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Brazil's Legal Culture: The Jeito Revisited

Keith S. Rosenn

University of Miami School of Law, krosenn@law.miami.edu

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BRAZIL'S LEGAL CULTURE: THE JEITO REVISITED*

KEITH S. ROSENN**

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**Professor of Law, University of Miami.

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I. INTRODUCTION

The Brazilian way of coping with the formal legal system is typified in this story of a recent graduate of a European medical school who wished to immigrate to Brazil. At his visa appointment, the Brazilian counsel in Paris immediately changed the applicant's profession from doctor to agronomist, explaining: "In that way I can issue you a visa immediately. You know how these things are? Professional quotas, confidential instructions from the department of immigration. Utter nonsense! . . . In any event, this way will make it perfectly legal."¹

At first the European protested, thinking the consul was trying to trap him into making a false declaration. The consul, however, insisted that reclassifying the European doctor as an agronomist would solve rather than create problems. The consul explained that he was simply employing the *jeito*, a Brazilian word that has no precise translation but corresponds roughly to a knack, twist, way, or fix. Only after living in Brazil for some time did this "medical-agronomist" realize that he had immigrated to a country where laws and regulations are enacted upon the assumption that a substantial percentage will be disobeyed, and where "civil servants, be they small or powerful, create their own law. Although this law does not happen to correspond with the original law, it meets with general approbation, provided that it is dictated by common sense."²

That Brazilian laws and regulations are regularly twisted to the demands of expediency does not make Brazil unique. The bending of legal norms to expediency occurs to some extent in all countries.³ It is especially common in Latin America, where the gap between the law on the books and actual practice is notoriously large.⁴ What is striking about Brazil is that the practice of bending legal rules to expedi-

1. P. KELLEMEIN, *BRASIL PARA PRINCIPIANTES* (8th ed. 1964).

2. *Id.* at 11-12.

3. Certain aspects of the *jeito* are well known in the United States, as any lawyer who has handled an uncontested divorce, invented the minutes of fictitious meetings of shareholders in small corporations, or engaged in plea bargaining in criminal cases will attest.

4. Eder, *Law in Latin America*, in 1 *LAW: A CENTURY OF PROGRESS* 39, 42-43 (N.Y.U. ed. 1937); de Vries, *Latin American Dichotomy Between Law and Practice*, N.Y.L.J., Aug. 30, 1982, at 1.

ency has been elevated into a highly prized paralegal institution called the *jeito*. The *jeito* has become an integral part of Brazil's legal culture. In many areas of the law, the *jeito* is the norm and the formal legal rule is the exception.

Jeito is easier to describe than to define. A visiting French social scientist, unable to find any equivalent in French, defined the *jeito* as "an ingenious maneuver that renders the impossible, possible; the unjust, just; and the illegal, legal."⁵ A Brazilian sociologist has defined the *jeito* as "a genuinely Brazilian process for resolving difficulties despite the content of rules, codes, and laws."⁶

The difficulty with these definitions is that the Brazilians use the term *jeito*, and its diminutive *jeitinho*, to refer to several distinct modes of behavior that have very different implications for societal functioning. Regardless of whether the Brazilian consul classified the European doctor as an agronomist because of sympathy, a bribe, or a sincere belief that the country needed more skilled physicians, Brazilians would refer to the consul's bending of the law as a *jeito*.

For analytic purposes the *jeito* can be broken down into at least five different kinds of behavior:

(1) A government official fails to perform a legal duty because of private pecuniary or status gains; *i.e.*, the official awards a government contract to the highest briber.

(2) A private citizen employs a subterfuge to circumvent a legal obligation that is sensible and just (in an objective sense); *i.e.*, an exporter under-invoices a shipment, receiving part of the purchase price abroad in foreign currency in order to evade currency controls and taxes on part of his profits.

(3) A public servant performs his legal duty speedily only in exchange for private pecuniary or status gains; *i.e.*, an official refuses to process an application to renew an auto license unless he has received a tip or knows the applicant.

(4) A private citizen circumvents a legal obligation that is unrealistic, unjust, or economically inefficient; *i.e.*, loans are disguised as joint ventures or borrowers are required to maintain compensating balances at low interest in order to circumvent a usury law that limits lawful interest to a rate well below market rates.

(5) A public servant deviates from his legal duty because of his conviction that the law is unrealistic, unjust, or economically inefficient; *i.e.*, a labor inspector overlooks the failure of a marginal firm in an area of high unemployment to pay the official minimum wage on the theory that strict enforcement would be likely to throw many em-

5. C. MORAZÉ, *LES TROIS ÂGES DU BRÉSIL* 195 (1954).

6. A. GUERREIRO RAMOS, *ADMINISTRAÇÃO E ESTRATÉGIA DO DESENVOLVIMENTO* 380 (1966).

ployees out of work and perhaps shut down the plant altogether.

The first two kinds of behavior fit the conventional definition of corruption—dishonest behavior benefiting an individual at the expense of the state. The third kind of behavior can also be labelled corruption by conventional standards, although most people would consider it less morally offensive than the first two forms of corruption. The fourth and fifth kinds of behavior are those in which public purposes are arguably served by evading legal obligations. These components of the *jeito* bear no stigma. On the contrary, they have made the *jeito* a highly prized Brazilian institution.

Obviously, these categories are not mutually exclusive. Some civil servants become aware of a law's uneconomic or unjust aspects only after their palms have been greased. Public officials sometimes cooperate with private citizens in legitimizing or facilitating the vitiation of legal rules by subterfuge.⁷

Until recently, the *jeito* was not considered a topic worthy of serious scholarly inquiry. As with the related institution of corruption, research on the *jeito* was considered taboo for lawyers and social scientists. This is partly attributable to the bias of Brazilian law schools against empirical research and in favor of classical exegesis of legal texts. Perhaps even more important is the difficulty in carrying out such research. Since the *jeito* often involves illegal transactions, participants tend to be less than candid in describing what has transpired. The written record, at least on its face, usually appears entirely legal. In addition, there is the problem of what Gunnar Myrdal has characterized as "diplomacy in research."⁸

The *jeito* is so entwined with problems of corruption that it is far more politic, especially for the foreign researcher, to pretend that legal rules correspond to what is done rather than run the risk of embarrassing friends and authorities by calling attention to the disparities. Yet, to understand the Brazilian legal system, one cannot afford to neglect this critical aspect of the legal process. Attitudes toward law reflected in a paralegal institution like the *jeito* are at least as important, and in many ways, more important than the institutions

7. A clear example is the Brazilian experience with rent control. Residential rents remained frozen during a 17 year period during which the cost of living rose at an annual average of more than 22%. Rent control statutes prohibited the landlord from raising the rent or evicting the tenant, but permitted the landlord to retake the premises for his own use or that of his family. Many landlords simulated a personal need for the leasehold in order to secure an under-the-table rent increase or to evict an undesired tenant. Recognizing the injustice created by the statute, the courts facilitated this *jeito* by placing the burden of proving the insincerity of the request upon the tenant, a *priori* an almost impossible task. Rosenn, *Controlled Rents and Uncontrolled Inflation: The Brazilian Dilemma*, 17 AM. J. COMP. L. 239 (1969).

8. 2 ASIAN DRAMA 939 (1969).

enshrined in the formal structure.

II. THE ROOTS OF THE JEITO

The roots of the *jeito* run deep into the Iberian past. During the critical formative era, Portuguese attitudes toward law were fundamentally influenced by Roman law, legal pluralism, and Catholicism. As a result of Portuguese colonization, these same fundamental influences shaped Brazilian attitudes toward law. Brazilian attitudes toward the administration of law were also shaped by the peculiar character of Portuguese colonial rule, as well as five cultural characteristics bequeathed by the Portuguese: high tolerance for corruption, lack of civic responsibility, profound socio-economic inequality, sentimentalism, and a willingness to compromise. The *jeito* is firmly rooted in this Luso-Roman legacy.

A. *The Dual Roman Law Heritage*

Iberian legal culture has been heavily influenced by Roman law. Roman law was originally steeped in custom and experience; consequently, it displayed remarkable flexibility and adaptability. It was a vital legal order that grew and developed as Rome herself grew and developed into the center of a vast empire.⁹ By the late Empire, however, Roman law had begun to diverge from socio-economic reality and to take on an idealistic and rigid character. Much that Justinian preserved in the *Corpus Juris* had little relevance to the Rome of his time. The Roman law revival that began in the eleventh century in the West was based upon a slavish study of the text of the *Corpus Juris*, and emphasized abstract, formal rules rather than socio-economic context.

Portugal was one of the countries most profoundly influenced by the scholasticism of the Glossators and the Commentators. Even though Portuguese positive law specifically provided that the glosses of Accursius and the opinions of Bartolus were to be applied only to fill lacunae, the influence of Roman law was so great that Portuguese judges frequently applied the solutions of these scholars in derogation of Portuguese statutory and customary law.¹⁰

The Roman law scholarship of the Glossators and the Commentators was primarily concerned with constructing a harmonious, universal system of ethical guides to conduct. This was largely accomplished by reasoning deductively from abstract moral postulates culled from the *Corpus Juris*. The end product was displacement of

9. Thomas, *Roman Law*, in AN INTRODUCTION TO LEGAL SYSTEMS 1-2 (J. Derrett ed. 1968).

10. I. C. TRÍPOLI, *HISTÓRIA DO DIREITO BRASILEIRO* 154 (1936).

traditional or customary rules of law by unrealistic ethical standards of conduct that reflected goals to be attained.

Portugal has a dual Roman law heritage. It inherited the living Roman law from the six centuries of Roman occupation, in time modified by custom and Gothic superimpositions. This aspect of Roman law found its expression in the old *Fuero Juzgo* (the Visigothic Code) and the *Fuero Real* (the Royal Code). It also inherited the idealized Roman law, culled by academicians from the texts of Justinian's *Corpus Juris*. It was this second aspect of Roman law that Portuguese kings found highly useful in their struggle to unify diverse legal systems and to expand their sovereign powers. This pattern of dualism—law as an ideal versus law as a practical system for ordering affairs—persists in Brazil today.

B. Legal Pluralism

The Romans also bequeathed Iberia a tradition of profound juridical inequality. Roman law recognized the principle of the personality of laws, which meant that the law applicable to a particular person depended upon the group to which he belonged rather than the territory in which he happened to live. Roman law was reserved for Roman citizens, while the Iberians were governed by their own customary law, at least with respect to matters involving private law.¹¹ The Visigoths, who overran the Iberian Peninsula in the fifth century, also applied the principle of the personality of laws. For much of their reign, the Visigoths were governed by the Code of Euric, while the Hispano-Romans were governed by the Breviary of Alaric (a crude restatement of Roman law), as modified by Celto-Iberian custom.¹² The Moors, who invaded the Peninsula early in the eighth century, followed the same principle, applying Islamic law to their own population and the Visigothic Code to the Roman-Gothic population.¹³

The critical first century of Portugal's independence began in 1143 during the Reconquest, a state of more or less permanent war that continued until 1249, when the Moors were finally expelled from Portugal. The tradition of legal pluralism continued during the Reconquest. The Portuguese kings customarily granted special legal privileges, embodied in municipal charters called *forais*, to cities and

11. K. RYAN, AN INTRODUCTION TO THE CIVIL LAW 6 (1962). In 212 A.D., Roman citizenship, hitherto reserved for a few, was extended to all inhabitants of the Roman Empire. M. CAETANO, HISTÓRIA DO DIREITO PORTUGUÊS 64 (1981).

12. K. KARST & K. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA 21 (1975). This dual legal system was eventually abrogated in the reign of Chindasvinth (641-652). *Id.*

13. *Id.* at 22.

towns as they were freed from Moorish control. The *forais*, which were contractual in nature, contained detailed rules and privileges for self-governance of the locale. In addition, Portuguese kings granted special legal privileges to the multiplicity of corporate estates that made up medieval society. The nobility, military orders, clergy, university faculty and students, merchants, and various other guilds were generally exempted from the ordinary jurisdiction of the king's courts and governed by their own *forais*, which created special laws and courts.¹⁴

Thus, even before its birth as a nation, Portugal was characterized by profound juridical inequality. During the Reconquest and for many centuries thereafter, Portugal had the antithesis of a universalist legal system. The *de facto* legal pluralism that is so often found in Brazil is firmly rooted in the *de jure* legal pluralism of Portugal's past.

