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KEITH S. ROSENN

Civil Procedure in Brazil

I. INTRODUCTION

Brazil inherited from Portugal an entirely written system of civil procedure based largely upon Roman and canon law. That system has been colorfully characterized by one Brazilian writer as "developing in successive phases, interrupted at each step by appeals of interlocutory decisions—dragging itself slowly, far from the sight of the judge, growing fat within the belly of its tiresome record."¹ This system of Roman-canonical procedure survived long after Brazil achieved independence in 1822. Although the 1850 Commercial Code simplified and improved the procedure governing commercial disputes, civil cases continued to be governed by the rules of civil procedure established in the *Ordenações Filipinas*, promulgated for the Portuguese in 1603 by Phillip III of Spain (Phillip II of Portugal). The 1891 Constitution, which adopted a federalist, republican form of government, authorized each state to promulgate its own procedural laws.² With few exceptions, the resulting state legislation adhered to the Romano-canonical system of civil procedure.³ Despite numerous calls for reform, little was done until the 1934 Constitution bestowed legislative authority over civil procedure on the federal government. Five years later this resulted in the adoption of the first national Code of Civil Procedure.⁴ The 1939 Code substantially reformed Brazilian civil procedure, introducing oral proceedings, concentrating many proceedings, and giving the judge a much more active role.⁵ Nevertheless, it contained numerous defects, and it was widely blamed for long delays that have chronically plagued the Brazilian court system. Thirty-four years later, it was replaced by a new code.

The Brazilian Code of Civil Procedure of 1973 [hereinafter

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1. Machado Guimarães, "O Processo Oral e o Processo Escrito," 74 *R. For.* 160, 162 (1938).

2. Braz. Const. of 1891, arts. 65(2) and 34 (23).

3. Amaral Santos, 1 *Preimeiras Linhas de Direito Processual Civil* 50-54 (11th ed. 1984).

4. Decree-Law No. 1.608 of 18 Sept. 1939.

5. Amaral Santos, *supra* n. 3 at 56; Sidou, "A Recepção da Oralidade no Sistema Processual Brasileiro," 31 *R. Bras. Dir. Proc.* 77 (1982).

CPC],⁶ which presently governs civil cases in both federal and state courts,⁷ is widely regarded as one of the best codes in Latin America. Drafted originally by Alfredo Buzaid, a distinguished jurist who served as dean of the University of São Paulo's Law School, Minister of Justice, and a Minister of the Supreme Federal Tribunal, the draft code was revised in 1969 and 1972 by two distinguished commissions of jurists before receiving numerous amendments on the floor of Congress. The 1973 CPC was designed to minimize the defects commonly criticized in Latin American codes, such as excessive emphasis on written documents and pleadings, lack of a trial or focused hearing, severe circumscription of the powers of the judge, and a plethora of opportunities for creating seemingly interminable delays.

The CPC made a number of desirable reforms. It permits the parties, albeit in limited fashion, to present evidence, objections, and arguments orally in a single concentrated hearing (*audiência*),⁸ a reform that has saved considerable litigation time. Brazil has also departed from traditional civil law practice by giving judges greater powers in all phases of judicial proceedings. Most Latin American codes reduce judicial activity to the final stage of the proceedings, the judgment stage, giving judges few powers to intervene at prior stages.⁹ Brazil, on the other hand, grants its judges the power to dismiss a complaint for failure to state a cause of action, to dismiss a party for lack of standing, to make evidentiary rulings, to order discovery, to raise procedural defects during the proceedings *sua sponte*, to grant summary judgment at an early stage, and even to make personal inspections of places, persons, or things *sua sponte*.¹⁰

Nevertheless, Brazilian civil procedure remains well within the civil law tradition. All determinations of law and fact are made by judges; juries are not used in civil proceedings. The common law lawyer will search in vain for rules of evidence, direct lawyer-to-witness cross-examination, or even a trial as he knows it. Instead, evidence is introduced piecemeal in the pleadings, in a series of written submissions to the clerk, and in a public hearing held before a judge prior to final judgment. Brazilian courts still have a decided tendency to give undue weight to documents and to be highly suspicious of oral testimony.

The CPC grants extensive powers to Brazilian judges, but these powers are frequently not exercised to any significant extent. The

6. Law No. 5.869 of 11 Jan. 1973.

7. Labor disputes are governed by a special procedural system and a separate court system. See generally Maranhão, "Processo do Trabalho," in 2 *Instituições de Direito do Trabalho* 456-516 (Sussekind, Maranhão & Vianna, eds., 5th ed. 1971).

8. CPC, arts. 444-57. See *infra* n. 75-79.

9. Vescovi, "Iberian Peninsula and Latin America," in *Civil Procedure: Ordinary Proceedings in the First Instance*, 16 *Int'l Ency. Comp. L.* 6-373, 375-76 (Cappelletti, ed., 1985).

10. CPC, arts. 295; 295 (II) and (III); 130, 331, and 395; 342, 355 and 381; 301, para. 4, 327, and 267, para. 3; 330; and 440.

typical Brazilian judge does not view his role as an activist. Brazil still adheres to the principle that the parties control the issues, evidence and arguments presented. A party must demand action from the court to secure relief. Even though the CPC contains numerous provisions permitting judges to act *sua sponte*, Brazilian judges normally take no action unless requested to do so by the parties.¹¹ Moreover, in comparison with judges in the United States, the powers of Brazilian judges are still somewhat limited. For example, Brazilian judges have no civil contempt power, nor do they have inherent equitable powers. Lack of these powers limits the ability of Brazilian judges to direct litigation and tends to make them less creative in finding solutions to legal problems. Moreover, virtually any court order, whether final or interlocutory, is appealable.¹² This not only limits judicial power but also ensures that a party bent on delay can keep litigation moving at a snail's pace.¹³

Brazil is currently undergoing a serious crisis in the administration of justice, marked by a widespread dissatisfaction with the operation of the courts. The causes are numerous and complex, but the existing procedural system appears to have been an important contributor to the crisis. A recent empirical study of the Rio de Janeiro bar revealed that most of the practicing lawyers attribute the crisis in the administration of justice to the long delays, excessive procedural formalism, routine disregard of procedural time limits, and corruption.¹⁴

II. TYPES OF BASIC PROCEEDINGS

Brazilian doctrine and the structure of the CPC divide civil proceedings into three basic types: cognitive, executory, and provisional.¹⁵ Cognitive proceedings, which are the most common, are designed to produce a determination of which litigant should prevail on the merits. Cognitive proceedings are, in turn, subdivided into three types of actions: declaratory, condemnatory, and constitutive. A declaratory action corresponds to the Anglo-American declaratory judgment action, where the plaintiff seeks a judicial declaration of his or her rights but no specific relief beyond that declaration. A condemnatory action, on the other hand, seeks specific relief, such as damages, from the defendant. A constitutive action seeks to cre-

11. CPC, art. 2. But see CPC, art. 262.

12. CPC arts. 513, 522, and 464. The only unappealable orders are those that are merely ministerial.

13. See *infra* n. 143-178 and accompanying text.

14. This study, based upon questionnaires returned by more than 400 practicing lawyers in Rio de Janeiro, found that more than 90% believed that the judicial system was in a state of serious crisis, and that corruption and formalism have been principal factors in undermining the prestige of the courts. Approximately 80% believed that the procedural system was excessively formalistic, and that this excessive formalism has contributed substantially to the notorious delays of justice, Correia de Mello Sobrinho, *O Advogado e a Crise na Administração da Justiça* 72-73 (1980).

15. Theodoro Junior, *Processo de Conhecimento* 63-64 (3d ed. 1984).

ate, modify, or extinguish a status or legal relationship, such as a suit for divorce or to terminate a contract.

The second basic type of proceeding is the executory proceeding, which seeks execution of a judgment or an executory title that is given the force of a judgment. Although in some ways resembling the Anglo-American writ of execution, the Brazilian executory action is considerably broader. It is often brought as a summary proceeding to collect liquid and certain debts without first obtaining a judgment. The executory proceeding is discussed more extensively in Section IV.

The third general type of proceeding is the provisional proceeding which is designed to aid or to protect the outcome of cognitive and executory proceedings.¹⁶ It covers ancillary proceedings and provisional remedies incident to a cognitive or executory action. The successful provisional proceeding usually results in attachment of the defendant's property or an order requiring that he post a bond.

Cognitive proceedings are further divided into two basic categories: ordinary and summary. Ordinary proceedings are usually lengthy affairs. In major cities, even without appeals, delays of several years between filing the suit and securing a final judgment are common. In theory, the summary proceeding requires only 90 days between filing suit and final judgment in the trial court,¹⁷ but such litigation is seldom completed in that time frame.¹⁸ Executory proceedings are often completed within a few months,¹⁹ but such proceedings begin with a judgment or its functional equivalent.

III. ORDINARY PROCEEDINGS

An ordinary proceeding is usually divided into three stages. First is the pleading stage (*fase postulatória*), which covers the filing of the complaint (*petição inicial*), the answer (*contestação*), and any additional pleadings. The pleading stage terminates with the conclusive opening order (*despacho saneador*),²⁰ issued only after the judge

16. CPC, art. 796. Provisional proceedings are discussed *infra* at n. 117-142 and accompanying text.

17. CPC, art. 281.

18. In some Brazilian courts, summary proceedings take longer than ordinary proceedings; Gusmão Carneiro, "Proposição para a Simplificação dos Ritos Sumarios," 25 *Ajuris* 75 (July 1982). Typical is Civil Appeal No. 92.390 (1983) before the Tribunal de Alçada of the State of Rio de Janeiro, involving a summary proceeding to prevent a private nuisance in the form of a neighbor's piano playing. No hearing was held until nine months after the action had been filed. The trial court handed down its decision eleven-and-one-half months after the action had been filed. Four months later the trial court's decision was reversed on appeal. Further appeals were attempted, including one to the Supreme Federal Tribunal. The dispute did not become *res judicata* until two years and three months following the filing of the action.

19. The time needed to complete an executory proceeding varies from place to place in Brazil. In Rio de Janeiro, for example, six to seven months is common. In cities with less congested dockets, two or three months will suffice.

20. The conclusive opening order is discussed *infra* at n. 43-47 and accompanying text.

has scrutinized the pleadings to determine if they are legally sound and if the procedural prerequisites have been complied with. Second is the evidentiary stage (*fase instrutória*), where most evidence is presented. Third is the decision-making stage (*fase decisória*), where a judgment is entered by the court.

