

ETHICAL STANDARDS, TRANSPARENCY, AND
CORRUPTION IN BRAZILIAN COURTS

MONALIZA O. DA SILVA*

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As Brazilian courts address increasingly large-scale corruption cases, the interaction between judges, litigants, and third parties has come under scrutiny. Although judges deliberate in public and courts broadcast their sessions on television, radio, and the internet, the Brazilian judiciary is not sufficiently accountable to the public. This article argues that lax ethical standards and informality open the door to undue biases that undermine judicial impartiality and transparency by allowing judges to have backchannel communications among themselves, and with litigants and third parties.

The Brazilian judicial framework has significant shortcomings. It lacks both ex ante rules to prevent undue biases and ex post rules to effectively address violations of ethical standards. Current ethical and procedural rules allow judges to communicate ex parte with actors whose interests may be affected by their decisions. This ability to exchange information with litigants and third parties without having to disclose it to the opposing party or to the public reinforces inequalities in the judicial system, as some parties may have privileged access that is not available to all litigants. Furthermore, the informality of this process makes it difficult to

* J.S.D. & LL.M., New York University; LL.B., University of São Paulo School of Law.

prove improper behavior. Because information exchanged in private meetings is not recorded, external audiences may not be able to verify when judges violate their impartiality duties. And because disciplinary sanctions are too lenient, there is no compelling deterrent to this behavior.

Transparency is only an effective accountability mechanism when it helps us to identify, prevent, and address undue biases. In the Brazilian case, efforts to increase transparency by opening the court to external audiences are insufficient to prevent misconduct, as judges can easily circumvent the public forums and exchange information privately.

I. INTRODUCTION

As corruption scandals throughout Latin America have emerged in the last decades,¹ the relationship between judges, litigants, and third parties have come under scrutiny in the region, particularly in Brazil. Recently, Operation Car Wash uncovered complex corruption schemes that led to the prosecution of prominent politicians and businesspeople.² In June

1. Recent corruption scandals in Latin America include *La Estafa Maestra* in Mexico, Oscar Centeno's notebook scandal in Argentina, and the Panama papers leak. See Ben Miller & Fernanda Uriegas, *Latin America's Biggest Corruption Cases: A Retrospective*, *AMS. QUARTERLY* (July 22, 2019), <https://www.americasquarterly.org/article/latin-americas-biggest-corruption-cases-a-retrospective> (summarizing some of the biggest corruption cases in various Latin American countries and the region as a whole). See also Manuel Balán, *Competition by Denunciation: The Political Dynamics of Corruption Scandals in Argentina and Chile*, 43 *COMP. POL.* 459, 465-66 (2011) (discussing corruption scandals during the Menem, de la Rúa, Duhalde, and Kirchner administrations in Argentina); *Id.* at 471-73 (discussing corruption scandals in the Aylwin, Frei, Lagos, and Bachelet administrations in Chile).

2. Operation Car Wash has been one of the largest and most consequential corruption scandals in Brazil and Latin America. See, e.g., KEVIN E. DAVIS, *BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNAT'L BRIBERY* 163-66 (2019) (explaining that Operation Car Wash was a scandal in which Odebrecht, a Brazilian conglomerate, was accused of paying bribes in 11 countries, many of them in Latin America); Nicholas Casey & Andrea Zarate, *Corruption Scandals with Brazilian Roots Cascade Across Latin America*, *N.Y. TIMES*, Feb. 13, 2017, at A3 (describing Operation Car Wash as "the largest anticorruption settlement in history."). Investigations implicated high ranking politicians and black market dealers and showed that private Brazilian construction companies paid bribes to senior managers of the Brazilian state-owned Petrobras oil company for contracts in large construction and engineering projects. See, e.g., Elizangela Valarini & Markus Pohlmann, *Organizational Crime and Corruption in Brazil: A Case Study of the "Operation Car Wash" Court Records*, 59 *INT'L J. L. CRIME & JUST.* 1, 1-2 (2019) (describing the nature and consequences of Operation Car Wash).

2019, *The Intercept*, an online news publication, published leaked private messages that the Operation's prosecutors exchanged among themselves and with the then judge of the case, Sergio Moro.³ In these messages, Moro and the head of the prosecution team, Deltan Dallagnol, discussed strategies on how to proceed with the investigations.⁴ Dallagnol acknowledged the weakness of his case to Judge Moro, who provided advice and questioned the strategy behind some of the prosecutors' actions.⁵ In the aftermath of the disclosure, Moro challenged the authenticity of the leaks, but did not consider the conversations to be problematic: "Judges talk to prosecutors, judges talk to attorneys, judges talk to policemen, that's normal."⁶ To what extent, however, do these informal communications undermine impartiality and transparency in courts?

Judicial ethical standards vary according to the jurisdiction. Each legal community has a different view of the role attorneys and judges play and how they should interact. Most jurisdictions require judges to be impartial and have various safeguards against biases. Common law jurisdictions generally prohibit *ex parte* communications.⁷ The American understanding is that, in an adversarial proceeding, the parties are

3. Andrew Fishman et. al, *Breach of Ethics: Exclusive: Leaked Chats Between Brazilian Judge and Prosecutor Who Imprisoned Lula Reveal Prohibited Collaboration and Doubts Over Evidence*, THE INTERCEPT BRASIL (June 9, 2019, 04:57 PM), <https://theintercept.com/2019/06/09/chat-moro-deltan-telegram-lava-jato/>.

4. *Id.*

5. *Id.*

6. Mariana Schreiber, *Qual o possível impacto para a Lava Jato das conversas atribuídas a Moro e Dallagnol? [What is the Possible Impact of the Conversations Attributed to Moro and Dallagnol on Operation Car Wash?]*, BBC BRASIL (June 10, 2019), <https://www.bbc.com/portuguese/brasil-48589742>.

7. For the definition of *ex parte*, see ARTHUR GARWIN ET AL., ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 176 (2d ed. 2011) (defining *ex parte* communications as "one that excludes any party who is legally entitled to be present or notified of the communication and given an opportunity to respond"); see also Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 NEB. L. REV. 251, 273-77 (2000) (discussing the various definitions of *ex parte* communications). The American judicial system generally does not allow *ex parte* communications. MODEL CODE OF JUD. CONDUCT r. 2.9(A) (AM. BAR ASS'N 2010) (prohibiting judges from initiating, permitting, or consenting to *ex parte* communications); MODEL RULES OF PROF'L CONDUCT r. 3.5(b) (AM. BAR ASS'N 1983) (prohibiting attorneys from communicating *ex parte* with judges).

entitled to hear and respond to all information the opposing party provides to the court.⁸ Continental European and Latin American systems, by contrast, adopt a different approach. In those jurisdictions, the judge is an active participant who engages with the parties to find the truth of the matter. Some of these jurisdictions allow judges and litigants to communicate with each other on a regular basis, even *ex parte*.⁹

This article explores the dissonance between the appearance of transparency and the reality of loose ethical standards in Brazilian courts. In Brazil, informality is common in the judicial system. For purposes of this article, informality consists of communications and contacts among judges, litigants, and third parties outside the courtroom that exclude one or more legally interested parties. These private communications may also occur among certain judges in informal settings when they do not include the other judges who are participating in the decision. When one party has access to the judge without the presence of the others and the communication is not included in the case's record, the opposing litigant will not have access to the information exchanged in the meeting.

While collegial courts deliberate in public and superior courts broadcast their sessions on television, radio, and the internet, the limits on interactions outside of the courtroom are weak. Judges establish relationships with actors who have a stake in their decisions, and they often communicate *ex parte* with litigants and third parties. As such, a policy that opens the courts to the public is not in itself capable of increasing access, improving accountability, or preventing corruption and undue influence.

Under Brazilian law, judges are relatively free to communicate with litigants and third parties. Within the scope of a particular case, the professional codes of ethics for both attorneys and judges expressly allow *ex parte* communications,¹⁰ and contact between judges and third parties is relatively com-

8. STEPHEN GILLERS, REG. OF LAWS.: PROBS. OF L. AND ETHICS 464 (11th ed. 2018).

9. See *infra* Section II.

10. Lei No. 8.906, de 4 de Julho de 1994, art. 7 VIII, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.7.1994 (Braz); Conselho Nacional de Justiça Processo No. 200820000007337, de 06 de agosto de 2008, DIÁRIO DA JUSTIÇA [D.J.], 18.9.2008, 1, art. 9, (Braz).

mon.¹¹ Under civil and criminal procedure laws, the grounds for recusal of judges are narrow, and judges have, in fact, broad discretion to recuse themselves.¹²

The Brazilian legal community generally accepts informal, off the record, interactions that do not include all legally interested parties. The development of Brazilian procedural law has entrenched these informal conversations, which are commonly justified through two pragmatic arguments: first, because judges have the power to order the production of evidence, they argue that informal exchanges with litigants help to decrease bureaucracy and coordinate fact-finding proceedings.¹³ Second, informal conversations are seen as necessary to combat the high caseload and relative inefficiency of Brazilian courts.¹⁴ In the context of a dysfunctional judiciary, informal conversations allow the parties to avoid unnecessary bureaucracy and direct the judge's attention to the most urgent matters.

These justifications, however, are unsatisfactory. Judges can play an important role in fact-finding proceedings without adopting informal practices. Even when judges interact closely with parties, contacts do not need to be *ex parte* to be efficient. In many jurisdictions, including the United States, judges play a prominent role in proceedings without engaging in *ex parte* communications. Moreover, efforts to reduce judges' role as fact finders in criminal proceedings in Brazil have not resulted in challenges to informality within the courts. In the aftermath of controversial judicial actions in the Operation Car Wash case and *The Intercept* leaks, the Brazilian Congress passed legislation aimed at diminishing judges' participation in investigations and at preventing them from abusing their powers.¹⁵ These statutes create criminal liability for judges who violate defendants' due process rights and create a

11. *See infra* Section III.

12. Judges must ~~or may~~ recuse themselves in certain situations, and may recuse themselves in others. The parties may challenge the judges' participation in a trial in the court where the judge sits. *See infra* Section III.

13. *See infra* Section III.

14. *See infra* Section III.

15. *See* Lei No. 13.869, de 5 de Setembro de 2019, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], Edição Extra de 05.09.2019, (Braz.) (creating criminal liability for judges who abuse institutional powers).

new type of judge.¹⁶ Under the new bifurcated regime, a guarantee judge is in charge of the investigation phase of criminal proceedings, while a deciding judge ultimately resolves the case.¹⁷ However, these statutes do not restrict the relationship among judges, litigants, and third parties, and thus will not decrease informal communications.¹⁸ Additionally, informality does not increase the judiciary's overall efficiency. Instead, the shortcomings of professional ethics law and practice create power inequalities between the parties, litigants in general, and other stakeholders in society.

Transparency, understood as the disclosure and publication of information, can only be an effective accountability mechanism if public information accurately reflects the underlying communications between judges, litigants, and third parties. Therefore, ethical rules and practices that impose little or no limits on *ex parte* and external communications and relationships will do nothing to realize the benefits of transparency. By their nature, informal conversations outside of the courtroom leave few traces; it is thus difficult, if not impossible, to track them and assess whether they were proper.

In Brazil, lax ethical standards reinforce the inequalities within the judicial system and diminish institutional trust. Because the exceptionally high caseload of Brazilian courts prevents judges from giving due care to every case they adjudicate,¹⁹ parties who have easy access to courts and influence over judges have an advantage over those who do not. Moreover, widespread corruption in every branch of government has

16. Lei No. 13.964, de 24 de Dezembro de 2019, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], Edição Extra de 24.12.2019, (Braz.).

17. *Id.*

18. *See infra* Section III.

19. For example, the Brazilian Supreme Court received 101,497 new cases in 2018 and 103,650 in 2017, and the Court is composed of 11 justices. *Estatísticas: Movimento Processual [Statistics: Case Status]*, SUPREMO TRIBUNAL FEDERAL [SUPREME COURT], <http://portal.stf.jus.br/textos/verTexto.asp?servico=estatistica&pagina=movimentoProcessual>. According to the National Council of Justice (*Conselho Nacional de Justiça*), for every 100,000 people, 11,796 have brought a new judicial claim to court. The CNJ also reported that the average of new cases per year was 1,577 per federal and state district judge and 1,392 per federal and state appellate judge. CONSELHO NACIONAL DE JUSTIÇA [NATIONAL COUNCIL OF JUSTICE], JUSTIÇA EM NÚMEROS: 2019 [JUSTICE IN NUMBERS: 2019] 84,109 (2019), https://www.cnj.jus.br/wp-content/uploads/conteudo/arquivo/2019/08/justica_em_numeros20190919.pdf.

raised the public's suspicion against politicians, attorneys, prosecutors, and judges.²⁰ The preponderance of informal ex parte communications prevents the public from knowing whether a judge was subject to undue influence, thereby increasing distrust of the judicial system.

Open deliberation and television broadcasting in collegial courts do not solve these problems. They may even compound the issue because open sessions project a misleading image of transparency to external audiences. Yet despite this public broadcasting, judges may conceal crucial information they obtained informally. Although judges should be allowed a protected environment in which to exchange information and deliberate with each other, litigants and third parties should not have privileged access to judges. A party should know of and be allowed to object to communications made by the other. And the public, for its part, should have more information about the relationships between judges and actors potentially affected by the court's decisions.

Rules of judicial conduct and established practices in Brazil should aim to preclude undue biases. Brazil should adopt ex ante rules that prevent certain actors from taking advantage of their influence and gaining informal access to judges. More specifically, the legal community should be more critical of judges' relationships with litigants and third parties. Ex parte communications should be restricted to non-essential aspects of a case or prohibited altogether. Grounds for the recusal of judges should be based on the appearance of bias, not on whether evidence of actual bias exists. Only with these rules in place can transparency measures serve as effective accountability mechanisms.

In Section II, this article discusses how many legal systems approach informality in the judicial process. Each jurisdiction has a different view of the role judges play in litigation and how parties should communicate with judges. While in adver-

20. Public trust in judges and prosecutors has diminished between 2013 and 2017. Trust in the judiciary fell from 34 percent to 24 percent, while trust in prosecutors decreased from 44 percent to 28 percent. In 2017, less than 25% of people surveyed trusted the Brazilian Supreme Court. LUCIANA DE OLIVEIRA RAMOS ET AL., FUNDAÇÃO GETÚLIO VARGAS [GETÚLIO VARGAS FOUNDATION], RELATÓRIO ICJ BRASIL – 1º SEMESTRE 2017 [TRUST IN THE JUDICIARY INDEX REPORT – 1ST SEMESTER 2017] 15-16 (2017), <http://hdl.handle.net/10438/19034>.

serial models the judge is an umpire who ensures the fairness of the process, in inquisitorial models the judge engages actively with the parties to uncover the truth of a particular matter.²¹ This section also discusses how the notion of orality informed the development of procedural law in Europe and Latin America. As modern legal systems evolved, they incorporated both adversarial and inquisitorial ideas into their law and practice. This section argues that it is possible for judges to interact with parties during judicial proceedings without using informal channels.

