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## ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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## ELECTRONIC JUDICIAL AUCTIONS AS AN ANTI-FRAUD INSTRUMENT

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The electronic auction was introduced in the Brazilian Judiciary Branch by Law No. 11,382/2006, and is regulated by Law No. 13,105/2015, New Brazilian Civil Procedure Code (Novo Código de Processo Civil). The statute has the following purposes: (i) to increase transparency and effectiveness of legal acts designed to satisfy creditors, to the extent that the possibility of bidding and purchasing auctioned goods has become a reality through the Internet for an unlimited number of interested parties; (ii) and by extension, to contribute toward settling judgment actions, serving as a useful instrument for reducing the length of judgment actions, in accordance with the principle of reasonable procedural times enshrined in article 5, LXXVIII, of the 1988 Brazilian Federal Constitution, a provision inspired in the “6<sup>th</sup> Amendment to the American Constitution – which ensures the right to a speedy trial” and reinforced by the applicable jurisprudence of the international human rights courts;<sup>1</sup> (iii) to reduce the influence of groups that have traditionally manipulated auctions organized within the Judiciary as a means to defraud the integrity of procedures.

Ten (10) years on from incorporation of the procedure in the Brazilian judicial system reveal that the rules regulating the procedure require continual revision in order to adapt them to new digital platforms and expand the number of beneficiaries, increase the speed of proceedings, and, moreover, reduce the costs to parties and the Judiciary, while serving to confirm, by extension, that the initial objectives have been met, without significant distortion.

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<sup>1</sup> S. M. ARRUDA, Comentário ao art. 5º, LXXVIII In J.J.G. CANOTILHO, G. F. MENDES, I.W. SARLET, L. STRECK, (Coords.), *Comentários à Constituição do Brasil*. São Paulo: Saraiva/Almedina, 2013, pp. 507-512.

## § 1 – ELECTRONIC AUCTIONS WITHIN THE BRAZILIAN JUDICIARY AND THEIR OBJECTIVE. CASE STUDIES AND RULES

### A) Objective of The Executive Jurisdictional Relief: Realization of the Violated Right

Executive jurisdictional protection consists in jurisdictional acts adopted in cases of rights violations.

“[...] we can infer that executive jurisdictional protection: (a) is undertaken for purposes of restoring rights, as well as preventing the occurrence of violations; (b) encompasses not only the results of the required execution (= material realization of the claimant’s rights), but the means for ensuring the desired outcome”<sup>2</sup>.

In the case of direct judgment execution for fixed amounts, in which the debtor responds through asset enforcement actions, the realization of such rights occurs through expropriation. That is, following application of a lien, the forced transfer of assets may be realized through one of the manners provided for under the system, the most common of which are judicial transfer of attached assets to the judgment creditor [adjudication]; transfer by private initiative or transfer by public auction. In the words of Araken de Assis,

“through forced transfers, the execution method employed in the enforcement of monetary obligations, the only rationally specific approach given the convertibility of the object of the transfer, the attached asset is offered to the public, specifically the highest bidder, for purposes of obtaining cash consideration and with the proceeds of the attached assets,” satisfy the creditor<sup>3</sup>.

### B) The Regulation of the Electronic Auction in Brazil

The use of electronic means to secure enforcement, through the expropriation of debtor assets within the Judiciary was introduced through Law No. 11,382/2006. At the time, the 1973 Brazilian Civil Procedure Code (Código de Processo Civil de 1973 – CPC/73) was in force. The Law’s explanatory statement<sup>4</sup> reveals that the effectiveness, transparency, and use of new means to satisfy legal claims have been objectives of legal practitioners for some time, as reflected in the words of Barbosa Moreira:

“The work conducted by the sharpest souls led to refinements in procedural law techniques executed

<sup>2</sup> J. M. G. MEDINA, *Execução*. São Paulo: editora Revista dos Tribunais, 2008, (Processo Civil Moderno), p. 25.

<sup>3</sup> ASSIS, Araken de. *Manual da execução* – 13. ed., rev. ampl. e atual. São Paulo: Editora Revista dos Tribunais, 2010. p. 813.

<sup>4</sup> Available at [<http://www2.camara.leg.br/legin/fed/lei/2006/lei-11382-6-dezembro-2006-547572-exposicaoodemotivos-150234-pl.html>], acesso em 16.11.2016.

through solid architectural design strategies of impressive majesty. [...]. Yet, there is a need for an effective application of the relevant tools to the model, patiently tempered and polished by the ingenuity of scholars.”