In practice, these stages tend to overlap. This is especially true for the last two stages, where the final hearing (*audiência*) encompasses both fact-finding and judgmental activities.

A. Pleading Stage

1. Complaint

Law suits are begun by filing a complaint with the clerk of the court. Before permitting service on the defendant, the judge scrutinizes the complaint to make sure that it meets legal requirements. If the complaint has a defect that can be cured, the judge will give the plaintiff ten days to amend.²¹

An American lawyer, accustomed to notice or fact pleading, will be surprised by the complaint filed by a Brazilian lawyer.²² It typically contains three parts: statement of facts, considerations of law (including a recitation of the statutes and authorities supporting the plaintiff's position), and prayer for relief. In addition, the plaintiff must set out in his complaint the proof that he intends to introduce, along with all documents supporting the facts alleged.²³

The judge may grant only relief that has been demanded by the parties. Therefore, the complaint must contain all the plaintiff's demands for relief, and each demand must be certain and definite.²⁴ After service of the complaint, a prayer may be amended, reduced or amplified only with the consent of the defendant, but such modification must take place prior to entry of the conclusive opening order. If the plaintiff omits a request for relief in his complaint or seeks to increase his demand, the judge will refuse the additional relief as *ultra petita*. Plaintiff must file another action to seek the additional relief.²⁵ The complaint must also place a value on the action, even if

21. CPC, art. 284. If the complaint is not amended within ten days, the judge will dismiss it. *Id.*, sole para.

22. In theory, a plaintiff who is not an attorney can represent himself, but only if no lawyer is available or willing to take the case. CPC, art. 36. Plaintiffs may proceed pro se when seeking support. Law No. 5.478 of 25 July 1968, art. 2. It is also customary to allow parties to make direct requests to the judge in certain kinds of cases. For example, defendants are customarily allowed to ask the judge directly to be allowed to pay overdue rent in order to avoid eviction, even though the relevant statute, Law No. 6.649 of 16 May 1979, art. 36, does not actually provide for such direct request.

23. CPC arts. 282-83 and 396.

24. CPC, art. 286. Generic requests for relief are allowed, however, in certain actions where specific requests are impossible or impractical. *Id.*

25. CPC, arts. 264 and 294. This excessively formalistic approach makes little sense, especially when one considers that the second action would probably qualify as a related action (*ação conexa*) and be consolidated with the first. CPC, arts. 103 and 105.

the action has no particular economic value.²⁶

The judge has three options after a complaint has been filed. He can accept it, reject it, or suggest that it be modified. If he accepts the complaint, the judge issues an order (*despacho liminar*) directing service on the defendant.²⁷ If the judge suggests amendment, the plaintiff has 10 days to redraft the complaint. If the plaintiff does not properly amend or the defect is incurable, the judge will dismiss the complaint. An order rejecting the complaint is appealable.²⁸

The procedure for filing a complaint practically guarantees substantial delays in starting a lawsuit, particularly if the courts are congested. Unlike the United States, Brazil does not permit the plaintiff's attorney to have the complaint served until the judge has reviewed and approved it, a process that can easily consume several months, and even more if an interlocutory appeal is taken. Since many cases settle as soon as a complaint is served and since much of the work done by the judge on his own in reviewing the law can be done more easily after hearing from defendant's counsel, the CPC's requirement of judicial approval prior to service of the complaint seems an inefficient expenditure of judicial resources. This defect is compounded by the inflexible refusal to permit plaintiff to amend his complaint with respect to the relief sought. In a highly inflationary economy like Brazil, this senseless lack of flexibility has generated a considerable amount of injustice and unnecessary relitigation because the value of the damages alleged in the complaint is worth far less several years later when judgment is finally rendered. Moreover, it is usually difficult to know what one's damages eventually will be, or more importantly, what damages one can prove, at the stage of drafting the complaint. It would be far preferable to permit flexible or indefinite damage claims and scrap the troublesome and unfair system of charging court costs as a multiple of the value placed on the action in the complaint.

2. Service of Process (*Citação*)

Proper service is a prerequisite for all actions. Service must be made by an officer of the court on the defendant personally or upon his legally authorized representative.²⁹ Brazilian law contains sev-

26. CPC, art. 258. Arts. 259 and 260 contain rules for determining the value of the relief requested by the plaintiff.

27. CPC, art. 285.

28. Barbosa Moreira, *O Novo Processo Civil Brasileiro* 33 (5th ed. 1982).

29. CPC, art. 214 and 215. Invalid service of process, however, will not be grounds for dismissal if the defendant appears and responds to the complaint. CPC, art. 214, para. 1. If three attempts at service have been unsuccessful, service can be set at a predetermined hour (*citação com hora certa*) by notifying a member of the defendant's family or a neighbor, setting a specific time and place for the defendant to appear to receive service. If the defendant fails to appear, service can be made on a family member or neighbor, followed by sending the defendant a letter or telegram. CPC, arts. 227-29.

eral quaint immunities from service of process for honeymooners, mourners, worshipers, and public officials at work. If the statute of limitations period (called prescription in civil law parlance) is about to expire, however, these immunities are waived.³⁰

The CPC permits service by registered mail, but this sensible innovation is unwisely limited to cases where the defendant is a commercial or industrial entity domiciled in Brazil.³¹ Service may also be made by publication if the whereabouts of the defendant is unknown or when the defendant is inaccessible or unidentified.³²

Third parties whose interests will be affected by the outcome of the litigation should be served with process and joined in the action (*denúnciação da lide*). Persons obligated to indemnify the losing party or who have guaranteed his obligation must be joined as defendant parties.³³ In certain kinds of cases, the Federal or State Public Ministry may intervene;³⁴ in other kinds of cases the Public Ministry must intervene, and plaintiff's failure to serve the Ministry may result in nullification of the action.³⁵

3. Defendant's Response

The defendant may respond to the complaint in essentially three ways: (1) answer (*contestação*) (2) exception (*exceção*), and/or (3) counterclaim (*reconvenção*). In an ordinary proceeding, the defendant normally has 15 days from the time of entry in the record of proof of service (or a time set by judge in case of service by publication) to respond to the complaint.³⁶

a. Answer

Like the complaint, the defendant's answer more closely resembles a brief than a pleading. Not only does it include factual allegations, but also the legal provisions and authorities on which the defendant relies. The answer also identifies the evidence the defendant intends to introduce and includes all documents supporting the defendant's position.³⁷

The answer may attack the sufficiency of the complaint on the

30. CPC, art. 217.

31. CPC, art. 222.

32. Plaintiff must include an official statement with respect to the defendant's whereabouts and within fifteen days publish service twice in local papers and once in the Official Gazette. CPC, arts. 231-232. A defendant located in a country that refuses service of letters rogatory is regarded as inaccessible. *Id.* at art. 231, para. 1.

33. CPC, art. 70.

34. Generally these are suits involving the public interest. CPC, art. 82 (III).

35. These are suits involving interests of minors and other incompetents, and actions concerning personal status, parental power, guardianship, incompetency, marriage, declaration of absence, and wills. CPC, arts. 81-82. The proceedings are annulable only if the party who should have been helped by the Public Ministry fails to prevail. See CPC, art. 84; Barbi, 1 *Comentários ao Código de Processo Civil* 380-81, 384 (3d ed. 1983).

36. CPC, arts. 297, 241 and 232 (IV).

37. CPC, arts. 300 and 396.

merits and/or raise procedural defects that cannot be raised by way of a special pleading, discussed below, called an exception.³⁸ Failure to aver defenses in the answer precludes their subsequent assertion, and undenied allegations are deemed admitted.³⁹

b. Exceptions

An exception is a plea used to assert lack of jurisdiction (because of the amount in controversy or territory) or to seek recusal of the judge because of actual or perceived bias. It can be filed at any stage of the proceeding, including appeal, by written petition to the presiding judge. Proceedings in the case are temporarily suspended until the exception is resolved.⁴⁰

c. Counterclaims

Only a defendant may file a counterclaim. The counterclaim must be either related to the principal action or based upon a defense to the complaint. The original cause of action must be pending at the time the counterclaim is filed, and the court must have an independent basis of jurisdiction over the counterclaim. Subsequent discontinuance of the original suit will not affect the counterclaim. Because it is deemed a new action, a counterclaim must be in the form of a complaint that is served upon the plaintiff's attorney and must comply with all the procedural requirements for any cause of action.⁴¹

d. Default

In the case of default, all facts alleged by the plaintiff will be deemed admitted. Judgment for the plaintiff does not, however, follow automatically. Plaintiff can request summary judgment but still must prove his case. A default may be set aside if a co-defendant answers the complaint or if plaintiff has failed to comply with some procedural requirement.⁴²

4. The Conclusive Opening Order (*Despacho Saneador*)

After the final pleadings have been filed, the parties and the

38. CPC, art. 301. These are similar to the affirmative defenses in the U.S. Federal Rules of Civil Procedure and include faulty service of process, lack of subject matter jurisdiction, *res judicata*, statute of limitations, failure to arbitrate when committed to do so, pending litigation, lack of capacity or power of attorney, and failure to post a required bond.

39. CPC, arts. 302 and 303.

40. CPC, arts. 304-314. Exceptions are supposed to be resolved within ten days. Id. arts. 308, 309, and 313.

41. CPC, arts. 315-18.

42. CPC, arts. 319, 320, 330 and 458 (II). See also Calmon de Passos, 3 *Comentários ao Código de Processo Civil* 466-67 (4th ed. 1983). If the complaint fails to attach a public document required to prove the plaintiff's claim, the facts alleged in the complaint will not be deemed admitted despite defendant's default. CPC, art. 320 (III).

court have an opportunity to make sure that all procedural requirements have been met and to narrow the issues.⁴³ If there are no disputed issues of fact or the factual issues can be resolved on the basis of documents already submitted, the judge can decide the merits immediately. He can also render summary judgment if the defendant defaults.⁴⁴

Brazil has an unusual procedural device for separating the pleadings from the merits. The conclusive opening order is an interlocutory decree declaring the inexistence of any procedural defects that might prevent consideration of the merits.⁴⁵ After all preliminary objections have been raised and resolved, the judge issues a conclusive opening order if he is satisfied that the case should be decided on the merits. The order usually defines the points in issue and determines which evidence will be received. The order precludes further consideration of issues already considered by the court or that could have been raised during the pleading stage.⁴⁶ The conclusive opening order also determines whether experts will be required; if so, it will designate the court's expert. Moreover, the order sets the date of the public hearing and determines what evidence should be adduced at that hearing.⁴⁷

B. Evidentiary Stage

The second phase of an ordinary proceeding is the evidentiary stage. Production of evidence, which begins at the pleading stage, is completed in this stage. Although Brazil's final public hearing has many characteristics of an Anglo-American trial, production of evidence is not concentrated into one hearing. Instead, evidence is gathered gradually over a period of several weeks or months. The proof-taking stage encompasses the actual production of evidence proposed in the pleadings and the conclusive opening order. Ordinarily, documentary evidence is introduced in the initial stage of ordinary proceedings by attachment to the pleadings. The judge will also admit documentary evidence at a later stage to support unforeseen facts or to refute evidence presented by opposing counsel.⁴⁸

43. The plaintiff must answer all procedural objections raised by the defendant within ten days. If required, the court will set a deadline for a party to correct irregularities in the action. CPC, art. 327. Failure to correct procedural problems leads to dismissal of the action without judgment on the merits. CPC, art. 267 (III).