Section III analyzes how informality has developed in Brazilian law and judicial practice. It presents the procedural and ethical legal framework and explains how judges, litigants, and third parties interact in Brazil. This section also discusses recent legislative reforms and explains their shortcomings.

Section IV argues that procedural, ethical, and transparency rules should aim to prevent three sorts of undue bias: conflicts of interest, influence based on the access litigants have to the judge, and quid pro quo corruption. It discusses how these biases undermine the judicial system's credibility.

Section V proposes rules that courts can adopt to prevent those undue biases and explains the extent to which transparency rules can act as an accountability mechanism. In particular, this section discusses the role of ex ante and ex post approaches to ethical standards. While ex ante rules are intended to prevent undue biases from occurring, ex post rules aim at punishing violations of ethical standards. These two approaches are complementary and should be analyzed together, and the Brazilian ethical framework has insufficient rules in both aspects. Transparency can only serve as an accountability mechanism when it uncovers potential undue biases and misconduct. This section concludes by finding that the Brazilian system, although it publishes certain information, fails to meet these goals because judges remain subject to bias from back channels of informal communication.

21. W. Zeidler, *Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure*, in RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* 14–15 (7th ed. 2018) (“While the English judge is an umpire sitting at the sidelines watching the lawyers fight it out and afterwards declaring one of them the winner, the German judge is the director of an improvised play, the outcome of which is not known to him at first but depends heavily on his mode of directing.”).

II. FORMALITY AND INFORMALITY IN JUDICIAL PROCEDURE

What a legal system considers to be improper judicial behavior depends on that system's procedural rules and practices. Common law jurisdictions impose great responsibilities on the parties for the conduct of the proceedings, while judges act as neutral arbiters who do not actively intervene in most litigation phases.²² In civil law jurisdictions, by contrast, judges interact directly with the parties and play an active role in the proceedings, especially in the production of evidence.²³ As a result, what common law courts would consider undue judicial interference in procedure, civil law courts see as an ordinary part of the judicial process.

When judges have significant powers to orchestrate the judicial process and weigh the evidence, it may seem acceptable for them to have direct contact with litigants and third parties outside of formal proceedings. Formal proceedings, such as an exchange of briefs, pre-trial conferences, and the trial itself, involve both parties and usually leave records that may be accessible to the public. Each party is aware of the information the other provided to the judge and has the opportunity to contest it. If, however, judges are not bound by the parties' fact-findings requests and can uncover evidence by themselves, one might think there are few reasons to prevent communications between a judge and a singular party about how the proceedings should take place. Instead of formally convening with parties and fellow judges, judges can search for information independently. As a result, judges could justify the use of informal proceedings as a means to save time and avoid bureaucratic hurdles. This logic, however, is flawed. Judges and litigants can properly communicate with each other without necessarily resorting to informality even when their interactions are active throughout the proceedings.

Judges argue that these contacts are convenient means to resolve practical issues that emerge during litigation. But informality and judges playing an active role in judicial proceedings are not necessarily correlated. Although professional eth-

22. Marvin Frankel, *The Search for Truth: An Umpireal View*, in RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* 16 (7th ed. 2018) ("The fact is that our system does not allow much room for effective or just intervention by the trial judge in the adversary fight about the facts.").

23. Zeidler, *supra* note 21.

ics rules must be tailored to the procedural system,²⁴ informality is still undesirable even when judges and parties have close contacts throughout the judicial process. A judge with powers to guide or constrain the parties' actions does not need to communicate with them about the case *ex parte* to properly do his or her job.²⁵ Furthermore, informality does not necessarily lead to an efficient or speedy trial. Judges can be case managers while keeping a safe distance from the litigants.²⁶

The American adversarial model is generally premised on the parties conducting most of the proceedings and judges abstaining from intervening in the pre-trial process.²⁷ In the United States, litigants work closely together, from service of process to discovery,²⁸ while maintaining distance from the judge. The parties may take depositions,²⁹ submit written interrogatories to each other,³⁰ or request the production or inspection of documents and electronically stored information of their own accord,³¹ unless the court actively decides to intervene.³²

Traditionally, judges in the United States would intervene in pre-trial proceedings only in limited circumstances.³³ In

24. *Cf.* Flowers, *supra* note 7 at 259–61 (claiming that rules of procedure, evidence, and ethics inform the adversary system).

25. *See generally id.* at 277, 287–9 (noting how *ex parte* communications diminish the appearance of impartiality and explaining other negative impacts on the judicial system).

26. In the United States, for instance, *ex parte* communications are mostly prohibited, but judges convene with both litigants throughout the pre-trial process to resolve early disputes in a case. *See id.* at 277–8 (describing limited situations in which *ex parte* communications are permitted).

27. *Id.* at 261.

28. FED. R. CIV. P. 4(c) (providing that after the plaintiff files the complaint with the court, he or she is “responsible for having the summons and complaint served” to the defendant).

29. *Id.* at r. 30(a)(1) (oral deposition); Fed. R. Civ. P. 31(a) (written deposition).

30. *Id.* at r. 33(a)(1) (providing that a party may serve the other with up to 25 interrogatories and that requests to server additional interrogatories may be granted at the court’s discretion so long as they are consistent with other Rules).

31. *Id.* at r. 34(a).

32. *See, e.g., id.* at r. 26(b)(2)(A) (allowing the court to limit discovery requests by order).

33. *See* Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 770 (1981) (explaining that, in the United States, traditionally “the trial judge

creasingly, however, litigation has become more complex, involving multiple parties and multiple claims. The multiplicity of parties, issues, and attorneys may lead to confusion and unnecessary conflicts between litigants if judges do not exercise control over the proceedings.³⁴ As a result, judges have become active participants as case managers to resolve early disputes between the parties.³⁵ For example, parties may file motions to compel discovery or request a protective order, and it falls upon judges to resolve these preliminary disputes.³⁶ The Federal Rules of Civil Procedure also enable judges to convene with the parties for case management purposes through ordering pre-trial conferences, creating the discovery schedule, discouraging wasteful actions, facilitating settlement, and establishing a trial plan.³⁷ However, although judges may be permitted a large degree of discretion in structuring their cases, they cannot investigate facts by themselves and may be subject to discipline for attempting to do so.³⁸ They must decide cases based on the claims and evidence the parties present before them in an adversarial manner.³⁹

To remain impartial, American judges and their staff are prohibited from having any *ex parte* communications concerning a pending or impending proceeding. The prohibition includes communications with judges who have been disqualified from the matter or who have appellate jurisdiction over it.⁴⁰ Judges are also barred from communicating about the specifics of the case pending before them with third parties, including unrelated attorneys and law professors.⁴¹ Although judges may discuss certain aspects of their cases with their col-

played virtually no role in a case until counsel for at least one side certified that it was ready for trial.”).

34. *See id.* at 772 (explaining how judges can work with the parties to simplify the discovery process and provide a forum where litigants can resolve immaterial and uncontested issues that typically arise in lawsuits).

35. *Id.* at 770.

36. FED. R. CIV. P. 37(a)(3)(A), (B) (allowing parties to move to compel disclosure or response to discovery requests); Fed. R. Civ. P. 26(c) (allowing parties to move for a protective order to deny or limit certain discovery production).

37. *Id.* at r. 16.

38. MODEL CODE OF JUD. CONDUCT r. 2.9(C) (AM. BAR ASS’N 2010).

39. *Id.*

40. *Id.* at cmt. 5.

41. *Id.* at cmt. 3.

leagues, they must do so in a manner that ensures they do not receive factual information not included in the record.⁴²

In the United States, *ex parte* communications are allowed only exceptionally.⁴³ Judges may communicate *ex parte* in cases of emergency or for administrative purposes as long as they do not discuss the substantive matters of the case.⁴⁴ Even when a communication is not substantive, judges should refrain if they believe the party will gain an advantage from it.⁴⁵ After an *ex parte* contact, even if it was inadvertent, judges must inform the other party of the substance of the communication and allow said party to respond to it.⁴⁶ Judges who engage in impermissible *ex parte* communication must recuse themselves from the case,⁴⁷ and both judges and attorneys are subject to discipline for violating this rule.⁴⁸

By contrast, European and Latin American systems grant much greater powers to judges in the production and assessment of evidence.⁴⁹ Although the strict divide between inquisitorial and adversarial models has faded,⁵⁰ some features of inquisitorial procedure remain in force in Europe and Latin America. Judges have fact-finding powers, engage in direct

42. *Id.* at r. 2.9(A)(3).

43. In addition to the exceptions mentioned in the Model Code of Judicial Conduct, *ex parte* communications are allowed when authorized by law. To protect confidential information, for instance, the court may review evidence *in camera* and distinguish, *ex parte*, privileged from non-privileged information. *See, e.g., Socialist Workers Party v. Attorney Gen. of U.S.*, 642 F. Supp. 1357, 1377–79 (S.D.N.Y. 1986) (appointing a special master to review certain files *in camera* to prevent confidential information about FBI informants from being revealed to public).

44. MODEL CODE OF JUD. CONDUCT r. 2.9(A)(1) (AM. BAR ASS'N 2010).

45. *Id.* at r. 2.9(A)(1)(a).

46. *Id.* at r. 2.9(B).

47. *See* ARTHUR GARWIN ET AL., *supra* note 7, at 197–98 (annotation to Rule 2.9).

48. *See id.*; MODEL RULES ON PROF'L CONDUCT, *supra* note 7, at r. 3.5(b) (prohibiting attorneys from making *ex parte* communications during a proceeding).

49. The generalizations presented in this brief overview of a few Latin-American and European legal systems may not be applicable to all jurisdictions in this region. The goal is simply to show the ideas that have influenced many of these legal systems and how a few of them have changed overtime.

50. *See* John R. Spencer, *Adversarial vs Inquisitorial Systems: Is There Still Such a Difference?*, 20 INT'L J. HUM. RTS. 601, 607-08 (2016) (describing how adversarial and inquisitorial systems have evolved and found common solutions to resolve common criminal procedure law concerns).

contact with litigants, and may communicate with them off the record to some extent.

For historical and cultural reasons, these jurisdictions tolerate a degree of informality. However, this was not always the case. During the *ancien régime*, procedural acts were valid only if in writing, and the parties involved in the process were not supposed to have direct contacts with the judge.⁵¹ Judges had to make decisions based only on the record of the case and relied on the work of notaries, who were in charge of transcribing depositions and testimonial evidence.⁵² Judges evaluated evidence based on a formal system that “mathematically” determined the weight of the evidence in a given claim.⁵³ Judges did not actively participate in most of the procedure.⁵⁴ Instead, the litigants were in charge of conducting most of the litigation.

This strict and formalistic model made judicial proceedings long and bureaucratic, and European thinkers, most notably from France, Germany, and Austria, eventually pushed for procedural reforms.⁵⁵ After the French Revolution in 1789, continental European countries shifted from a formalistic to an oral system of judicial process.⁵⁶ Aspiring to accomplish more efficient judicial decision-making, the new codes of procedure increased the role of orality and allowed judges to intervene directly in the procedure.⁵⁷

Orality did not mean that the entire procedure was to be conducted orally. Although the goal was to expand the role of oral debate and testimony, essential elements of the litigation, such as initial pleadings, continued to be written.⁵⁸ Orality also

51. Mauro Cappelletti, *Social and Political Aspects of Civil Procedure: Reforms and Trends in Western and Eastern Europe*, 69 MICH. L. REV. 847, 848 (1971).

52. *Id.* at 848.

53. *Id.* at 848–49 (“The evaluation of evidence was mathematically established by law.”).

54. *Id.* at 850 (noting how the judge did not “intervene and direct the proceedings.”).

55. *Id.* at 851–54 (describing procedural law developments in France, Germany, and Austria following the French Revolution).

56. *Id.* at 851, 853–54; see also Spencer, *supra* note 50, at 604 (discussing the Napoleonic Code of Criminal Procedure and its influence in continental Europe).

57. Cappelletti, *supra* note 51, at 853–54.

58. Benjamin Kaplan et al., *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193, 1213 (1958).

went beyond privileging oral communications and encompassed other core ideas. Importantly, it meant that parties would have direct contact with the judge. At the hearing, the parties would present evidence, debate their claims, and receive a final judicial decision. Judges did not have to rely on notaries and written transcripts. Instead, they could observe the evidence directly and critically evaluate it. Adopting a principle of immediacy, hearings had to be concentrated into one or only a few sessions, and the judge would decide the case right after the parties presented the evidence to him or her.⁵⁹ As a result, under this new model, judges and litigants acted closely together. Many of their interactions potentially were neither formalized nor supervised by the opposing party or the public.

Some of these ideas are still present in modern European systems, while others have been abandoned or relaxed. The goal of immediacy, for instance, has been modified to reflect the modern reality of complex cases that may require more than a few sessions to be completely resolved. Because civil law systems only use juries in criminal cases,⁶⁰ the distinction between trial and pre-trial proceedings is not as meaningful in

59. See Cappelletti, *supra* note 51, at 853–54 (“On the Continent, the great reform movement presented itself under an overarching and yet too often misleading symbolic name: ‘orality.’ What it meant, however, was much more than a mere reaction against the prevalence of writing in the *jus commune* and derivative proceedings. . . . [I]n addition to a revaluation of the oral element in procedure, the leading ideals of the reform movement were the following: first, ‘immediacy’—that is, a direct, personal, open relationship between the adjudicating organ and the parties, the witnesses, and the other sources of proof; second, ‘free’ or, more precisely, ‘critical’ evaluation of evidence, unfettered by a priori rules of exclusion or evaluation, and based on the direct observation of the evidentiary elements by the judge in open court; third, ‘concentration’ of the case in a single hearing or in a few closely spaced oral sessions before the court, carefully prepared through a preliminary stage in which writings were not necessarily to be excluded; finally, and as a consequence of the first three ideas, a more rapid unfolding of the litigation.”).

60. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 848 (1985) (explaining that there is no civil jury in Germany); Angelo P. Sereni, *Basic Features of Civil Procedure in Italy: A Comparative Study*, 1 AM. J. COMP. L. 373, 374 (1952) (noting that, unlike the United States, there is no jury in civil suits in Western Europe).

civil law countries as it is in the United States.⁶¹ While in American civil trials the jury sees only the results of the discovery process, in civil law jurisdictions the judge decides both preliminary and conclusive matters of fact. When cases involve multiple parties and claims and extensive evidence production, immediacy goals must be relaxed to allow the judge time to interact with the parties and make these decisions.⁶² Writings have also become more important as procedural rules limit the admissibility of oral evidence.⁶³

Judges, however, continue to be the central figure in the litigation.⁶⁴ They take the initiative in the production of evidence and frequently communicate with the parties.⁶⁵ In France and Portugal, for instance, an investigating judge is in charge of conducting discovery, issuing interlocutory decisions, and resolving early disputes between the parties.⁶⁶ This system had spread over continental Europe, but was abolished in some jurisdictions, such as Germany and Italy.⁶⁷ Yet, even in Germany judges participate actively in the production of evi-

61. See Sereni, *supra* note 60, at 378 (noting the lack of distinction between pre-trial and trial proceedings in Italy).

62. See Kaplan et al., *supra* note 58, at 1212 (describing how in Germany, “The theoretical ideal [of quick resolution] is not often attained even in the simpler contested cases. Commonly there are several sessions for oral-argument and proof is very often taken by installments. Adjournments for convenience of parties, experts, witnesses, and the court contribute to the prolongation of proceedings.”).

63. Sereni, *supra* note 60, at 386.

64. See Kaplan et al., *supra* note 58, at 1221–22 (describing the presiding judge as the “principal actor for the court”).

65. See Geoffrey C. Hazard, *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1024 (1998) (explaining that, in civil law jurisdictions, the production of evidence is carried out by the court, not the parties. Parties may ask the judge to produce evidence, but the judge has discretion to decide).

66. Decreto-Lei No. 78 de 17 de Fevereiro de 1987, DIÁRIO DA REPÚBLICA, No. 40 de 1987, Série I de 17.02.1987 617, art. 17 (Port.) (specifying the powers of the investigating judge in Portugal); CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] arts. 49, 79–84.1 (Fr.) (specifying the powers of the investigating judge in France).

67. The instructor judge was abolished in Germany and Italy in 1974 and 1988, respectively. It has also been abandoned in France. Spencer, *supra* note 50, at 604 (explaining how the instruction judge has disappeared over time from French and German legal systems). For an explanation of the former role of the inquiring judge in Italy, see Sereni, *supra* 60, at 380–84.

dence and the selection of expert witnesses.⁶⁸ A level of informality is also present in some of these systems, as *ex parte* communications are allowed at least to some degree.⁶⁹ Other courts that come from this tradition, however, have shifted towards a more adversarial model. The Italian Code of Conduct for lawyers, for instance, establishes that attorneys who take advantage of their relationship with judges or communicate with them in the absence of opposing counsel are subject to discipline.⁷⁰

The variety of procedural rules in different legal systems shows that interactions between judges and litigants need not be informal for a system to function. In the United States, judges interact with parties and address their early disputes without having to communicate *ex parte*. Pre-trial conferences allow both parties to express their concerns to the judge early on in a formal environment and do not confer privilege on one party at the expense of the other. In Italy, a system that traditionally incorporates features of inquisitorial models, the procedural framework has evolved to include elements of adversarial models to preserve judges' impartiality.⁷¹ This shift includes the prohibition on *ex parte* communications.⁷²

68. See Langbein, *supra* note 60, at 828–30 (describing the role of German judges during the hearing, in examining and recording of evidence, selection of expert witnesses, and judgment).

69. See Doak Bishop & Isabel Fernández de la Cuesta, *A Defense of the IBA Guidelines on Party Representation*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 106, 113 (Arthur W. Rovine ed., 2015) (noting that some countries, such as Germany, generally allow *ex parte* communications); Catharine Rogers, *Guerrilla Tactics and Ethical Regulation*, in GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION 313, 330 (Günter J. Horvath & Stephan Wilske eds., 2013) (noting variations in European practices concerning *ex parte* communications); Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1, 37–38 (1993) (explaining that in some European legal systems, *ex parte* communications on non-fundamental issues are allowed).

70. Codice deontologico forense [Code of Conduct for Italian Lawyers] 31 gennaio 2014, G.U. Ott. 16, 2016, n.241, art. 53 (It.).

71. *C.f.* James T. Ogg, *Adversary and Adversity: Converging Adversarial and Inquisitorial Systems of Justice—A Case Study of the Italian Criminal Trial Reforms*, 37 INT'L J. COMP. APPLIED CRIM. JUST. 31, 58-59 (2013) (noting, however, that changes in Italian procedure that incorporate adversarial aspects have clashed with hurdles of culture and tradition).

72. Codice deontologico forense [Code of Conduct for Italian Lawyers] 31 gennaio 2014, G.U. Ott. 16, 2016, n.241, art. 53 (It.).

Judges still play an important role in the proceedings in both these systems, but they are not allowed to exchange information with one of the parties and exclude the other.

III. COMMUNICATIONS AND RELATIONSHIPS BETWEEN JUDGES, LITIGANTS, AND THIRD PARTIES IN BRAZILIAN COURTS

The waves of European legal thought presented in the preceding section have influenced Latin American and Brazilian law and practices. Legal changes in Portugal and Spain had lasting direct and indirect effects on Latin American law even after decolonization. The former colonies mostly kept their colonial procedural codes after independence, and they continued to look to Europe for guidance when they changed their procedural rules.⁷³ From the 1930s onwards, Italian and German legal theory also became influential because of the work of a few European professors who fled to Latin America during World War II.⁷⁴

Soon after its independence in 1822, Brazil incorporated Portuguese procedural law.⁷⁵ As such, Brazilian civil procedure was formalistic and mainly written.⁷⁶ The parties were

73. See Carlos Petit, *Due Process and Civil Procedure, or How to Do Codes with Theories*, 66 AM. J. COMP. L. 791, 795 (2018) (noting that the relationship between Spain and its former colonies is essential to understanding legal reforms in those countries).

74. *Id.* (describing the “dissemination in Latin America of German-Italian doctrines on the civil trial, which had been already well established in Spain since the 1920s. European totalitarianism and war, which brought German (James Goldschmidt, Uruguay), Italian (Tulio E. Liebman, Brazil), and Spanish (Niceto Alcalá-Zamora, Mexico; Santiago Sentís Meledo, Argentina) specialists in procedural law to Latin America fostered the propagation of so-called scientific proceduralism in the host countries, where local schools were formed and new translations published.”).

75. See Osvaldo Agripino de Castro, Jr., *Helping to Trade With Brazil: A General Overview on Brazilian Law*, ADS ADVOGADOS (2011), https://web.archive.org/web/20110706150550/http://www.adsadvogados.adv.br/imprimir_artigo.php?id=11 (noting that King Philip’s Code continued to be enforced following Brazil’s emancipation).

76. See Oscar Valente Cardoso, *A Oralidade (e a Escrita) no Novo Código de Processo Civil Brasileiro [Orality (and Writing) in the New Brazilian Civil Procedure Code]*, 8 CADERNOS DO PROGRAMA DE PÓS-GRADUAÇÃO EM DIREITO/UFRGS [NOTES OF LAW GRADUATE PROGRAM/UFRGS] 247, 267 (2013) (noting that the Portuguese Ordinations procedure were mainly written, but had a few elements of orality. For example, under King Philip’s Code, the initial claim was oral and the dispute was to be resolved right after the hearing). The first

supposed to control most parts of the process and maintain distance from the judge.⁷⁷

Later, the 1939 Code of Civil Procedure (1939 Code) adopted the orality principle and other features of the inquisitorial system that had become prominent in continental Europe at the time.⁷⁸ Influenced by changes in Portuguese, German, and Austrian law, the 1939 Code simplified legal formalities and allowed the parties to have greater interaction with the judge.⁷⁹ The 1939 Code established that hearings could not be interrupted; ideally, the parties were to debate their claims and the judge was to render a decision in one single session.⁸⁰ The 1939 Code adopted the judicial principle of physical identity, meaning the judge who issued the final decision had to be the one who had heard the entire claim.⁸¹

These ideas influenced the subsequent Codes of 1973 and 2015 and the current Constitution of 1988, but some aspects of orality were reduced.⁸² For instance, large parts of the pro-

Brazilian Procedural rules were established in the Regulation 737 (*Regulação 737*), which was also formalistic and required mostly written procedures. *Id.* at 268.

77. *See generally id.* at 264 (noting how, under Portuguese law applied in Brazil, the predominantly written process kept the judge away from the proceedings).

78. *See* ANTONIO CARLOS DE ARAÚJO CINTRA ET AL., *TEORIA GENERAL DO PROCESSO* [GENERAL THEORY OF PROCESS] 111, 114–15 (22d ed. 2006) (discussing how Italian authors, mainly Giuseppe Chiovenda and Enrico Tullio Liebman, who argued in favor of orality in legal proceedings, influenced Brazilian scholars. Liebman, for instance, who left Italy during the Second World War, became a professor at University of Sao Paulo School of Law and was closely related to Alfredo Buzaid, the Minister of Justice who later drafted the 1973 Civil Procedure Code).

79. Keith S. Rosenn, *Civil Procedure in Brazil*, 34 *AM J. COMP. L.* 487, 487 (1986).

80. CÓDIGO DE PROCESSO CIVIL 1939 [C.P.C. 1939] [CIVIL PROCEDURE CODE 1939] arts. 269, 270, 271 (Braz.).

81. CÓDIGO DE PROCESSO CIVIL 1939 [C.P.C. 1939] [CIVIL PROCEDURE CODE 1939] art. 120 (under the 1939 Civil Procedure Code, judges who moved from one jurisdiction to another had to return to their original court to conclude cases if they had participated in the discovery or preliminary phases. If the judge was unavailable—for incapacity or death, for instance—the substitute judge had to rehear all oral evidence). *See also* Cardoso, *supra* note 76, at 270 (noting that the 1939 Civil Procedure Code adopted the judicial principle of identity).

82. *Compare* Alfredo Buzaid, *Exposição de Motivos* [Explanation of Reasons], in 1 CÓDIGO DE PROCESSO CIVIL: HISTÓRICO DA LEI 8, 18-19 (Senado Federal,

ceedings, including the initial claim and the answer, are usually written. The current 2015 Civil Procedure Code does not incorporate the principle of physical identity, and courts routinely relax the rule in criminal cases.⁸³ Judges do not have to decide the case at the hearing,⁸⁴ and although the hearing is supposed to be a single proceeding, parties may agree to fragment it in several sessions.⁸⁵

In 2019, Congress passed legislation aimed at curbing abuses of power and diminishing judicial power to intervene in criminal investigations.⁸⁶ The statutes are reactions to judicial and prosecutorial actions many found intimidating and coercive in Operation Car Wash.⁸⁷

First, the Abuse of Power statute subjects judges and other authorities to criminal liability for abusing their institutional powers.⁸⁸ For example, judges are now criminally liable for deciding to arrest someone when the law clearly does not justify it or for refusing to release someone when the law clearly requires it.⁸⁹ Judges are also prohibited from using temporary

Subsecretaria de Edições Técnicas ed., 1974) (Buzaid, the Minister of Justice who drafted the 1973 Civil Procedure Code, argued that the orality principle could not be fully effective in Brazil. He claimed that because of the country's territorial extension, industrial development in the twentieth century, and the judicial career system, complete orality could not be fully accomplished. As a result, the 1973 Code created exceptions to the judicial principle of identity and allowed the parties to appeal interlocutory decisions under certain circumstances, including to a higher court), *with* Cardoso, *supra* note 76, at 274–77 (Cardoso, however, argues that this “mitigation” of orality in fact deleted too many core oral aspects of the 1939 Code).

83. See Gustavo H. R. I. Badaró, *A regra da identidade física do juiz na reforma do código de processo penal* [*The Rule of the Judge's Physical Identity in the Reform of the Penal Procedure Code*] BADARÓ ADVOGADOS (Aug. 21, 2018), <http://www.badaroadvogados.com.br/21-082018-a-regra-da-identidade-fisica-do-juiz-na-reforma-do-codigo-de-processo-penal.html> (noting that, although the CPP requires that the judge who presided over the case be the one to render the sentence, it would be better if the provision called for the same judge who initiated the investigation to complete it and judge the case).

84. CÓ DE PROCESSO CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] art. 66 (Braz.).

85. *Id.* at art. 365.

86. See *supra* notes 15–16.

87. See *supra* note 15.

88. See Lei No. 13.869, de 5 de Setembro de 2019, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], Edição Extra de 05.09.2019, (Braz.) (creating criminal liability for judges who abuse institutional powers).

89. *Id.*, art. 9.

arrests as a tool to compel witnesses to testify.⁹⁰ It is not obvious, however, when the law is clear, and judges acting in good faith may be overly uncertain about the lawfulness of their actions.

Second, amendments to the criminal procedural code included in what has become known as the “anti-crime package” legislation determine that the judge who decides investigation matters should not be the same as the one who decides the case.⁹¹ The statute provides that criminal proceedings shall be accusatory and creates a new figure, a guarantee judge.⁹² The guarantee judge has the power to decide on the legality of temporary arrests and detentions, early discovery matters, and other investigation requests from the prosecution,⁹³ and also decides whether to indict the accused.⁹⁴ After the indictment, a deciding judge takes control of the case and may overrule the guarantee judge’s prior interim decisions, including injunctions.⁹⁵ The deciding judge may hear witnesses throughout the trial and decide whether to allow further discovery.⁹⁶

The constitutionality of both statutes is currently under the Brazilian Supreme Court’s (*Supremo Tribunal Federal*, STF)

90. *Id.*, arts. 10, 15.

91. Lei No. 13.964, de 24 de Dezembro de 2019, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], Edição Extra de 24.12.2019, (Braz.).

92. CÓDIGO DE PROCESSO PENAL [C.P.P.] [CRIMINAL PROCEDURE CODE] art. 3-B (as amended by Lei No. 13.964, de 24 de dezembro de 2019, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], Edição Extra de 24.12.2019) (Braz.).

93. *Id.* at art. 3-B V, VI, VII, IX (as amended by Lei No. 13.964, de 24 de Dezembro de 2019, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], Edição Extra de 24.12.2019) (Braz.). (providing that the guarantee judge has the power to decide on temporary arrests and detentions, and other preliminary discovery matters, such as whether to allow phone tapping, access to bank records or other confidential information, and searches and seizures).

94. *Id.* at art. 3-B XIV (as amended by Lei No. 13.964, de 24 de Dezembro de 2019, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], Edição Extra de 24.12.2019) (Braz.).

95. *Id.* at art. 3-C § 1 (as amended by Lei No. 13.964, de 24 de Dezembro de 2019, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], Edição Extra de 24.12.2019) (Braz.).