In an effort to enhance procedural performance in this area, which continues to be the Achilles heel of the process, that is, executive enforcement procedures, rules were proposed within the Brazilian Institute of Legal Procedure and the Ministry of Justice, which were the subject of wide-ranging debate for almost two years. The objectives of the measure included simplifying the procedures for public auctions, with the possibility of using electronic platforms for this purpose.

As such, article 689-A was incorporated in the Brazilian Civil Procedure Code (Código de Processo Civil). The provision included the possibility of substituting the public auction model in articles 686 - 689 of the Code with disposal through the World Wide Web on virtual pages created by the Courts or affiliated entities, in accordance with the applicable regulations of the Courts and the Federal Justice Council, in accordance with the requirements of broad publicity, authenticity, and security.

The slow and archaic public auction procedure initiated through public notices (article 686 of the CPC/73) published in “customary locations” five (5) days in advance in at least one major newspaper distributed locally and held in the lobby of the respective Forum [and the auction itself in the venue where the assets were housed or a location designated by the judge] was simplified by digital tools that offered users, interested parties, and the general public greater efficiency. However, it is important to highlight that the applicable administrative regulations did not provide for the substitution of the legal regime ensuring the right of defense and adversarial proceedings, rooted in the principle of due process, but merely simplification of the procedure by “dematerializing” it, specifically through the insertion of a public notice on the pertinent Web page and waiver of the provision requiring bidders or proponents to be physically present<sup>5</sup>.

In addition to optimizing the procedure and fulfilling a fundamental corollary of the principle of human dignity, including the right to a speedy trial – aimed not only at the executive branch, but the administration of justice based on the State-Court linkage – the possibility of rendering the procedure more accessible and transparent emerged as a tool to prevent the actions of “judicial auction mafias” reported from time to time in the media<sup>6</sup>.

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<sup>5</sup> A. ALVIM, ASSIS, Araken de, E. A. ALVIM, *Comentários ao Código de processo civil* – 1. Ed. – Rio de Janeiro: GZ Ed., 2012. p. 1.121.

<sup>6</sup> In criminal action 0001941-28.2012.04.03.6116, a lawyer was convicted for associating with his clients to defraud court settlements. In the case in point, a legal entity had been set up to take out the assets belonging to the debtor that were auctioned by determination of the Federal Court to pay debts of the company. The assets were mostly sold at lower prices than the valuation, that is, the debtor himself, through an interposed person, repurchased the assets for less than the market value instead of

The National Justice Council (Conselho Nacional de Justiça – CNJ), a body created through Constitutional Amendment 45/2004 – mandating reform of the judicial branch, based primarily on the principles of access to justice (recourse, reasonableness, and procedural efficiency) – which is tasked with overseeing administrative and financial activities in the judicial branch through the analysis and review of plans, targets, and evaluation programs, tracked the effective implementation and activation of these innovative provisions.

In addition to the CNJ’s resolutions, an example of the actions and commitment to transparency pervading the entire procedure is a 2009 administrative directive in which the Council “ordered the termination of the partnerships between the National Institute of Judicial Quality (Instituto Nacional da Qualidade Judiciária – INQJ)” with the Regional Court of Labor (Tribunal Regional do Trabalho – TRT) of the 15<sup>th</sup> Region and recommended that all remaining courts end the respective partnership as well. “In the CNJ’s view, the partnership enabled no-bid contracts for purposes of “unlawfully” circumventing bidding requirements. At the time the Council also questioned the legal eligibility of the INQJ to maintain the contract.” The matter was taken to the Courts through Petition for Injunctive Relief 28,086 filed with the Brazilian Federal Supreme Court (Supremo Tribunal Federal – STF). A final decision has not yet been handed down in the case. According to the available information, the CNJ determined that the INQJ was

“using its status as a Public Interest Civil Society Organization (Organização da Sociedade Civil de Interesse Público – OSCIP) to sign partnerships with bodies of the judicial branch for the delivery of specialized computer services developed by its anonymous partner, S4B DIGITAL DESENVOLVIMENTO DE TECNOLOGIA MULTIMÍDIA LTDA”.

