation actually occurs.[40] Applied to court fees, Posner's foundational 1973 article in the Journal of Legal Studies provides the central insight: [35] court fees function as user charges, prices for access to the judicial product. The optimal fee approximates the marginal social cost of processing a case. A fee set below marginal cost subsidizes litigation and induces excessive demand; a fee set above marginal cost deters welfare-enhancing suits.[44] The economic goal is a fee that screens out frivolous claims, whose private value is positive, but whose social value is zero, without deterring meritorious ones.[48]

There is, however, a structural flaw in the Kaldor-Hicks criterion that its proponents tend to understate. By not requiring that losers be compensated, only that winners could, in principle, compensate them, the standard permits decisions that impose real and severe losses on specific individuals in exchange for diffuse and hypothetical aggregate gains. In a context of deep economic inequality, this creates a troubling dynamic: the criterion can function as ideological cover for regressive transfers of income, sanctioning arrangements that extract welfare from the poor and concentrate it among the wealthy, so long as aggregate numbers work out on paper. I find this intellectually dishonest in a specific way: it gives economic respectability to decisions that would otherwise simply be recognized as unfair.[119] Far from being a neutral allocative tool, an unconstrained Kaldor-Hicks analysis produces outcomes that are, in substance, utilitarian and ad hoc, calibrated to maximize an abstraction called social wealth at the cost of the concrete dignity of those who lose. Applied to court fee design, this risk is not theoretical. A fee structure that is 'efficient' under Kaldor-Hicks might simultaneously be unconstitutional under the human dignity principle enshrined in CF/88, art. 1(III), [120] precisely because it forces the poorest litigants, those whose access to justice has the least private financial value but the greatest social urgency, to bear a cost they cannot absorb. This is why the economic analysis of law must be treated as an instrument of resource allocation within a legal order, not as a substitute for it.

One further clarification is warranted at this point. Posner's broader positive thesis, that the common law tends toward efficiency, has generated substantial debate in both American and European legal scholarship, and that controversy is not the object of this article. In my view, both civil law and common law systems carry important institutional contributions that deserve acknowledgment on their own terms: the common law tradition's respect for precedent-based rule creation, which generates norms that are contextually sensitive and refined through iterative application; and the civil law tradition's organization of legal systems through comprehensive statutes, which provides the systematic predictability and accessibility that are the hallmarks of codification. Both are essential instruments for guaranteeing legal certainty in a democratic rule-of-law state. What matters, for the purposes of this article, is not which tradition Posner's efficiency claims more accurately describe, but whether the economic tools he developed can be applied - with appropriate constitutional constraints - within Brazil's civil law legal order.

Returning to the problem of this research, it is important to remark that the market for legal services also suffers from asymmetric information and positive externalities to rights enforcement, both of which justify state intervention in the form of legal aid.[50] When fees are set at cost-recovery levels, they create a regressive access barrier to individuals with lower-value claims or lower incomes, who happen to be excluded from the court system even when their claims have genuine social value.

The economic framework is analytically indispensable because it clarifies the incentive effects of different fee structures, identifies sources of market failure in legal services, and provides a vocabulary for distinguishing efficient from inefficient institutional designs. However, it must operate within a constitutional order whose values are not reducible to wealth maximization. A fee structure that achieves fiscal balance while making courts prohibitive for a large portion of the population would, on Posner's own terms, be efficient. It would also violate the constitutional guarantee of access to justice under CF/88 arts. 5(XXXV) and 5(LXXIV), and Brazil's obligations under the ACHR.

The tension is not a failure of either constitutional law or economic analysis, it is a prompt for calibrating their interaction. A budget deficit in the Federal Judiciary that results from a principled policy of ensuring that economically meritorious claims can be adjudicated regardless of the claimant's financial situation is constitutionally permissible, even required, provided it is fiscally manageable and not the product of inefficiency or abuse. The constitution defines which consequences we are willing to accept. The economic analysis tells us what those consequences will be. Both are necessary. Neither alone is sufficient.