96. *Id.* at art. 400 (establishing the rules for the criminal trial and determining that witnesses of both the prosecution and defense present their testimony at the trial hearing); *Id.* at arts. 402, 404 (explaining that when it is necessary to determine matters of fact to decide the case, parties may request the production of evidence before presenting their closing arguments. The deciding judge decides whether to grant these requests.).

scrutiny. Judges' associations and political parties have challenged the rules, arguing that they undermine the independence of judges, prosecutors, and police authorities.⁹⁷ They claim the Abuse of Powers statute imposes ambiguous criminal standards that will lead judges and prosecutors to second-guess their decisions and refrain from conducting proper investigations.⁹⁸ The creation of guarantee judges is controversial and has been challenged in the STF as well.⁹⁹ It is unclear whether this division of labor between judges will lead to a proper balance between legitimate investigation interests and the defendants' rights, or what potential costs this measure has.

Importantly, however, none of these measures deal directly with informality in Brazilian courts. Neither the Abuse of Power nor the Anti-Crime legislative package addresses *ex parte* communications and judges' relationships with each other, litigants, and third parties. Under established law, *ex parte* communications are expressly allowed and are seen as a necessary characteristic of the judicial system. Informality is

97. At the moment, there are at least three lawsuits challenging the constitutionality of the Abuse of Powers statute pending before the STF. S.T.F. No. ADI 6.238, Relator: Min. Alexandre de Moraes (Braz.) (pending), <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5792373>; S.T.F. No. ADI 6.236, Relator: Min. Alexandre de Moraes (Braz.) (pending), <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5784525>; S.T.F. No. 6.266, Relator: Min. Alexandre de Moraes (Braz.) (pending), <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5820018>. Two other cases have been dismissed by the rapporteur for lack of standing but may still be subject to appeal, S.T.F. No. ADI 6.234, Relator: Min. Celso de Mello, 12.11.2019, 261, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.e.], 29.11.2019 (Braz.); S.T.F. No. ADI 6.240 MC/DF, Relator: Min. Celso de Mello, 12.11.2019, 259, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.e.], 27.11.2019 (Braz.).

98. *See, e.g.*, S.T.F. No. ADI 6.236, Relator: Min. Alexandre de Moraes, Petição Inicial [Process] 6 (Braz.) (arguing that the crimes the statute establishes are vague and undetermined); S.T.F. No. ADI 6.236 Min. Alexandre de Moraes, Petição Inicial [Process] 3-4 (arguing that the uncertainty the statute creates will lead to unjustified risks for judges, even when their decisions are in accordance with the law); S.T.F. No. ADI 6.266 Min. Alexandre de Moraes, Petição Inicial [Process] 4 (arguing that the Abuse of Powers statute has created fear among public administration officials and will lead them to take unnecessary precautions before making a decision.).

99. At the moment, the STF has rendered decisions in at least three lawsuits challenging the constitutionality of the creation of guarantee judges. S.T.F., No. ADI 6.298, Relator: Min. Luiz Fux (Braz.) (pending); S.T.F. No. ADI 6.299, Relator: Min. Luiz Fux (Braz.) (Pending); S.T.F. No. ADI 6.300, Relator: Min. Luiz Fux (Braz.) (pending).

now commonly accepted as a part of Brazilian legal culture. Current practice goes far beyond the orality ideals of the nineteenth century encouraging a closer relationship with the parties at trial. As adopted in Brazil, informality has blurred the lines between practicality and misconduct.

A. *The Legal Framework*

The Brazilian Constitution, statutes, and ethical regulations guarantee due process rights and establish that judges must be impartial. But because of informality, the boundaries between lawful conduct and questionable behavior are blurred. The law does not prohibit or limit *ex parte* communications *per se* and as a result, judges create relationships with litigants and third parties that may lead to undue biases in adjudication.

The Constitution requires judicial impartiality by establishing due process rights and limiting judges' freedom to participate in economic or political activities. Individuals cannot be deprived of their freedom or property without due process and must have the opportunity to be heard in both judicial and administrative proceedings.¹⁰⁰ To prevent judges' financial and partisan interests from affecting their professional capacity, the Constitution prohibits them from engaging in partisan activities, receiving compensation or contributions from third parties, and practicing other professions, with the exception of academic activities.¹⁰¹ The Constitution also prohibits former judges from acting as litigators in the court they previously belonged to for a certain period of time.¹⁰²

The Civil and the Criminal Procedure Codes prescribe consequences for when judges breach their obligations of impartiality and violate the rights of the parties. The Codes declare that judges have to guarantee equal treatment to the parties and describe the circumstances under which they must or

100. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] arts. 5 LIV–LV (Braz.) (establishing that no one will be deprived of their freedom or property without due process and that the right to respond and defend oneself is assured to every litigant in judicial or administrative proceeding).

101. *Id.* at art. 95.

102. *Id.*

may recuse themselves.¹⁰³ For example, judges must recuse themselves due to previous participation in the case—i.e., if they acted directly in the proceeding as a representative of the parties, prosecutor, witness, or expert witness,¹⁰⁴ or issued a decision on the matter as a member of a different court.¹⁰⁵ Judges must also recuse themselves from cases in which their spouse or close relatives are parties or representatives of the parties,¹⁰⁶ cases in which they may benefit directly as an employer, heir or donee,¹⁰⁷ or cases that involve an entity in which they have a stake as a member or partner, or where they participate in academic activities.¹⁰⁸ Judges may be precluded from participating in the decision when they have received gifts from the parties or their representatives, advised any of them, or are their friends, enemies, creditors, or debtors.¹⁰⁹ Finally, they may not decide cases in which they may favor their personal interests.¹¹⁰ Judges may also choose to recuse themselves without having to justify their decision.¹¹¹ Neither Code, however, stipulates to what extent judges are allowed to communicate with the parties outside of the courtroom.

Under professional responsibility law, lawyers and judges must avoid undue influence but *ex parte* communications are expressly allowed. Attorneys have a duty to refrain from using their relationships with judges in their or their clients' favor.¹¹² Judges, for their part, are obligated to avoid undue influence,¹¹³ maintain distance from the parties,¹¹⁴ and grant all litigants equality of treatment.¹¹⁵ Nevertheless, lawyers have

103. CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] art. 139 (Braz.).

104. *Id.* at art. 144 I.

105. *Id.* at art.144 II.

106. *Id.* at art. 144 III, IV, VIII.

107. *Id.* at art. 144 VI.

108. *Id.* at art. 144 V, VII.

109. *Id.* at art. 145, I, II and III.

110. *Id.* at art. 145 IV.

111. *Id.* at art. 145 §1.

112. Res. No. 02/2015, de 19 de Outubro de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 4.11.2015, art. 2 VIII(a) (Braz.).

113. Conselho Nacional de Justiça Processo No. 200820000007337, de 06 de agosto de 2008, DIÁRIO DA JUSTIÇA [D.J.], 18.9.2008, 1, art. 5 (Braz.).

114. *Id.* at art. 8.

115. *Id.* at art. 9.

the right to have direct access to judges.¹¹⁶ This means that attorneys and judges may meet in private, even without the opposing parties. The Code of Judicial Ethics is explicit in affirming that “a hearing granted to one of the parties is not a violation of equality of treatment.”¹¹⁷ As such, many communications between the judge and the parties are unilateral and do not appear on the record of the case.

If judges violate their impartiality duties, their decisions may be voided,¹¹⁸ and they may be subject to disciplinary proceedings. Parties may request the recusal of allegedly biased judges.¹¹⁹ Judges may opt to voluntarily recuse themselves or direct the motion to the collegial court of the tribunal where they sit.¹²⁰

Judges are subject to disciplinary action in their tribunal or the National Council of Justice (*Conselho Nacional de Justiça*, CNJ).¹²¹ The CNJ was created in 2004 and is composed of fifteen members, including the chief justice of the STF, judges of superior and lower courts, members of the federal and state offices of prosecution (*Ministério Público*), attorneys, and individuals appointed by the House of Representatives and the Senate.¹²² The CNJ is responsible for supervising the administrative and financial affairs of the judiciary and overseeing the judicial profession.¹²³ It may issue professional ethics regula-

116. Lei No. 8.906, de 4 de Julho de 1994, art. 7 VIII, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.7.1994 (Braz.).

117. Conselho Nacional de Justiça Processo No. 200820000007337, de 06 de agosto de 2008, DIÁRIO DA JUSTIÇA [D.J.], 18.9.2008, 1, art. 9 § 1 (Braz.).

118. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 93 IX (Braz.).

119. CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] art. 146 (Braz.).

120. *Id.*

121. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 93 VIII (Braz.).

122. More precisely, the CNJ is composed of the STF chief justice, a Superior Court of Justice (*Superior Tribunal de Justiça*, STJ) justice, a Superior Labor Court (*Tribunal Superior do Trabalho*, TST) justice, a state court of appeals (*Tribunal de Justiça*, TJ) judge, a lower state court judge, a federal court of appeals (*Tribunal Regional Federal*, TRF) judge, a federal district court judge, a lower labor court judge, a Union Office of Prosecution (*Ministério Público da União*, MPU) member, a State Office of Prosecution (*Ministério Público Estadual*) member, two attorneys appointed by the Bar Association (*Ordem dos Advogados do Brasil*, OAB), and two individuals, known for their legal knowledge and good reputation, one appointed by the House of Representatives and the other, by the Senate. *Id.* at art. 103-B.

123. *Id.* at art. 103-B § 4.

tions and may initiate disciplinary proceedings against judges.¹²⁴ The CNJ may also remove existing disciplinary actions from their original tribunals and exercise its own jurisdiction over the matter.¹²⁵

Judges have substantial institutional protections in Brazil. Superior court justices are tenured officials from the moment they take office, while ordinary judges are tenured after two years in the position.¹²⁶ Before acquiring tenure, an ordinary judge may be fired through disciplinary proceedings.¹²⁷ A tenured judge, by contrast, can only be removed from office after a criminal conviction in court.¹²⁸ The lightest disciplinary punishments are warning sanctions, which are applicable only to lower court judges, and are not rendered public.¹²⁹ A judge may be transferred from one jurisdiction to another as a disciplinary measure.¹³⁰ The harshest sanctions are temporary leave and forced retirement.¹³¹ However, even when subject to sanctions, judges still receive benefits. Judges who are temporarily removed or forced to retire receive a pension proportional to the time they have served.¹³²

124. *Id.* at art. 103-B § 4 I, III.

125. *Id.* at art. 103-B §4, III.

126. *Id.* at art. 95 I; Lei Complementar No. 35, de 14 de Março de 1979, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 14.3.1979 art. 22 (Braz.).

127. See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 93 VIII (Braz.) (“The acts of removal . . . of a judge, for public interest, shall be based on a decision by the vote of the absolute majority of the respective court or of the National Council of Justice, full defense being ensured.”).

128. *Id.* at art 95 I; Lei Complementar No. 35, art. 29 (Under the Constitution, a tenured judge can only be removed after a judicial conviction. The Constitution does not specify what sort of judicial decision can lead to the end of tenure. It is implied, although not clear in the law, that judges can only be removed from office after a criminal conviction).

129. Lei Complementar No. 35, arts. 42 §1, 43, 44 (sanctions of “*advertência*” (warning) and “*censura*” (reprimand) are applicable only to lower court judges. *Advertência* is the lightest sanction and consists of a written warning of misconduct. *Censura* is given for repeat offenders. A *Censura* prevents a judge from being promoted for a year).

130. *Id.* at art. 42 III.

131. *Id.* at art. 42 IV,V.

132. See, e.g., Julia Affonso, *Juízes punidos com aposentadoria por venda de sentença e desvios receberam R\$10 mi em 6 meses* [Judges Punished with Forced Retirement for Selling Judicial Decisions and Misappropriation of Funds received R\$10 Million in Six Months], ESTADÃO (June 9, 2019, 9:40 AM), <https://politica.estadao.com.br/blogs/fausto-macedo/juizes-punidos-com-aposentadoria-por-venda-de-sentenca-e-desvios-receberam-r-10-mi-em-6-meses/> (Braz.) (re-

Importantly, the CNJ does not have any reach over STF justices. The STF itself has decided that the CNJ “has no jurisdiction over the Supreme Court and its justices.”¹³³ The Court concluded that, because the STF is the highest court in the judicial hierarchy and has the power to review the CNJ’s decisions, the CNJ cannot regulate and exercise administrative or financial oversight over the STF or subject STF justices to disciplinary proceedings.¹³⁴ Only the Senate has jurisdiction to impeach and try STF justices for crimes related to their official capacity.¹³⁵ Moreover, for other crimes, only the STF has jurisdiction over its own members.¹³⁶

B. *Informality in Practice*

In practice, this legal framework has many shortcomings. There are many ways in which judges have worked inside the framework to communicate with interested parties and maintain close relationships that may unduly bias their judgment.

First, although judges cannot engage in economic activity or receive compensation from third parties,¹³⁷ many have

porting that 47 judges who have been forced to retire cumulatively received R\$10 million in six months. Sebastião Teixeira Chaves, former chief judge of Rondonia’s appeals court, received R\$415,972.81 in six months in compulsory retirement compensation.).

133. S.T.F. No. ADI 3.367, Relator: Min. Cezar Peluso, 13.4.2005, DIÁRIO DA JUSTIÇA [D.J.], 17.3.2006, 197, 198 (Braz.) (noting in the decision summary: “O Conselho Nacional de Justiça não tem nenhuma competência sobre o Supremo Tribunal Federal e seus ministros, sendo esse o órgão máximo do Poder Judiciário nacional, a que aquele está sujeito.” [The National Council of Justice has no jurisdiction over the Federal Supreme Court and its ministers, which is the highest body of the national judiciary and to which the National Council of Justice is subject.]).

134. *Id.*

135. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 52 II (Braz.) (establishing that the Senate has the power to impeach a justice for “crimes of responsibility”). These crimes, related to the justices’ official capacity, are defined by law. Lei No. 1.079 de 10 de Abril de 1950, DIÁRIO OFICIAL [D.O.F.C.] de 12.4.1950 art. 39 (Braz.) (justices commit responsibility crimes when they (i) modify an issued decision or vote through means that violate the judicial process, (ii) participate in a decision when they should have recused themselves, (iii) engage in partisan activities, (iv) neglect their official duties, or (v) their actions are incompatible with judicial “honor, dignity, and decorum.”).

136. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 102 I(b) (Braz.).