In fact, the partnerships “avoided the bidding procedure that would have been required to have S4B contracted directly with the Judiciary”. This conduct resulted in an illegal monopoly by INQJ over auction procedures. For its part, the petitioner, INQJ, argued that execution of the auction procedures was not an activity that required a prior bid procedure, as it

“involved a service that is delivered directly to creditors, albeit under the auspices of the Courts, by private entities.

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redeeming the execution (pay or consign the full amount of the debt, plus interest, costs and fees to prevent the property from being expropriated).

Another type of fraudulent scheme, investigated by the Public Prosecutor's Office, consisted of people who intimidated competitors or even paid fees so they would give up bidding. (Available at <https://noticias.terra.com.br/brasil/policia/pf-prende-16-em-operacao-contrafraudes-a-leiloes-em-sergipe,b25c4fc7b94fa310VgnCLD200000bbccc0aRCRD.html>).

With the advent of the auction held totally virtually, in theory, the conducts described in the examples above become difficult, since the generality of users registered to participate in the auction and the value of the bids offered can hardly be controlled by such criminal associations.



Therefore, the assertion that a bid procedure was required for purposes of contracting the LEJ tool by bodies of the judicial branch has no merit.”

In reviewing the petition for relief, Minister Ricardo LEWANDOWSKI ruled that there was an absence of imminent and irreparable damage (*periculum in mora*) sufficient to warrant emergency relief, adding that suspension of the implementation of the judicial electronic auction system did not provide grounds for granting the injunction, given that the overarching public interest does not require, necessarily, continued operation of the project, as, in the case at hand, the CNJ decided, based on that same public interest, in favor of the need for a bid procedure, which would not have the effect of interrupting ongoing judicial auctions, insofar as these may be conducted by means other than electronic bidding procedures<sup>7</sup>. With respect to the merit of the petition for injunctive relief, the Minister found that circumvention of the principles of the Public Administration had been sufficiently established<sup>8</sup>, as the

“public auctioneer, pursuant to article 706 (CPC/73), is merely nominated by the judgment creditor, with the case judge exercising ultimate authority on the final selection. In this light, the bid procedure requirement is not waived by virtue of the execution of contracts by the Court for the use of electronic tools in auction procedures,” by virtue of which the Minister struck down the plan<sup>9</sup>.

The decision was appealed. A ruling has not yet been issued on the appeal.

Without delving too far into the case in question, the matter reflects the afflictions that beset the Brazilian Judiciary, namely the suspicions of fraud or adoption of unorthodox procedures that linger over entities which execute agreements with the Courts. It is this type of situation that needs to be prevented.

Following the enactment of the New Civil Procedure Code (Novo Código de Processo Civil – CPC/15), the rules regulating electronic public auctions underwent, out of necessity, significant modification, in order to ensure the procedure was more visible and realistic with respect to its underlying objectives.

In general, the new procedural rules require that disposal be carried out by (i) individual initiative or (ii) an electronic or in-person judicial auction (article 879, I and II, CPC/15). Indeed, pursuant to the provision in article 882 of the CPC/15 electronic procedures are now the rule, to the extent in-person auction

<sup>7</sup> Available at [<http://www.cnj.jus.br/noticias/67340-stf-nega-liminar-a-instituto-que-pretendia-suspender-decisao-do-cnj->], acesso em 14.11.2016.

<sup>8</sup> Article 37 of the Brazilian Federal Constitution mandates that “the direct and indirect public administration of any Branch of the Federal, State, Federal District, or Municipal Governments shall meet the principles of legality, impersonality, morality, publicity, and efficiency”.

<sup>9</sup> Available at: <http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28MS%24%2ESCLA%2E+E+28086%2ENUME%2E%29+NAO+S%2EPRES%2E&base=baseMonocraticas&url=http://tinyurl.com/awo6jez>.

procedures will only be employed where the electronic option is not possible.

Although redundant, insofar as there would be no need for an infra-constitutional provision to apply this right, article 882, paragraph 1, states that judicial disposal by electronic means must fulfill the due process guarantees of the parties and meet the requirements of full publicity, authenticity, and security, in accordance with the rules prescribed in the laws governing digital certification (article 882, paragraph 2).

Broad dissemination of disposal procedures is among the tasks assigned to the public auctioneer, who must give priority to dissemination of a public notice on the World Wide Web (article, 887, paragraph 1).