44. CPC, art. 330.

45. CPC, art. 331. The conclusive opening order stemmed from a Portuguese Decree of 29 May 1907, and was adopted into Brazilian law in the Code of Civil Procedure of 1939. Pontes de Miranda, 4 *Comentários ao Código de Processo Civil* 206 (1974).

46. The only exception to this rule is lack of jurisdiction, a contention that can be raised at any time. CPC, arts. 113 and 305.

47. CPC, art. 331.

48. CPC, arts. 396-97. The judge will usually allow documents to be submitted late if there is some good reason for the delay. See also 4 Pontes de Miranda, *supra* n. 45 at 381-84.

1. Oral Testimony

The judge has the power to interrogate the parties and the witnesses. The judge may depose any party to the action at any stage of the proceedings,⁴⁹ but ordinarily parties and other witnesses testify only at the final public hearing. Good cause, such as the privilege against self-incrimination, right to privacy, or privileged business communications, will excuse a party or a witness from having to testify.⁵⁰ If a party refuses to answer or improperly answer questions without showing good cause, the judge has the power to impose sanctions, such as treating allegations against the non-appearing or uncooperative party as admitted.⁵¹ Failure to deny facts alleged in the complaint or failure to appear for questioning without good cause also constitutes an admission.

The actual questioning of witnesses is done through the judge. Following preliminary questions to each witness by the judge, each side's counsel submits questions that he would like the judge to ask that witness. The judge normally propounds these questions unless he deems them impertinent or irrelevant.⁵² Prepared written answers are not permitted, but a party may refer to notes during questioning.⁵³ The lawyer who calls a witness begins by telling the judge what the testimony will cover. The lawyer then requests the judge to ask certain questions of the witness. Counsel's questions are then put to the witness by the judge, a process roughly analogous to direct examination in the United States. The judge allows the lawyer calling the witness to formulate additional questions, which the judge also propounds. When the lawyer calling the witness has no further questions, opposing counsel initiates the analogue to cross-examination. He does this by formulating a series of questions for the judge to propound to the witness in order to "clarify" his testimony. Some of these questions are prepared in advance, but some are normally modified or invented as a response to the testimony just presented.⁵⁴ Lawyers have no opportunity for redirect or re-cross examination.

After listening to the testimony, the judge dictates to the clerk-typist the gist of what the witness has said. Generally, no court stenographer is present to make a word-by-word transcript of the proceedings. All testimony is typed up and signed by the judge, the deposed witness, and the parties.⁵⁵ At this time the witness may inspect the typed record and correct any errors.

Testimonial evidence is generally presented in the following or-

49. CPC, art. 342.

50. CPC, arts. 347 and 406.

51. CPC, art. 343, §§ 1 & 2.

52. CPC, art. 416.

53. CPC, art. 346.

54. CPC, art. 416. See also Carneiro, *Audiência de Instrução e Julgamento* 88 (2d ed. 1983).

55. CPC, art. 417.

der: expert testimony, depositions of the parties, and finally, non-party witnesses.⁵⁶ The court may order any person referred to in testimonial or documentary evidence to appear and testify. When witnesses differ in their testimony, the court may order a confrontation to try to resolve the conflict.⁵⁷ Before a non-party witness may testify, he will be questioned as to whether he is related to a party or has any interest in the action. Witnesses sufficiently impeached on the ground of incompetency or disqualified on the ground of interest or suspicion may be dismissed.⁵⁸

Despite its greater emphasis on orality, the CPC contains numerous arbitrary and illogical constraints on oral testimony reflecting traditional civilian disdain for such testimony. For example, the maximum number of witnesses any party may present is ten, and only three witnesses may be presented to prove the same point.⁵⁹ Contracts whose value at the time they were made exceeds the monthly minimum wage by a factor of ten (about \$500) cannot be proven by oral testimony alone.⁶⁰ A witness cannot testify with respect to facts already established by a document.⁶¹ A witness may be excused from testifying because of professional privilege or risk of grave loss to himself or family.⁶²

Many potential witnesses are restricted in their ability to testify because they are categorized as incompetent, disqualified for interest, or suspect. Incompetents, such as the insane, the blind and deaf under some circumstances, and children under the age of sixteen are prevented from testifying on the ground they lack capacity.⁶³ The parties, their spouses, and all lineal and collateral relatives up to the third degree of consanguinity or affinity, as well as representatives, guardians, judges and attorneys in the case, are disqualified because of interest.⁶⁴ Capital enemies or intimate friends of a party, convicted perjurers, notorious liars, and those financially interested in the litigation are classified as suspect.⁶⁵ Persons disqualified for interest or regarded as suspect may testify if strictly necessary, but they may not testify under oath. In a marvelous bit of legislative circumlocution, the CPC directs the judge "to give such testimony the credence it may deserve."⁶⁶

56. CPC, art. 452.

57. CPC, art. 418.

58. CPC, art. 414. See n. 63-66 *infra* and accompanying text.

59. CPC, art. 407, sole para.

60. CPC, art. 401. Compare Article 1341 of the French Civil Code prohibiting proof in court of any contract with a value of more than 50 francs (about U.S. \$7) (amended by Decree No. 80-553 of 15 July 1980, to 5000 francs) unless there is a written document either accepted by a notary or signed by the parties.

61. CPC, art. 400 (I).

62. CPC, art. 406.

63. CPC, art. 405.

64. CPC, art. 405, § 2; Amaral Santos, 4 *Comentários ao Código de Processo Civil* 265 (3d ed. 1982).

65. CPC, art. 405, § 3.

66. CPC, art. 405, § 4.

From the perspective of a lawyer trained in the common law tradition, the process by which oral testimony is taken is seriously deficient. The number of witnesses deemed unfit to testify is far too broad. Children younger than 16 can make excellent witnesses. The parties or their relatives are frequently the persons who know the most about the facts of the case. The inability of counsel to question witnesses directly is a serious handicap in exposing doubts and contradictions in testimony. Brazilian judges generally pay little attention to demeanor when a witness is testifying. Indeed, they often pay little attention to the oral testimony when given, preferring to rely on the written version in the clerk's summary.

2. Expert Testimony

Expert testimony is presented in the period between the conclusive opening order and the public hearing, generally in the form of written findings submitted to the clerk of the court. When expert testimony is needed, the judge will normally designate his own expert, and each party will designate his own expert.⁶⁷ The topics addressed by the experts depend upon the questions devised by the parties and the judge. Experts can themselves call witnesses and solicit documents from parties. Once the fact-finding stage is concluded, the experts confer and present their conclusions. The experts may be called later to appear at the public hearing to answer any questions concerning their findings.⁶⁸

3. Discovery

Brazil has discovery, albeit in a more restricted form than in the United States. In addition to the judge's inherent power to order production of evidence or the taking of testimony, the CPC authorizes any party, either in the complaint or in the answer, to request the court to order the production of documents or other evidence in the possession of the opposing side.⁶⁹ Because the evidence requested must be clearly specified, this procedure is of little use to the litigant who does not know what evidence the other party has. If a party unjustifiably refuses to produce a requested document or other evidence, the judge has no power to compel production. Instead, the court will deem as admitted the facts the other party intended to substantiate with the requested evidence. This sanction, however, is of little use to the party who does not know what is in the evidence the other party refuses to turn over. A party can justifiably refuse to produce documents or other tangible evidence for many reasons, including a right to privacy in family matters, the

67. CPC, arts. 145 and 421. A recent amendment requires the court to select experts who have university credentials and are professionally registered. In areas where no such experts are available, the judge can use his own discretion in designating an expert. Law No. 7.270 of 10 Dec. 1984.

68. CPC, arts. 425, 426, 429 and 435.

69. CPC, arts. 355 and 356.

privilege against self-incrimination, or some other privilege. Refusal to produce a document will not be excused if it is common to the parties, or if the requested party has either a legal obligation to exhibit the document or intends to rely on it.⁷⁰

A separate request may be instituted against a third party to produce documents or other evidence.⁷¹ A third party may assert the same privileges permitted to a party. The judge, however, has the power to order the police to seize the evidence in case of non-compliance with a judicial request for production.⁷²

At any stage of the proceedings, the judge is authorized to inspect people or things in order to clarify issues in the case.⁷³ The inspection may occur in the courthouse or in the place where the evidence or person is located. Parties have a right to be present at a judicial inspection and to make relevant observations. After completing his inspection, the judge must reduce his observations to writing and make his report part of the record.⁷⁴

C. *The Decision-making Stage*

1. The Public Hearing (*Audiência*)

The final stage of the proceedings begins with a focused public hearing that resembles a common law bench trial.⁷⁵ At the start of the hearing, the judge usually attempts to settle the case.⁷⁶ Any settlement agreement must be ratified by the judge, who verifies the form of the settlement, the authority of the parties to settle, and that non-waivable rights are not involved.⁷⁷

If the case remains unsettled, the judge will order the introduction of proof on disputed points previously determined by the court.⁷⁸ This consists of the oral testimony discussed above. The hearing concludes with oral argument, limited by the CPC to 20 minutes per party.⁷⁹

2. Rules of Proof

Brazil is far more liberal than most Latin American countries with respect to rules of proof. Civil law countries traditionally limit judicial decision-making with detailed rules of legal proof. Brazil, however, has taken the progressive position of permitting the judge

70. CPC, arts. 358, 359 and 363.

71. CPC, art. 360.

72. CPC, art. 362.

73. CPC, art. 440.

74. CPC, arts. 442 and 443.

75. CPC, arts. 444-57.

76. The duty to attempt a settlement is imposed in cases involving the family and patrimonial rights. CPC, art. 447.

77. Rarely will a Brazilian judge attempt to push the parties into a settlement.

78. CPC, art. 451.

79. CPC, art. 454. This can be extended an additional ten minutes at the judge's discretion. *Id.*

to evaluate the evidence freely.⁸⁰ To be sure, the judge is not entirely free. In certain circumstances, the law creates a presumption or requires that proof be made by a public instrument.⁸¹ If no particular rules govern the evaluation of proof, the CPC directs the judge to decide in accordance with the common rules of experience.⁸² Probably the most significant constraint on judicial freedom to evaluate the evidence is that the judge must write an opinion stating the reasons underlying his decisions.⁸³ This rule frequently functions as a salutary check upon all judicial decision-making.