3.4. Court Fees and Legal Aid in Comparative Perspective

In the United States, federal civil actions attract a filing fee of USD 405.[53] The American Rule, each party bears its own fees regardless of outcome, means that the financial risk of litigation is concentrated in private attorneys fees rather than court charges, making the total cost of tort liability in the U.S. the highest among the surveyed jurisdictions.[55] The access-to-justice deficit this creates is well documented. Deborah Rhode of Stanford Law School observed that the United States 'is the only wealthy nation that makes virtually no guarantee of civil legal assistance to those who cannot afford it,' with approximately four-fifths of the civil legal needs of low-income individuals remaining unmet.[56] Rhode's subsequent monograph amplified that estimate: approximately four-fifths of the civil legal needs of low-income Americans and two- to three-fifths of those of middle-income Americans remain unmet, a finding that is all the more striking given that it describes one of the wealthiest legal systems in the world.[58] The In Forma Pauperis doctrine provides formal fee exemption for those who demonstrate inability to pay.[59] Eligibility is typically available to recipients of public assistance programs, food stamp beneficiaries, and incarcerated individuals without resources, with income assessments conducted by the court.[60] Gideon v. Wainwright established a constitutional right to counsel in criminal cases,[61] but for civil proceedings there is no analogous guarantee.

Notwithstanding formal fee exemptions, access to quality civil legal representation remains sharply limited for the indigent. Under 28 U.S.C. § 1915(d), a court may dismiss an IFP petition if the action is found frivolous, a determination that by its inherently subjective nature produces divergent outcomes among federal judges and undermines legal certainty.[62] In Neitzke v. Williams, the Supreme Court established that a claim is frivolous when it relies on an indisputably meritless legal theory or on fantastic or delusional factual scenarios.[63] The Department of Justice has recently highlighted the cascading consequences of this structural gap, noting that the imposition of fines and fees without regard to economic capacity generates cycles of debt and systematically erodes public trust in the justice system.[64] The American experience thus reveals a fundamental tension: formal mechanisms for fee exemption exist, but the absence of a civil legal aid guarantee means that having a waived filing fee is rarely sufficient to secure meaningful access to adjudication. The cost of counsel, not the cost of filing, is the decisive barrier.

The court fee system in England and Wales differs structurally from the United States in two fundamental respects. Governed primarily by the Courts Act 2003,[65] the system operates under the English Rule (loser pays), under which the losing party bears the reasonable costs of the prevailing party, dramatically restructuring litigation incentives relative to the American model.[66] Professor A.A.S. Zuckerman of Oxford, an adviser to Lord Woolf's Access to Justice inquiry and the leading British academic authority on civil procedure costs, argued that 'the courts cannot function as instruments of civil justice unless they are broadly accessible to all citizens who have legitimate grievances.'[67] Drawing on his analysis of the chilling effect that high court fees exercise on parties with meritorious but economically modest claims, Zuckerman identified the correlation between fee levels and litigation costs as a central challenge for any system committed to genuine equality before the law.[68]

The most constitutionally significant moment in the British debate over court fees occurred in R (UNISON) v Lord Chancellor [2017] UKSC 51, where the UK Supreme Court unanimously declared the Employment Tribunals Fees Order 2013 unlawful. Economic evidence before the Court demonstrated that the fees had rendered the pursuit of legally recognized employment rights 'irrational' for most claimants, producing a sustained and dramatic decline in case filings.[69] The Court held that the fees had effectively prevented workers from enforcing rights conferred by Parliament.[70] At its core, the judgment rejected the government's framing of courts as merely a service to be priced: 'courts exist in order to ensure that the laws made by Parliament are enforced'[71] — a statement that resonates directly with the Brazilian constitutional guarantee of access to justice. For indigent parties, the Help with Fees (HWF) scheme grants a full exemption or partial reduction, subject to strict savings caps.[72] Eligibility requires that applicants hold less than GBP 4,250 in savings for lower fee brackets,[73] a threshold that reflects the UK's specific cost-of-living context and illustrates why direct numerical transplantation to Brazil would require substantial recalibration.[74]

Of the five systems examined, Germany offers the most structurally coherent response to the economic problem Posner identifies: how do you price adjudication so that only claims worth adjudicating actually get filed? Governed by the Gerichtskostengesetz (GKG), fees are calculated on the basis of the disputed amount (Streitwert), on a graduated scale that increases with the value of the claim while declining as a proportion of the claim's value for higher-stakes disputes.[75] The loser-pays principle under ZPO § 91 means that the prevailing party's reasonable attorneys' fees, which in Germany are also regulated by statute, are also recoverable, making the expected cost of losing a German civil case considerably higher than its American or Brazilian equivalents.[76]