C. The Influence of Catholicism

Historically, law and religion have blended in the heavily Catholic, Iberian Peninsula. The result has usually been disrespect for law. Catholicism, with its rigid dogmas, moral intolerance, formalism, and slowness to change, has stimulated considerable *jeito*-like activity. The tradition of disregard for law can be traced back at least as far as the *Fuero Juzgo*, which contained outrageously intolerant prescriptions prohibiting the Jews from practicing their religion. Despite the harsh prohibitions of the *Fuero Juzgo*, however, Jews were able to observe their religious customs by paying bribes.¹⁵ Similarly, the numerous Church-inspired laws for the protection of the Indians in the Portuguese and Spanish colonies were widely disregarded by colonists bent on enslaving the Indian population.¹⁶

This pattern of paying lipservice to religiously inspired legislation has continued in modern Brazil. Shortly after independence, Brazil adopted a decree requiring that all questions of marriage be resolved in accordance with canon law as prescribed in the Council of Trent and the Constitution of the Archbishop of Bahia.¹⁷ Not until 1977 did Brazil permit divorce under any circumstances. Even then, enactment of a divorce law required a constitutional amendment.¹⁸

14. M. CAETANO, *supra* note 11, at 235-39.

15. S. SCOTT, *THE VISIGOTHIC CODE* xiii (1910).

16. See S. SCHWARTZ, *SOVEREIGNTY AND SOCIETY IN COLONIAL BRAZIL* 122-39 (1973). Resistance to Hapsburg Indian policy was so strong among Brazilian colonists that the Crown was eventually forced to repeal this legislation because it could not be enforced. *Id.* at 137.

17. Decree of Nov. 3, 1827.

18. Law No. 6.515 of Dec. 26, 1977, made possible by Constitutional Amendment No. 9 of June 28, 1977.

Brazilians coped with canon law's absolute prohibition against divorce by treating legal separation as a divorce, and by often contracting subsequent marriages outside Brazil or in foreign embassies. Despite their illegality, these marriages enjoyed considerable social acceptance, particularly in urban areas.¹⁹ Moreover, Brazilian legislation steadily expanded the legal rights of "second wives," permitting the second wife to receive accidental death benefits and governmental pensions under certain circumstances to the detriment of the legal wife, and according the children of second unions full legitimate status.²⁰

Another religiously inspired legal measure is the usury law, which prohibits charging interest greater than twelve percent per annum.²¹ This statute has been so circumvented by a wide variety of *jeitos* in the wake of double and triple digit inflation that it is today widely regarded as revoked by practice.²² Similarly, abortion is a crime, but an estimated three million abortions are performed each year, giving Brazil one of the highest abortion rates in the world.²³

D. Colonial Administration

The manner in which Portugal administered its colony indelibly stamped the legal institutions of Brazil. The diversity of means for transmitting the royal will to the colonists was nearly matched by the diversity of means for colonial administrators to frustrate that will. The result was bureaucratic confusion, administrative delay, mistrust of government officials, and disrespect for law. This colonial heritage has impeded a series of attempts at administrative reform in Brazil.

1. The Legacy of Patrimonialism

Portuguese colonial rule, like that of the Spanish, was essentially patrimonialist.²⁴ It was the product of an absolute monarchy, with

19. See T. DE AZEVEDO, SOCIAL CHANGE IN BRAZIL 26-31 (1963); *El Divorcio en America Latina*, 37 *Visión* 50 (Nov. 21, 1969).

20. See W. BARROS MONTEIRO, CURSO DE DIREITO CIVIL, DIREITO DA FAMILIA 15-22 (8th ed. 1968).

21. Decree No. 22.626 of Apr. 7, 1933. Law No. 1.521 of Dec. 26, 1951, art. 4, provides criminal penalties for usury.

22. J. CHACEL, M. SIMONSEN, & A. WALD, CORREÇÃO MONETÁRIA 19 (1970). For some of the *jeitos* employed in Brazil to circumvent the usury law, see K. ROSENN, LAW AND INFLATION 186-87, 201-02 (1982); Simonsen, *Brazilian Inflation: Postwar Experience and Outcome of the 1964 Reforms*, in ECONOMIC DEVELOPMENT ISSUES: LATIN AMERICA 261, 301-04 (Comm. for Econ. Dev. Supp. Paper No. 21, 1967).

23. *Jornal do Brasil*, Nov. 6, 1983, 1st cad., at 15. See also W. RODRIGUES, LAW AND POPULATION IN BRAZIL 18-19 (1975).

24. R. FAORO, OS DONOS DO PODER: FORMAÇÃO DO PATRONATO POLÍTICO BRASILEIRO 15-22, 130-31 (3d ed. 1976); F. URICOECHA, THE PATRIMONIAL FOUNDATIONS OF THE BRAZILIAN BUREAU-

“the King as its head, chief, father, representation of God on earth supreme dispenser of all favors, and rightful regulator of all activities, even to all personal and individual expressions of his subjects and vassals.”²⁵ Administrators were tied to the king by bonds of personal loyalty and profit rather than official duty. All taxes, tributes, and the royal share in monopoly profits were the personal income of the sovereign rather than the nation. Patrimonialism produced widespread corruption, an incredible penchant for bureaucratic red tape, and a highly unpredictable and personalistic legal system.

a. Corruption

A patrimonialist regime generates a relatively low expectation that government officials will act honestly and in the public interest. This is because the concepts of public service and public office are alien to patrimonialism. Instead, an administrative position or office is regarded as a personal privilege granted or purchased from the king.²⁶ It is not surprising that even by the relaxed standards of the colonial era, the Portuguese enjoyed “an unenviable reputation for corruption.”²⁷ Because patrimonialism encouraged colonial administrators to view their office as a franchise for private gain, Brazilian history abounds with tales of corruption and dishonesty on the part of Portuguese officials.²⁸ Citizens could claim no rights in a patrimonial regime. Instead of public services, citizens sought favors from the government. These were dispensed on a personal basis, often in re-

CRATIC STATE (1980); E. WILLEMS, *LATIN AMERICAN CULTURE: AN ANTHROPOLOGICAL SYNTHESIS* 89-98 (1975). Patrimonialism is an archetypical form of political system in which a traditional sovereign, such as a king, either personally or through his administrative staff, determines all political and administrative decisions. The sovereign, however, gives up some of this absolute power by ceding to certain officials or private individuals special rights or privileges, in exchange for goods or services, thereby creating estates. In this form of organization, the “legal order is rigorously formal but thoroughly concrete and in this sense irrational. Only an ‘empirical’ type of legal interpretation can develop. All ‘administration’ is negotiation, bargaining, and contracting about ‘privileges,’ the content of which must then be fixed.” M. WEBER, *ON LAW IN ECONOMY AND SOCIETY* 263 (M. Rheinstein ed. 1967). See also 3 M. WEBER, *ECONOMY AND SOCIETY* 1010-42 (G. Roth & C. Wittich eds. 1968).

25. C. PRADO JUNIOR, *FORMAÇÃO DO BRASIL CONTEMPORÂNEO* 297 (1942).

26. E. WILLEMS, *supra* note 24, at 90.

27. Tyrawly to Newcastle in Public Record Office London, State Papers/Portugal 89/40, cited in D. ALDEN, *ROYAL GOVERNMENT IN COLONIAL BRAZIL* 209 (1968). In a dispatch from Lisbon dated Feb. 14, 1738, Lord Tyrawly reported:

The Portuguese, more than any other people adhere to that rule of Scripture, that a gift maketh room for a man, and it is incredible how a present smooths the difficulties of a solicitation; nay, they even expect it, and though the presents necessary are not considerable, since a few dozen bottles of foreign wine, or a few yards of fine cloth will suffice, yet this often repeated amounts of money.

Id.

28. See D. ALDEN, *supra* note 27, at 389; R. FAORO, *supra* note 24, at 172-75.

turn for graft.²⁹ One has only to recall the successful campaign slogan circulated about Adhemar de Barros when running for the governorship of São Paulo—"Rouba mas faz!" ("He steals but gets something done!")—to realize the persistency of this negative expectancy of public morality.

b. Bureaucratic Red Tape

Patrimonialism produced a superabundance of red tape, for the sovereign delegated no real decision-making powers to his colonial administrators. Their function was simply to execute royal commands. Seemingly interminable delays and endless red tape were produced by the exaggerated centralization of bureaucratic power in Lisbon. The extraordinary preoccupation with trivia by the Overseas Council (*Conselho Ultramarino*), the Lisbon-based administrative organ that superintended the Portuguese colonies from 1642 to 1808, was astonishing. The Council directly concerned itself with even the pettiest details of Brazilian life, such as the quality of wood used for crating sugar and sex life of slaves. As one of the most astute students of Brazilian colonial life put it:

Lisbon wanted to know about everything, and the Council was interested in everything, at least theoretically, for in practice the physical impossibility of attending to such an accumulation of paper work not only delayed dispatches, sometimes for decades, but also left a great number of cases to repose eternally in the drawers of the archives.³⁰

c. The *Ad Hoc* Administration of Justice

Patrimonialism produced a judicial system in Brazil that was essentially inefficient and venal. Lack of justice was a constant complaint, even though apparently well qualified magistrates were dispatched from Portugal to man the benches. Justice was regularly bartered like any other commodity, albeit delivered more slowly. Judicially collecting a debt was an extremely onerous, time-consuming, and expensive proposition, subject to many exceptions and much paperwork. The decisions of the magistrates were never really final, for everyone had the right to appeal any decision directly to the king, who dispensed justice as he saw fit that day. Supervision over the notaries and judicial clerks was practically nil. Since these offices were frequently leased or subleased, sometimes for more than the po-

29. E. WILLEMS, *supra* note 24, at 90.

30. C. PRADO JUNIOR, *supra* note 25, at 303. See also 2 W. FERREIRA, *HISTÓRIA DO DIREITO BRASILEIRO* 251 (1952).

sition's salary, the investment in the office was commonly recouped through acceptance of bribes. That most colonists preferred the justice of their own (or hired) hands, family or friends to that of the King's magistrates was hardly surprising.

Not even the laws regulating the conduct and qualifications of the magistrates themselves were observed. Although expressly forbidden by law to marry Brazilians, the Portuguese magistrates did so regularly. They also became involved with Brazilian colonists in business ventures that made some of the magistrates quite wealthy. Although the laws prohibited Brazilians from serving on the high courts and in other judicial capacities, in practice these statutes were continually bent to permit Brazilians to hold these posts.³¹

Much of the law that governed colonial Brazil was personalized and *ad hoc*. Laws and decrees were often tailored for a particular individual or situation and had no more universal application. Scanning the confused and contradictory mass of statutes, orders, opinions, regulations, *alvaras*, decrees, *cartas-de-lei*, edicts, and instructions, through which the sovereign transmitted his will to the Brazilian colony, one is amazed that the administrative machinery functioned at all.³²

These transmissions from Portugal supplemented the basic law,

31. S. SCHWARTZ, *supra* note 16, at 325-27.

32. Perhaps the best summary of the nature of Portuguese colonial rule is this description of two Belgian scholars:

The institutions in the Portuguese colonies were mostly copied from those of the metropolis, without being, however, adapted to their new destination. Administrative organization never proceeded according to a uniform plan: it was determined by the march of events. The duties of many officials, their hierarchy and relations of service, were not stipulated by laws or general rules, but by a mass of special decrees, some appointing functionaries for the places, others dealing with the solution of a transitory difficulty or the suppression of some abuse. Often the administrative machinery worked of itself, as a result of habit or routine, sometimes in accordance with the designs of the central government, other times against them.

If the Portuguese kings since the reign of John II (1481-95) had their lawyers who gave the laws of the kingdom the interpretation most suitable to the interest of the Crown, the colonial governors also had their own legal authorities, who furnished the texts with the meaning most favorable to the power of the chiefs who respectively employed them. It is certainly not an easy task to describe this administrative machinery, even when one knows the text of the laws and decrees which have organized it, which is not always the case; but it is still more difficult to explain their real working. It is frequently impossible to distinguish with certainty the laws that were applied from those which were not applied, or which were not applied as they ought to have been, and it is not without difficulty that we are enabled to define with precision the duties of the several authorities.

C. LANNOY & H. VANDERLINDEN, *HISTOIRE DE L'EXPANSION COLONIALE DES PEUPLES EUROPÉENS* 87-88 (1907), cited in M. OLIVEIRA LIMA, *THE EVOLUTION OF BRAZIL COMPARED WITH THAT OF SPANISH AND ANGLO-SAXON AMERICA* 57-58 (1914).

the *Ordenações Filipinas*, which was promulgated in 1603.³³ Although often referred to as the *Código Filipino*, the *Ordenações* was not really a code. Rather it was a compilation of prior compilations, which, in turn, had awkwardly amalgamated Roman law, the *forais*, customary usage, the Visigothic Code, the *Siete Partidas*, canon law, and the general legislation of Portugal since 1211. Much of its draftsmanship was unclear to begin with, and it became such a hodgepodge of overlapping and inconsistent amendments that a divining rod seemed as sure a guide to legal research as any other method. Nevertheless, the *Ordenações* remained the bulwark of Brazil's civil law until 1917, almost a century after independence and a full fifty years after Portugal had relegated the *Ordenações* to the statutory scrapheap.