137. The Constitution establishes that judges are prohibited from receiving, for any reason, “aid or contribution from individuals, public and private

taken advantage of the academic activity exception. Through a resolution, the CNJ determined that judges can teach, provide pedagogical advice, and participate in lectures and academic events.¹³⁸ Judges are required, however, to provide information to their respective courts concerning the institution, time, and date of the activity.¹³⁹ Courts must publish this information online.¹⁴⁰

Judges, however, do not need to report whether they received compensation for their academic activity and, if they did, the amount of that compensation. This has opened the door to questionable behavior, as judges have benefited from businesses and received indirect contributions from parties that may potentially appear before their courts.¹⁴¹ It has become public knowledge that judges are often paid handsomely to give lectures to entities that appear as litigants in their

legal persons, except as allowed by law.” *Id.* at art. 95 §1 IV. The Judicial Code of Ethics is more precise. It establishes that judges must refrain from participating in commercial activities, except as shareholders, provided they do not exercise management or control. Conselho Nacional de Justiça Processo No. 200820000007337, de 06 de agosto de 2008, DIÁRIO DA JUSTIÇA [D.J.], 18.9.2008, 1, art. 38 (Braz.).

138. Resolução No. 34, Conselho Nacional de Justiça [National Council of Justice] de 24 de Abril de 2007, DIÁRIO DA JUSTIÇA [D.J.], 80/2007:131 de 26.4.2007 arts. 1, 2, 4-A (as amended by Resolução No. 226, Conselho Nacional de Justiça [National Council of Justice] de 14 de Junho de 2016, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.e.] 100:2 de 15.6.2016) (the 2016 amendment explicitly allowed the participation of judges in lectures and events. Before, judges did participate in those activities, but it was unclear whether they would be considered as “academic activities” and, thus, lawful under the academic exception).

139. *Id.* at art. 4-A.

140. *Id.* at art. 5.

141. As an example, former judge and now governor of Rio de Janeiro, Wilson Witzel, had multiple event and production companies and profited from them. His wife was also engaged in the business. It is not clear what role Witzel played in the companies, and whether these companies were operating while he was a federal judge. Gabriel Sabóia & Rodrigo Mattos, *Empresa que Witzel disse estar inativa organizou evento em março* [Company that Witzel Said to be Out-of-Business Organized An Event in March], UOL NOTÍCIAS (Oct. 26, 2018, 2:12 PM), <https://noticias.uol.com.br/politica/eleicoes/2018/noticias/2018/10/26/wilson-witzel-empresa-inativa-evento-2018.htm> (Braz.); Juliana Castro & Hudson Corrêa, *Wilson Witzel omitiu empresas da Justiça Eleitoral* [Wilson Witzel Omitted Companies from the Electoral Justice], GLOBO (Oct. 15, 2018, 04:30 AM), <https://oglobo.globo.com/brasil/wilson-witzel-omitiu-empresas-da-justica-eleitoral-23158802> (Braz.).

courts or have an interest in their decisions.¹⁴² Moreover, courts do not always follow the CNJ reporting requirements. Currently, most courts do not publish information about their members' academic activities¹⁴³ and some judges have not been sanctioned for failing to divulge their participation in events.¹⁴⁴

142. See, e.g., Ricardo Mendonça & Alexandre Aragão, *Banco paga palestras de juízes do trabalho que julgam seus processos* [Bank Pays Lecture Fees to Labor Judges who Decide Cases in Which it Is a Party], FOLHA DE SÃO PAULO (Sep. 6, 2015, 2:00 AM), <https://www1.folha.uol.com.br/paywall/login.shtml?https://www1.folha.uol.com.br/poder/2015/09/1678348-banco-paga-palestras-de-juizes-do-trabalho-que-julgam-seus-processos.shtml> (In 2013, four justices of the Superior Labor Court (*Tribunal Superior do Trabalho*, TST), including its chief-justice, reported that they received compensation for lectures given at Bradesco, one of the largest Brazilian banks. The Bank had cases pending before the TST and these justices were rapporteurs of some of them. One of the justices received R\$161,800 for 12 lectures, equivalent to 238.6 times the minimum wage at that time.); José Odeveza, *Judiciário têm histórico de altos faturamentos com palestras* [The Judiciary has a Record of High Profit with Lectures], JUSDH (Jul. 24, 2019), <http://www.jusdh.org.br/2019/07/24/judiciario-tem-historico-de-altos-faturamentos-com-palestras/> (Braz.) (reporting that Justice Luís Roberto Barroso and Justice Gilmar Mendes have received R\$46,800 and R\$60,000, respectively, to give lectures. That is equivalent to approximately \$12,000 and \$15,000); Frederico Vasconcelos, *Governo de Minas oferece R\$40 mil por palestra de ministros* [The Government of Minas Offered Justices R\$40 Thousand per Lecture], FOLHA DE SÃO PAULO (May 25, 2015, 2:00 AM), <https://www1.folha.uol.com.br/poder/2015/05/1633186-governo-de-minas-oferece-r-40-mil-por-palestra-de-ministros.shtml> (In 2015, the government of Minas Gerais offered R\$40,000 to Justices Luís Fux of the STF and Luís Felipe Salomão of the STJ for a lecture. After the contract became public, both Justices decided to refuse the compensation).

143. See Ricardo Mendonça, *Após um ano, regra de transparência para palestra de juiz é descumprida* [After a Year, Transparency Rule on Judges' Lectures is not Followed], VALOR ECONÔMICO (Jul. 03, 2017, 5:00 AM), <https://valor.globo.com/politica/coluna/apos-um-ano-regra-de-transparencia-para-palestra-de-juiz-e-descumprida.ghtml> (Braz.) (reporting that, at least until mid-2017, only one superior court (the Superior Labor Court, TST) and one appellate court (The TRF – 3rd Region) fully complied to the CNJ Resolution publication requirements).

144. See, e.g., Paula Sperb, Ricardo Baltazar & Amanda Audi, *Moro omitiu palestra remunerada em prestação de contas como juiz federal* [Moro Omitted Paid Lecture in Rendering of Accounts as Federal Judge], FOLHA DE SÃO PAULO (Aug. 4, 2019, 2:00 AM) <https://www1.folha.uol.com.br/poder/2019/08/moro-omitiu-palestra-remunerada-em-prestacao-de-contas-como-juiz-federal.shtml> (in August 2019, it became public that the now Minister of Justice and former judge Sergio Moro did not report a paid lecture he gave in 2016. In response, Moro argued that he did not report the lecture by mistake and

STF Justice Gilmar Mendes' partnership in a private law school, the *Instituto Brasiliense de Direito Público* (IDP), described below, provides a good example of how blurry the limits on judges' academic activities are. Although the law allows judges to participate in academic activities, it is unclear whether being a partner of a closely held educational institution falls under this umbrella. The CNJ decided that judges are subject to discipline for exercising managerial activities that go beyond teaching or coordinating pedagogical programs in academic institutions.¹⁴⁵ The prohibition is justified because, by being one of a few owners of an educational enterprise, judges might take advantage of their prestige to profit in a market where they exercise great influence. Parties hoping to gain favor with the judge may simply offer to sponsor the institution's activities. Mendes and his family closely participate in the IDP's affairs but, as a member of the STF, his actions have not come under the CNJ scrutiny.

Mendes helped found the IDP in 1998 and still participates in the Institute's affairs.¹⁴⁶ Currently, his son, Francisco Schertel Mendes, is the director of the institute.¹⁴⁷ The IDP has received contributions from entities that have appeared in important cases under the STF's jurisdiction. For example, in 2015, the IDP signed a sponsorship contract with J&F holding, which controls JBS, an international beef and poultry company founded in Brazil.¹⁴⁸ The contract established that J&F would give R\$2.1 million to IDP to sponsor events.¹⁴⁹ JBS, however, was being investigated as a participant in the Operation

donated part of the payment to charity. His compensation was probably between R\$10,000 and R\$15,000).

145. Conselho Nacional de Justiça Pedido de Providência No. 200710000003002, Relator Con. Joaquim Falcão, 8.8.2008 (Braz.). It is not clear, however, to what extent the CNJ enforces this rule. See Sabóia & Mattos, *supra* note 141 (discussing the Wilson Witzel case).

146. IDP, CORPO DOCENTE [FACULTY], <https://www.idp.edu.br/profile/gilmar-mendes/> (last visited Aug. 3, 2020).

147. *Dirigentes*, IDP, <https://www.idp.edu.br/idp/dirigentes/> (last visited Apr. 20, 2020).

148. Leticia Casado & Camila Mattoso, *Instituto de Gilmar Mendes recebeu patrocínio de R\$ 2,1 milhões da J&F [Gilmar Mendes' Institution Received a R\$2.1 Million Sponsorship from J&F]*, FOLHA DE SÃO PAULO (Jun. 14, 2017, 2:00 AM), <https://www1.folha.uol.com.br/poder/2017/06/1892791-instituto-de-gilmar-mendes-recebeu-patrocínio-de-r-21-milhões-da-jf.shtml>.

149. *Id.*

Car Wash corruption scandal.¹⁵⁰ A few months after the contract, its executives finalized plea bargain agreements that the STF approved.¹⁵¹ Mendes was even the rapporteur of some of the cases related to the JBS investigation.¹⁵² The IDP also has close connections with a bank, Bradesco, which is a party to cases before the STF and has an interest in the Court's decisions that impact the financial sector. Between 2011 and 2017, Bradesco lent R\$36.4 million to IDP with interest below the market rate.¹⁵³ Bradesco has also sponsored IDP events,¹⁵⁴ though IDP failed to publicly disclose this sponsorship in event materials or otherwise.¹⁵⁵ Mendes has not recused himself in cases involving JBS or Bradesco, even though his impartiality in those cases could be easily challenged as he and his institution have benefitted from the companies' donations.

Second, judges engage outside of courts with actors interested in the cases they decide and refuse to recuse themselves

150. See Claire Felter & Rocio Cara Labrador, *Brazil's Corruption Fallout*, COUNCIL ON FOREIGN RELS. (Nov. 7, 2018), <https://www.cfr.org/backgrounder/brazils-corruption-fallout> (explaining the role of JBS in Operation Car Wash).

151. Oscar Rousseau, *JBS Chiefs Enter Plea Bargain Amid Bribery Claims*, GLOBALMEATNEWS.COM (Aug 2, 2017), <https://www.globalmeatnews.com/Article/2017/05/19/Seven-JBS-executives-enter-plea-bargain-amid-another-corruption-probe> (quoting a JBS statement that company executives had entered into a plea bargain ratified by the Supreme Court).

152. Mendes was the rapporteur of Wesley Batista's and Joesley Batista's habeas corpus requests. Wesley was the CEO of the JBS and Joesley, the chairman of the board of directors. S.T.F. No.HC 148.239, Relator: Gilmar Mendes, 22.9.2017, 217, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.e.], 25.9.2017 (Decisão Monocrática) (Braz.); S.T.F. No.HC 148.239, Relator: Gilmar Mendes, 22.9.2017, 217, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.e.], 25.9.2017 (Decisão Monocrática) (Braz.) (J. Gilmar Mendes denied both habeas corpus requests).

153. Filipe Coutinho, *Exclusivo: Bradesco deu desconto milionário em empréstimo a faculdade de Gilmar Mendes [Exclusive: Bradesco Granted Millionaire Discount in Loans to Gilmar Mendes's University]*, BUZZFEED NEWS (Sept. 27, 2017, 1:17 PM), <https://www.buzzfeed.com/br/filipecoutinho/exclusivo-bradesco-deu-desconto-milionario-em-emprestimo-a-bradesco-da-desconto-milionario-em-emprestimo-a-instituto-de-gilmar.shtml>.

154. Rodrigo Rangel & Filipe Coutinho, *Os patrocínios ocultos do ministro [The Justice's Secret Sponsorships]*, CRUSOÉ (May 11, 2018), <https://crusoe.com.br/edicoes/2/os-patrocínios-ocultos-do-ministro/> (Braz.).

155. *Id.*

even when there are clear indications of conflict of interest.¹⁵⁶ The relationships between Michel Temer, who became president after Dilma Rousseff's impeachment in 2016, and the STF justices illustrate the sort of informality accepted in Brazil. Temer met with different justices multiple times despite the STF having active jurisdiction over cases in which the government had an interest and cases in which Temer was being personally investigated for corruption.

In June 2017, Temer met Justice Mendes at Mendes' home to discuss electoral reform.¹⁵⁷ The meeting occurred right before Temer was to select a new prosecutor general, and before the STF was to approve the JBS executives' plea agreement. At the time, Temer was being investigated because the JBS executives referred to him in their agreements.¹⁵⁸ Temer and Mendes had met at least once before this meeting,¹⁵⁹ once after in 2017,¹⁶⁰ and once again in May 2018.¹⁶¹

156. See Conrado H. Mendes, *O Inimigo do Supremo [The Enemy of the Supreme Court]*, JOTA (June 5, 2017, 11:51 AM) (describing for instance Justice Mendes as someone who "walks at ease through public and private environments, with partisan counterparts. Gilmar Mendes has counterparts. Politicians who circulate around him ask for favors in the Court, ask for advice on personal legal problems or on the constitutional path of the country, in private meetings outside of the Court or phone calls. To negotiate, promise support, organize dinners at home, go to dinner at others' places. The justice is a constant presence in the 'diner circles of royal banquets', in Rodrigo Janot's (former prosecutor general) words. He courts the political power and the political power courts him. There is reciprocity." [original in Portuguese]) (Braz.).

157. Andréia Sadi, *Temer teve encontro fora da agenda à noite na casa de Gilmar Mendes [Temer Had an Off-Schedule Meeting at Night at Gilmar Mendes's Home]*, GLOBO (June 28, 2017), <http://g1.globo.com/politica/blog/andrea-sadi/post/temer-teve-encontro-fora-da-agenda-noite-na-casa-de-gilmar.html> (Braz.).

158. *Id.*

159. See Murilo Ramos, *Após encontro com Gilmar Mendes, Temer muda de ideia sobre ministro do STF [After Meeting with Gilmar Mendes, Temer Changes His Mind about STF Justice]*, ÉPOCA (Feb. 6, 2017, 2:21 PM), <https://epoca.globo.com/politica/expresso/noticia/2017/02/apos-encontro-com-gilmar-mendes-temer-muda-de-ideia-sobre-ministro-do-stf.html> (Braz.) (Temer met with Mendes before selecting a new justice to replace Teori Zavascky, who was the rapporteur of the Operation Car Wash case in the STF before he died in a plane crash.).

160. See Andréia Sadi, *Temer se Reúne com Gilmar Mendes no Palácio do Jaburu [Temer Gets Together with Gilmar Mendes at the Jaburu Palace]*, GLOBO (Nov. 12, 2017, 9:33 PM), <https://g1.globo.com/politica/blog/andrea-sadi/post/temer-se-reune-com-gilmar-mendes-no-palacio-do-jaburu.ghtml> (Braz.).