The truth of factual assertions can be proven by any lawful and morally acceptable means.⁸⁴ Facts need not be proven if they are notorious, admitted by the parties or legally presumed.⁸⁵ The burden of proof is generally on the plaintiff with respect to facts essential to his cause of action, and is on the defendant with respect to facts that modify or negate the plaintiff's cause of action.⁸⁶ The party who alleges foreign law, state or municipal law, or customary law has the burden of proving it.⁸⁷

3. Judgment (*Sentença*)

Judgment can be rendered immediately after oral argument. In theory, at least, judgment must be rendered not more than ten days after the final public hearing.⁸⁸ Judgment on the merits may be rendered even before the hearing, such as where the plaintiff renounces his right of action, the defendant admits the essential allegations of the complaint, the parties reach an out-of-court settlement, or the judge dismisses the complaint because it is time-barred.⁸⁹

To be effective, a judgment must be "published". This means it must be either read by the judge at the hearing or simply inscribed in the official books by the clerk of the court, in which case it will become effective upon notice to the parties, usually by publication in

80. CPC, art. 131.

81. Art. 366 of the CPC provides that if the law requires a public instrument as the substance of an act, no other means of proof will suffice. A public instrument, which is a document of public record prepared by a notary, is required for certain types of judicial acts, such as adoptions, antenuptial agreements, and real property conveyances. See Brazilian Civil Code, arts. 133 and 134.

82. CPC, art. 335.

83. CPC, art. 131. Cf. CPC, art. 458 (II).

84. CPC, art. 332.

85. CPC, art. 334.

86. CPC, art. 333.

87. CPC, art. 337. As a practical matter, the court often takes judicial notice of state and municipal law. Foreign law is usually proven by submission of copies of laws or treatises rather than by expert witnesses. See 4 Amaral Santos, *supra* n. 64 at 50-52.

88. CPC, art. 456.

89. CPC, art. 269. The judge can render summary judgment when there are no factual issues to be decided, or when the factual issues may be resolved by simple examination of documentary evidence contained in the complaint or in other situations in which a hearing is deemed unnecessary. *Id.*, art. 330.

the Official Gazette.⁹⁰ The judgment must contain the names of the parties, the relief requested, the defendant's answer, and the principal events of the proceedings. It must also contain the judge's analysis of the issues of fact and law, as well as his disposition of those issues.⁹¹ The judgment does not become *res judicata*, however, until no further appeal is possible.

D. Summary Proceedings⁹²

Summary proceedings can be utilized only for small claims⁹³ or certain kinds of actions. The latter group constitutes a hodgepodge with no discernible unifying trait. It includes suits to recover: personal property, easily provable liquid and certain debts, attorneys' fees, doctors' bills, and damages suffered in car accidents or to buildings. It also includes cases involving renewal of leases of rural land, condominium fees, and building expenses.⁹⁴ While it makes eminent sense to permit a summary proceeding with abbreviated proof taking for small and easily provable claims, it makes little sense to permit summary proceedings for such potentially costly and difficult to prove claims as those arising from automobile accidents.

The CPC mandates that the entire summary proceeding, excluding any appeals, be completed within 90 days from the filing of the complaint.⁹⁵ The law does not, however, impose sanctions if this deadline is exceeded, and it almost always is.⁹⁶ The principal delay lies in setting a docket date for the hearing. In Rio de Janeiro, for example, hearings are generally not held until six months to one year after the filing of a complaint.⁹⁷

Not only must the complaint satisfy the same formal requirements as ordinary proceedings, but it must also include the names of witnesses to be called.⁹⁸ If the complaint is approved, the judges orders service of process on the defendant and sets a date for the hearing.⁹⁹ The defendant is not required to answer the complaint, and

90. Carneiro, *supra* n. 54 at 140-43.

91. CPC, art. 458.

92. This is a slightly inaccurate translation of *procedimento sumaríssimo*, which literally means "most summary proceedings." Curiously, the CPC does not provide for summary proceedings. The creation of the category of "Most Summary Proceedings" when there are no summary proceedings to distinguish is odd and is criticized into the doctrine. E.g., Vianna de Lima, "O Procedimento Sumaríssimo no Novo Código de Processo Civil," 246 *R. For.* 116 (1976). As one of Brazil's most preeminent jurists, Haroldo Valladão, has observed: "Today in Brazil in the Code of Civil Procedure, a summary procedure does not exist. The *processo sumaríssimo* of the Code of Civil Procedure is a second class summary procedure." Cited in Severo da Costa, "Idéias Gerais para Dinamizar o Judiciário," 535 *R. Trib.* 11, 12 (1980).

93. The amount in controversy cannot exceed 20 times the minimum wage. The minimum wage usually varies between U.S. \$35-70. CPC, art. 275 (I).

94. CPC, art. 275 (II).

95. CPC, art. 281.

96. See Calmon de Passos, *supra* n. 42 at 181.

97. See *supra* n. 18.

98. CPC, art. 276.

99. CPC, arts. 277 and 278.

he cannot file a counterclaim. The defendant must raise all his defenses, both procedural and substantive, at the hearing.¹⁰⁰

Summary proceedings do not have a separate proof-taking stage. The judge considers all preliminary objections raised by the defendant, as well as all defenses on the merits, at the hearing. After taking of the evidence, each party has only 10 minutes for oral argument. The final judgment may be rendered immediately after oral argument, but not later than five days thereafter.¹⁰¹

IV. EXECUTORY PROCEEDINGS

Execution involves a separate action in which the defendant must be served and have the opportunity to defend. The procedure is more summary than in an ordinary proceeding, and the range of defenses is more limited. A critical factor is that in order to defend the action the defendant must submit to attachment of his funds or property within 24 hours after service or, if the suit concerns a specific object, it must be deposited with the court within ten days.¹⁰²

An executory action is always based upon an executory right (*título executivo*). There are two kinds of executory rights: judicial and extrajudicial. A judicial executory right derives from the final judgment of a court.¹⁰³ An extrajudicial executory right, which resembles a *cognovit* note, derives from certain kinds of debts that Brazilian law treats as the functional equivalent of a judgment. These include: (1) negotiable instruments, such as bills of exchange, promissory notes, *duplicatas*,¹⁰⁴ and checks; (2) obligations to pay a sum certain or to deliver fungible goods, if evidenced by a public document or by a writing signed by the debtor and two witnesses; (3) debts secured by a mortgage, pledge, *antichresis*,¹⁰⁵ or bond, as well as sums due under a life or personal accident insurance policy because of the death or incapacity of the insured; (4) debts stemming from rentals of real property; (5) judicial awards of fees, costs, expert witness fees; (6) tax debts; and (7) other cases expressly provided for by statute (e.g., attorney's fees or tenant's security deposit).¹⁰⁶ Regardless of whether one's executory right is judicial or extrajudicial, a creditor may not institute an executory action un-

100. CPC, arts. 278 and 315, para. 2.

101. CPC, art. 280, as amended by Law No. 7.219 of 19 Sept. 1984.

102. CPC, arts. 737, 652 and 621.

103. CPC, art. 584. The judgment need not be rendered by a Brazilian court. A judicial executory right can also be created by a settlement, arbitral award, or a foreign judgment, provided it is homologated by a Brazilian court, or, in the case of a foreign court judgment, by the President of the Supreme Federal Tribunal. *Id.*

104. A *duplicata* is a signed copy of the invoice of a sale of goods and functions as a trade acceptance bill. See Silva, "The 'Trade Acceptance' of the Brazilian Commercial Law," 4 *Am. Bus. L.J.* 31 (No. 1, 1966).

105. *Antichresis* is a form of civil law mortgage in which the debtor agrees to give his creditor the income from real estate the debtor has pledged.

106. CPC, art. 585. The statutory examples are found in Law No. 4.215 of 27 Apr. 1963, art. 100, sole para., and Law No. 6.649 of 16 May 1979, art. 32, para. 2, respectively.

less he has a liquid and certain right, a requirement that has created serious difficulties for holders of floating rate notes.¹⁰⁷

If the executory right stems from a judgment, grounds for opposing execution are restricted to formal defects in the process.¹⁰⁸ On the other hand, if the executory right is extrajudicial, the debtor may not only interpose any of the formal defenses to execution of a judgment, but he may also raise any defense that would have been proper at the prejudgment phase of an ordinary suit.¹⁰⁹ Hence, the most important practical effect of the executory action is to give holders of extrajudicial executory rights the power to secure prejudgment attachment, an institution not otherwise formally recognized in Brazil.

V. PROVISIONAL PROCEEDINGS (*PROCESSO CAUTELAR*)

Provisional proceedings are ancillary or incidental measures designed to safeguard the proper functioning or outcome of the cognitive and executory proceedings.¹¹⁰ These proceedings, which are formally given the status of independent actions in the CPC, constitute an area where Brazilian judges have substantial discretion and power, and where attorneys sometimes display considerable ingenuity and creativity in protecting their client's interests. Provisional proceedings vary enormously. Some are specified in the CPC; others are indefinite and are not infrequently invented for the occasion.