2. *Lei da Boa Razão* (Law of Good Sense)

In the *Lei de Boa Razão*, enacted in 1769, the Portuguese bequeathed to the Brazilians a canon of statutory interpretation that was a precursor of the *jeito*. This law made decisions of Portugal's highest court a source of law with binding precedential value.³⁴ It also directed the judiciary to apply Roman law to fill legislative lacunae only when it accorded with "good human sense." "Good human sense," at least as defined by the statute, meant consistent with natural law, perceived as Roman ethical ideals formally recognized by the legal rules and practices of Christian nations.

In practice, the *Lei da Boa Razão* encouraged judges and lawyers to look to common sense, custom, comparative legislation, and the spirit of the law as the basis for decision when the *Ordenações* was unclear or omissive, which was often the case. The *Lei de Boa Razão* substantially increased the doctrinal freedom and legal discretion of the Brazilian judiciary and bar at the expense of Roman law and Portuguese statutory law. Orlando Gomes, one of Brazil's leading civil law scholars, has suggested that the secret of the longevity of the *Ordenações* in both Brazil and Portugal can be traced to its wealth of omissions, coupled with so flexible a source of subsidiary law as good sense.³⁵ Thus the Brazilian practice of reinterpreting laws in the light of good sense had a spiritual ancestor in the *Lei da Boa Razão*.

33. The Portuguese legal labyrinth was similar to that prevailing in the Spanish colonies, although somewhat more confusing. After 1680 the Spanish colonies at least had the benefit of the *Recopilación de Leyes de los Reynos de Indias*, an official compilation of more than 6,300 laws and regulations affecting colonial life. Brazilians lacked even this crude sort of official compilation.

34. 1 C. TRIPOLI, *supra* note 10, at 155-57.

35. Gomes, *Historical and Sociological Roots of the Brazilian Civil Code*, 1 INTER-AM. L. REV. 334 (1959).

3. The Weakness of Portuguese Control

With a population estimated at only one million in the fifteenth century, Portugal lacked sufficient manpower to enforce rigid controls over its widespread empire. Moreover, the Portuguese Crown refused to spend sufficient funds in Brazil to create the infrastructure necessary for effective law enforcement. Whereas Spanish rule over much of the New World was facilitated by the prior existence of tightly controlled, autocratic Indian civilizations, the Portuguese had no such base upon which to build in Brazil.³⁶ While in Portugal power became increasingly centralized in the hands of the king, power in Brazil became increasingly decentralized in the hands of large landowners. Initially, Portugal ceded more extensive jurisdictional powers to Brazil's original colonizers than did other colonial powers and subsequently had greater difficulty reasserting royal authority over the great landholders.³⁷ Particularly in the backlands, Portuguese administration was ineffective. Justice (what there was of it) was in practice administered by *coroneis* (colonels), large landowners who controlled the military in their area.³⁸ Gilberto Freyre summarized the prevailing relationship succinctly: "Over [Brazil's colonial aristocracy] the King of Portugal may be said, practically, to have reigned without ruling."³⁹

While the Portuguese never enshrined in positive law the celebrated Spanish administrative formula for not enforcing inconvenient royal edicts—"I obey but do not comply",⁴⁰ in practice the same

36. W. PIERSON & F. GIL, *GOVERNMENTS OF LATIN AMERICA* 70 (1957); E. BURNS, *A HISTORY OF BRAZIL* 16 (1970).

37. See E. LAHMEYER LOBO, *PROCESSO ADMINISTRATIVO IBERO-AMERICANO* 454-58 (1962). The text of one of these extensive grants appears in English translation in E. BURNS, *A DOCUMENTARY HISTORY OF BRAZIL* 33-50 (1966).

38. The Crown tried to curb their excesses at the end of the 17th century by enacting legislation appointing resident magistrates every five leagues, as well as restricting the terms of office of local military leaders, but the law understandably went unenforced. C. BOXER, *THE GOLDEN AGE OF BRAZIL* 307 (1964).

39. G. FREYRE, *THE MASTERS AND THE SLAVES* 27 (1946).

40. Law 24, Book II, title 1 of the *Recopilación* expressly recognized the right of Spanish viceroys and other officials to stay the execution of orders where special circumstances rendered their implementation inopportune. Writing in 1616, the great Spanish jurist, Castillo de Bavidilla, explained the reasoning underlying this formula:

By laws of these realms it is provided that the royal provisions and decrees which are issued contrary to justice and in prejudice of suitors are invalid and should be obeyed and not executed. . . and the reason for this is that such provisions and mandates are presumed to be foreign to the intention of the Prince, who as Justinian has said, cannot be believed to desire by word or decree to subject and destroy the law established and agreed to with great solicitude.

Noted in C. HARING, *THE SPANISH EMPIRE IN AMERICA* 114 (Harbinger ed. 1963).

There were clearly limits as to how much administrators could get away with under this

principle was widely applied.⁴¹ Indeed, it is fair to state that the principle of noncompliance was institutionalized.⁴²

Several other factors contributed to the weakness of Portuguese administrative control over Brazil. Portugal punished serious crimes with exile to Brazil, making the colony a dumping ground for social misfits, whose respect for law and order was attenuated prior to arrival. In contrast with the English colonies, relatively few colonists came to Brazil with any domicilliary intent. Most came with the intention of reaping riches rapidly and returning posthaste to Portugal.⁴³

Portugal's strict mercantilist policies and heavy taxation gave Brazilians strong economic incentives to avoid compliance. Tax evasion and smuggling became a way of life not only in Brazil, but also in Portugal.⁴⁴

Even if Portuguese law had been clear and appropriately designed for Brazilian conditions, and the colonial authorities had been inclined to enforce it, a gap between the law on the books and practice would certainly have resulted from the lack of effective communications. One of the most striking features of Brazil is the enormity of its land mass, which is larger than the continental United States and twice that of Europe excluding Russia. Littoral areas are cut off from the interior by sheer cliffs. Even today, roads are few and far between. Given the extreme precariousness of communications, decisionmakers have had to fall back on improvisation.

E. Lack of Civic Responsibility and Personalismo

The Portuguese handed down to the Brazilians a weak sense of loyalty and obligation towards the society in which they lived, and a strong sense of loyalty and obligation towards family and friends. In comparing the Portuguese character with the Spanish, Marcus Cheke noted:

[A] trait that is common to both peoples is their lack of what

formula, although a great deal obviously slipped by. See Phelan, *Authority and Flexibility in the Spanish Imperial Bureaucracy*, 5 *AD. SCI. Q.* 47, 59 (1960).

41. See E. LAHMEYER LOBO, *supra* note 37, at 434-44; M. KIEMAN, *THE INDIAN POLICY OF PORTUGAL IN THE AMAZON REGION: 1614-1693* (1954).

42. E. WILLEMS, *supra* note 24, at 93.

43. G. FREYRE, *supra* note 39, at 85-86. After 1680, the caliber of colonists improved markedly because some of Portugal's better families fled to Brazil to avoid Spanish subjugation. Manchester, *The Rise of the Brazilian Aristocracy*, 11 *HISP. AM. HIST. REV.* 145, 147 (1931).

44. E. WILLEMS, *supra* note 24, at 97-98. Toward the end of the 18th century, the French consul estimated that at least one-tenth of Lisbon's total population made their living from contraband. *Notations générales sur le commerce de Portugal par/consul/Helfflinger* (1786), noted in D. ALDEN, *supra* note 27, at 389.

may be termed "civic sense." Even more than the Spaniard, the Portuguese is kind and charitable to five categories of persons: to his family, to his friends, to the friends of his family, to the friends of his friends, and lastly, to the beggar in his path. But to other fellow citizens he acknowledges little obligation.⁴⁵

The proposition that the law should be applied even-handedly and impersonally to all citizens conflicts with this Portuguese heritage. The dominant attitude is reflected in the familiar Brazilian adage: *Para os amigos tudo, para os indiferentes nada, e para os inimigos a lei* (For friends, everything; for strangers, nothing; and for enemies, the law). Family and friendship ties very frequently impose on Brazilian bureaucrats the duty to bend the law; the duty to execute the law in unbent form is usually relegated to a lesser plane. As a preeminent student of national character has explained: "[T]he basic Brazilian personality. . . stresses direct personal relations, based upon liking rather than unconditioned, impersonal, practical relations. Personal liking is above the law."⁴⁶

F. Profound Socio-Economic Inequality

From its inception, Brazilian society has been characterized by profound socio-economic inequality. The initial colonization scheme was the ill-fated captaincy system, which began the pattern by conveying enormous areas of land and effective sovereignty over these areas to a dozen nobles. The pattern was continued in the socio-economic system of the *fazendas*, large agrarian estates that still dominate much of the Brazilian countryside. To this day income is highly concentrated in Brazil, with a huge gulf separating the small upper class and the burgeoning middle class from the great mass of the population.⁴⁷

This profound socio-economic inequality has been accompanied by *de facto* juridical inequality. Brazil has always had one law for its elite and a very different law for its masses. Despite the constitutional rhetoric of equality, in Brazil, as in much of the world, one's

45. *The Portuguese Character*, in PORTUGAL AND BRAZIL 42, 45 (H. Livermore ed. 1953).

46. J. RODRIGUES, *THE BRAZILIANS: THEIR CHARACTER AND ASPIRATIONS* 57 (1967).

47. According to 1970 census data, the top 5% of Brazil's population received 36.3% of the nation's income, while the bottom 40% of the population earned only 9%. W. BAER, *THE BRAZILIAN ECONOMY* 105 (2d ed. 1983). According to the most recent income data, in 1982 about 41% of the economically active population earned the minimum wage (roughly U.S. \$80 to \$100 per month) or less, while only 10.29% earned more than five times the minimum wage. Less than 1% earned more than 20 times the minimum wage. National Research by Sampling of Homes (PNA). *Jornal do Brasil*, Nov. 11, 1983, 1st cad., at 13, cols. 1-3.

status and connections are critical variables governing actual application of the law.⁴⁸ Particularly in dealings with the bureaucracy and the police, the rules applied to the upper and middle classes differ from those applied to the lower class. Vestiges of this class discrimination can still be found in formal legal structure, such as the requirement that educated persons be detained in special jails.⁴⁹

G. Sentimentalism

A corollary of the emphasis on direct personal relations is the *coitado* complex, the compassion and sympathy that Brazilians so readily extend to those in unfortunate circumstances. If forced to opt between helping someone whom he pities and respecting a rule of law, the Brazilian frequently ignores the law. Emilio Willems, an anthropologist with extensive field work in Brazil, has observed that the Brazilians sympathetically tolerate and accept human frailties. A lawbreaker, particularly when a juvenile or a person motivated by jealousy or vengeance, is often treated as a *coitado* (a poor soul) by the public, and helped to escape.⁵⁰

The *coitado* is someone to be befriended, and once befriended, that direct, personal obligation rises above an impersonal, abstract legal norm. This national sentimentalism tends to soften the law's rigors and to multiply instances of the *jeito*.

H. The Art of Compromise

"The key to Brazil's success in developing a strong, modern, and humane society in tropical America has been its talent for compromise."⁵¹ This ability to conciliate and compromise has been developed into an art and a tradition by the Brazilians. This may have resulted from the natural obstacles encountered in colonizing such a vast territory with so few people and so little might.⁵² The Portuguese were never able to impose their rule on the Indians and settlers with the forcefulness and absolutism of the Spanish. They were also

48. See R. DA MATTA, CARNAVAIS, MALANDROS E HERÓIS 139-93 (2d ed. 1980).

49. Code of Criminal Procedure, Art. 295 (1941).

50. Willems, *Portuguese Culture in Brazil, Proceedings of the International History of Latin American Civilization Colloquium on Luso-Brazilian Studies* (1953), reprinted in 1 HISTORY OF LATIN AMERICAN CIVILIZATION 51, 57 (L. Hanke ed. 1967). This is, however, less likely today to be true than it was at the time Willems wrote. Now public unhappiness with the high urban crime rate has made lynching, another form of the *jeito*, an increasingly common public reaction to serious crime.

51. G. FREYRE, NEW WORLD IN THE TROPICS 7 (1st Vintage Ed. 1963).

52. J. RODRIGUES, CONCILIAÇÃO E REFORMA NO BRASIL 23-24 (1965). Vianna Moog has suggested that the true origin of the *jeito* lies in the Brazilian's need to conquer the overwhelming natural obstacles by subtlety and indirection. BANDEIRANTES E PIONEIROS 258-59 (8th ed. 1966).

far less concerned than the Spanish with drawing color lines or theological orthodoxy.⁵³ Brazil's history is replete with examples of crises surmounted by resort to good sense and compromise instead of strict adherence to the law or abstract philosophic doctrine.⁵⁴ One celebrated example was the 1840 coronation of Dom Pedro II at the age of fourteen in blatant disregard of the Constitution, which required that Brazil's monarch be at least eighteen years old.⁵⁵ Although Brazilian history is not without its episodes of violence, the country has been spared the splintering and bloody revolutions that have characterized the history of much of Latin America.⁵⁶ The *jeito* can be viewed as one manifestation of this proclivity, inherited from the Portuguese, for finding pragmatic solutions to thorny problems.