Legal assistance (Prozesskostenhilfe, PKH) enables financially disadvantaged individuals to initiate or defend civil actions and depends on the cumulative satisfaction of three criteria: financial need, assessed against statutory income exemptions and savings limits[77]; sufficient prospects of success, requiring that the claim or defense have a reasonable prospect of success and not appear arbitrary[79]; and non-arbitrariness of the litigation as a whole. Where all three are satisfied, the court may exempt the applicant from court costs, appoint state-funded counsel or order payment in installments, with the possibility of subsequent repayment should the beneficiary's financial situation improve significantly.[80] The German system achieves a balance between the constitutional imperative of ensuring access to justice for the economically disadvantaged and the fiscal responsibility that prevents the mechanism from becoming an unqualified subsidy for speculative litigation. The merit-screening requirement the feature most relevant to the Brazilian reform debate - is discussed critically in Part IV.

Portugal deserves particular attention in this comparison, for reasons that go beyond mere geographic proximity. The Portuguese Civil Code of 1867 (Código Seabra) served as the foundational model for Brazilian private law, [82] and Portuguese procedural codes influenced Brazilian legislation throughout the twentieth century. The constitutional foundation of Portugal's system is also notable. Article 20 of the Portuguese Constitution guarantees that 'justice shall not be denied for lack of financial resources' [81], a provision that names financial insufficiency explicitly as an impermissible ground for denial of justice, rather than conditioning judicial access on the demonstration of indigence.

The current cost regime is governed by the Regulamento das Custas Processuais (RCP, Decree-Law No. 34/2008), [83] with fees expressed in Units of Account (UC), currently EUR 102 under Portaria No. 372-B/2024. [84] The fee schedule in Schedule I-A calibrates fees to claim value in a tiered structure, from 1 UC for claims up to EUR 2,000, ascending proportionally, with a three-times multiplier for complex proceedings [86] and a supplementary fee for claims above EUR 275,000.[87] The loser-pays rule applies under art. 527 of the Portuguese Code of Civil Procedure.[88]

The Legal Support (Apoio Judiciário) regime, established by Law No. 34/2004,[90] is administered by the Instituto da Segurança Social (ISS) the Social Security Institute - rather than by the courts themselves. This administrative separation relieves courts of the burden of adjudicating eligibility and ensures uniform application of objective income criteria. Eligibility is based on the índice de referência de apoios sociais (lAS, set at EUR 509.26 in 2024), with full exemption for households below 1.5 times the lAS and partial support for those between 1.5 and 2.5 times.[91] The regime provides four modalities: full exemption, fee reduction, deferred payment, or installment payment.[93] Unlike the German PKH, it does not screen for litigation merits at the eligibility stage.[94]

Three of the five systems examined - Germany, Portugal, and the United Kingdom operate under the proportionality standard for court fees developed by the ECtHR under Article 6(1) of the European Convention on Human Rights.[96] In Kreuz v. Poland (June 19, 2001), the applicant was required to pay fees equivalent to approximately the average annual wage to pursue a civil claim.[97] The Court held that limitations on the right of access to a court 'must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired'[98], a proportionality test requiring a reasonable relationship between the fee and the legitimate aim of cost recovery. In Weissman v. Romania, the Court extended this analysis to fee-to-claim ratios without ceilings or means-tested exemptions,[101] and in Airey v. Ireland it recognized that effective access may require the state to provide legal aid in proceedings whose complexity makes self-representation impractical.[102]

4. Results

4.1. Comparative Findings and their Limits

What emerges from placing the five systems alongside one another is, above all, that structural solutions exist. The UC mechanism with mandatory periodic adjustment, the ISS-administered means test, the loser-pays rule calibrated to realistic claim values, these are not theoretical proposals. They are operating realities in a legal order that shares Brazil's civil law tradition and, in Portugal's case, a direct historical connection to Brazilian law. The reform debate in Brazil is not a debate about whether better institutional designs are conceivable. It is a debate about whether the will to implement exists.

That said, the comparative analysis also generates critical findings about what does not travel well across legal orders.

First, the concept of 'frivolous litigation' as a screening mechanism, one of the central justifications in economic literature for setting court fees above a nominal level. The concept is appealing in the abstract. In practice, it does not survive contact with the principle of legal certainty, at least not in the form that literature implies. In my experience on the bench, what appears to be a frivolous claim under a preliminary assessment is frequently a claim that is poorly articulated, procedurally imperfect, or factually thin at first glance, but that, once heard, raises a genuine legal question. The reverse is also true. The risk of a gate-keeping filter at the fee-exemption stage is that it substitutes a pre-adjudicatory judgment for the merits process. When that determination is made by different judges applying different intuitions about what constitutes a 'reasonable prospect of success,' the equal protection dimension of legal certainty is compromised: similarly situated parties receive different outcomes not because the law distinguishes between them, but because their judge did. Labor rights, environmental enforcement, and administrative review claims are particularly vulnerable to this kind of informal filtering, precisely because they are often politically contentious and technically complex in ways that make a prima facie assessment unreliable.