The following may not enter bids: (i) executors, trustees of heirs, administrators, or liquidators, in respect of assets in their custody and under their responsibility; (ii) lead public officials, with regard to assets they are charged with administering and disposing; (iii) judges, members of the Public Prosecutor's Office (Ministério Público) or the Public Defender's Office (Defensoria Pública), clerks, heads of the judicial secretariat, and other Court employees and assistants, in regard to assets and rights subject to disposal in the locality to which they are assigned or to which their authority extends; (iv) civil servants in general, with respect to assets and rights of the legal entity for which they work or which exercises direct or indirect management over them; (v) auctioneers and their representatives, in respect of the assets they are responsible for selling, and (vi) the attorneys of any of the parties (article 890, I - VI).

With respect to excessively low price bids, “Contrary to the 1973 CPC, the 2015 CPC extends the proscription on excessively low bid proposals to electronic auctions, as there is no margin, with respect to these, for distinguishing between the dual nature of auctions, the first and second, a typical feature of in-person bid procedures and provided for in article 895, subsection II”<sup>10</sup>.

In conjunction with the rules in the Code of Civil Procedure, the CNJ “initiated discussions in December 2015 on the regulations required under the new CPC through the establishment of a working group” that “concluded that there were five matters demanding regulation by the CNJ,” among them electronic auctions. The result of the studies – following public consultations on the pertinent issues held in the period March and April 2016, which garnered 413 statements and recommendations, as well as a public hearing convened in May 2016 with the participation of 48 experts, judges, attorneys, professors, consultants, public defenders, and representatives of

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<sup>10</sup> C. S. BUENO, *Manual de direito processual civil: inteiramente estudado à luz do novo CPC* –Lei 13.105, de 16.03.2015. São Paulo: Saraiva, 2015. p. 516.

professional associations<sup>11</sup> – culminated in the publication of Resolution 236, dated July 13<sup>th</sup>, 2016. Specifically, through the participation of individuals directly involved in the delivery of legal services (which itself confirms the quest for a more participatory form of justice) rules were developed that took into account: (i) “operational efficiency, access to the justice system, and social responsibility,” all “strategic objectives of the judicial branch”, pursuant to CNJ Resolution, dated September 1<sup>st</sup>, 2014”; (ii) “electronic judicial disposal is aimed at facilitating the participation of bidders, reducing costs, and speeding up the execution process,” efforts that reflect, in combination, the search for transparency through use of the World Wide Web and digital tools, without neglecting the protections to which the debtor is entitled, at all times and without question, namely a full defense and the right to adversarial proceedings.

The Resolution clearly evokes the concern with giving digital resources priority over other means. In sum, judicial auctions will be executed exclusively by certified auctioneers (article 1), who, in turn, will only be certified after demonstrating that they (a) have discharged the profession for at least three years (article 2); (b) have or own property intended for storing or conserving seized assets (article 2, paragraph 1, I); (c) operate “computer systems capable of controlling seized assets, providing photographs and specifications, which the Court can consult online, as well as equipment to record or film public acts involving judicial sales of assets, or, alternatively, that they maintain contracts with third parties having the necessary equipment” (article 2, paragraph 1, II); (d) have the means to ensure wide dissemination of the judicial disposal and infrastructure to hold electronic judicial auctions,” adopting the best practices of the information technology market (article 2, paragraph 1, III and IV). With a view to ensuring transparency and probity, judicial auction procedures must meet the requirement of full publicity – making sure the related information is not restricted to small groups capable of unlawfully manipulating the process – authenticity and security (article 1); auctioneers and their respective representatives may not enter bids on assets they are responsible for selling. Failure to comply with the rules above may result in the decertification of auctioneers (article 4, sole paragraph), who are also responsible for the storage, custody, and conservation of assets in their capacity as judicial depositaries; full dissemination of notices for public auctions in general; “creating and maintaining, on the World Wide Web, electronic addresses and Web environments capable of ensuring the execution of electronic judicial auctions” (article 5, XI), answering questions before, during, and after transactions (article 14, paragraphs 2 and 3). Drawings for public auctions may be done by electronic

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<sup>11</sup> Available at: <http://www.cnj.jus.br/noticias/cnj/82841-conselho-regulamentacional-aliacao-judicial-eletronica-conforme-novo-cpc>.