When Temer was temporarily detained in March 2019 after leaving office, Mendes met with Rodrigo Maia, the Speaker of the House.¹⁶² The warrant that allowed the detention of Temer also named Moreira Franco, a former governor of Rio de Janeiro and former member of Temer's cabinet, and Maia's father-in-law.¹⁶³ In 2018, Temer visited the then Chief Justice, Carmen Lúcia, at her home to discuss matters of public security and the ongoing federal intervention in Rio de Janeiro.¹⁶⁴ Temer was being investigated for corruption at the time, and the Court had just lifted the confidentiality of his bank records.¹⁶⁵ Temer also met with Justices Dias Toffoli and Luís Fux on several occasions to discuss salary adjustments for the judiciary.¹⁶⁶ None of these justices have recused themselves on matters involving the former president.

161. Marcelo Ribeiro, *Temer está em encontro social com Gilmar Mendes e Ministros* [Temer Is in Social Meeting with Gilmar Mendes and Ministers], VALOR ECONÔMICO (May 12, 2018, 4:22 PM), <https://www.valor.com.br/politica/5520773/temer-esta-em-encontro-social-com-gilmar-mendes-e-ministros>.

162. *Maia se encontrou com Gilmar Mendes durante prisão de Temer* [Maia Met With Gilmar Mendes During Temer's Jail Time], EXAME (Mar. 21, 2019, 4:36 PM) (Braz.), <https://exame.abril.com.br/brasil/maia-se-encontrou-com-gilmar-mendes-durante-prisao-de-temer/> (Braz.).

163. *Id.*

164. Gustavo Uribe, *Em ofensiva jurídica, Temer tem encontro com presidente do STF* [In Legal Offensive, Temer Has a Meeting with STF's Chief Justice], FOLHA DE SÃO PAULO (Mar. 10, 2018, 2:27PM), <https://www1.folha.uol.com.br/poder/2018/03/em-ofensiva-juridica-temer-tem-encontro-com-presidente-do-stf.shtml>.

165. *Brazil: Supreme Court Lifts Ban on Temer's Banking Records*, TELESURTV.NET (Mar. 6, 2018), <https://www.telesurenglish.net/news/Brazil-Supreme-Court-Lifts-Ban-on-Temers-Banking-Records-20180306-0005.html>.

166. See Carolina Brígido, *Foi só um bate-papo, diz Toffoli sobre encontro com Temer* ["It Was Just Chatting," Toffoli Says About Meeting with Temer], GLOBO (Nov. 20, 2017, 6:11 PM), <https://oglobo.globo.com/brasil/foi-so-um-bate-papo-diz-toffoli-sobre-encontro-com-temer-22090190> (Braz.); *Encontro com Temer foi 'coincidência', diz Toffoli* [Meeting with Temer Was a 'Coincidence', Toffoli Says], BRASIL 247 (Nov. 24, 2017, 5:11 PM), <https://www.brasil247.com/poder/encontro-com-temer-foi-coincidencia-diz-toffoli> (The trial on Congressional Immunities was interrupted because Toffoli requested to analyze the case more in depth – he presented what is known as *vista* request. He later said that the timing of the meeting and the trial were a "coincidence."). See also Talita Fernandes, *Fora da agenda, Temer discute aumento salarial com ministros do STF* [Off-Schedule, Temer Discusses Salary Raise with STF Justices], FOLHA DE SÃO PAULO (Aug. 23, 2018, 10:52 PM), <https://www1.folha.uol.com.br/mercado/2018/08/fora-da-agenda-temer-se-reune-com-ministros-do-stf-para-discutir-reajuste.shtml> (reporting Temer's meeting with Tof-

Third, judges may acknowledge a conflict of interest and recuse themselves but act behind the scenes to influence their colleagues. They may also recuse themselves in one procedure while participating in another that is closely related.

In 2016, the STF was about to decide whether someone who has been criminally indicted by the Court could occupy an office in the presidential line of succession.¹⁶⁷ Although this was an abstract constitutional question presented by the political party Rede, it was specifically targeted at Eduardo Cunha, the Speaker of the House.¹⁶⁸ At that time, the impeachment proceedings against Dilma Rousseff were already in progress. Uncertainties existed about whether she was going to be removed and whether the accusations against her would also reach the vice-president, Michel Temer. Cunha, a long-time politician who had been implicated in several corruption investigations, including Operation Car Wash,¹⁶⁹ was the next in line. Interestingly, Cunha himself, as Speaker, had initiated the proceedings in the House. Because of congressional im-

foli and Fux regarding salary adjustment in the week of August 23, 2018); Reynaldo Turollo Jr. & Gustavo Uribe, *Em reunião com Toffoli e Fux, Temer não se compromete com sanção de reajuste* [In Meeting with Toffoli and Fux, Temer Did Not Commit to Approve Salary Raise], FOLHA DE SÃO PAULO (Nov. 14, 2018, 9:09 PM), <https://www1.folha.uol.com.br/mercado/2018/11/em-reuniao-com-toffoli-e-fux-temer-nao-se-compromete-com-sancao-de-reajuste.shtml> (reporting another meeting among Temer, Toffoli, and Fux to discuss the salary increase of the Judiciary).

167. The Brazilian presidential succession line is as follows: the Vice-President, Speaker of the House, the President of the Senate, and the Chief Justice of the STF. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] arts. 79, 80 (Braz.). If both the president and vice-president are permanently out-of-office, (1) new popular elections must be called if the vacancy occurs in the first two years of the term, or (2) Congress has to select a new president 90 days after the vacancy. *Id.* at art. 81.

168. Nathalia Passarinho & Renan Ramalho, *Supremo suspende mandato e afasta Cunha da presidência da Câmara* [Supreme Court Suspends Mandate and Removes Cunha from the Presidency of the Chamber], GLOBO (May 5, 2016 9:18 PM), <http://g1.globo.com/politica/operacao-lava-jato/noticia/2016/05/maioria-do-stf-confirma-afastamento-de-eduardo-cunha-da-camara.html> (Braz.) (noting postponement of the judgement as to whether Cunha could still sit in the line of presidential succession).

169. See, e.g., Brad Brooks, *Former Brazil House Speaker Cunha Sentenced to 15 Years for Graft*, REUTERS, Mar. 30, 2017, <https://www.reuters.com/article/us-brazil-corruption-cunha/former-brazil-house-speaker-cunha-sentenced-to-15-years-for-graft-idUSKBN1712DX> (reporting that Cunha was indicted in Operation Car Wash).

munities, only the STF had jurisdiction to prosecute Cunha criminally. Although the Court had already decided to indict him, there was concern that if both Rousseff and Temer were removed, Cunha would temporarily take office as president while subject to the criminal jurisdiction of the STF.¹⁷⁰

Since 2015, the Court had been weighing under seal another request from the prosecutor general to remove Cunha from his position. The prosecutor general alleged that Cunha should be temporarily jailed because he was continuing to benefit from corruption schemes and abusing his position as Speaker to obstruct the pending investigations.¹⁷¹ These accusations led to a public outcry to remove Cunha when Rede publicly announced the filing of its constitutional review claim.¹⁷² Fearing that the rapporteur of the Rede case, Justice Marco Aurélio Mello, would remove Cunha through a unilateral decision,¹⁷³ the other justices coordinated to respond to the prosecutor general's 2015 request first.

170. FELIPE RECONDO & LUIZ WEBER, OS ONZE [THE ELEVEN] 62 (2019).

171. *Brazil Prosecutor Seeks Removal of Congress Speaker*, BBC (Dec. 17, 2015), <https://www.bbc.com/news/world-latin-america-35118477> (noting the prosecutor's allegations that Cunha was using his political position to avoid corruption investigations).

172. See Jonathan Watts, *Brazilian Politician who Orchestrated Ousting of Rousseff Sentenced to Prison*, GUARDIAN (Mar. 30, 2017, 1:43 PM), <https://www.theguardian.com/world/2017/mar/30/brazil-eduardo-cunha-guilty-prison-dilma-rousseff-impeachment> (citing mass protests against Cunha leading up to his conviction).

173. STF justices have large powers to make unilateral decisions, especially in injunction cases. See Diego W. Arguelles & Leandro M. Ribeiro, *Ministrocracia: O Supremo Tribunal individual e o processo democrático brasileiro [Ministrocracy: The Individual Supreme Court in Brazilian Democracy]*, 37 NOVOS ESTUDOS 13, 23-26 (2018) (Braz.) (explaining how justices have expanded this power from interlocutory decisions to changing the status quo of a case without the participation of the collegial branches). Justice Marco Aurélio Mello is known for making individual decisions regardless of their political consequences. His colleagues feared he could issue an injunction without their input and cause a political crisis with other branches of government. In 2016, Aurélio Mello also decided monocratically to remove Renan Calheiros from the presidency of the Senate because there was a criminal case against him pending before the STF. The Senate refused to obey the order and filed an appeal to the en banc court. The case soured the relationship between the Court and Congress, as politicians saw the decision as a violation of Congress' institutional prerogatives, and the Court saw the lack of compliance with the order as disrespectful of its authority, regardless of the merit of Aurélio Mello's decision. Gustavo Garcia & Renan Ramalho, *Senado decide*

Justice Luís Roberto Barroso recused himself from the Rede case as he had close connections to three of the six attorneys representing Rede—two were his former law firm partners and one was his nephew.¹⁷⁴ Nevertheless, this did not stop Barroso from forming a coalition with his colleagues to decide against Cunha.¹⁷⁵ He met with Antônio Carlos de Almeida Castro, known as Kakay, a prominent criminal attorney who was considering representing Cunha. Barroso asked Kakay to refrain from accepting the representation, and Kakay declined to take the case.¹⁷⁶ Barroso also met with his STF colleagues to coordinate their votes.¹⁷⁷ He later discussed the matter with Justices Marco Aurélio Mello,¹⁷⁸ Teori Zavascki, Ricardo Lewandowski, and Luis Fux.¹⁷⁹ Thanks to Barroso's efforts, the Court first decided to remove Cunha from his position as Speaker for obstructing investigations against him.¹⁸⁰ Later, in the Rede case, the Court decided that authorities in the line of succession who have been indicted in the STF need not be removed from their position but were disallowed from assuming the presidency even temporarily.¹⁸¹ The part of the decision that prevented authorities such as Cunha from assuming the presidency was unanimous, a result of an agreement the justices had reached in advance.¹⁸²

Another example concerns Justice Celso de Mello. In 2011, the STF had to decide the fate of Cesare Battisti, an Italian national who had been a member of leftist groups in the

descumprir liminar para afastar Renan e aguardar Plenário do STF [Senate Decides to Defy Order to Remove Renan and Wait for STF En Banc Court], GLOBO (Dec. 6, 2016, 1:58 PM), <https://g1.globo.com/politica/noticia/renan-senado-decide-nao-cumprir-liminar-e-aguardar-decisao-do-plenario-do-stf.ghtml>.

174. RECONDO & WEBER, *supra* note 170, at 63.

175. *Id.* at 65–66.

176. *Id.*

177. *Id.* at 64.

178. *Id.*

179. *Id.* at 66–67.

180. S.T.F. No. AC 4.070, Relator: Min. Teori Zavascki, 5.5.2016, 225, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.e.], 20.10.2016 (Braz.) (justice Barroso participated in this decision. Only the conclusion of the case is available on the STF website, as other parts are protected under seal.)

181. S.T.F. No. AC 4.070, Relator: Min. Marco Aurélio Mello, 7.12.2016, 177, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.e.], 29.8.2018 (Braz.).

182. RECONDO & WEBER, *supra* note 170, at 67.

1970s and was accused of murder in Italy.¹⁸³ After fleeing to Brazil, the Italian government requested Battisti's extradition, but the Brazilian government granted him refugee status as someone under political persecution.¹⁸⁴ The STF was called to decide whether to grant the Italian extradition request.¹⁸⁵ The case was controversial because of potential conflicts between the Court and the Executive Branch. The justices disagreed over whether the president had complete discretion to grant refugee status. In particular, some justices were reluctant to uphold the refugee designation because they did not regard Italy as an authoritarian regime and did not believe murder constituted a political crime.¹⁸⁶ Moreover, the justices argued that Brazil would violate its extradition treaty with Italy if the Court obeyed the Executive Branch.¹⁸⁷ Justice Celso de Mello recused himself from this case because his former assistant was on Battisti's defense team.¹⁸⁸ However, Celso de Mello, who was in favor of the extradition, presented his arguments to his colleagues and the press through written memos and informal conversations.¹⁸⁹

From these two examples, one can infer that STF justices believe recusing themselves means only that they cannot vote in a particular case. However, this interpretation is too narrow. If a judge has a conflict of interest, it may pervade aspects of the case before the ultimate vote. Recusal should entail that the judge refrain not only from voting, but also from interfering in the matter or influencing his or her peers. In the

183. See generally Lorenzo Tondo, *Cesare Battisti Admits Murdering Four People in Italy in 1970s*, GUARDIAN (Mar. 25, 2019, 2:04 PM), <https://www.theguardian.com/world/2019/mar/25/cesare-battisti-admits-to-murdering-four-people-in-italy-in-1970s> (detailing Battisti's original conviction and flight to Mexico, France, and Brazil).

184. *Brazil President Defends Decision to Grant Asylum to Fugitive*, CNN (Jan 16, 2009), <https://www.cnn.com/2009/WORLD/americas/01/15/brazil.italian.fugitive/> (noting that Brazil granted Battisti political asylum).

185. *The Supreme Court Releases Cesare Battisti*, FED. SUPREME COURT (June 8, 2011), https://www2.stf.jus.br/portalStfInternacional/cms/destaquesClipping.php?sigla=portalStfDestaque_en_us&idConteudo=182485 (Braz.).

186. *Id.* (reporting the Court's plenary opinion the crimes for which Battisti had been convicted and pursued were not political).

187. *Id.* (Gilmar Mendes, in dissent, argued that the President must act under the law and comply with international treaties).

188. RECONDO & WEBER, *supra* note 170, at 260.

189. *Id.*

United States, for instance, judges who participate in a certain trial are precluded from discussing the matter with disqualified colleagues precisely because being removed from a case necessitates losing not only the authority to decide but also the power to interfere in the decision-making process. The STF members should not be able to use their privileged position or personal relationships to influence their colleagues off the record. Otherwise, recusal becomes an empty, easily overcome mechanism to prevent conflict of interest.

When Justice Barroso decided to recuse himself from the Rede request, he should have recognized that both the Rede and the prosecutor general requests had the same immediate goal of removing Cunha from his position and preventing him from taking office as president. He should have abstained from speaking with his colleagues about interrelated matters or interfering with Cunha's legal representation. Justice Celso de Mello should also have refrained from expressing his views to the press and to his colleagues in the Battisti case. The recusal should have precluded him from taking any action on the matter. Even though his former assistant was participating in Battisti's defense and Celso de Mello was in favor of the extradition, once recused, he should not have informally expressed his views to his colleagues.