107. CPC, art. 586. See also CPC, art. 618 (I). For cases denying execution to floating rate notes, see, e.g., *Fator Empreendimentos Imobiliários S/A v. Titotto*, A.C. No. 235.791, 524 R. Trib. 127 (1st Trib. Alçada Civ. S.P. 1977); *SOCEMI S/A de Empreendimentos Imobiliários v. Vieira dos Santos*, A.C. No. 250.549, 525 R. Trib. 126 (1st Trib. Alçada Civ. S.P. 1978); *Siqueira v. Construtora Paschoal & Goulart Ltda.*, Ap. No. 22.091, 582 R. Trib. 194 (3d Civ. Ch. Trib. Alçada M.G. 1983); *Contra: Moura Lima v. Banco Ipiranga de Investimentos S/A*, A.C. 5.004, 530 R. Trib. 187 (Trib. Just. R.J. 1977); *Binatti v. Blanco Filho*, A.C. No. 306.664, 579 R. Trib. 113 (1st Ch. Trib. Alçada Civ. S.P. 1983); *Lisandro de Albernaz v. Guimarães*, Ap. 84.500, 580 R. Trib. 251 (4th Ch. I. Trib. Alçada R.J. 1983); *Lara v. Banco Ipiranga de Investimentos S/A*, A.C. No. 4.479, 514 R. Trib. 220 (1st Ch. Civ. Trib. Just. R.J. 1977).

108. These defects include: (a) invalid service of process on a default judgment; (b) failure to comply with a legal requisite, such as failure to move for calculation of damages, fees, costs, or monetary correction, or failure to take a mandatory appeal; (c) lack of a legal interest by the party seeking execution; (d) execution is sought against the wrong party; (e) improper cumulation of executions, such as where the same court does not have jurisdiction over all the judgments; (f) seeking more than plaintiff is entitled to under the judgment; (g) nullity of the executory process, such as where a good that cannot be pledged has been pledged; (h) any factor that occurs after the judgment that modifies or extinguishes the obligation, such as payment, novation, or bankruptcy; or (i) lack of jurisdiction or disqualification of the judge because of interest or bias. CPC, art. 741.

109. CPC, art. 745.

110. *Barbosa Moreira*, supra n. 28 at 417-18; *Pontes de Miranda*, 12 *Comentários ao Código de Processo Civil* 3 (1st ed. 1976); *Vianna de Lima*, "O Processo Cautelar no Novo Código de Processo Civil," 246 *R. For.* 106-107 (1974).

A. *Specified Provisional Proceedings*

Simplifying somewhat, specified provisional measures can be divided into four categories: (1) techniques for assuring the production and protection of evidence, (2) devices to preserve the status quo among the parties or to preserve property, (3) measures to protect persons, and (4) measures to protect the court's jurisdiction.¹¹¹ The first category includes judicial orders requiring the production of physical exhibits, business records, or documents;¹¹² search and seizure of persons or things;¹¹³ advance production of evidence, such as taking depositions of party and non-party witnesses, and securing reports from experts;¹¹⁴ formal disclaimers of responsibility and other formal notices; and protests of overdue bills and notes.¹¹⁵ The second category includes orders for attachment,¹¹⁶ sequestration,¹¹⁷ orders to conserve or to refrain from altering property,¹¹⁸ and orders to post bond.¹¹⁹ The third category includes appointments of guardians for minors and incompetents,¹²⁰ custody awards,¹²¹ and provisional support.¹²² The fourth category covers assessments of damages and other sanctions on those who violate orders of attachment, sequestration, or other measures preserving the status quo.¹²³

B. *Unspecified Provisional Proceedings*

In addition to these specified provisional proceedings, Brazilian judges are granted generalized powers to authorize or prohibit practices or acts and to issue provisional measures they deem adequate to avoid damage.¹²⁴ These "unnamed" provisional measures offer great leeway to the judge in decreeing suitable ways to insure that the status quo will be maintained. One significant limitation is that the judge does not have the power to garnish wages except to secure payment of support.¹²⁵ Another limitation is that the provisional relief cannot exceed that to which a party is entitled if he prevails in

111. See Lacerda, 8 *Commentários ao Código de Processo Civil* 14-19 (Book I, 2d ed. 1984).

112. CPC, arts. 844, 355-63, 381 and 382.

113. CPC, art. 839-43.

114. CPC, arts. 846-51. See also, CPC, arts. 861-66 for advance proof of the existence of certain facts or juridical relations, and CPC, arts. 877-78, for proving pregnancy.

115. CPC, arts. 867-73, 882-87.

116. CPC, arts. 813-21.

117. CPC, arts. 822-25.

118. CPC, arts. 855-60, 888 (I).

119. CPC, arts. 826-38.

120. CPC, art. 888 (V).

121. CPC, art. 888 (III) and (VII).

122. CPC, arts. 852-54.

123. CPC, arts. 879-81.

124. CPC, arts. 798-799.

125. CPC, arts. 648, 649, and 734. See Neves, 7 *Comentários ao Código de Processo Civil* 22-23 (1984).

the principal action.¹²⁶

Even though Brazilian judges have had the power to issue unspecified provisional remedies since 1939, lack of doctrinal development and limited awareness by the practicing bar has generally restricted the use of these remedies to a few specific situations. The most common of these situations are staying protest of negotiable instruments, suspending of shareholders' meetings, staying endorsement of bills of exchange, stopping payment on checks, and freezing bank accounts.¹²⁷

By far the most common use of the "unnamed" provisional remedies has been to stay protest of a negotiable instrument (*sustação de protesto cambial*). When a firm is threatened with impairment of its credit rating due to the filing of an unwarranted protest of non-payment of its commercial paper, standard procedure is to ask a judge to order suspension of the protest proceedings, thereby preventing publication of the protest in the commercial newspapers and gazettes. Frequent resort to the stay of protest is a byproduct of the widespread use of the trade acceptance (*duplicata*) in Brazilian commercial transactions. Since mere proof that one has delivered the goods or rendered the service for which the *duplicata* has been issued can be substituted for an acceptance actually signed by the firm that is obligated to pay the *duplicata*, the opportunities for fraud are numerous.¹²⁸ Generally, the judge requires the firm seeking the stay of protest to deposit the amount in controversy into the court, but the time value of this deposit can be recovered in a subsequent action for damages.¹²⁹

C. Procedure in Provisional Proceedings

Provisional proceedings are treated as separate actions with their own summary procedure. Like ordinary cognitive proceedings, provisional proceedings begin with the filing of a complaint. The complaint is then reviewed by the judge, and if everything is in order, he will direct that the complaint be served. The judge may, however, concede the requested relief *ex parte* before even directing that the complaint be served.¹³⁰ After service of the complaint, the defendant has five days to file an answer in which he must indicate the evidence he intends to present. If the defendant fails to answer in a timely fashion, the judge is to decide the case within five days following completion of the pleadings.¹³¹ On the other hand, if the answer raises an issue requiring production of evidence, the judge

126. Sanches, "Poder Cautelar Geral do Juiz," 587 *R. Trib.* 13, 18 (1984).

127. Lacerda, *supra* n. 111 at 135-259.

128. See Marrey Neto, "A Sustação Liminar do Protesto Cambial e o Depósito do Valor do Título," 583 *R. Trib.* 27 (1984).

129. *Id.* at 36.

130. CPC, art. 804.

131. CPC, arts. 803, 285 and 319. If a timely answer is filed, but no issue of fact requiring proof is present, the judge has ten days to decide the case. Vianna de Lima, *supra* n. 110 at 108.

must issue an order setting a hearing. The final decision of the judge either granting or denying the requested provisional measure is a final judgment and is treated as such. Either party can appeal, but the appeal has no suspensive effect unless the provisional measure is entered against the government, in which case the measure is effective only after confirmation on mandatory appeal.¹³² If it will provide the other party with adequate protection, a bond can be substituted for another form of provisional remedy.¹³³

Provisional proceedings can be initiated either prior to or during the course of a cognitive or executory proceeding. If a provisional measure is conceded prior to commencement of the principal action, the plaintiff has thirty days in which to begin the principal action; otherwise the provisional measure will be dissolved.¹³⁴ The provisional measure will also be dissolved if the judge dismisses the principal action, with or without judgment on the merits.¹³⁵

Provisional measures are regarded as urgent and are normally conceded if the judge concludes that such measures are probably necessary to prevent irreparable injury. To a considerable extent, provisional proceedings resemble common law injunctions, both affirmative and negative. The prerequisites to granting such provisional relief in Brazilian courts are similar to obtaining injunctive relief in U.S. courts. Normally, one must demonstrate to a Brazilian court the following: (1) a sufficient probability of success on the merits in the principal action; (2) irreparable harm or damage that will at least be difficult to repair; and (3) risk of loss of one's rights through delays in resolution of the principal action. Often concession of a provisional measure is conditioned upon posting of a bond to indemnify the other party.¹³⁶ In addition to a wholly separate indemnification obligation for the bad faith litigant,¹³⁷ the beneficiary of a provisional measure will be obligated to reimburse the other party for the damage caused by the measure if the beneficiary fails to prevail in the principal action or fails to file the principal action in a timely fashion.¹³⁸ Provisional measures can always be modified or revoked.

132. CPC, arts. 520 (IV) and 475 (II). But see the limitations imposed by Law No. 6.825 of 22 Sept. 1980. Provisional measures are not commonly entered against the government because most of the purposes for such measures can often be more effectively achieved by use of the writ of security (*mandado de segurança*) or habeas corpus. Moreover, government property is immune from attachment, sequestration, or execution. Judgments must be satisfied out of budgetary appropriations upon issuance of a special judicial order called a *precatório*.

133. CPC, art. 805.

134. CPC, arts. 806 and 807.

135. CPC, art. 808.

136. CPC, art. 804.

137. CPC, art. 16.

138. CPC, art. 811.

VI. APPEALS

Brazilian procedure follows the general pattern of the civil law in having a single judge of the first instance and a collegial tribunal of three judges of the second instance. Practically all cases can be appealed, and the court of second instance essentially affords the litigants a trial *de novo*. In exceptional circumstances, review by a court of the third, or even fourth instance, will be afforded.