means, where the judgment creditor does not select an auctioneer as per article 883 of the Brazilian Civil Procedure Code, in accordance with the principle of impersonality, technical capacity, and experience of the auctioneer (article 9 and paragraphs). In addition, to ensure broad participation registration of parties interested in the electronic judicial auction is free of charge (article 13). The costs for dissemination of the auction are borne by the auctioneer, who is compensated through the specific percent commission prescribed by law. Bids entered during the auction in the management system are immediately disseminated online to ensure “real-time bidding”, to which end “systems through which bids are entered by email or any other method involving human collection and entry of proposals” are not permitted (article 22 and sole paragraph). The case judge may order tracking of the IP number of the machines used by the bidder (article 27) and the entire procedure – which must be remain available for immediate access by the Court – “must be recorded in electronic and multimedia files with sufficient audio, data, and image storage capacity” (article 34).

Therefore, the rules are invariably aimed at ensuring real access to information relating to public auctions and the responsible conduct of auction procedures, with a view to guaranteeing the effectiveness and efficiency of the corresponding acts.

## **§ 2 – THE NEED FOR CONTINUOUS REVIEW OF THE RULES GOVERNING ELECTRONIC AUCTIONS WITHIN THE JUDICIAL BRANCH, FOR THE PURPOSE OF ADAPTING THE MECHANISM TO THE BROADER OBJECTIVE OF TRANSPARENCY THROUGH THE ADOPTION OF DIGITAL TOOLS**

### **A) Digital Media and Access to Justice**

Experience reveals, as only it could, that digital means and their evolution have become important tools for democratic societies and, specifically, with regard to the issue in question, serve to contribute to expanding the reach of a justice system that is open, inclusive, participatory, and capable of effective delivery humane legal services.

For some time now it has been recognized that “from the postulate of access to justice and due process of law, one can deduce the existence of a constitutional guarantee to the executive jurisdictional protection”, since it is the fundamental right of the creditor, without which the constitutional promise of adequate protection of subjective rights would fall into the void<sup>12</sup>. But, more interesting than simply recognizing civil enforcement as a fundamental right, it is necessary to verify what the

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<sup>12</sup> T. F. SIQUEIRA, *A responsabilidade patrimonial no novo sistema processual civil*, Coleção Liebman. São Paulo: Revista dos Tribunais, 2016. p. 126.

consequences of this recognition are. In this exercise it is verified that the

“judge has the power-duty to: (i) interpret the rules regarding executive means in order to extract from them the greater protection of the fundamental right to executive protection; (ii) no longer apply rules imposing a restriction on this right that is not justified by the protection of another right that should prevail in the specific case and (iii) adopt executive techniques that are necessary even if not expressly provided by law”<sup>13</sup>.

The search for effectiveness in the result of the forced expropriation of assets in order to meet the rights of the creditor cannot, however, give grounds for the violation of the debtor’s rights, because as unacceptable as cruel justice “is indifferent, alienated justice, because in both the magistrate disregards the human person, failing to satisfy the innate objective right of the dignity of the person”<sup>14</sup>. It cannot be forgotten, therefore, that the debtor, like any other person, has the right to an adversary system and full defense, resulting from the due process of law. Thus, the creditor’s fundamental right to enforced execution can only be restricted for the protection of another fundamental right, which in this case should prevail<sup>15</sup>.

This is the reason, for example, of the existence of rules, in the Brazilian order that limit the expropriation power, that is, those that determine the impossibility to levy execution of certain assets. It is important, however, to emphasize that the rules of impossibility to levy execution must be applied in accordance with the methodology of the application of the standards of fundamental rights, and do not in certain specific cases result in

“disproportion/unnecessity/inadequacy between the restriction to a fundamental right and the protection of another. That is to say: it must be made clear that the court must make a constitutional review of the application of the rules of impossibility to levy execution, if its application proves to be unconstitutional, because it is unreasonable or disproportionate, it must remove it, being a solution for the specific case”<sup>16</sup>.

In this respect, the use of virtual tools for expropriation acts must always be guided not only by positive prescriptions but also by the very vector of the dignity of the human person, or to protect the rights of creditors or debtors. And in this point, it is important to point out that in the New Civil Procedure Code, Article 8<sup>17</sup> provides that the judge, in the application of the law,

<sup>13</sup> *Ibidem*, p. 127.