Fourth, the relationships and *ex parte* interactions between judges and litigants create imbalances between the parties and open the door to undue influence. Close relationships between judges and attorneys are common in the Brazilian legal community. An exchange between STF Justice Joaquim Barbosa and Appeals Judge Tourinho Neto, both members of CNJ at the time, illustrates the problem. In 2013, the CNJ was deciding whether to sanction a judge accused of repeatedly violating ethical rules.¹⁹⁰ Tourinho Neto, the case rapporteur, argued that the accused was negligent but should not be sanctioned with forced retirement. He claimed that forced retirement should be an exceptional punishment applicable only

190. Mariana Oliveira, *Barbosa aponta 'conluio' entre juizes e advogados durante sessao do CNJ* [Barbosa Points Out 'Collusion' between Judges and Attorneys During CNJ's Session], GLOBO (Mar. 19, 2013, 2:01PM), <http://g1.globo.com/politica/noticia/2013/03/barbosa-aponta-conluio-entre-juizes-e-advogados-durante-sessao-do-cnj.html> (video available) (Braz.).

when a judge is “dishonest” or “shameless.”¹⁹¹ Barbosa disagreed and claimed that dishonesty is not a necessary element to discipline a judge.¹⁹² The debate evolved as follows:

Tourinho Neto: If we were to do that [sanction with forced retirement], Mr. President, how many judges would we have to kick out [of the judiciary]? How many justices would we have to kick out?

Barbosa: I think there are many.

Tourinho Neto: No, Mr. President! Justice is not like that; if it were, we would be doomed.

Barbosa: We can change our justice. [. . .] This collusion between judges and lawyers is the most pernicious thing that exists. [. . .] We know, right? There are “gracious” decisions, condescending [decisions], completely out of the rules.

Tourinho, to emphasize that the case they were discussing was not as serious, completed the discussion with a hypothetical comparison to “judges who travel abroad to wedding parties, all paid for by a lawyer [who invited them].”¹⁹³ In the aftermath of this discussion, judges’ and lawyers’ associations heavily criticized Barbosa for casting doubts on the integrity of the legal profession and even went so far as to request that he be removed from the Bar Association.¹⁹⁴

The *Intercept* leaks that revealed conversations between Operation Car Wash prosecutors and the then judge of the case, Sergio Moro, show how close the relationships between judges and the parties can be. In their messages, Dallagnol,

191. *Id.*

192. *Id.*

193. *Id.*

194. *Advogados e juizes criticam Joaquim Barbosa [Attorneys and Judges Criticize Joaquim Barbosa]*, MIGALHAS (Mar. 21, 2013), <https://www.migalhas.com.br/Quentes/17,MI174678,71043-Advogados+e+juizes+criticam+Joaquim+Barbosa> (Braz.) (discussing the reaction of various Brazilian lawyers’ groups to Barbosa’s comments); *Presidente da OAB/DF impugna inscriçao de Joaquim Barbosa como advogado [The President of the Federal District Bar Association Contests Joaquim Barbosa’s Enrollment as an Attorney]*, MIGALHAS (Sep. 30, 2014), <https://www.migalhas.com.br/Quentes/17,MI208521,91041-Presidente+a+OABDF+impugna+inscricao+e+Joaquim+Barbosa+como+advogado> (on the Federal District Bar Association’s request to suspend Barbosa’s membership) (Braz.).

the leading prosecutor, told Moro the weaknesses of the prosecution's case.¹⁹⁵ In response, Moro advised Dallagnol on how to proceed with the investigation,¹⁹⁶ specifically telling him what sort of crime to investigate.¹⁹⁷ Moro also discouraged Dallagnol from pursuing an in-depth investigation of former President Fernando Henrique Cardoso and his family because it could diminish political support of the case.¹⁹⁸ The content of the conversations has sparked an intense debate, but the existence of such close contact between judges and prosecutors has not been challenged. The question has been whether Moro "advised" the prosecutors, not whether having close contact with the parties should be unethical. After the scandal, many scholars and practitioners have pointed out that the ex-

195. See Andrew Fishman et al., *Exclusivo: Deltan Dallagnol duvidada das provas contra Lula e de propina da Petrobras horas antes da denuncia do triplex* [Exclusive: Deltan Dallagnol Had Doubts about the Evidence Against Lula and the Petrobras Bribery up to Hours Before the Filing of the Triplex Claim], THE INTERCEPT BRASIL (June 9, 2019, 4:57 PM), <https://theintercept.com/2019/06/09/dallagnol-duvidas-triplex-lula-telegram-petrobras/> (reporting that Dallagnol wrote to Moro that: "[t]he indictment is based on lots of indirect evidence of authorship, but this cannot be said in the filing and we avoided this point in our official communication." (original in Portuguese)).

196. See Fishman, *supra* note 3 (reporting on leaked messages in which Moro advised Dallagnol to change the order of the investigations and not spend too much time without acting).

197. See *Leia os diálogos de Sergio Moro e Deltan Dallagnol que embasaram a reportagem do Intercept* [Read the Dialogues That Led to The Intercept Article], THE INTERCEPT BRASIL (June 12, 2019, 8:48 PM), <https://theintercept.com/2019/06/12/chat-sergio-moro-deltan-dallagnol-lavajato/> (reporting that Dallagnol explained to Moro that about "30% of the cases are of bribery, 40% are in a gray area, and 30% are clearly illegal campaign financing;" Moro responded that Dallagnol should focus on the "first 30%" – i.e., bribery – because the other cases would create "many enemies that will go beyond the institutional capacity of the prosecution office and the judiciary." (original in Portuguese)).

198. Rafael Moro Martins et al., *Lava Jato fingiu investigar FHC apenas para criar percepção pública de 'imparcialidade', mas Moro repreendeu: 'Melindra alguém cujo apoio é importante* [Car Wash Team Pretended to Investigate FHC to Create Public Perception of "Impartiality," but Moro Reprehended: "[It] Offends Someone Whose Support Is Important], THE INTERCEPT BRASIL (June 18, 2019, 6:15 PM), <https://theintercept.com/2019/06/18/lava-jato-fingiu-investigar-fhc-apenas-para-criar-percepcao-publica-de-imparcialidade-mas-moro-repreendeu-melindra-alguem-cujo-apoio-e-importante/>.

change of information and proximity between judges and litigants in Brazil is common.¹⁹⁹

The purpose of these examples is not to show that suspicious behaviors are widespread in the Brazilian judiciary. The argument is rather more narrowly focused to show that authorities at the top of the judicial hierarchy accept this sort of problematic informality. As the next section explains, the discussion should shift from the particularities of these cases to a broader debate on what sort of contact judges, litigants, and third parties should have with each other.

IV. UNDUE BIASES: CONFLICT OF INTEREST, UNDUE INFLUENCE BASED ON ACCESS, AND QUID PRO QUO CORRUPTION

Although informality in theory removes bureaucratic hurdles, in actuality it creates imbalances between litigants and opportunities for improper behavior. Further, it increases the probability of undue biases and corruption in courts. Unnecessary formalities and bureaucratic hurdles may make litigation more costly and prolonged. But quite often, formal mechanisms serve as safeguards to prevent judges from acting in spite of conflicts of interest, favoring parties who have contacts with them, or engaging in quid pro quo corruption.

To explore how transparency rules can lead to accountability and prevent undesirable behavior in courts, one needs to understand how ethical standards and transparency requirements interact. These rules shape the relationships between judges, litigants, and third parties. As such, professional ethics and transparency rules should be designed to prevent three types of undue judicial biases: conflict of interest, undue influence based on access, and quid pro quo corruption.

199. See GloboNews Painel, *As consequências dos vazamentos ligados à Lava Jato [The Consequences of the Operation Car Wash Leaks]*, GLOBO SAT PLAY (June 15, 2019), <https://globosatplay.globo.com/globonews/v/7696660/> (last visited Oct. 31, 2019) (Braz.) (interview with Gustavo Badaró, a known criminal attorney and criminal procedure professor at University of São Paulo, and Ronaldo Porto Macedo, a legal theory professor at University of São Paulo and FGV-SP, discussing the impact of the leaks to the development and legacy of Operation Car Wash. Although they have a few disagreements about whether the content of the messages is lawful, they take the informality in the Brazilian practice for granted in many occasions.).

A judge, like any other individual, has biases. Some of these biases are acceptable—even inherent to the profession. For example, judges may have preconceived views on how they should interpret and apply the law. These views may lead them to favor certain arguments and parties over others. Difficult cases generate disagreement among judges, but such differences in opinion are acceptable, even welcome, when they follow from contrasting views of what the law requires. Two equally competent judges, deciding in good faith, may reach different judgments in the same matter simply because they adopt different theories of legal interpretation.

As a general rule, judges are not subject to discipline simply for adopting diverging adjudication theories. Higher courts may reverse lower court decisions if they disagree with the ruling or reasoning without imposing any disciplinary sanction on the lower judge. Higher court judges may also disagree among themselves about what the answer to a particular legal question is. The opinions judges have on law, morality, and the role of adjudication inform their decisions. As long as these opinions are reasonably recognized as legitimate by the legal community, judges may rely on them to justify their decision. It is irrelevant whether there is an objective right answer to hard cases.²⁰⁰ Ultimately, judges, as arbitrators of legal disputes, need to reach conclusions even if they have to compromise on accuracy.

Other biases, however, are inherently corrupt or reinforce inequalities and privileges that should not exist in any judicial system. Judges, like any other public official, should not take

200. The question on whether judges' decisions in hard cases are discretionary or bounded by pre-existing legal principles has been the subject of endless legal theory debates. Here, I just point out that, from a practical perspective, judges rely on their underlying views about the law to decide. Quite often, there are disagreements on whether judges' understanding about adjudication and their own roles is compatible with the established law or whether their decisions are correct. See Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 33-40 (1967) (discussing the problems of the positivist notion of discretion); JEREMY WALDRON, *LAW AND DISAGREEMENT* 181 (1999) ("Even if scepticism is rejected, even if there *are* moral facts which make true judgments true and false judgments false, still the best a judge can do is to impose his *opinion* about such facts on the 'hapless litigants' who come before him The truth of moral realism (if it is true) does not validate any particular person's or any particular judge's moral beliefs.").

advantage of their office to foster their personal interests or the interest of people closely related to them. They also should not privilege parties on the basis of one having better access to the court. More precisely, if courts are to be neutral arbitrators of the disputes before them, then rules of judicial conduct and disclosure of information should prevent and address conflicts of interests, undue influence based on the privileged access lawyers have to the judge, and quid pro quo corruption. Although these three types of bias may overlap and the distinction between them may be subtle, it is important to understand what they mean and when they occur.

A. *Conflict of Interest*

Conflict of interest occurs when judges may personally benefit from their own decisions or have reasons to use their powers in favor of someone else. Such conflicts are often obvious, and the law already prevents judges from deciding certain categories of cases. In Brazil, for instance, judges must not participate in cases in which their spouse or relatives appear.²⁰¹ Other conflicts are less evident, but problematic nonetheless. The examples detailed above of how judges have profited from paid lectures and connections with educational institutions show that judges may benefit from close relationships with entities that have stakes in cases before their courts. The rules are clearly failing here, and there are two main reasons why: First, they allow judges to profit from actors that may appear before them. Second, the public has no means of knowing to what extent judges' interests are intertwined with those of their sponsors, as judges are not required to disclose whether they received compensation for their lectures.

Brazilian justices have claimed that, even when they have a potential conflict, they are capable of deciding impartially. Justice Mendes, for example, has pointed out that he has voted against his own interest many times.²⁰² In *Funrural*, a case con-

201. CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] art. 144 III (Braz.).

202. Justice Mendes used this argument when he was called to recuse himself from deciding a Habeas Corpus case involving Eike Batista. *See* Conrado H. Mendes, *supra* note 156 (Batista was a client of Sergio Bermudes, a personal friend and law firm partner of Guiomar Mendes, Justice Mendes's wife. After the court granted Batista's Habeas Corpus petition, Mendes's spokesperson stated that "It is worth remembering that in the beginning of

cerning a farm product tax, the STF was called to determine whether an earlier decision that declared the tax's constitutionality had retroactive effects.²⁰³ The decision would have a direct impact on agricultural and livestock markets, relevant to Mendes because his family used to sell cattle to JBS.²⁰⁴ Mendes met personally with Joesley Batista, a JBS executive, days before the *Funrural* decision.²⁰⁵ By majority vote, the STF decided that the *Funrural* tax had retroactive effects and, as such, was due even during the time the constitutionality of the tax was being challenged in court.²⁰⁶ After the decision, Mendes claimed that he had supported the majority and had no reason to recuse himself.²⁰⁷ He emphasized that he had voted against his personal interest, as now his family would have to pay the overdue tax.²⁰⁸

This argument is flawed. When a judge has a conflict of interest, it is not necessarily a conclusive decisional factor. A judge may decide against his or her interests because of peer pressure or out of concern for the suspicious of others, for example. However, as a matter of simple probability, a conflict of interest makes judges more likely to decide a certain issue in a way that favors their interests. In a contested case, self-interest may be the shifting factor. Because it is difficult to assess the extent to which judges' personal interests were deter-

April, Justice Mendes denied a request to release the businessman Eike Batista (HC 141.478) and, in that case, there was no challenge to his participation in the case." (original in Portuguese)).

203. *Rejeitados embargos contra decisão sobre contribuição de empregador pessoa física ao Funrural [Embargoes Against Decision on Contribution of Individual Employer to Funrural Rejected]*, SUPREMO TRIBUNAL FEDERAL (May 23, 2018), <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=379330> (Braz.).

204. Luiza Calegari, *Gilmar Mendes admite que família fornece gado à JBS, diz jornal [Gilmar Mendes Admits that Family Supplies Cattle to JBS, Says Newspaper]*, EXAME (May 27, 2017, 11:48 AM) (Braz.).

205. *Id.*

206. *Rejeitados embargos contra decisão sobre contribuição de empregador pessoa física ao Funrural, supra* note 203.

207. Calegari, *supra* note 204.

208. Bela Megale & Camila Mattoso, *Família de Gilmar Mendes fornece gado para a JBS [Gilmar Mendes's Family Supplies Cattle to JBS]*, FOLHA DE SÃO PAULO (May 27, 2017, 2:00 AM), <http://www1.folha.uol.com.br/poder/2017/05/1887895-familia-de-gilmar-mendes-fornece-gado-para-a-jbs.shtml> (Braz.) (quoting Mendes as saying he voted against his own economic interest because his family will have to pay the tax retroactively).

minative factors on their decision-making process *ex post*, it is crucial to have *ex ante* rules in place to prevent judges from rendering decisions in cases where they have a conflict of interest.