One of the principal causes of seemingly interminable delay in Brazilian courts is the large number of opportunities to seek appellate review. Virtually all interlocutory orders are appealable. In certain kinds of cases, appellate review is not only mandatory, but the trial judge is also required to appeal his own decision *ex officio*.¹³⁹ Even decisions rendered by small claims courts or by Brazil's highest court can be appealed.¹⁴⁰ The 1973 Code reduced the ways to seek review of lower court decisions to five: (1) appeal, (2) bill of review (3) request for a rehearing *en banc*, (4) request for clarification, and (5) extraordinary appeal.¹⁴¹

A. Appeal

Appeal is the usual way to seek review of a final judgment.¹⁴² An appeal normally has two effects. One is the suspension of enforcement of the judgment, and the other is the submission of the case to the appellate tribunal. Only in exceptional cases does an appeal lack supersedeas effect.¹⁴³

A basic principle of Brazilian procedure is that a request for appellate relief must first be addressed to the court that entered the judgment or order being appealed. Thus, the trial court initially decides whether to permit an appeal by determining whether the formal requirements for appealability are met.¹⁴⁴ If these formal requirements are met, the lower court is obliged to send up the record to the higher court. The lower court's determination of non-appealability is not necessarily fatal, for the party can still seek to overturn such a determination by filing a bill of review (*agravo de*

139. Any judgment that annuls a marriage, is entered against the government, or is decided adversely to execution of the claims of the Public Treasury, is subjected to an automatic appeal. CPC, art. 475. Since 1980, however, judgments against the government or Treasury claims are subject to automatic appeal only if their value is equal to or greater than 100 ORTNs (about U.S. \$600 in September 1985). Law No. 6.825 of 22 Sept. 1980, art. 1.

140. See Law No. 7.244 of 7 Nov. 1984, art. 41, and *Internal Rules of the Supreme Federal Tribunal*, arts. 330, 333, and 337.

141. CPC, art. 496.

142. CPC, arts. 513-21. A losing party normally has 15 days from publication of the judgment to appeal; the appellee also has a period of 15 days to respond. If the appellant is the Public Ministry or the Public Treasury, or if the appellants are joint parties with different attorneys, the period for filing an appeal is extended to 30 days. CPC, arts. 508, 188, and 191.

143. CPC, arts. 515 and 520.

144. Barbosa Moreira, *supra* n. 28 at 166-71.

instrumento).¹⁴⁵

Appeal is the most important form of review. It is most often used because it stays the judgment below. An appeal is usually heard by one of the chambers of the tribunals of a state. Unless there is a dissent, no further appeal will lie, with the exception of the limited cases allowing an extraordinary appeal.¹⁴⁶ An appeal constitutes essentially a trial *de novo* in the appellate court, which does not regard the findings of fact or law below as presumptively correct. Because the entire record is reduced to writing and demeanor evidence is deemed unimportant, the appellate court regards itself in as good a position as the trial court to evaluate the evidence and determine the application of the law to the facts. Moreover, additional evidence can be admitted directly before the appellate court if *force majeure* prevented its introduction below.¹⁴⁷

A recent effort to reduce appellate case loads has modified the right to appeal in executory proceedings brought by the treasury of any level of government and in all federal court proceedings. In cases where the amount in controversy is less than 50 ORTNs (roughly U.S. \$360 in January 1986), only a request for reconsideration (*embargos infringentes do julgado*) or request for clarification is permitted.¹⁴⁸ Since both these review procedures are decided by the same court that heard the case originally, this reform measure may violate the Constitution as an effective denial of the right to appeal.¹⁴⁹

B. *Bill of Review (Agravo de Instrumento)*

One normally seeks review of interlocutory decisions through the bill of review, a procedural device invented by the Portuguese as a device for maneuvering around a law of King Alfonso IV that prohibited interlocutory appeals.¹⁵⁰ Virtually all significant interlocutory orders are reviewable by a bill of review, which must be filed within five days from publication of the interlocutory order.¹⁵¹ The bill of review differs from other types of appeals in that the appellant does not have to secure a determination of appealability from the court whose decision he is seeking to review.¹⁵² Only if filing fees have not been paid can the trial judge avoid a bill of review.

Theoretically, except in a few specified cases, the bill of review has no suspensive effect; hence, the order being reviewed remains in

145. See n. 150-56 *infra* and accompanying text.

146. See *infra* n. 162-67.

147. CPC, art. 517.

148. Law No. 6.825 of 22 Sept. 1980, art. 4; Law No. 6.830 of 22 Sept. 1980, art. 34. See also *supra* n. 139.

149. See Calmon de Passos, "O Devido Processo Legal e o Duplo Grau de Jurisdição," 25 *Ajuris* 130, 136, 141-44 (July 1982).

150. Tucci, "Agravo de Instrumento," 5 *Enciclopedia Saraiva de Direito* 232, 234-35 (1977).

151. Barbosa Moreira, *supra* n. 28 at 199-20.

152. CPC, art. 528.

effect.¹⁵³ If the order is upheld, nothing changes. But if the order is reversed or reformed, all subsequent proceedings are annulled. Since a busy judge is often reluctant to risk wasting further effort on a case if there is a chance that his interlocutory order will be overturned, it is common for judges to take no further action so long as a bill of review is pending, a period that typically consumes several months. Thus, in practice a bill of review often does have a suspensive effect.

Brazilian lawyers sometimes try to couple a writ of security with a bill of review because a stay can be granted in a writ of security suit.¹⁵⁴ The appellate courts, however, generally refuse to permit such attempts at piggybacking to secure a stay.

In order to preserve review of an adverse interlocutory decision that may not seriously prejudice a party at the time rendered, one can file a bill of review and ask that it be held until judgment. If the judgment is ultimately unfavorable to that party, the bill of review can be joined with an appeal. The bill of review will be decided prior to the appeal.¹⁵⁵

Whenever one of the parties is a foreign nation or an international organ, and the other is a municipality or person domiciled or resident in Brazil, a bill of review or an appeal can be taken directly to Brazil's highest court, the Supreme Federal Tribunal.¹⁵⁶

C. Request for a Rehearing *en Banc* (*Embargos Infringentes*)

If a decision on an appeal or in a rescissory action¹⁵⁷ is not unanimous, the losing party can challenge the decision by demanding a rehearing *en banc*.¹⁵⁸ In the event disagreement within the tribunal is partial, the rehearing will be limited to only those points of disagreement. Consequently, the dissenting vote becomes critical, and one must annex or attach a copy of the dissent to the request for rehearing.

Like most types of appellate review, a request for rehearing *en banc* is initially presented to the tribunal that rendered the decision from which review is sought. The rehearing, however, is decided by five judges of a group formed from two chambers within the appellate tribunal. The case will be assigned to one member of the original tribunal who serves as the reporter. If he concludes that the challenge presented by the request for rehearing is improper as a matter of form, the reporter will summarily decline the review sought without reaching the merits. From his decision a form of review called the *agravo de mesa* or *agravinho* can be taken before the

153. CPC, arts. 497 and 558.

154. See *infra* n. 190-195 and accompanying text.

155. CPC, art. 522 § 1.

156. CPC, art. 539.

157. See *infra* n. 172-75 and accompanying text.

158. CPC, art. 530.

entire group of five judges.¹⁵⁹ The reporter simply places the case on the table for determination during the next session, gives his report, and refrains from voting. If his colleagues decide to rehear the case, a new reporter will be chosen by lot. On the other hand, if the reporter grants the request for rehearing, the challenge will be distributed immediately before a five-judge group for decision.¹⁶⁰

D. Request for Clarification (*Embargos de Declaração*)

The request for clarification is a procedural device for clarifying an unclear or contradictory decision. It is also used when a decision fails to decide a point that should have been decided.¹⁶¹ A request for clarification suspends the period for the bringing of any other forms of review. The judge of the first instance grants or denies the request when his decision is being challenged. Any request for clarification of a decision of an appellate court is received by the reporter of the challenged decision and decided at the next session of the same tribunal.

E. Extraordinary Appeal (*Recurso Extraordinário*)

The extraordinary appeal, which was adapted from the U.S. writ of error,¹⁶² is the principal means of appealing to the Supreme Federal Tribunal. The extraordinary appeal will lie only if the challenged decision: (1) contravenes provisions of the Federal Constitution or fails to uphold a treaty or federal law; (2) declares a treaty or federal law unconstitutional; (3) upholds a state or municipal law against a claim of unconstitutionality or conflict with federal law; or (4) interprets federal law in a way different from that decided by another tribunal or by the Supreme Federal Tribunal itself.¹⁶³

The second and third categories are relatively clear, but the first and fourth have been fertile sources of litigation. Extraordinary appeals taken pursuant to the first and fourth categories have been sharply limited by constitutionally authorized Internal Rules of the Supreme Federal Tribunal. Large classes of appeals will be heard only if they raise substantial constitutional or federal questions or diverge from the *Súmula* of the Supreme Federal Tribunal.¹⁶⁴ Con-

159. The period for filing a request for rehearing *en banc* is 15 days. The other party has a similar time in which to oppose the request. If, however, the request is judged to be procedurally improper, the *agravo de mesa* must be brought within 48 hours from the date of publication of the decision. CPC, arts. 508 and 532.

160. CPC, arts. 532 and 533.

161. CPC, arts. 464 and 535. A request seeking clarification of a decision of the first instance must be brought within 48 hours of the publication of the judgment. CPC, arts. 464 and 465. A request for clarification of an appellate decision must be brought within 5 days from the date of publication of the decision. CPC, arts. 535 and 536.

162. Pontes de Miranda, 4 *Comentários à Constituição de 1967*, 79, 90 (1967).

163. Braz. Const., art. 119 (III) (a-d) (1969); CPC, art. 541.

164. Braz. Const., art. 119, para. 1, as amended by Const. Amend. No. 7 of 13 Apr.

ferring discretion on the Supreme Federal Tribunal to limit its consideration of cases to those raising important constitutional and federal questions was modeled upon the U.S. Supreme Court's writ of certiorari, created by the Judiciary Act of 1925.¹⁶⁵

The extraordinary appeal must be brought within 15 days from publication of the decision below and must be addressed to the president of the tribunal that rendered the appeal decision. The filing of an extraordinary appeal has no suspensive effect on the judgment.¹⁶⁶ The Supreme Federal Tribunal's jurisdiction will be limited to the federal or constitutional issues raised; it will not have jurisdiction over issues of fact or nonfederal legal questions. On the other hand, once the Supreme Federal Tribunal decides to hear an extraordinary appeal, it will not only determine the law but will go on to apply the law to the facts of the case on appeal.¹⁶⁷ Thus, the Supreme Federal Tribunal acts more like the U.S. Supreme Court than the Courts of Cassation of France or Italy.