III. THE LEGAL CULTURE: PATERNALISTIC, LEGALISTIC AND FORMALISTIC

A. Paternalism

The paternalism that stemmed from the Portuguese monarchy, the Catholic Church, and the extended patricarchal family still permeates Brazilian society. It is commonly expressed in the *patrão* (patron) complex of traditional Brazil. In return for fealty and service, the *patrão*, a member of the local elite, customarily looks after the interests of his employees, tenants, or debtors. The *patrão* plays the role of protector, interceding with the authorities when any of his flock is in trouble.⁵⁷ This aspect of the *patrão* system serves to personalize and particularize legal relations for the lower class. The ultimate *patrão* is the state, from which the Brazilians seem to expect just about everything "from jobs, credit, high wages, health care, to economic stability, and subsidies for carnival masquerades."⁵⁸

Authority is tightly concentrated in Brazil, and is delegated most reluctantly. As with many developing countries, almost all decisions, even the most petty, must come from the top. A typical complaint is that of Jarbas Passarinho, former Minister of Education, that no sooner had he taken office than his subordinates began appearing with "urgent" documents that required his signature: permission to

53. E. WILLEMS, *supra* note 24, at 147.

54. See generally J. RODRIGUES, *supra* note 52.

55. E. BURNS, *supra* note 36, at 122-23.

56. Keith, *The Nonviolent Tradition in Brazilian History: A Myth in Need of Explosion, and Love*, *Commentary in CONFLICT AND CONTINUITY IN BRAZILIAN SOCIETY* 231 (H. Keith & S. Edwards eds. 1969).

57. See C. WAGLEY, *AN INTRODUCTION TO BRAZIL* 106-11 (1963).

58. Willems, *Brazil*, in *THE INSTITUTIONS OF ADVANCED SOCIETIES* 525 (A. Rose ed. 1958).

unload 156 pieces of paper and a lease of a home for an inspector of secondary education in the Northeast.⁵⁹ Helio Beltrão, Planning Minister in the Costa e Silva regime and until recently Minister of Debureaucratization, has observed:

The concentration of the power of decision at the highest levels was, and still is, the most serious ill of the country's administrative organism. The repugnancy for delegation has been responsible for the incredible delay in solving the most routine matters, . . . for the interminable routing of processes for "higher consideration," and, in the final analysis, for the demoralization of those governing, who see themselves separated from the governed by a veritable bulwark of paper.⁶⁰

The long waiting period during which documents wend their way to the top encourages resort to the *jeito*.

Historically, elites have paternalistically bestowed constitutions and laws upon the Brazilian populace with little regard or awareness of the desires and capabilities of those governed.⁶¹ Instead of being the product of popular pressures, an objective fact-finding study, or a crystalization of custom, legislation is usually the product of what a small group imagines would be ideal for the people. Thus, the labor legislation that the Vargas regime enacted in the late 1930s and early 1940s paternalistically granted many benefits and protections to the worker that have been the object of extensive struggles by labor movements in other parts of the world. Paid vacations, maternity benefits, job security, minimum wages, special treatment for women and children, health and sanitary conditions on the job, were all granted to employees in the Consolidated Labor Laws. Instead of creating a strong, independent labor movement, this legislation turned the labor movement into a ward of the state. To this day labor has remained dependent on the Ministry of Labor and the labor courts to secure wage increases, better working conditions, and enforcement of the labor laws, many of which have been more breached than honored.⁶²

59. *Realidade* of Mar. 1970, at 36.

60. Quoted in *O Globo*, Aug. 24, 1970, at 23.

61. I O. VIANA, *INSTITUIÇÕES POLÍTICAS BRASILEIRAS* 30, 149 (2d ed. 1955). The same point has been made with respect to Latin America generally. Busey, *Observations on Latin American Constitutionalism*, 24 *THE AMERICAS* 46 (1967).

62. Perhaps the most circumvented provisions have been the tenure and minimum wage provisions. Since a worker could not be fired after ten years of service except for grave fault, duly proven before the labor courts, employers routinely discharged workers just before completing the tenth year of service. When the labor courts began to treat nine and a half years as equivalent to ten to prevent the practice, employers simply discharged employees sooner. Expo-

The disparity between the government's and the people's views of what is best has made Brazilians prone to act according to an old adage—*manda quem pode, obedece quem quer* (he who can, commands; he who wants to, obeys).

B. Legalism

Brazilian legal culture is highly legalistic; society places great emphasis upon seeing that all social relations are regulated by comprehensive legislation. Brazilians feel that new institutions or practices ought not be adopted without prior legal authorization. As has been said with reference to German legalism, Brazil has a "horror of a legal vacuum."⁶³ The country has reams of laws and decrees regulating with great specificity every aspect of Brazilian life, as well as some aspects of life not found in Brazil. It often appears that if something is not prohibited by law, it must be obligatory.

Another facet of this legalistic mentality is the tendency to regard as done that which is enacted into law. Brazil inherited from Portugal the naive faith that almost any social or economic ill can be cured by legal prescription. Brazil has continually repeated the colonial pattern of Spain and Portugal by enacting laws with little regard for the prospects of enforcement. Unenforceable laws have typically been remedied by new laws, most of them equally unenforceable. The persistence up to the present of the assumption that all problems can be solved on a legal level is remarkable.⁶⁴ Whether the society is willing

sition of Motives of the Law of the Fund of Guaranty of Service, Law 5.107 of Sept. 13, 1966; R. ALEXANDER, *LABOR RELATIONS IN ARGENTINA, BRAZIL, AND CHILE* 121-22 (1962). As in many countries, minimum wage legislation has been impossible to enforce in Brazil, particularly in the interior. Employees are frequently obliged to sign a paper indicating that they have been receiving the legal minimum to satisfy the regional labor inspector, but it is an open secret that many workers receive less. Even the federal government itself has been known to pay less than the minimum wage.

63. H. SPIRO, *GOVERNMENT BY CONSTITUTION* 184 (1959).

64. E. WILLEMS, *supra* note 24, at 173. See also Viera, da Costa, & Barbosa, O "jeitinho" brasileiro como um recurso de poder, 16 REV. AD. PUB. 5, 18 (abr/jun. 1982). Roberto de Oliveira Campos, former planning minister and chief architect of President Castelo Branco's economic program, once satirized the country's legalistic mentality by suggesting the following bill to reduce the nation's high interest rates despite the acute inflation and great shortage of credit:

Decree Law No. 001—Regulates the Law of Supply and Demand and prohibits the scarcity of money or merchandise.

Article 1.—The Law of Supply is maintained.

Article 2.—The Law of Demand is repealed.

Article 3.—The natural or artificial scarcity of money or any other merchandise is permanently prohibited.

Article 4.—The just profit shall be equal to 10 percent per annum, because we are all born with ten fingers on our hands.

and able to shoulder the costs of enforcement is seldom a suitable topic for discussion.

Lawmakers are generally not content to set forth desired conduct in general terms. They seem driven to try to anticipate and regulate all possible future occurrences with detailed, comprehensive, and occasionally incomprehensible legislation. Situations that should be left to judges or administrators in other countries to work out on a case-by-case basis under the rubric of "reasonableness" are preordained by statute. For example, the Law of Directives and Bases of National Education⁶⁵ attempts to spell out the nature and structure of primary, secondary, and university education for all of Brazil. The statute establishes uniform curricula, schedules, and programs for the entire country. Article 92 states: "The Union shall apply annually for the maintenance and development [of education] 12 percent of its tax receipts, and a minimum of 20 percent for the States, Federal District and the Counties." With good reason, provisions of this type have seldom been honored. This legislative style reflects a deep-seated mistrust of those administering and interpreting the laws, as well as the entire legalistic and codifying tradition of the civil law, which exalts certainty as a supreme value.⁶⁶

Evidence of legalism can be found everywhere. Little stands on street corners sell copies of the latest laws. Questions such as whether a particular student was properly failed or which professor won a competition to be a chair professor are regularly litigated, even carried to the nation's highest court.⁶⁷ A separate court system has been set up to resolve disputes growing out of sporting events, particularly soccer matches. Even when behaving arbitrarily and unconstitutionally, Brazilian governments feel compelled to go through a legalistic charade.⁶⁸

Os Pseudojuristas, in *ENSAIOS CONTRA A MARÉ* 47, 50 (1969).

65. Law No. 4.024 of Dec. 20, 1961.

66. J. MERRYMAN, *THE CIVIL LAW TRADITION* 50-51 (1969). See generally H. SPIRO, *supra* note 63, at 211-36.

67. *E.g.*, *União Federal v. Camin*, RE 56.595, 33 RTJ 738 (S.T.F. 1965); *União Federal v. Rocha Castro*, RE 59.496, 40 RTJ 492 (S.T.F. 1966).

68. For example, when the Vargas regime confiscated the estate of Paul de Leuze, a wealthy French newspaper owner, whose sole heir was a nephew, the government did not simply appropriate the estate; the wealth transfer was "legalized" by enactment of a statute retroactively disinheriting any nephew claiming as an heir, thereby producing an escheat. See K. LOEWENSTEIN, *BRAZIL UNDER VARGAS* 46-49 (1942). Similarly, when Costa e Silva suffered an incapacitating stroke in 1969, the reins of government were lifted by a junta of the heads of the armed forces, despite the constitutional provision for succession by the vice president (in this case a civilian). The official explanation given was that there had been no "succession" in the constitutional sense. The junta was merely acting as attorneys of the stricken president. This extra-legal takeover was then "legalized" by Institutional Act No. 12 of Aug. 31, 1969, the 12th of a series of 17 such measures promulgated by fiat of the military group that assumed the

Legalism has contributed to the *jeito's* popularity in two ways: it has led to an abundance of regulatory legislation, and a failure to build sufficient flexibility into that regulation. The *jeito* can be viewed as a legalistic response to both problems.

C. Formalism

Closely related to legalism is the exaggerated concern with legal formalities. Every nation has some formalistic behavior, but Brazilian concern with authenticity and verification is both impressive and oppressive. For example, prior to 1980, ensuring that a power of attorney executed in the United States would be given legal effect for the purpose of transferring real property in Brazil required the following seven procedures:

(1) execution of the power of attorney before a notary in the United States, (2) authentication of the notary's signature with the clerk of the local court, (3) authentication of the signature of the clerk of the court before the Brazilian consul in the United States, (4) authentication of the Brazilian consul's signature with the Foreign Office in Brazil,⁶⁹ (5) translation of the power into Portuguese by an official translator, (6) registration of the power with the Registry of Instruments and Documents, and (7) registration of the power with the appropriate Registry of Real Property.

Foreigners may be validly divorced abroad, but before Brazilian officials will accord the foreign decree any validity, the document must be translated by the Foreign Office and homologated by the Supreme Federal Tribunal. Cashing a traveler's check at a government bank requires presentation of one's passport or identity card, supplying a local address and telephone number, signing numerous copies of a form, which is then typed up, stamped, and initialed by a regiment of bank clerks. Although the government has streamlined the process somewhat as part of an energetic campaign to stimulate exports, securing an export license in 1981 was reported to involve 1,470 separate legal actions with thirteen government ministries and fifty agencies.⁷⁰ Even registering to vote may take weeks to secure the approvals of a dozen different governmental agencies. Then one must prove that one has been registered to vote in every previous place of

duties of a continuous constitutional convention in the name of the revolution.

69. This exigency was eliminated by a debureaucratization measure, Decree No. 85.541 of Jan. 31, 1980.

70. Freed, "Brazil Bureau Is Battling Bureaucracy," *Miami Herald*, May 15, 1981, at 9c, cols. 3-6.

residence. Moreover, oftentimes an approval from one government agency expires before all other necessary documentation is in order, requiring one to begin the process anew.

The presumption appears to be that every citizen is lying unless he produces written, documentary proof that he is telling the truth. The formal legal system, whether ascertaining criminal guilt or issuing employment benefits, displays a decided tendency to believe only documents and not people. Helio Beltrão's personal experience as Planning Minister bears this out well. A decree which he submitted to the President for consideration in 1968 was perceived as scandalous because it abolished the requirement that an official document certifying one is alive be presented by anyone personally appearing at the appropriate government department to collect his pension. The formalistic legal system was far more comfortable with documentary proof that the person at the window was indeed alive.⁷¹

Another facet of formalism is the obvious discrepancy between conduct and the legal rules designed to regulate such conduct. Brazilians commonly refer to laws in much the same manner as one refers to vaccinations: there are those that take, and those that do not.⁷² It was only partly in jest that Capistrano de Abreu, one of the nation's most distinguished historians, proposed, as a panacea for Brazil's ills, passage of the following law:

Article 1. The law shall be obeyed.