B. *Undue Influence Based on Counsel's Access to the Judge*

Courts should avoid undue influence based on the privileged access of counsel to the judge. Informality allows parties with greater means to benefit from this access. The judiciary has limited resources and must allocate them across different types of cases.²⁰⁹ Repeat players, such as the government and prominent attorneys, have constant and personal contact with judges and are better able to capture their attention.²¹⁰ As a result, they have access to resources and privileges that are not available to most one-shot litigants.

In the case of Brazilian superior courts, such as the STF, access can be crucial but is often unequal. The superior courts are all located in the federal district of Brasília, so the cost of scheduling appointments with justices is much higher for out-of-state attorneys. Often, these courts overschedule hearings and appointments, and attorneys who travel from other states may miss their chance to be heard and talk to the justices.²¹¹ Moreover, superior courts have a heavy caseload and cannot devote equal attention to every case. The readily available attorneys are more likely to have time to express their concerns to the justices, distinguish their cases from a mass of claims, and obtain favorable treatment.

209. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 96 (1974) (addressing the idea that the judiciary has limited resources and may not be able to fully adjudicate all claims).

210. *Id.* at 97–103 (describing the advantages “repeat players” might enjoy in the judicial system).

211. I have heard this complaint from different attorneys who practice in Brazilian higher courts, including the STF. Some regulatory agencies, such as the Administrative Council for Economic Defense (*Centro Administrativo de Defesa Econômica*, CADE), schedule video conference hearings. I am not aware that any STF justice does the same.

C. *Quid Pro Quo Corruption*

Courts should aim at diminishing the probability of quid pro quo corruption. This is a concept difficult to define,²¹² but at its core it involves an exchange of something of value for a favorable decision from someone with authority to decide. While in a conflict of interest situation, the conflict increases the likelihood that a judge will be improperly influenced, a quid pro quo exchange is a conscious bargain where the judge commits him- or herself to decide in favor of the party offering the corrupt deal. This behavior is outlawed and considered a crime.²¹³ The problem, however, is that proving such an agreement may be difficult in practice. First, it is not clear what constitutes something of value.²¹⁴ Second, parties involved in a corrupt scheme have incentives to conceal their communications. Informality thus allows bad faith judges and litigants to more easily engage in this type of dealing.²¹⁵

212. See SUSAN ROSE-ACKERMAN & BONNIE J. PALIFKA, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* 7-11 (2016) (discussing the many definitions of corruption, their merits, and shortcomings).

213. CÓDIGO PENAL [C.P.] [CRIMINAL CODE] arts. 317, 333 (bribery), art. 158 (extortion), art. 332 (influence peddling), art. 312 (embezzlement of public funds).

214. See, e.g. Deborah Hellman, *A Theory of Bribery*, 38 *CARDOZO L. REV.* 1947, 1964-65 (2017) (explaining how difficult it is to determine when the exchange of “something of value” for an official action is qualified as bribery in an effort to distinguish lawful from unlawful campaign contributions).

215. There have been a few quid pro quo corruption cases involving the Brazilian judiciary. See Moisés L. Vieira, *A corrupção no judiciário e o caso dos magistrados aposentados pelo Conselho Nacional de Justiça (2008-2017)* [The Corruption in the Judiciary and the Case of Judges Under Forced Retirement by the National Council of Justice (2008-2017)] (2019) (unpublished Masters Dissertation, Universidade Federal do Rio Grande do Sul) (on file with author), 78-80 (the CNJ has decided a few disciplinary proceedings against judges accused of receiving bribes in exchange for a judicial decision. However, it is hard to assess the dimensions of the problem, as disciplinary proceedings are often confidential. The CNJ often releases only fragments of their decisions and does not publish the judge’s names in the cases. According to Vieira’s estimate, the CNJ has adjudicated at least 118 disciplinary proceedings against judges from 2007-2017. Out of 85 proceedings that ended with a guilty verdict, 57 received the maximum disciplinary penalty: forced retirement with proportional compensation for time served. Of those 57 cases, only two judges were prosecuted in ordinary courts.). See also, *Ex-juiz Rocha Mattos é condenado por lavagem de dinheiro* [Former Judge Rocha Mattos is Convicted for Money Laundering], *GLOBO* (Apr. 13, 2015, 3:44 PM), <http://g1.globo.com/sao-paulo/noticia/2015/04/ex-juiz-rocha-mattos-e-condena>

One could argue that informality, as a feature of the Brazilian judicial system, is a cultural trait that should be respected rather than a problem. One could also claim that informality can be justified as a mechanism to facilitate the resolution of judicial disputes in a flooded judiciary, especially when the judge is dealing directly with discovery matters. However, those arguments are unpersuasive in the Brazilian context. Both in law and practice, informality in Brazilian courts has discredited the judiciary and perpetuated the privileges of a small group of lawyers who have easy access to judicial authorities. Moreover, Brazilian courts suffer from efficiency problems as piles of cases obstruct the judiciary every year.²¹⁶ The solution, however, is not to create communication back channels. Instead, procedural clarity, a system of binding precedents, and filters throughout the judicial hierarchy are examples of alternatives that could increase the judiciary's de-

do-por-lavagem-de-dinheiro.html (Braz.) (The most well-known case of quid pro quo corruption in Brazilian courts in recent years, 2003's Operation Anaconda revealed that federal judge, João Carlos da Rocha Mattos, coordinated with attorneys, businessmen, and federal agents to exchange judicial decisions for illicit payments. When Rocha Mattos and his co-conspirators were convicted in 2004, prosecutors recovered \$19.5 million from his Swiss bank account. Rocha Mattos was later convicted in 2015 for money laundering.); Nayara Felizardo, *Punição: Aposentadoria [Punishment: Retirement]*, THE INTERCEPT (Sept. 19, 2019, 11:03 PM), <https://theintercept.com/2019/09/29/juizes-desembargadores-venda-sentencas/> (Braz.) (reporting other corruption cases being investigated in several states of Brazil); Eduardo Tchao & Felipe Freire, *STJ apura se celular apreendido em operação contra milícia tem provas de venda de sentenças judiciais no RJ [STJ Analyzes whether Cellphone Apprehended in Rio de Janeiro Has Evidence of Judicial Decision Sale]*, GLOBO (Sept. 30, 2019, 7:30 PM), <https://g1.globo.com/rj/rio-de-janeiro/noticia/2019/09/30/stj-apura-se-celular-apreendido-em-operacao-contramilicia-tem-provas-de-venda-de-sentencas-judiciais-no-rj.ghtml> (Braz.) (reporting police search due to suspicion that a formal judge, Siro Darlan, was involved in a negotiating sell of sentence); 2003: *Operação Anaconda desarticula quadrilha especializada na venda de sentenças judiciais [2003: Anaconda Operation Disengages Organized Group Specialized in Selling Judicial Decisions]*, CBN (Sept. 27, 2016, 6:00 AM), <https://cbn.globoradio.globo.com/institucional/historia/aniversario/cbn-25-anos/boletins/2016/09/27/2003-OPERACAO-ANACONDA-DESARTICULA-QUADRILHA-ESPECIALIZADA-NA-VENDA-DE-SENTENCAS-JUDIC.htm> (Braz.).

216. Using the STF as an example, in 2018, the Court received 101,497 new cases, and decided 14,535 cases in its collegial branches. The justices decided 112,218 cases unilaterally in the same period, which is an average of 10,207.1 cases per justice (when including the chief justice). Estatísticas: Movimento Processual, *supra* note 19.

cision-making capacity without resorting to the arbitrariness inherent in privileged access and connections.

V. APPROACHES TO ADDRESS UNDUE BIASES

To tackle these three types of bias, courts may adopt ethical and procedural rules that prevent their occurrence (*ex ante* rules) or punish judges who engage in unfair behavior (*ex post* rules). *Ex ante* rules prevent judges from participating in cases where they might have a conflict of interest, unduly favor one of the parties, or engage in *quid pro quo* corruption. While disqualification and recusal rules prevent judges from deciding cases in which they have an obvious stake, limits on *ex parte* communications play an important role by preventing judges from siding with one party before the decision of the case. *Ex post* rules also help curb this behavior by sanctioning judges who violate *ex ante* rules or become biased because of conflict of interest, undue influence caused by privileged access of counsel, or *quid pro quo* corruption. These two approaches are complementary. Ideally, the institutional framework should diminish the probability of undue biases, provide means to identify ethical violations, and effectively sanction these violations when they do occur.

It is not enough for procedural and ethical rules to only prevent and address improper behavior; they must also prevent the appearance of impropriety. The impression that judges decide certain cases based on their personal preferences or interests instead of their legal convictions is problematic for two reasons: First, it damages institutional trust, as external audiences will be suspicious about the neutrality of courts. Second, the lack of effective *ex ante* mechanisms makes it difficult to disentangle, *ex post*, legitimate judicial justifications from illegitimate ones.

Even if we assume that most judges perform their job in good faith, we cannot always identify those who are susceptible to undue biases and those who are not. Because off-the-record communications leave no trace and one cannot know a judge's inner motivations, it is difficult to prove misconduct, even textbook examples of corruption, when it exists. If judges have broad discretion to act when they have a conflict of interest or to engage in *ex parte* communications, bad faith judges will take advantage of the system to favor themselves.

Moreover, judges may not even be aware of their own biases. By receiving attorneys in their offices, judges may give preference to those who have easier access to the court or develop personal sympathy and hostility towards them. Take, for instance, the relationship between judges and prosecutors or state attorneys. As repeat players, prosecutors are often close to the judge, and they share a certain “team-member mentality” because they are both public officials.²¹⁷ If they are also allowed to engage in *ex parte* communications, prosecutors will enjoy inherent advantages to which their opposing counterparts do not have access.

Ex post mechanisms are also important because they address situations where *ex ante* rules fail. Even when efficient *ex ante* rules are in force, cases might arise in which judges violate their ethical obligations and improperly side with a party or personally benefit from a decision. Because of concerns that the interference of other branches of government could undermine judges’ independence, the judicial profession usually is self-regulated. As a result, judges must take upon themselves the duty to critically evaluate their colleagues’ behavior. An efficient disciplinary mechanism makes it easier for judges to hold each other accountable.

The Brazilian framework fails on both ends. First, its *ex ante* mechanisms do not effectively prevent undue biases or the appearance of impropriety. As discussed above, even in the highest levels of the judicial hierarchy, rules of recusal and disqualification are routinely not taken seriously, and the freedom to engage in *ex parte* communications opens the door to undue biases. Some judges, including STF justices, do restrict access by meeting with attorneys only in the presence of the opposing counselor in open spaces in the presence of others.²¹⁸ Others refuse to discuss pending matters with their

217. See Flowers, *supra* note 7, at 266–70 (listing “team-member mentality” and familiarity among the factors that give prosecutors many advantages *vis-à-vis* defendants); Galanter, *supra* note 209, at 97 (identifying prosecutors as “repeat players” who have resources and experience advantages in courts, as compared to defendants who are often “one-shotters”).

218. Former justice Joaquim Barbosa was known for adopting this practice when in the STF. Justice Rosa Weber, for instance, is known for receiving attorneys only during the breaks of the STF sessions in a public space of the Court known as *Salão Branco* (“White Room”).

colleagues in private.²¹⁹ These, however, are only individualized efforts that do not reflect the prevailing pattern. Second, ex post mechanisms are not a deterrent in Brazil. The harshest disciplinary sanction for bad behavior is not, in fact, a penalty. Forced retirement with proportional pay more resembles a reward, as the disciplined judge will still receive a salary without having to work.

As a result of these pervasive faults in the judicial system, the Brazilian courts' transparency rules are insufficient as accountability mechanisms. Brazilian courts claim to be transparent because they have open deliberation, publish session transcripts, and, in the case of superior courts, broadcast their public meetings on television, radio, and the internet. But the official information they publish is of little relevance if one wishes to ward against conflicts of interest, undue influence caused by access, or quid pro quo corruption. Published information about the deliberation is insufficient to show what sorts of relationships judges have with litigants and third parties. It also does not uncover prior communications among the judges or between them and the parties. Even when the press releases information about potential conflicts of interest, judges hardly ever recuse themselves. Moreover, the secrecy over disciplinary proceedings, which are decided in open sessions at the CNJ but do not have records easily available to external audiences, contributes to the impression that judges are not subject to the public's scrutiny.

The legislative reforms enacted in the wake of Operation Car Wash do not address the three biases identified in this article. They are not the effective ex ante or ex post mechanisms required to deal with conflicts of interest, undue influence based on access, and quid pro quo corruption. Furthermore, it is not clear whether the reforms hope to prevent undue biases in the judiciary or are simply efforts to curb investigations. The Operation affected the interests of prominent politicians and businesspeople and led to a backlash against judges and prosecutors. Although it is important to subject judges, prosecutors, and police authorities to external scrutiny, the Abuse of Power Statute and the Anti-Crime legislative package amendments to the Criminal Procedure Code have created other problems.

219. Justice Marco Aurelio Mello is known for refusing to receive drafts or briefs from their colleagues before the STF's deliberative sessions.

For example, the Abuse of Power statute creates uncertainty and a chilling effect as judges and prosecutors find themselves subject to dubious criminal liability standards. The division of labor between guarantee and deciding judges also fails to prevent undue biases, as the statute does not limit the relationships or communications between these two judges, litigants, and third parties. Although it may prevent deciding judges from obtaining information about the case before the trial, problematic *ex parte* interactions between all actors engaged in the process may still occur.

VI. CONCLUSION

Transparency can serve as an accountability mechanism in courts because publicizing information helps to identify, prevent, and address undue judicial biases. When ethical standards and procedural rules are designed to prevent judges from presiding over cases in which they have conflicts of interest, are unduly influenced due to access, or subject to *quid pro quo* corruption, transparency rules can uncover judges' improper behaviors. When, however, ethical standards are lax and judges have access to backchannels, formal transparency becomes ineffective because it cannot reveal the underlying communications and relationships among judges, litigants and third parties that happen outside the courtroom.

Although Brazilian courts open their deliberations to the public and, at the highest levels, broadcast their meetings on television, radio, and the internet, they still are not sufficiently accountable. Procedural and ethical rules allow judges to communicate with each other behind the scenes, meet with litigants *ex parte*, and maintain relationships with actors who might have high stakes in judicial decisions. The legal community has come to accept informality as an inherent feature of the Brazilian judicial system. At all levels of the hierarchy, the close relationship between judges and litigants is taken for granted. *Ex ante*, ethical rules and practices allow judges to be subject to undue biases, and current disclosure requirements are not enough to reveal conflicts of interest. *Ex post*, judges are subject to discipline only exceptionally, and the records of these cases are usually under seal. Therefore, the image of transparency and accountability Brazilian courts project to the public is misleading, as external audiences have limited means

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to scrutinize them. Only by establishing strong ex ante and ex post accountability measures can Brazil achieve a truly transparent and just judicial system.