<sup>14</sup> W. BALERA, R. SAYEG, *Capitalismo humanista*, Petrópolis: KBR, 2011. p.129.

<sup>15</sup> T. F. SIQUEIRA, *A responsabilidade patrimonial no novo sistema processual civil* Coleção Liebman. São Paulo: Revista dos Tribunais, 2016.p. 145.

<sup>16</sup> A. DO PASSO. CABRAL, R. CRAMER, (Coord), *Comentários ao novo Código de processo civil*. Rio de Janeiro: Forense, pp. 24-33.

<sup>17</sup> Art. 8 “In applying the legal system, the judge shall attend to social purposes and to the requirements of the common good, safeguarding and promoting the dignity of the

will attend to the social purposes to which it is directed and to the demands of the common good, always observing the principles of dignity of the human person, reasonableness, legality, impersonality, morality, publicity and efficiency. And the mention of dignity of the human person in the legal system is never redundant. In the case of the article in question the use of the term “dignity of the human person” - a constitutional principle that permeates all other principles and rules related to fundamental rights - along with the verb “promote” starts to determine the requirement of a more active behavior of the magistrate<sup>18</sup>.

### **B) The Need to Revise the Norms Related to the Electronic Auction, in the Judicial Sphere, and Satisfaction of the Execution in Order to Improve them**

According to Nelson Nery Junior, the effectiveness of the constitutional guarantee of speed and reasonable duration of the process makes it necessary for the Judiciary Branch to be equipped with a logistical apparatus, as well as to invest in the “technical training of judges and the material elements necessary for the good performance of the functions of magistrates and auxiliaries of justice”, but the changes that guarantee real effectiveness of the fundamental right inscribed in art. 5, LXXVIII of the Federal Constitution/88, do not depend only on the change of mentality of the Judiciary Branch, but mainly “on the Executive and Legislative Branches and the change of mentality of the rulers and politicians, in the sense of complying with and enforcing the Constitution, avoiding the judicialization of the issues that private individuals must submit to the Judiciary Branch because of failure of the public power” in the exercise of its functions<sup>19</sup>.

For these reasons, it should be noted that, in addition to the monitoring of technological changes and developments, which will ultimately create safer and more efficient means for electronic procedures, the legislator and operators must also make a constant exercise of the review of standards by observing their results.

In this area, the National Justice Council is vitally important because, through programs that foster transparency in the administration of justice and public access to its results, jurisdictions will certainly be able to democratically exercise their constitutional guarantees, including receiving from public agencies information of private, collective or general interest<sup>20</sup>.

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human person and observing proportionality, reasonableness, legality, publicity and efficiency”.

<sup>18</sup> A. DO PASSO. CABRAL, R. CRAMER, (Coord), *Comentários ao novo Código de processo civil*, Rio de Janeiro: Forense, pp. 24-33.

<sup>19</sup> N. JR. NERY, *Princípios do processo na Constituição Federal*, 9ª ed. rev., ampl. e atual. São Paulo: Editora revista dos tribunais, 2009 p. 319 e 320.

<sup>20</sup> Art. 5, XXXIII of CF/88.

It should be noted, for example, the possibility of extending the scope of CNJ Resolution no. 102 of December, 2009 - which establishes that courts and councils publish on their websites “relevant information on their financial and budgetary management related to expenditures on human resources, general services such as cleaning and IT, consumables, asset purchase and other costing expenses”<sup>21</sup>, all in order to give greater transparency to the management of the Judiciary Branch, which ultimately enables social control - and initiatives such as the Transparency Portal – created from the provisions of Supplementary Law 131/2009 that has as its objective the real-time disclosure of budget and financial execution by the public sector – to cover the demonstration, through indicators, of the results achieved through the use of the electronic auction procedure.

However, the CNJ’s own performance needs to be carefully weighed so that no excess is made, as Ana Amelia Menna Barreto warns in an article about the new CPC (Civil Procedure Code), the electronic process and the digital media, the delegation of powers to the CNJ and, supplementary, to the courts generates legal uncertainty, since in Brazil we have about 40 different computerized systems adopted by the 27 (twenty-seven) Courts of Justice, 5 (five) Federal Regional Courts, Superior Court of Justice and Supreme Federal Court, as, so far, only the Labor Court has adopted a single system. The same author questions this delegation, since in many respects it could enter into strictly procedural matters<sup>22</sup>, which could ultimately lead to questioning about the constitutionality of the edited rules since, according to the Federal Constitution, it is the exclusive responsibility of the Union to legislate on procedural law, pursuant to art. 22.