Article 2. All dispositions to the contrary shall be revoked.⁷³

Many factors explain the prevalence of formalism in Brazil, and indeed for much of Latin America as well. Independence brought little relief from legislation ill-suited to the demands of Brazilian society. In general, Brazilian laws have not been autochthonous; most have been imported wholesale from Europe or the United States with little, if any, consideration given to their suitability for transplantation to Brazilian soil.

The failure to tailor laws to Brazilian needs is largely attributable to the legislative process. Most Brazilian legislation has been drafted

71. *O Globo*, Aug. 24, 1970, at 23.

72. Francisco Campos, Vargas' durable Minister of Justice, was reported to have responded to the criticism that a new law was identical to one that Campos himself had written only a year earlier, by saying: "There is no harm done, my son. We are going to publish this one now because the other did not take." *Correio da Manhã*, Dec. 11, 1966, 4th cad., at 3. Roberto Campos, economic czar in the Castelo Branco regime, is also reputed to have adhered to the same approach. Viera, da Costa & Barbosa, *supra* note 64, at 18.

73. *Jornal do Brasil*, Oct. 18, 1967, 1st cad., at 6.

by distinguished jurists or law professors in an atmosphere far removed from the clamor of special interest groups. The draftsmen have typically consulted the various solutions to the problem that have been enacted abroad and tried to select one that, as an abstract proposition, appears best, rather than seek a rule that crystallizes custom or practice. Seldom has there been a fact finding inquiry about the peculiarly Brazilian nature of the economic, social, political, or administrative problems involved. Disputes among jurists and professors about the rule being adopted are frequent, but these are typically technical, doctrinal disputes. The end product of this process has been the legislation of idealized standards of behavior, continuing a tradition that harks back to Portugal's adoption of Roman law.

1. Legal Science and Legal Education

Brazilian legal education has been overwhelmingly formalistic. Almost exclusive emphasis has been placed upon classical exegesis of the formal legal text. Little effort has been devoted to examination of how particular rules function in practice. Legal study has been focused on understanding rules of law and has ignored the conduct of the persons affected by these rules.⁷⁴

Legal science has heavily influenced many, though by no means all, of Brazil's lawyers. Generations of Brazilian law students have been taught that law is a science, and that the task of the legal scientist is to analyze and elaborate principles that can be derived from a careful study of positive legislation into a harmonious, systematic structure. The components of this system are believed to be purely legal, a set of ultimate truths related by rigorous deductive logic. Hence, the legal scientist's inquiry is almost exclusively directed towards the legal rule. Although he may pay lip service to facts derived from nonlegal disciplines such as anthropology, sociology, political science, or economics, the legal scientist actually ignores nonlegal facts because they detract from his search for absolute principles and

74. The prevailing attitude is stated in a classic introductory text by a former member of Brazil's highest court:

Obedience to the juridical order is not conditioned on the opinion or the acquiescence of the subject: *lex iubet, aut vetat*. The relation between rule and conduct is subordination, not causality. The juridical imperative is, as defined by B. Somlo, "the expression of will that is directed to the behavior of a third party, without worrying about whether this third party is disposed to abide by it."

H. LIMA, INTRODUÇÃO A CIÊNCIA DO DIREITO 35 (15th ed. 1966). See generally Steiner, *Legal Education and Socio-Economic Change: Brazilian Perspectives*, 19 AM. J. COMP. L. 39 (1971); Rosenn, *The Reform of Legal Education in Brazil*, 21 J. LEGAL EDUC. 251 (1969).

the true nature of legal institutions.

Viewing law as a science and legal education as a means of dogmatically imparting the true meaning of legal rules has led to a divorce between the formal legal system and actual conduct. One of Brazil's leading jurists, the late Santiago Dantas, perceived the problem clearly in a seminal address calling for a reform in legal education:

In the study of abstract legal rules presented as a system one can easily lose the sense of the social, economic, or political relationship the law is intended to control. The legal system has a logical and rational value, autonomous, so to speak. The study we make of this system, with strictly deductive and *a priori* methods, leads to a condition of self-sufficiency which enables the jurist to turn his back on the society and lose interest in the matter regulated as well as in the practical significance of the legal solution.⁷⁵

2. Strategies for Promoting or Avoiding Social Change

There is more to formalism, however, than legal science and the superimposition of imported forms ill-suited to Brazilian needs. In certain instances formalism may be a conscious strategy for promoting social change. This thesis has been elaborated by Guerreiro Ramos, who argues that in the Brazilian historical context, formalism has been an important strategy adopted by the elite in order to forge a nation.⁷⁶ In his view, "Formalism is not a bizarre characteristic, a sign of social pathology. . . , but a normal and regular fact that reflects a global strategy of [transitional] societies through which they attempt to move beyond their current stage."⁷⁷ Given the rudimentary state of Brazilian society in the nineteenth century, any institutional framework that the architects of the legal system wished to adopt was necessarily formalistic.

Many of the legal institutions that the elite imported had essentially hortatory and aspirational functions. Although Brazil may have lacked the social and political infrastructure that would allow the constitutional system imported from the United States to function in 1891, the hope was that Brazilian society would evolve sufficiently to convert the constitutional theory into practice. While persuasive, Guerreiro Ramos' theory is unsupported by historical evidence.

75. *A Educação Jurídica e a Crise Brasileira*, 13-14 *REV. JURÍDICA* 7, 18 (1955).

76. *Supra* note 6, at 387-93.

77. *Id.* at 365.

Whether supportive evidence will ever be adduced is uncertain.⁷⁸

Conversely, one can argue that there are cases where formalism has been adopted as a conscious strategy for averting social change. In Brazil, as in a great many developing nations, it is frequently easier and less socially divisive for opponents of legislation aimed at effecting fundamental changes in the society to prevent implementation rather than enactment. Proponents of basic reforms are accorded a symbolic victory, but in practice nothing changes because supporters of the status quo have sufficient political and economic power to defeat the reform at the administrative level.

In 1964, the Brazilian Congress passed an elaborate and largely unintelligible land reform statute,⁷⁹ similar in many respects to the bill that the Congress had rejected a year earlier when Goulart had occupied the presidency. The law's passage was assured by confidence that the new military government would leave land reform at the formalistic level. This confidence was not misplaced. In the years since enactment, there has been much study, a constitutional amendment, more legislation, and the creation and abolition of administrative agencies to deal with the problem, but little land reform.⁸⁰

IV. THE BUREAUCRATIC IMBROGLIO

Intertwined with the problem of formalism and essential to a comprehension of the persistence of the *jeito* is the nature of the Brazilian bureaucracy. Historically, the bureaucracy has served as a means of employing educated persons whom the private sector could not absorb. This practice has imparted a "make work" character that has continued to the present day. Since the late 1930s, when the first Vargas regime began to intervene earnestly in the operation of the economy, the proliferation of New Deal-like governmental agencies has greatly swollen the bureaucratic ranks. It appears that the most favored solution to any given problem is the creation of a new agency to deal with it. The recent proliferation of governmental agencies is truly astonishing. Each agency accumulates staff and soon acquires a vested interest in maintaining, if not enlarging, its own area of supervision. It is not uncommon for the jurisdiction of a new agency to overlap with that of an existing agency. Each agency is a law unto

78. The same difficulty surrounds this theory as advanced for other Latin American countries. See Busey, *supra* note 61.

79. Law No. 4.504 of Nov. 30, 1964.

80. M. CEHELKY, LAND REFORM IN BRAZIL: THE MANAGEMENT OF SOCIAL CHANGE 223-25 (1979). According to a report recently submitted to SUDENE, the principal development agency for the Northeast, landholding in the Northeast has become increasingly concentrated since enactment of the land reform law. *Jornal do Brasil*, Nov. 16, 1983, 1st cad., at 7, cols. 1-2.

itself; one agency sometimes vetoes permissions or projects approved by another.

As in most developing nations, there are critical shortages of well-trained personnel and equally critical surpluses of unemployed or under-employed persons. Voters are easily attracted by the promise of governmental jobs, and the Brazilians have kindly refrained from dismissing civil servants when regimes change. Despite longstanding civil service legislation providing for selection on the basis of competitive examinations, positions have historically been filled by the *pistolão* (literally, the big gun; hence, anyone who uses his power and influence on behalf of others). In 1969, it was estimated that a maximum of 89,000 out of the approximately 500,000 in the federal service, or about 17.8 percent, had entered by merit examinations,⁸¹ a sad indication that the civil service law⁸² is simply another of the many statutes that "have not taken."

Political clientage, which began under the *patrão* system of traditional rural Brazil, still dominates the bureaucratic structure.⁸³ One who owes his job to political clientage is more likely to do favors for family or friends. Moreover, the influx of large numbers of untrained and unqualified personnel has itself generated more red tape, partially to give superfluous employees something to do, and partially to diffuse responsibility so that fixing blame for incompetence becomes more difficult. Attraction and retention of top-flight talent has been seriously hampered by low governmental salaries that have not kept pace with inflation and increasing competition from the private sector.⁸⁴ Large numbers of civil servants have at least one other daytime job; many show up only to collect their paychecks.

Bureaucratic practices are designed to promote administrative inefficiency. Many departments are open only a few hours a day, and a multiplicity of documents is required to substantiate any claim. Official documents usually require stamps, which must be purchased elsewhere than the agency processing the documents. Governmental forms must be purchased separately from commercial stationers; until the late 1960s, even income tax returns had to be purchased.

81. Lambert, *Trends in Administrative Reform in Brazil*, 1 J. LAT. AM. STUD. 167, 181 (Pt. II, Nov. 1969). Circumvention of civil service requirements was particularly blatant when Kubitscheck and Goulart were in power; attempts were then made to bestow permanent status on thousands of temporary employees. See Siegel, *The Strategy of Public Administration Reform: The Case of Brazil*, 26 PUB. AD. REV. 45, 52-53 (1966).

82. Law No. 284 of Oct. 28, 1936.

83. See Pearse, *Some Characteristics of Urbanization in the City of Rio de Janeiro*, in URBANIZATION IN LATIN AMERICA 191, 202 (P. Hauser ed. 1961).

84. Between 1974 and 1982, salaries of federal government employees declined 41% in real terms. In 1983, federal salaries rose only 78.7% in the face of an inflation rate of 211%. *Jornal do Brasil*, Dec. 18, 1983, 1st cad., at 33, col. 1.

Processing fees often must be paid at commercial banks and the receipts presented to the processing agency. Typically, Brazilians needing governmental authorizations or documents are compelled to go from one agency to another, enduring many slow-moving lines before arranging all the necessary pieces of paper and stamps. Citizens are then often forced to wait weeks, months, or years while the process is sent up for "higher consideration."⁸⁵

In this setting it is relatively simple for civil servants to rationalize levying direct taxes upon those members of the public requiring their services. Brazilians complain, and not without justification, that "*êles criam dificuldades só para vender facilidades*" (they create difficulties only to sell solutions).

A. The *Despachante*

The *jeito* normally operates hand in glove with another Brazilian institution, the *despachante* (roughly, an expeditor), who has counterparts in many nations. The omnipresent *despachante*, who lubricates Brazil's sticky administrative process, has become a thriving, specialized professional, complete with his own union and competitive examinations. Some *despachantes* handle only customs matters; others specialize in police work, naturalization, auto licenses, marriages, or "legalization of real estate."⁸⁶ In 1970, the yellow pages of Rio's phone book contained more than 300 separate listings for *despachantes*.

The *despachante* is an intermediary who, in return for a commission or fee, purchases and fills out the multiplicity of legal forms, delivers them to the proper persons, and extracts the needed permission or document. Even when a *despachante* is not legally required, it is often impossible to secure anything quickly from the bureaucracy without one. Securing necessary documents can be so difficult

85. Peter Bell, former President of the Inter-American Foundation, relates the experience of a professor from Minas Gerais who waited ten years for a tax refund and then made the diabolically magnanimous gesture of donating to the government the entire refund, by this time a trifling sum because of inflation. The startled tax official pleaded earnestly with the professor to forego his civil gesture, for the procedure to enable the treasury to accept the gift was equally lengthy and involved. *Brazil*, in *TOWARDS STRATEGIES FOR PUBLIC ADMINISTRATION IN DEVELOPMENT IN LATIN AMERICA* 89, 92 (J. Honey ed. 1968).