The German PKH illustrates this tension concretely. The merit-screening requirement functions tolerably well in Germany because the institutional context supports it. The legal profession's duty of candid advice is taken seriously, the educational level of the population is such that a lawyer's frank assessment of litigation prospects is generally understood and accepted, and the courts have developed a coherent body of doctrine about what constitutes a 'reasonable prospect of success.' None of these conditions reliably obtain in Brazil. More pointedly, in the Brazilian Small Claims Courts, parties may litigate without a lawyer. Imposing a merit screen in that context means evaluating the viability of a claim presented by a layperson without counsel, before it has even been heard.

The asymmetry between a trained judge and an unrepresented individual at the gatekeeping stage is precisely the kind of structural inequality that access-to-justice guarantees are designed to prevent.

A second critical finding concerns the direct transplantation of European fee thresholds to a developing country context. The Portuguese and German income criteria are carefully calibrated to their respective social structures. In Portugal, the IAS threshold of EUR 509.26 and the 1.5x multiplier for full exemption reflect an income distribution that, while unequal by European standards, is considerably more compressed than Brazil's. If those thresholds were applied directly to Brazil, translated at purchasing power parity or nominal exchange rates, they would exclude from legal aid a large portion of the Brazilian population that, while nominally above the threshold, lacks the practical financial capacity to sustain litigation costs over a multi-year proceeding. The lesson is not that objective income criteria are wrong. On the contrary, they are the only constitutionally sustainable answer to the current ad hoc regime. The lesson is that the thresholds and formulas must be calibrated to Brazilian income distribution, not borrowed wholesale from a different social context.

The most directly transferable element of the comparative analysis is the Portuguese institutional design: the separation between legal aid eligibility assessment (administered by the ISS) and judicial proceedings. This separation achieves three things simultaneously: a) it relieves individual judges of the burden of making real-time indigency determinations in the middle of case management; b) it ensures that eligibility criteria are applied consistently across the country by a specialized administrative agency rather than through thousands of individualized judicial decisions; and, c) it creates a data trail that allows the system to monitor abuse and require repayment when beneficiaries' circumstances change. None of this requires new constitutional amendments or radical legislative overhaul. It requires a decision to separate the function from the court.

4.2. The Fiscal Irrationality of the Current Brazilian System and the Case for Reform

The CNJ's Justiça em Números (Justice in Numbers) from 2024 provides the empirical backbone for what practitioners already observe. The judicial activity consumes 2.45% of the combined expenditures of all levels of Brazilian government.[103] The Federal Judiciary's 2023 operational deficit reached BRL 13.214 billion, with total costs of BRL 13.364 billion against revenue of BRL 150 million.[105] The Small Claims Courts, exempt from first-instance fees, absorb a disproportionate share of new filings.[107]

The pattern is not uniform across case types. In practice, the majority of new filings in the Federal Judiciary relate to social security (previdenciária) litigation, a significant portion of which concerns disability benefits (benefícios por incapacidade). Unlike most civil law claims, disability benefit determinations do not give rise to res judicata — a party may refile after a change in circumstances, or simply after an initial denial, without preclusion. In the absence of any filing cost, this generates a perverse incentive structure: the same claim, or a marginally modified version of it, may be refiled multiple times, each iteration consuming judicial resources without any cost-sharing that might prompt counsel to assess whether the new filing has a realistic prospect of success. This is not, to be clear, an argument against the substantive right to refile - that right is constitutionally grounded and socially necessary in a system with a high incidence of administrative error in benefit determinations. It is, rather, an argument for a fee structure that at minimum introduces a price signal for serial filings, distinguishing between genuine new claims and repetitive ones.