But not only the rules that govern the electronic auction in the Civil Procedure Code could be more comprehensive and specific. Also, other alternatives, which could even use the electronic means for its effectiveness, could be considered. As Heitor Vitor Mendonça Sica points out, our legal system already provides for some techniques to facilitate access to executive acts in executions carried out unilaterally by the creditor in hypotheses such as the extrajudicial auction of goods specified in unpaid warrant upon maturity (Article 23 § 1 of Decree 1,1102/1903); extrajudicial sales, by the pledge creditor, of the good pledged (article 1,433 of the Civil Code); extrajudicial auction of a share of land and a corresponding part built in the incorporation by the administration regime, also called “at cost” (article 63 of Law 4,864/1965) and later extended to the detached assets (article 31-F, § 14, of Law 4,591/1964, included by Law 10,931/2004); sale, on the stock exchange, of shares of the remission shareholder (article 107, II, of Law 6,404/1976); sale of the object of fiduciary property in the financial and capital market

<sup>21</sup> Available at: [<http://www.cnj.jus.br/transparência>], acesso em 10.11.2016.

<sup>22</sup> A. A. M. BARRETO, *O Novo CPC, o processo eletrônico e os meios digitais*, Available at: <http://www.migalhas.com.br/dePeso/16,MI228356,81042-O+novo+CPC+o+processo+eletronico+e+os+meios+digitais>.

(article 66-B, § 3, of Law 4,728/1965, included by Law 10,931/2004); execution of credits with real estate guarantee, pursuant to Decree-Law 70/1966 and Law 9,514/1997. The author suggests that, for the effectiveness of civil enforcement, it would be necessary to think more slowly and carefully about the extension of easier access to justice in other situations, for example in some countries such as Portugal and Spain that recently changed their law system in order to facilitate access to at least part of the extrajudicial acts so as to assign to extrajudicial agencies the tasks inherent to location, constriction, evaluation and expropriation of assets<sup>23</sup>. After analyzing the Portuguese model of easier access to justice, Joel Dias Figueira Junior concludes that

“the real success that can be achieved with this practice, above all, through the prism of simplification, economy, speed, effectiveness and satisfaction, is innumerable and feasible, since there will be direct repercussions for the consumers of justice and in the state judicial sphere, as regards the release of time (...)”<sup>24</sup>.

It is concluded, therefore, that: (i) the use of the electronic form to carry out the auctions that aim at the forced fulfillment of the execution has been prioritized and refined over the years, since it is a means, potentially more effective, speedy and compatible not only with the technological advances available, but also with the need for transparency and open, accessible justice, everything aiming ultimately at the realization of the dignity of the human person; (ii) however, the advantages inherent to the use of the electronic auction mechanism presented so far are intuitive, since there is no tool that allows the comparison of data to determine if the electronic auction is more effective or transparent than face-to-face auctions (iii) in such a case, the regulation of the matter in question, to date, is not sufficient to achieve these objectives, and there is a need for the refinement of the instruments, both to accompany technological innovations and the development of new digital platforms, and so that the Power, whether in the judicial, administrative or executive function, adapts to these innovations, either by adopting positive actions or by abandoning certain practices that make the process time-consuming and expensive.

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<sup>23</sup> H. V. M. SICA, Notas sobre a efetividade da execução civil. In *Execução civil e temas afins do CPC/1973 ao novo CPC: estudos em homenagem ao Professor Araken de Assis*. ALVIM, ARRUDA; ALVIM, EDUARDO ARRUDA *et. al* (Coord. Org.) São Paulo: Editora Revista dos Tribunais, 2014. pp. 507 a 509.

<sup>24</sup> J. D. JR. FIGUEIRA, Execução e desjudicialização do processo civil. In *Execução civil e temas afins do CPC/1973 ao novo CPC: estudos em homenagem ao Professor Araken de Assis*, A. Alvim, A. Eduardo, *et. al* (Coord. Org.) São Paulo: Editora Revista dos Tribunais, 2014. pp. 576-603.