86. *Despachantes* who arrange for the importation and exportation of goods have long enjoyed a legal monopoly. Only those authorized by presidential decree and their assistants may process papers before the customs officials. Decree-Law No. 4.014 of Jan. 13, 1942, Art. 1. Customs *despachantes* receive governmental authorization to ply their trade only after passing an examination on their knowledge of customs practice and serving a two year apprenticeship. *Id.* at Art. 14. Until 1968, not even the owner could go through the laborious process of extracting his goods from customs without an authorized *despachante*. Decree-Law No. 366 of Dec. 19, 1968.

that it is not uncommon for one government agency to employ a *despachante* to extract something from another. The simplest transactions, such as obtaining a marriage license or identity card, can take days, or months, or even longer, depending on whether one has used a *despachante* and how much he has been paid.

The *despachante* functions effectively because he knows how to fill out the bewildering variety of forms, to whom the copies should be delivered, and what documentation will be required. He attends to several matters at the same time and is adept at breaking in ahead of the long lines of persons waiting to handle their own affairs.⁸⁷ Most importantly, he operates expeditiously because he has cultivated friends in the bureaucracy. This cultivation is frequently fertilized by the turnover of a portion of his fee or by appropriate Christmas or birthday presents. Of course, if one is fortunate enough to have a friend, or a friend of a friend, in the right governmental office, the services of the *despachante* can be foregone. Were it not for the *jeito* and the *despachante*, the entire administrative apparatus of Brazil would grind to a halt.

B. Administrative Reform

For the past forty years a series of unsuccessful attempts have been made to reform Brazil's ungainly, bloated, inefficient public administration. These efforts have been directed primarily through an elite centralized agency, the Administrative Department of Public Service (DASP), and substantial inputs of foreign technical assistance. The reasons for this failure are complex; the core of the problem has been an underlying political structure and a set of cultural values that have not been conducive to implementation of a merit system.⁸⁸

Operating on the theory that modernization and development require impersonal, predictable, and efficient administrative behavior, the military regimes ruling the country since the 1964 seizure of power have given administrative reform high priority. A series of measures, clustering around Decree-Law No. 200 of February 25, 1967, was introduced to decentralize decision-making and reduce red tape. Between March 1967 and the end of 1969, some 347 govern-

87. One practical reason for permitting the *despachante* to avoid the long lines of people handling their own affairs is that the *despachante's* papers are normally in order, while the bulk of people trying to cope with the bureaucracy on their own are ill-informed and lack the necessary documentation, at least on the first few visits. Dealing directly with *despachantes* makes the public servant appear more efficient.

88. See L. GRAHAM, CIVIL SERVICE REFORM IN BRAZIL: PRINCIPLES VERSUS PRACTICE 59-182 (1968); G. SIEGEL, THE VICISSITUDES OF GOVERNMENTAL REFORM IN BRAZIL: A STUDY OF THE DASP (1978).

mental departments were reorganized and nearly two-thirds of the steps in their document processing were eliminated. The military also sought to reduce the large numbers of superfluous civil servants by pensioning them off. In addition, sizeable numbers were dismissed for corruption or political reasons. The result was a modest improvement in bureaucratic efficiency.

In July 1979, the government decided to deal with the problem of bureaucratic inefficiency in a characteristically Brazilian fashion, by creating a special Ministry of Debureaucratization. Headed initially by Helio Beltrão, former Minister of Planning, this new agency has thus far issued a series of sensible decrees simplifying many bureaucratic procedures.⁸⁹ Unfortunately, the bureaucracy has also dealt with the Ministry of Debureaucratization in typical Brazilian fashion, ignoring many of its debureaucratization measures. Reacting to numerous complaints about the disregard of the reforms, Beltrão countered with a decree requiring the bureaucracy to take the Ministry of Debureaucratization seriously.⁹⁰ The debureaucratization measures have also created a modest improvement in administrative efficiency in the past few years.

V. PENETRATION OF THE FORMAL LEGAL SYSTEM

Brazil's formal legal system has all the earmarks of a modern, developed institutional structure. At its heart are the Constitution and comprehensive basic codes of civil, criminal, and commercial law, as well as criminal and civil procedure. The Constitution is modeled after that of the United States, while the basic codes are largely drawn from European models. Disputes within the formal legal system are resolved by a hierarchical arrangement of courts on the basis of the wording and legislative history of the statutory rules, scholarly doctrine, opinions of distinguished jurists, and prior court decisions. This part of the legal system is administered by a specially trained, highly influential group of law professionals—lawyers, judges, and notaries.

The formal system has gradually begun to penetrate into the interior of Brazil, but this penetration is far from complete. Large areas of this huge country are still inaccessible, despite improvements in

89. The pamphlet, *Desburocratização—medidas adotadas* (Presidência da República, Programa Nacional de Desburocratização—Mar. 1981), summarizes the first 148 of these measures.

90. Decree No. 84.585 of Mar. 24, 1980, providing that all requests for information from the Ministry of Debureaucratization must receive priority, that the general public must be allowed to complain to the noncomplying agency, and that any offending agency must modify its procedures to comply with the new debureaucratization measures.

modern communications and transportation. Much of the rural interior still is only nominally under the control of the formal authorities. The great bulk of the rural population is still largely unaffected by the formal legal structure. Its disputes are resolved by *patrões*, *paterfamilias*, or large landowners in accordance with local custom.⁹¹ Although the situation is changing, especially since the military takeover in 1964, federal and even state law is little known or enforced in much of the interior.⁹² Continued tolerance of a system of local authority is a tacit compromise, with the local bosses delivering the rural vote to federal and state authorities in exchange for ample extra-legal autonomy.⁹³ The tradition is "to render justice to one's friends and to apply the law to one's adversaries."⁹⁴

Not only in rural regions has penetration of the legal system been limited. Millions of urban Brazilians live in *favelas*, squatter settlements that ring all major cities. Penetration of formal legal structure in the *favela* is fragmentary and precarious, for the *favela*'s very existence is of doubtful legality. Instead, the *favela* is governed by a mixture of the formal legal system and an informal, customary system, as well as a curious set of laws and regulations designed to permit the formal authorities to deal with the *favelados* without having to acknowledge the lawfulness of the *favela*'s existence.⁹⁵

A. Caligula Revisited—Finding the Governing Law

Resort to the formal system even in modern, urban sectors is greatly hampered by difficulties in ascertaining its provisions. Caligula, the tyrannical Roman emperor, was reputed to have had his laws and decrees posted high off the ground where none of the populace could read them. Brazilian methods are not so obvious, but they are

91. See Steiner, *supra* note 74, at 46.

92. Jacques Lambert's observations in the mid-1950s are essentially valid today:

But when one leaves the "new country" in which the Government's action is exercised directly, federal and even state legislation is weakened by intervention of local authorities, whose command is more respected than that of the distant Government. The man of the interior is accustomed to go to the local authorities to seek protection against laws which he does not know and fears, instead of going to functionaries of the Central Government to ask them to apply the law. In spite of centralizing institutions, the old Brazil effectively continues decentralized, because the uniform. . . law is not respected or even known.

J. LAMBERT, *OS DOIS BRASIS* 238 (2d ed. 1967).

93. V. NUNES LEAL, *CORONELISMO, ENXADA E VOTO: O MUNICÍPIO E O REGIME REPRESENTATIVO NO BRASIL* 8, 31 (1948).

94. *Id.* at 158.

95. See generally S. CONN, *THE SQUATTER'S RIGHTS OF FAVELADOS* (CIDOC Cuaderno No. 32, 1969); Santos, *The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada*, 12 L. & Soc'y REV. 5 (1977).

frequently more effective. Discovering the governing law in Brazil is nearly as perplexing and difficult a task today as in colonial times.

The myriad forms of the federal government's positive law—the Constitution, amendments, institutional acts, complementary laws, decree-laws, laws, decrees, regulations, resolutions, ordinances, circulars, instructions, etc.—are published in the *Diário Oficial*, the official gazette. (There are corresponding publications at the state level.) Technically, Brazilian laws and decrees must be published in the *Diário Oficial* or other official organs in order to produce a juridical effect.⁹⁶ Nevertheless, not all Brazilian legislation is published. Brazil has “invisible legislation” that is deliberately kept from public view. Many of these secret decrees are reputed to deal with national security, but some deal with such apparently innocuous subjects such as creation of a special fund for autonomous organs for research or teaching on industry, commerce, or agriculture.⁹⁷ Moreover, regulatory agencies, such as CACEX and INPI, often operate with secret directives for the regulation of importation or the approval of technology transfer agreements.⁹⁸

Publication of legislation in the *Diário Oficial* by no means ensures that anyone will be able to find it later. The federal *Diário Oficial*, is unindexed, undigested, and occasionally unreadable. Useful unofficial indexes of legislation are published from time to time, but they are frequently outdated.⁹⁹ There is a semi-official collection of laws and decrees called the *Coleção das Leis do Brasil*, but its precarious indexing is on a volume-by-volume basis. Since 1937, an unofficial collection of laws and decrees, *Coleção Lex*, has been published; it too suffers from incompleteness and precarious indexing, also on a volume-by-volume basis, albeit with an occasional multi-volume index.

Whether one finds a particular law or decree frequently depends upon luck and the caption's phraseology. Even at the federal level, no official codification integrating the multiplicity of legislative pronouncements on any given subject exists. While an attempt is made from time to time to integrate the myriad income tax statutes, these

96. W. ACCIOLI, *INSTITUIÇÕES DE DIREITO CONSTITUCIONAL* 344 (2d ed. 1981); 2 M. CAETANO, *DIREITO CONSTITUCIONAL* 334 (1978); 3 PONTES DE MIRANDA, *COMENTÁRIOS A CONSTITUIÇÃO DE 1967*, 177 (1967); 62 *ENCICLOPEDIA SARAIVA DO DIREITO* 427-73 (1977).

97. Decreto Reservado No. 5 of July 12, 1979. See generally *Jornal do Brasil*, July 7, 1983, 1st cad., at 10, cols. 1-2.

98. See Rosenn, *Trends in Brazilian Regulation of Business*, 13 *LAW. AM.* 169, 173 (1981).

99. These private compilations, such as the *Vademecum Forense* and the *Carteira da Revista Forense*, collect most of the basic statutes and some of the decrees, but they are far from complete. They perform some, but by no means all, of the task of integrating the jumble of conflicting and complementary laws.

official compilations, misleadingly labelled "Regulations," are incomplete, sometimes incorrect, and quickly obsolete. Instead of changing code provisions, Brazilian practice is to adopt supplemental legislation. To determine the governing law, one is often required to unearth a number of separate statutes and decrees dealing within a given subject and then undertake the jigsaw job of piecing together the provisions still in force.¹⁰⁰

No one really knows how many laws are in force in Brazil. Instead of specifically repealing obsolete legislation, virtually all new legislation ends with an article declaring that all laws inconsistent with this law are hereby revoked. The explanation for this legislative *modus operandi* is simple: no one really knows which laws conflict with the measure being enacted. Aliomar Baleeiro, when still a member of the Supreme Federal Tribunal, estimated the number of laws in force in Brazil at 65,000. The late Pontes de Miranda, Brazil's most prolific jurist, lowered that estimate by about one-third in the process of remarking on the absurdity of expecting a lawyer to function in a legal system with 45,000 laws in force.¹⁰¹

It is not simply the huge number of laws in force that generates confusion, but also the poor quality of so many laws and regulations. All too often new Brazilian legislation overlaps with existing legislation and is dreadfully drafted.¹⁰² Rarely can one understand a new measure without simultaneously looking at a number of prior statutes and decrees. One must also await clarifying decrees and regulations to find out what a new law really means. Even then one is never sure, for regulations typically repeat verbatim or paraphrase the words of the statute. Tax laws, which can be issued by executive decree, tend to suffer more than most legislation from hasty draftsmanship and inadequate conceptualization.

The process is illustrated by the government's effort to raise the rates on the Tax on Financial Transactions (IOF: *Imposto sobre Operações Financeiras*) and to expand its scope. Without any public discussion or even notice, the government simply issued a decree-law tripling the tax rate on most credit transactions.¹⁰³ This decree-law

100. See H. FERNANDES PINHEIRO, *TÉCNICA LEGISLATIVA* (2d ed. 1962), presenting a tour of the technical aspects of elaborating Brazilian laws, as well as a collection of horrors of past efforts.

101. Address at the University of Brasilia Law School, *Jornal do Brasil*, May 27, 1980, at 10, cols. 1-2.

102. For example, so many different rent control laws were enacted between 1942 and 1964 that no fewer than 18 different regimes regulating rentals were simultaneously in force. Statement of Motives, Law No. 4.494 of Nov. 25, 1964, sec. XI.