F. *Review of Decisions of the Supreme Federal Tribunal*

Even after a case has been decided by the Supreme Federal Tribunal, further appeal may be possible. The Supreme Federal Tribunal sits in two chambers composed of five judges each. If a decision of one chamber on an extraordinary appeal or bill of review differs from a decision by another chamber or by the Tribunal sitting *en banc*, the aggrieved party can seek further review in the Tribunal *en banc* by filing a request for resolution of the conflict in decisions (*embargos de divergencia*).¹⁶⁸ In five types of cases, unless a decision of the Supreme Federal Tribunal is unanimous, an aggrieved party is entitled to further review by asking for a rehearing.¹⁶⁹ Even decisions of the full Tribunal in these classes of cases are subject to granting of a rehearing if there are at least three dissenting votes.¹⁷⁰ Finally, a party can always file a petition seeking clarification of any final decision.¹⁷¹

1977, and Internal Rules of the Supreme Federal Tribunal, art. 325. The *Súmula* is discussed at infra n. 180-85 and accompanying text.

165. Bermudes, "Arguição de Relevância da Questão Federal," 7 *Enciclopedia Saraiva de Direito* 435, 437-38 (1978).

166. CPC, arts. 542 and 543, para. 4.

167. Barbosa Moreira, supra n. 28 at 227, 235-39.

168. CPC, art. 546, sole para.; *Internal Rules of the Supreme Federal Tribunal*, art. 330.

169. The five classes of cases are: (1) decisions holding that a criminal prosecution is proper, (2) decisions holding that a *revisão criminal* (the penal counterpart of the civil rescissory action, filed to review a nonappealable criminal judgment) is improper, (3) rescissory actions, (4) representations of unconstitutionality, and (5) ordinary criminal appeals decided against the accused. *Internal Rules of the Supreme Federal Tribunal*, art. 333.

170. *Id.*, sole para. The only exception from the requirement of a minimum of three dissenting votes is for criminal cases in secret session. *Id.*

171. *Id.* at arts. 337-39.

VII. RECISSORY ACTIONS

Brazil's penchant for ensuring that litigation can drag on interminably is reflected in the operation of the rescissory action. A rescissory action can be used to set aside a final judgment on the merits if brought within two years of the date the judgment became final.

Grounds for rescinding a final judgment on the merits are relatively broad, making finality all the more elusive. Final judgments can be set aside on collateral attack if they are based upon: (1) judicial corruption, (2) absolute lack of jurisdiction, (3) fraud by the prevailing party or collusion between the parties, (4) offense to the principle of *res judicata*, (5) literal violation of a statutory provision, (6) false proof, (7) after-discovered documentary evidence, (8) an invalid admission or settlement, or (9) an error of fact.¹⁷² A prerequisite for bringing a rescissory action is the plaintiff's depositing 5% of the value of the judgment with the court as liquidated damages in case the action is unsuccessful.¹⁷³ Filing a rescissory action does not, however, suspend execution of the judgment.¹⁷⁴

The rescissory action is brought directly before the appellate tribunal, which can remand to the court of first instance for taking of necessary evidence. If the action is successful, the tribunal will set aside the judgment and, if proper, enter its own judgment. It will also decide whether the deposit shall be returned to the plaintiff.¹⁷⁵

The rescissory action is often used in Brazil after all appeals have failed. The breadth of the grounds affords the unsuccessful litigant substantial opportunity to relitigate his case and reflects an underlying distrust of the ability of the judicial system to reach correct results.

VIII. UNIFICATION OF CASE LAW

Brazil is heir to two opposing traditions with respect to the precedential value of judicial decisions. On one hand, Brazil inherited from Portugal the tradition of the *assento*, the judicial decision with binding precedential value. Early in the development of Portuguese law decisions of the *Casa da Suplicação*, Portugal's highest court, interpreting the law were regarded as an authoritative source of law. During the colonial period, this practice was confirmed in the *Lei da Boa Razão* (Law of Good Sense) of 18 August 1769.¹⁷⁶ Similarly, in more modern times, the Superior Labor Tribunal au-

172. CPC, art. 485.

173. CPC, arts. 488 and 494. No deposit is required if a rescissory action is brought by the Public Ministry or the federal, state, or municipal governments. *Id.*, art. 488, sole para.

174. CPC, art. 489.

175. CPC, arts. 491-94.

176. Nunes Leal, "Passado e Futuro da "Súmula do STF," 553 *R. Trib.* 287, 290 (1981); Villaca Azevedo, "Assentos e Uniformizacao da Jurisprudencia," 8 *Enciclopedia Saraiva de Direito* 201, 203-209 (1978).

thoritatively interpreted the labor legislation, both in concrete cases and in the abstract, and these interpretations (called *prejulgados*) were binding on all the labor courts.¹⁷⁷ On the other hand, Brazil is also heir to the civil law tradition in which the doctrine of separation of powers denies the judiciary the ability to make law and refuses to consider judicial decisions as binding precedents. The tension between these two traditions has resulted in an intriguing compromise. Brazil has developed both a procedure for resolving conflicts in the case law and a unique quasi-precedential device called the *Súmula*, previously discussed in Section VIII (B).

A. Procedure for Unifying the Case Law

In contradistinction to most civil law jurisdictions, Brazil has a procedure for eliminating conflicts in the case law. Any judge of an appellate tribunal who notes a conflict between the interpretation of the law in a case in which he is participating and a prior interpretation by the tribunal can request that the tribunal *en banc* resolve the conflict. Parties to the litigation are granted a similar right.¹⁷⁸ If the conflict is recognized by the tribunal, the proper interpretation will be determined by an absolute majority of the entire tribunal, after first hearing from the Public Ministry. During the time the tribunal is resolving the conflict, the litigation giving rise to the conflict will be suspended. The interpretation given to the point of law at issue will then be binding upon the tribunal. This resolution of the disputed point of law will then be entered into the *Sumula*.¹⁷⁹

B. The *Súmula*

The *Súmula* is a peculiarly Brazilian adaptation of the doctrine of *stare decisis*. It consists of a series of capsulized authoritative interpretations of legal rules, usually not more than one sentence in length, drawn from the headnotes to the tribunal's decisions. Judicially-created rules are enshrined in the *Sumula* only after the case law has "firmed up", either through *en banc* uniformization or through the decided weight of the cases adopting a particular position.¹⁸⁰ The concept of the *Súmula* began in the Supreme Federal

177. Sampaio, "O Supremo Tribunal Federal e a Nova Fisionomia do Judiciário," 273 *R. For.* 29, 35 (1981).

178. CPC, art. 476.

179. CPC, arts. 478 and 479. Each tribunal has its own rules about formulating *Súmulas*. For example, in the Federal Appellate Tribunal (TFR), in addition to the procedure for unifying the case law, a *Súmula* can result from a unanimous decision, or by absolute majority in at least two cases in agreement. In the Superior Labor Tribunal (TST) a special commission comprised of the presidents of each chamber passes on each *Súmula* suggested, and if the commission approves, the legal rule become a *Súmula* if it is subsequently approved by an absolute majority of the *en banc* Tribunal. Nunes Leal, *supra* n. 176 at 288-89. In the Supreme Federal Tribunal (STF) *Súmulas* are determined only by an absolute majority of the Tribunal *en banc*. *Internal Rules of the Supreme Federal Tribunal*, art. 102.

180. Nunes Leal, *supra* n. 176 at 287-89.

Tribunal in 1964 and has gradually spread to other tribunals.¹⁸¹

The precedential value of the *Súmula* is a matter of considerable debate. With one exception, the *Súmula* does not technically constitute binding precedent upon any court other than the tribunal that formulated it. From a purely formal standpoint, the precedential value of the *Súmula* is that once a disparity in precedent within a specific tribunal is settled by a *Súmula*, further attempts to argue the divergent position will be summarily rejected by the tribunal. Nevertheless, the lower courts and lawyers treat the *Súmula* as *de facto stare decisis* because taking a contrary position practically guarantees a reversal.¹⁸²

The exceptional case stems from Constitutional Amendment No. 7 of 13 April 1977, which granted the Supreme Federal Tribunal original jurisdiction to interpret authoritatively federal and state laws, as well as normative acts, in a special action called a representation, can be initiated only by the Federal Procurator General.¹⁸³ In such cases, the interpretation given by the Supreme Federal Tribunal has "binding force for all effects".¹⁸⁴

A *Súmula* can be changed, and occasionally is, by an absolute majority of the full court. Any Minister of the Supreme Federal Tribunal can reopen a question settled by a *Súmula*.¹⁸⁵ The Supreme Federal Tribunal has issued more than 600 *Súmulas*. Even if they are not legally binding upon other courts, they constitute the most persuasive authority one can cite to the courts.

IX. EXTRAORDINARY PROCEDURES FOR PROTECTING CONSTITUTIONAL GUARANTEES

A. Habeas Corpus

Brazil's first constitution created numerous constitutional rights, but the legal system lacked procedures for the court to protect these rights. The process of developing such procedures began in the Penal Code of 1830, which borrowed the writ of habeas corpus from the British.¹⁸⁶ It soon became apparent that habeas corpus was an inadequate remedy to protect the panoply of rights guaranteed by the Constitution. Before long, Brazilians began stretching habeas corpus to cover threats to personal liberty as well as actual physical restraints.¹⁸⁷ By 1891, the Brazilian concept of habeas corpus had

181. Id. at 288-89.

182. See Sampaio, *supra* n. 177 at 35. See also Correa, "A Missão Atual do STF e a Constituinte," 160 *R. Dir. Adm.* 1, 18 (1985).

183. See *infra*, sect. IX (c).

184. *Internal Rules of the Supreme Federal Tribunal*, art. 187. See Barbosa Moreira, 5 *Comentários ao Código de Processo Civil* 8-10, 35-37 (4th ed. 1981).

185. *Internal Rules of the Supreme Federal Tribunal*, art. 103.

186. Eder, "Habeas Corpus Disembodied: The Latin American Experience," in Nadellmann, et. al (eds.), *XXth Century Comparative and Conflicts Law* 463, 465 (1961).

187. Id. at 466-69.

evolved into a considerably more versatile and potent procedure for preserving constitutional guarantees than its English ancestor. Brazil's first Republican Constitution, adopted in 1891, provided:

Habeas corpus shall lie whenever an individual suffers, or is in imminent danger of suffering, violence or coercion through illegality or abuse of power.¹⁸⁸

Illegality was interpreted to include unconstitutionality. Because of its rapid, summary procedure, habeas corpus became a favorite technique for challenging the constitutionality of statutes and decrees. Although constitutional questions could be raised in ordinary litigation, the slow pace of such suits sharply limited their utility in protecting individual rights.