Posner's model is precise about the mechanism: fees set at zero or near-zero below marginal social cost function as a subsidy that removes the price signal which would otherwise prompt litigants to weigh expected costs against expected benefits.[108] The result is not merely fiscal, it is allocative. Cases that would settle or not be brought if each party faced a real cost are litigated instead, consuming judicial capacity that would otherwise be available for disputes in which adjudication is genuinely necessary. Legal certainty, understood in the tradition of Brazilian constitutional scholarship as the permanent, equal determination of legal effects for all subjects of the legal order [110], demands that these distortions be corrected. Max Weber identified legal rationality as the institutional precondition for the predictability that modern economic activity requires.[109] A court system structurally under-financed and institutionally inconsistent in its legal aid determinations fails this requirement, irrespective of how generous its constitutional text is.

The legislative gap is traceable to a single point of inaction. Law No. 9,289/1996 set the minimum court fee at BRL 10.64.[115] Article 14 required periodic monetary adjustment. However, that adjustment has not occurred since 2000.[116] IPCA-adjusted (inflation index), the minimum fee should today be approximately BRL 46.55; SELIC-adjusted (government interest rate), approximately BRL 172.28. Of the 3.6 million new Federal Judiciary filings in 2023,[117] applying the IPCA-corrected fee to just 10% of those proceedings would generate approximately BRL 62 million in additional revenue, a 40% increase over current collections.[118] Not a solution to a BRL 13 billion deficit, but a meaningful beginning, and one that illustrates how far the system has drifted from any rational relationship between the price of adjudication and its actual cost.

There are two bills currently before the Brazilian Senate which seek to address the most tractable parts of this problem. Senate Bill No. 2,339/2022 proposes objective legal aid criteria anchored to enrollment in the Cadastro Único and monthly income thresholds.[112] Senate Bill No. 429/2024 introduces a special fund, the Fundo Especial da Justiça Federal (Fejufe), to finance judicial modernization from fee revenues.[113] Both are necessary, but neither is sufficient on its own. Together, they represent the minimum institutional adjustment that the constitutional guarantee of access to justice and the imperative of fiscal sustainability jointly require.

The comprehensive reform this article proposes builds on those bills and adds three further elements: (i) mandatory IPCA adjustment of the minimum court fee, mirroring Portugal's periodic UC adjustment by ministerial order; (ii) an ad valorem model for fees on higher-value claims, eliminating the fixed ceiling that today makes the cost of adjudicating a BRL 100 million dispute identical to that of a BRL 100,000 dispute; and (iii) the institutional separation of legal aid eligibility from judicial proceedings, drawing on the Portuguese ISS model. These measures are not designed to eliminate the judicial deficit, because that would require addressing the blanket exemption enjoyed by public authorities, the largest litigants in the country, a question that raises political obstacles beyond the scope of this article. They are designed to correct the most visible sources of irrationality in the current system while maintaining the constitutional guarantee of effective access to justice for those who genuinely need it.

5. Conclusion

The problem examined in this article does not have a clean solution. Access to justice and fiscal sustainability are genuine constitutional values that pull in opposite directions, and the task of constitutional law is to manage that tension rather than dissolve it.

This analysis has established four principal conclusions. Court costs in Brazil are constitutionally sound as a tax species, and the use of claim value as a tax base is defensible on practical grounds because the actual cost of judicial services cannot be calculated in advance with sufficient precision to generate a meaningful fee schedule, and the claim value provides a legally certain, economically rational approximation within the limits established by STF precedent. Brazil's legal aid regime is structurally dysfunctional because a relative presumption of indigence, designed to protect genuine access, has become in practice a de facto universal exemption, a problem visible to any judge administering a substantial Federal Court docket and confirmed by the fiscal data that the CNJ publishes annually. The economic analysis of law provides indispensable tools for evaluating fee design but must be applied within the constraints of a constitutional order that assigns independent value to access to justice, a value that cannot be reduced to Kaldor-Hick's efficiency. And the comparative analysis, while generating transferable institutional models, requires critical filtering. The Portuguese UC mechanism and ISS-administered means test are transferable, but the German merit-screening requirement and the literature's frivolous-claims filter are not, without adaptations that address Brazil's specific social structure, income distribution, and legal culture.

The proposed reform, moderate fees with mandatory annual adjustment, objective legal aid criteria, and an administratively separated eligibility process, asks those who can pay a small, proportionate contribution to do so, while maintaining meaningful access for those who cannot. That is not a radical proposal. It is the minimum that legal certainty, constitutional equity, and the long-term sustainability of the Federal Judiciary jointly require. What has been lacking is not the diagnosis, the CNJ has been publishing it for years, but the legislative will to act on it.

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