103. Decree-Law No. 1.783 of Apr. 18, 1980. The tax's name was also changed to the Tax on Credit, Foreign Exchange, Insurance, and Securities Transactions (*Imposto sobre Operações de Crédito, Câmbio e Seguro e Normas Relativas a Títulos e Valores Mobiliários*), but the ab-

also doubled the IOF rate on insurance premiums, imposed a ten percent tax on purchase of securities on credit, and effectively produced a partial, unannounced devaluation by imposing a fifteen percent tax on the purchase of foreign exchange to cover imports.¹⁰⁴ This dramatic boost in tax rates, the expansion of the types of taxable transactions, and the failure to provide for any exemptions produced a huge outcry from affected interests. Great uncertainty also prevailed as to the tax basis. Was the revamped IOF to be calculated solely on the principal amount, or were financing costs and monetary correction to be included in the tax base? The Central Bank, which is charged with administering the IOF, quickly began issuing a series of resolutions and circulars "clarifying" the scope of the IOF and creating exceptions.¹⁰⁵ Some of these measures merely modified a prior clarification.

The life of this series of resolutions and circulars was extraordinarily short. All were revoked by Central Bank Resolution No. 619 of May 29, 1980, which contains forty pages of detailed regulations, including a long list of exemptions. This Resolution is unnecessarily complex and difficult to understand, particularly since many rules refer the reader back to prior Central Bank rules. In addition to these drafting and conceptualization problems, the reformulation of the IOF suffered from another serious defect: its application to 1980 transactions violated the constitutional precept against retroactivity.¹⁰⁶

An editorial by one of Brazil's leading newspapers summed up the chaotic state of Brazil's legal system in these terms:

Since it is impossible to know our law, given the excess of legal texts theoretically in circulation, new laws have been made on the supposition that they will affect areas still unregulated. The result is that there are laws which in part repeat themselves, laws which contradict themselves, and laws which result from pure speculation without contact with social reality. Consequently, these laws have only formal validity, remaining, as Miguel Reale has said, "in the limbo of normativity." Problems arise; one makes new laws designed to solve them.

breviation IOF has been retained.

104. The tax rate was subsequently increased to 25%. Decree-Law No. 1.844 of Dec. 30, 1980.

105. Cent. Bank Res. No. 610 of Apr. 18, 1980; Cent. Bank Res. No. 612 of May 8, 1980; Cent. Bank Circ. No. 523 of Apr. 23, 1980; Cent. Bank Circ. No. 525 of Apr. 30, 1980; Cent. Bank Circ. No. 530 of May 8, 1980.

106. União Federal e Banco Central do Brasil v. J. Alves Verissimo S.A. — Indústria, Comércio e Importação, RE No. 97.749 (S.T.F. *en banc*, Nov. 10, 1982), 151 REV. DIR. AD. 29 (1983).

But these laws are not applied and the problems continue and worsen. The Brazilian becomes ensnarled in this normative mess, therefore, in which he becomes immobilized and loses hope, be he a public servant or merchant, a handyman or industrialist. This is because when he least expects it, a bureaucrat pulls from his desk a legal provision, as if it were a gun, and shoots the citizen who wishes to engage in any kind of productive activity.¹⁰⁷

The image of bureaucrats firing legal missiles to kill productive activity is most apt. No one really knows how much government regulation reduces Gross National Product, nor how much inflation is attributable to maintaining Brazil's huge bureaucracy and absorbing the costs of bureaucratic bungling, but both figures are surely strikingly high.

In contrast to this superabundance of legislative and administrative measures, many decisions of important tribunals, including the nation's highest court, remain unpublished. Since there is no doctrine of *stare decisis* (although the introduction of the *Súmula* in 1964 was a step in that direction),¹⁰⁸ it is common to find numerous decisions on both sides of a given question. Indexing of reported cases is unreliable and sketchy at best; it depends on the terminology employed in the headnote. One looks in vain for comprehensive digests, Shepard's, a key number system, CCH or PH type services, or an index to legal periodicals. To be sure, cases are not as important in civil law jurisdictions, and Brazil is better than most Latin American countries in indexing and reporting cases. Nevertheless, the system falls far short of what is available in the neighboring civil law jurisdiction of Argentina.

It is not unusual to discover that the authorities charged with administering a particular body of law are unaware of significant changes in the statutory or case law. Inertia, ignorance, and inability to keep abreast of rapid-fire legal change contribute to the gap between the law on the books and the law actually being applied.

107. *Olimpiada Legislativa*, *Jornal do Brasil*, May 27, 1980, at 10, col. 1.

108. The *Súmula* is a collection of rules of law that have become firmly settled by decisions of the Supreme Federal Tribunal. Its provisions are summarily cited to dispose of those issues in future litigation. The *Súmula* can be overruled or modified, but only by an absolute majority of the full tribunal. *Regimento Interno do Supremo Tribunal Federal*, arts. 98, § 1 & 99 (1979). For an authoritative account of the origins and importance of the *Súmula*, see Nunes Leal, *Passado e Futuro da Súmula do S.T.F.*, 145 *REV. DIR. AD.* 1 (1981).

B. After Goulart, the Deluge

The acceleration of modernization in the past four decades has strikingly transformed much of Brazil from a traditional, semifeudal, agrarian society into an urban, industrialized nation. This development has rendered much of the basic law hopelessly obsolete. Moreover, the modernization process has been accompanied by tremendous inflation, itself an important cause of legal obsolescence.¹⁰⁹ A number of projects have been started to reform outmoded codes, but with few exceptions, most of these projects have produced only new drafts rather than new codes.

In an effort to bring the legal system to grips with many of the nation's most pressing economic and social problems, the post-1964 military regimes have unleashed a legislative deluge.¹¹⁰ Much of this new socio-economic legislation has been incredibly complicated and difficult to administer. This is partially because much has been drafted by economists and engineers, and partly because much has been enacted by executive decree, eliminating the opportunity for legislative debate and hearings that might have eliminated some of the ambiguities and complexity. Eventually, this phase of constant experimentation and tinkering will draw to a close, and the new legal framework will have a chance to be absorbed by the groups whose conduct is being regulated. Until then, there is always the *jeito*.

C. The Malfunctioning of the Court System

The malfunctioning of the court system has also been responsible for the prevalence of the *jeito*. The reputation of the Brazilian courts for efficiency and integrity in discharging their official functions has been badly tarnished in recent years.¹¹¹ The rapid growth of the pop-

109. See K. ROSENN, *supra* note 22; Lefcoe, *Money Correction and Mortgage Lending in Brazil: Observations for the United States*, 21 STAN. L. REV. 106 (1968); Rosenn, *Adaptations of the Brazilian Income Tax to Inflation*, 21 STAN. L. REV. 58 (1968).

110. Between April 2, 1964, when the military ousted the Goulart regime, and the end of December 1982, the executive promulgated 2,000 decree-laws and 35,194 decrees. During the same time, the Congress approved only 2,766 laws. Because Brazilian legislation is numbered sequentially, these figures were obtained by simply subtracting the numeration of each respective category of legislation on March 31, 1964, from the corresponding numeration on December 31, 1982.

111. More than 90% of practicing lawyers surveyed in Rio de Janeiro indicated that judicial administration was in a state of serious crisis. Principal explanations for the crisis were delays, excessive formalism, and corruption. N. CORREIA DE MELO SOBRINHO, *O ADVOGADO E A CRISE NA ADMINISTRAÇÃO DA JUSTIÇA* (1980). A former dean of the Law School of the Catholic University in Rio de Janeiro incisively analyzed the failings of the Brazilian judiciary in these terms:

In view of the low level of remuneration of its staff, its administrative conservatism, and its technical dismantlement, it must be considered as a Judiciary that is operation-

ulation and the economy has overcrowded court dockets. In some courts delays are so long that the often heard lament—"What enters, never leaves!"—appears justified. Brazilian civil procedure offers seemingly endless opportunities for delay; loopholes and possibilities for filing additional appeals abound.

Those with good tort or contract claims have been reluctant to enter the courts to enforce them. Brazil has been characterized as a defendant's jurisdiction, because of the historic tendency of Brazilian judges to award small amounts to those bringing suit.¹¹² Until 1981, when a law was adopted requiring automatic adjustment of all judgments in accordance with price index changes,¹¹³ inflation had severely undermined the efficacy of judicial awards.

The court system has been subverted by corruption, particularly on the part of the police and court clerks, who are notoriously underpaid.¹¹⁴ All too often pleadings or records mysteriously disappear. One judge of a state criminal court in Rio de Janeiro recently complained that in his division alone 142 cases had simply disappeared and another 72 had been archived without judicial decision or with forged judicial signatures. If these were merely traffic cases, the situation would be deplorable, but what is so shocking is that all these missing cases were homicides.¹¹⁵ Rio's leading newspaper recently carried the story of a state representative, who although convicted of numerous crimes, avoided serving any sentence because the court records in his case had mysteriously vanished.¹¹⁶

Litigation is very expensive in Brazil. Court costs, which are

ally inefficient. In view of the elevated procedural costs, the excessive professional ritualism, and the rigid structure of power, it must be considered as a Judiciary that is socially elitist. Finally, in view of its precarious economic and financial autonomy, the formal selection process for judges, and its subservient relations with the Executive, it must be considered as a Judiciary that is politically dependent.

Falção Neto, *Cultura Jurídica e Democracia: A Favor da Democratização do Judiciário*, in DIREITO, CIDADANIA E PARTICIPAÇÃO 3, 4 (B. Lamounier et al. eds. 1981).

112. P. GARLAND, A BUSINESSMAN'S INTRODUCTION TO BRAZILIAN LAW AND PRACTICE 21 (1966).

113. Law No. 6.899 of Apr. 8, 1981. Monetary correction now covers all judgment debts, including costs and awards for attorney's fees, until the date of effective payment. *Id.* at art. 1. Monetary correction begins on the date of judgment except for suits to collect liquid and certain debts, where monetary correction runs from the date of maturity. *Id.* at art. 1, §§ 1 & 2.

114. In December 1983, court clerks in Rio de Janeiro were being paid roughly \$45 to \$310 per month, depending upon experience. *Jornal do Brasil*, Dec. 15, 1983, 1st cad., at 8, cols. 2-3. A very sizeable percentage (76.6%) of lawyers interviewed in Rio pointed to the low salaries paid to the court clerks as responsible for corruption in performance of their duties. N. CORREIA DE MELO SOBRINHO, *supra* note 111, at 47.

115. *Jornal do Brasil*, Nov. 28, 1983, 1st cad., at 12, col. 2.

116. *Jornal do Brasil*, Nov. 2, 1983, 1st cad., at 12, cols. 2-4. *See also* *Jornal do Brasil*, Sept. 18, 1983, 1st cad., at 28, col. 5.

generally fixed in accordance with the amount allegedly in controversy, are high; indeed, for small claims they sometimes exceed the amount in controversy.¹¹⁷ Attorneys fees are also expensive. Although the prevailing party is normally awarded attorneys fees, lawyers customarily arrange for considerably higher fees than the relatively modest percentages awarded by the courts, and contingency fees and class actions, which are so common in the United States, are unavailable in Brazil.¹¹⁸ Scattered legal aid programs provide occasional assistance for a tiny percentage of the poor,¹¹⁹ but it is fair to state that the great bulk of Brazil's population is effectively denied access to justice by economic barriers. As part of the current debureaucratization effort, a small claims court with a greatly simplified and inexpensive procedure, has recently begun in the state of Rio Grande do Sul and will hopefully be replicated in the rest of the country.

The lengthy delays, coupled with the expense and the unlikelihood of receiving anywhere close to a complete indemnification, have made many Brazilians reluctant to enforce their rights in court. Because the judicial process has become dysfunctional, many are inclined to seek alternative methods of protecting themselves.

VI. COSTS OF THE JEITO

Several problems created by the corrupt components of the *jeito* are obvious. Resources are frequently misallocated when the criterion of the private gain of the allocator is employed. Procurement of construction contracts become more costly, either through the total price paid or the inferior quality of the performance received. Much social injustice and unrest stems from permitting certain firms and individuals to avoid compliance with the law through payment of bribes or utilization of family connections.

The government's power to redistribute income, stimulate desirable conduct, or discourage undesirable conduct through taxation or regulatory legislation is sharply limited by the loopholes carved through corrupt practices. As Gunnar Myrdal has observed in the South Asian context, "Corruption introduces an element of irration-

117. Court costs were recently raised 300% in the state of Rio de Janeiro, producing protests from the Bar Association about pricing justice out of reach of most Brazilians. *Jornal do Brasil*, July 14, 1983, 1st cad., at 12, cols. 3-4.

118. Brazilian attorneys frequently charge more if they win, but they seldom agree to charge nothing if they lose. Joinder of litigants is common, but true class actions in the U.S. sense are not permitted in Brazil. Moreover, standing rules prevent associations from litigating on behalf of their members with the exception of the labor courts. Falção Neto, *supra* note 111, at 8-9.

119. Knight, *Legal Services Projects for Latin America*, in *LEGAL AID AND WORLD POVERTY* 77, 82-87 (Committee on Legal Services to the Poor in the Developing Countries ed. 1974).

ality in plan fulfillment by influencing the actual course of development in a way that is contrary to the plan or, if such influence is foreseen, by limiting the horizon of the plan."¹²⁰ Government power to promote development is also weakened to the extent that tolerance of corruption saps popular support and respect for the government.

It is expensive and time consuming to have to resort to *despachantes* every time licenses or permissions are needed. Many are forced to forego economic opportunities because they cannot afford this expense. The cycle can be vicious indeed. A person whose papers are not in order has great difficulty securing employment, but he may not be able to secure the necessary documents without the aid of a *despachante*, whose services he cannot afford. The small entrepreneur may be thwarted from opening his own business because he has insufficient capital to pay for the expenses of legalizing the business.¹²¹ The system heavily discriminates against the poor, who are forced to wait patiently in the long lines in front of the windows of governmental departments. Millions of potentially productive manhours are lost waiting in these lines.

The corrupt aspects of the *jeito* retard administrative efficiency. People are reluctant to assume personal responsibility for decision making, preferring to pass documents up for higher consideration. Civil servants do nothing without written authorization, and fear of an investigation leads to much collegiate decision-making to divide or obscure responsibility. The practices of exacting "speed money" and "delay money" also impede administrative efficiency. While speed money may accelerate the administrative process in individual cases, studies in other countries have concluded that the practice actually aggravates delays in the administrative apparatus as a whole.¹²² *A fortiori*, payment of "delay money," a common practice for defendants unanxious to see their cases speedily determined or a competitor licensed, bogs down the system.

The *jeito* is essentially an *ad hoc* institution, and its uncertainty and unpredictability discourages potential investors. Lack of a predictable legal structure makes business planning difficult. Transac-

120. 2 G. MYRDAL, *ASIAN DRAMA* 952 (1968).

121. Currently, a small business may need as many as 38 different bureaucratic permissions in order to operate legally. These are listed in Timotheo, *Pequenos empresários lutam para vencer a burocracia*, *Jornal do Brasil*, July 18, 1983, 1st cad., at 12, cols. 3-4. As a result of the debureaucratization campaign, however, obtaining permission from the Commercial Registry has become much simpler and rapid. *Jornal do Brasil*, Aug. 28, 1983, 1st cad., at 29, cols. 1-3.

122. This was the finding of the Indian Committee on Prevention of Corruption (Santhanam Committee 1964), noted in 1 G. MYRDAL, *ASIAN DRAMA* 953 (1968).

tions cloaked in the dubious legality of the *jeito* may wear well today but come apart at the seams tomorrow.

There is a significant moral cost as well. Frequent resort to the *jeito* contributes to the general disrespect for the rule of law and orderly processes—a very serious problem in present day Brazil. The fact that competitors resort to the *jeito* with impunity forces the businessman who may wish to respect the law to circumvent it in order to compete. The corrupt side of the *jeito* produces widespread tax evasion in Brazil, whose underground economy is estimated at thirty-five percent of Gross Domestic Product. This is reputedly the second largest underground economy in the world.¹²³ Outgrowths of both the corrupt and public service sides of the *jeito* are the dramatic upsurge in lynchings and the blatant activities of death squads that systematically liquidate common criminals.¹²⁴ Police routinely beat confessions from suspects classified as common criminals, a long-standing practice that has traditionally escaped judicial control.¹²⁵ Once one condones the principle that officials and private citizens may reinterpret or ignore laws they deem overly restrictive or unwise, resort to that principle is not easily cabined. Discriminatory law enforcement and the breakdown of legitimacy may well be the result.

Still another significant cost resulting from widespread resort to the *jeito* is the loss of governmental credibility. The Brazilian government also resorts to the *jeito* to achieve particular short-term objectives. For example, the cost-of-living index was notoriously manipulated in 1973 to understate the inflation rate by half.¹²⁶ More recently, the government misrepresented the size of its fiscal deficit in an effort to secure release of badly needed foreign currency loans from the International Monetary Fund. This bald-faced attempt at “cooking the books” backfired and resulted in a long delay in the release of loan funds to Brazil.¹²⁷

Finally, by acting as a safety valve, the *jeito* tends to prevent the building up of sufficient pressure for sorely needed legal and administrative reform. Legal structures that have long since broken down continue to function with the patchwork of the *jeito*. All too frequently the patch works poorly, producing serious misallocations of

123. *The Rise of the “Black” Economy*, LAT. AM. REG. REP. BRAZIL, Sept. 16, 1983, at 6-7.

124. See H. BICUDO, *MEU DEPOIMENTO SOBRE O ESQUADRÃO DA MORTE* (7th ed. 1978).

125. Pinheiro, *Violência e Cultura*, in DIREITO, CIDADANIA E PARTICIPAÇÃO 30 (B. Lamounier et al. eds. 1981). See also H. BICUDO, *Comentários*, *supra* note 124, at 59.

126. K. ROSENN, *supra* note 22, at 406 n.17; *Jornal do Brasil*, June 28, 1983, 1st cad., at 17, col. 1.

127. See *Thumbs-down from IMF Fuels Fears of Brazilian Moratorium*, LAT. AM. WEEKLY REP., May 27, 1983, at 1; *IMF Investigates Failure to Meet Performance Targets*, LAT. AM. WEEKLY REP., May 6, 1983, at 4-5.

resources. The case of regulation of the electric power industry illustrates this misallocation. Legislation adopted in 1934 limited the return on a power company's investment to ten percent of its historic or original cost, less depreciation.¹²⁸ Despite a statute that required the government to inventory the assets of the electric companies, the government either could not or would not determine these rate bases.¹²⁹ Although it may have been appropriate for a stable economy, this regulatory scheme was most inappropriate for Brazil, where inflation has been chronically severe. Because the chief power companies were foreign-owned, widespread nationalistic opposition blocked a change of the law in order to benefit the power companies.¹³⁰

Brazil's impressively rapid economic growth in the post World War II decades required large increases in electric power, and the power companies were understandably reluctant to increase their investments without being assured an adequate return. Characteristically, the impasse was resolved by retaining the basic regulatory statute but bending it to expediency via special temporary decrees and the *jeito*. Instead of modifying the basic rate structure, the government permitted the power companies to increase their total revenues through "additional" or surcharges, preferential exchange subsidies, generous financing, toleration of dubious accounting procedures, and charges to consumers to finance connections to the net. The power companies were also permitted to increase their revenues by overextending their distribution systems. In addition, the government itself assumed major responsibility for generating electric power, leaving the private companies with the distributing phase of the operations.¹³¹

In this case the *jeito* enabled Brazil to muddle through some twenty years of serious inflation without modifying a totally obsolete regulatory structure. On the other hand, the accommodation of the *jeito* was far from ideal. The uncertainty and instability of the extra-legal negotiations and special arrangements by which the power companies were regulated discouraged much-needed investment and long range planning for the power industry. Existing equipment was seriously overloaded and allowed to run down, producing chronic black-

128. The Water Code, Decree No. 24.643 of July 10, 1934, art. 180. Cf. Decree-Law No. 3.128 of Mar. 19, 1941, arts. 2 & 9.

129. Parecer do Ministro Orosimbo Nonato, in *A Verdade sobre as Concessões de Electricidade no Brasil* 15, 16 (1962).

130. J. TENDLER, *ELECTRIC POWER IN BRAZIL: ENTREPRENEURSHIP IN THE PUBLIC SECTOR* 55-59 (1968). There was also widespread political opposition to legislative recognition of inflation adjustments on the theory that this would be tantamount to a public concession of the government's inability to control inflation. *Id.* at 57.

131. *Id.* at 44-79.

outs. This, in turn, impeded industrial production and commerce, as did the substantial delays in connecting new service applicants. In addition, factories and businesses had to incur the additional expenses of installing their own generating equipment for the frequent emergencies and to bear the costs of interrupted service.

VII. BENEFITS OF THE JEITO

When the formal legal structure contains serious impediments to development, the *jeito* may play a positive role in the development process by permitting avoidance of legal and administrative hangups at relatively little cost. When stymied by restrictive legislation, the innovator is able to resort to the *jeito* to introduce new approaches without governmental interference, just as the sufficiently capitalized entrepreneur is able to utilize the *jeito* quickly to legalize a new venture.

When the government adopts short-sighted policies, the *jeito* can be an important factor in minimizing the damage. For example, both Chile and Brazil tried to fight inflation by freezing food prices. Chilean bureaucrats struggled valiantly to enforce these price controls, thereby stagnating the food supply and increasing inflationary pressures. On the other hand, Brazilian bureaucrats characteristically permitted the *jeito* to operate. Consequently, agricultural prices were allowed to rise enough to stimulate an increase in the production of foodstuffs, helping relieve some of the inflationary pressure.¹³²

In practice, the net effect of the *jeito* is frequently to push the government into assuming a more *laissez-faire* position than it is ideologically disposed to assume. Like many developing nations, Brazil has considerable regulatory legislation designed to curb economic abuses, *i.e.*, foreign investment regulations, transfer of technology restrictions, price controls, and usury laws. If rigorously enforced, such legislation might well nip economic growth in the bud. Permitting circumvention, as the Brazilians have done, enables the government to cater to popular pressures for restraining certain kinds of useful economic activities without actually preventing such activities.

In a world in which laws and regulations are constantly changing, the *jeito* ironically serves as an important source of stability and predictability. Industrial and commercial activity is much less precarious when businessmen and industrialists have a sense that no matter what changes tomorrow may bring in the law, the *jeito*, be it corrupt or public serving, will insure business as usual. Indeed, it can even be

132. See Leff, *Economic Development Through Bureaucratic Corruption*, 8 AM. BEHAV. SCI., No. 3, pp. 11-12 (Nov. 1964).

argued that the corrupt-type *jeito* will in the long run promote economic efficiency, for the most efficient firms will be able to offer the largest bribes and eliminate their more inefficient competitors.¹³³ To the extent that the *jeito* functions equally well on kinship or friendship ties, however, inefficient firms will still be able to compete.

One can also argue that the *jeito*, particularly in its "speed money" form, operates as a direct tax on those best able to pay, and is thus one of the few progressive features in Brazil's regressive tax system. Moreover, this direct tax has little leakage since the sums collected go directly to poorly paid public servants as salary supplements. This analysis, however, ignores the very real economic burden placed on the poor who need the governmental services but cannot pay the tax. The poor ultimately pay an even heavier tax in the form of man-hours lost from work and the time spent without needed governmental documents and licenses.

The chief benefit of an institution like the *jeito* is that it permits a society to buy time to work out serious institutional tensions without violently rupturing the social fabric. Major overhauls in a nation's legal and administrative structure produce severe strains and stresses. Frequently, there is little political consensus about whether and how basic institutions should be modernized. The *jeito* may be considered a way of temporizing to avert, or at least postpone, civil strife. By preserving the facade of legitimacy in the face of rapid social and economic change, the *jeito* has been invaluable in enabling the Brazilian system to operate without violent conflict.

VIII. CONCLUSION

It is difficult to separate the benefits of the *jeito* from the costs of having an obsolete or unsuitable legal system, for the two plainly overlap. If the choice were between continuing to operate with an obsolete or unsuitable legal structure and operating with the *jeito*, in the great majority of cases the latter will produce a net benefit, especially where the *jeito* is employed in a public service sense. At least the *jeito* enables a society to continue to function despite the inappropriateness of its formal legal system. Closer examination, however, may lead to the conclusion that there is no real choice. Brazil could not have tolerated the closing down of its power companies because of inadequate returns. If the *jeito* had not been employed, the country would have had to modify its regulatory legislation or nationalize the foreign power companies. Either of these avenues entailed serious political and economic costs, which must be subtracted from the cost

133. *Id.* at 11.

of resorting to the *jeito*.

Although the *jeito* results in a number of important benefits, they are primarily short-run benefits. In the long-run the *jeito*, and the style of operations which it permits to continue, constitute serious obstacles to development. Development requires a high degree of social integration and community cooperation, as well as departure from traditional, personalistic, authoritarian patterns of behavior. It also requires greater productivity and fairer redistribution of income. The formal legal system can be one of the modern state's most effective instruments for promotion of social interdependence and more equitable distribution of wealth. The existence of an institution such as the *jeito*, however, enables a society to continue individualistic, traditional patterns of behavior despite the state's attempt to substitute more progressive, achievement-oriented patterns of behavior via the formal legal structure.

Ultimately, development should imply far more than increases in per capita income, investment, or productivity. Development should also imply the existence of an institutional structure which will permit meaningful equality before the law. Conditions precedent to such equality are a formal legal structure reasonably attuned to the times and culture, a high degree of obedience to the rule of law, and impersonal, efficient administration of the laws. A modern developed society should have little room for the operation of an institution like the *jeito*. A society like Brazil, however, which has such a plethora of laws, decrees, and regulations that retard development, appears to be have room aplenty.