By the 1920s, habeas corpus suits were being brought to protect the exercise of many constitutional rights. Brazilian judges granted writs of habeas corpus to protect freedom of speech and assembly, as well as political and electoral rights. The writ was even granted to permit minors to participate in *carnival*.¹⁸⁹

B. *The Writ of Security (Mandado de Segurança)*

The flood of habeas corpus cases began to overwhelm the Brazilian courts. In 1926, a constitutional amendment cut back habeas corpus jurisdiction to cases in which there was an actual or imminently threatened interference with an individual's right to come and go. Several years of living with a restricted form of habeas corpus, however, convinced many Brazilian jurists that a summary procedure was needed to protect constitutional rights that could no longer be fitted within the ambit of habeas corpus. Article 113(23) of the 1934 Constitution created a new procedural institution called the writ of security.¹⁹⁰ This writ combines into a single action the effective characteristics of the Anglo-American writs of prohibition, injunction, mandamus, and quo warranto. The writ of security will lie to protect any "clear and certain right unprotected by habeas corpus, irrespective of the authority responsible for the illegality or the abuse of power."¹⁹¹ Nevertheless, Brazilian courts still construe their habeas corpus jurisdiction quite broadly to include many matters that are not, strictly speaking, criminal proceedings.¹⁹²

The writ of security embodies three essential procedural advan-

188. Braz. Const. of 1891, art. 72(22).

189. Eder, *supra* n. 186 at 468.

190. Nunes, *Do Mandado de Segurança e de Outros Meios de Defesa contra Atos do Poder Público* 1-8 (8th ed. by J. Aguiar Dias, 1980).

191. Braz. Const. of 1969, art. 153(21). This language is substantially the same as the original Article 113(23) of the 1934 Constitution.

192. E.g., Vieira Netto, H.C. No. 45.232, 44 R.T.J. 322 (STF 1968) (granting habeas corpus against an order of a military judge suspending petitioners from practicing their professions); Helena Sidou, H.C. No. 50.828, 65 R.T.J. 97 (STF 1973) (denying habeas corpus to a model who sought judicial assurance against possible arrest if she were to appear topless at the beach).

tages that have made it a highly useful check on the activities of public authorities:

(1) It can function as an affirmative or negative injunction, compelling an authority to perform or cease performing a particular act. Previously, the courts did not lack the power to nullify administrative acts, but an award of damages was ordinarily the only remedy.¹⁹³

(2) It is a summary action that takes preference on court calendars over all other actions except habeas corpus. (In theory, only 20 days should elapse from the filing of the action to the date of decision, although in practice this usually takes several months.)¹⁹⁴

(3) The court can issue an *ex parte* preliminary injunction or restraining order to preserve the status quo.¹⁹⁵ A stay is frequently of crucial importance, given the long delays of ordinary litigation.

Unlike the Brazilian writ of habeas corpus, the writ of security cannot be used to attack the constitutionality of law on its face.¹⁹⁶ After a writ of security is conceded, the law simply may not be enforced against the party that sought the writ, nor against similarly situated parties who may have joined in the suit. Non-parties must bring their own writs of security if the administrative authorities persist in applying the law to them. If, however, the President of the Supreme Federal Tribunal sends the Federal Senate a copy of the Tribunal's decision conceding a writ of security because a law or decree is unconstitutional, the Senate has a constitutional obligation to suspend execution of such law or decree.¹⁹⁷

C. Representation (*Representação*)

Brazil has developed a procedure for challenging the constitutionality of any statute on its face directly before the nation's highest court. Called a "representation", this action is used primarily as a check on state legislatures and governors rather than to protect the constitutional rights of individuals directly. Originally, this action was limited to challenging state statutes that offended the principles of a republican form of government.¹⁹⁸ Not until 1965 was the

193. Buzaid, " 'Juicio de amparo' e Mandado de Seguranca," 56 *R. Fac. Dir. Univ. São Paulo* 172, 218 (1961).

194. See Othon Sidou, *As Garantias Ativas Dos Direitos Coletivos: Habeas Corpus, Ação Popular, Mandado de Segurança* 353 (1977).

195. Law No. 1.533 of 31 Dec. 1951, art. 7.

196. *Súmula* No. 266 of the Supreme Federal Tribunal states: "The writ of security will not lie against a law in the abstract."

197. Braz. Const., of 1969, art. 42 (VII). The thorny question of the extent of judicial power if the Senate refuses to comply arose in the case of *Engenharia Souza e Barker Ltda. v. Senado Federal*, 38 R.T.J. 5 (STF 1966), where the Senate had suspended only part of a statute declared unconstitutional by the Supreme Federal Tribunal. The Tribunal resolved its dilemma by treating a petition for a writ of security as a representation action after the Procurator General obligingly agreed to bring the action. The Tribunal then abrogated the offending statute in its entirety.

198. Since 1891, Brazilian constitutions have authorized the federal government to intervene in state activities to assure observance of the following principles:

representation expanded to permit challenge to "any federal or state law or normative act. . . ."199

The representation's utility as a device for protecting constitutional rights is severely limited by a unique standing requirement. A representation can be instituted only by the Procurator General,²⁰⁰ who is selected by the President. Therefore, the constitutionality of laws and acts that the executive does not want challenged must be tested by some procedure other than the representation.

D. Popular Action (*Ação Popular*)

Brazil has a popular action for the limited purpose of annulling any acts injurious to the patrimony of any public entity.²⁰¹ The action has no real standing requirements. It can be brought by any citizen irrespective of whether he has any personal stake in the controversy. Acts can be annulled if performed by an agent without the power to do so, if performed for an illegal or improper purpose, or if performed without observance of the proper formalities.²⁰² In contradistinction to Brazilian decisions other than representation, a decision in a popular action is binding *erga omnes*.²⁰³

(1) republican form of government; (2) independence and harmony of powers; (3) temporary nature of elective offices (which are limited to the terms of corresponding federal officers); (4) prohibition of governors and mayors immediately succeeding themselves; (5) municipal autonomy; (6) rendering of administrative accounts; (7) guarantees of the judiciary. See, e.g., Braz. Const. of 1946, art. 7 (VII). The Procurator General was authorized to submit to the Supreme Federal Tribunal any state act that he deemed offensive to the above constitutional principles. *Id.*, art. 8, sole para.

199. Const. Amend. XVI of 26 Nov. 1965, now art. 119 (I)(1) of the Braz. Const. of 1969.

The representation is similar to a nineteenth century Colombian system of judicial review set out in Colombian Const. of 1863, art. 72, which provided:

The Supreme Court shall suspend, by unanimous vote, on petition of the Procurator General or of any citizen, the enforcement of the legislative acts of the state assemblies, insofar as they may be contrary to the Constitution or laws of the Union, reporting in each case to the Senate so that the latter may decide definitely as to the nullity or validity of said acts.

200. Citizens may petition the Procurator General to institute a representation, but if he refuses to do so, they have no recourse. *M.D.B. v. Procurador-Geral da Republica*, Reclamação No. 849, 59 R.T.J. 333 (STF *en banc* 1971).

201. Braz. Const. of 1969, art. 153(31). See generally Silva, *Ação Popular Constitucional: Doutrina e Processo* (1968).

202. Law No. 4.717 of 29 June 1965, art. 2. The procedure is similar to that of an ordinary proceeding but with a more rigorous time frame. The judge who fails to file his decision within 15 days after receipt of the documentary record (in cases that can be decided on the written record) is subject to the sanctions of suspension from the merit promotion list for two years and loss of time from the seniority promotion list. *Id.* at art. 7 (VI), sole para.

203. *Id.* at art. 18. The only exception is if the action is denied because plaintiff failed to prove his claim.

X. LITIGATION EXPENSES

A. Court Costs

Litigation is expensive in Brazil, especially when viewed in light of income per capita. The legal system imposes costs upon the litigants at every step of the proceedings. The first item is the judicial fee (*taxa judiciária*), which is fixed and paid to the state where the action is begun.²⁰⁴ Unless receipt for payment of the judicial fee is annexed to the complaint, the clerk will not distribute it to a judge. A nominal charge is made for the services of the court clerk in distributing the case to a particular judge. As soon as the complaint is received by the judge, the plaintiff must pay another charge called the costs of the *cartório*, levied to pay for the work of the clerk's office. This charge varies in accordance with the kind of service performed by the court. In many states an unofficial grease payment to the clerk is essential.²⁰⁵ Extra charges often range from two to five times the official fee. Such exactions may be resisted, but most lawyers pay the extra charges without complaint because of the extremely low level of the clerks' salaries.

The taking of an appeal involves a separate set of costs. The appellant must pay the clerk a per page fee for preparing the record on appeal. A filing fee must also be paid for taking an appeal or an exception.

B. Expert Witness Fees

A substantial charge is made for the fees of expert witnesses. An expert requested by the plaintiff must be paid by the plaintiff, while an expert requested by the defendant must be paid by the defendant. An expert requested by the judge must be paid by the plaintiff. Since Brazil operates under the principle that the losing party pays all costs, the burden of these costs may be eventually redistributed. In certain circumstances, the cost will be divided between the parties, such as where each side is partially successful.²⁰⁶

C. Attorneys' Fees

As in other civil law countries, Brazil requires the losing party to pay the other side's attorney's fees. In cases where neither party is an indigent, Brazilian judges normally fix attorney's fees at 10 to

204. In Rio de Janeiro, this fee is set at 2% of the value of the lawsuit. A minimum fee is generally imposed to prevent actions with little or only nominal value from getting off too lightly.

205. A recent empirical study of Rio de Janeiro lawyers found that 80% of those interviewed customarily made grease payments to the clerks. Correia de Melo Sobrinho, *supra* n. 14 at 47-48. In some states, payment of both "speed money" and "delay money" is common. Payments to make the entire file disappear are not infrequent in some areas. See Rosenn, "Brazil's Legal Culture: The Jeito Revisited," 1 *Fla. Int'l L.J.* 1, 36 (1984).

206. CPC, arts. 20, 21 and 33.

20 percent of the amount of the judgment.²⁰⁷ This does not mean, however, that Brazilian lawyers rely solely upon fee awards, or that the losing party's attorney remains unpaid. Both sides normally enter into fee agreements with their own lawyers. Such arrangements typically reflect the minimum fee schedules of the bar association plus a variable or percentage-based fee reflecting the outcome of the litigation.²⁰⁸ In some of the larger cities, a few law firms charge hourly rates for the services of their attorneys, but most prefer to charge a fixed amount for each service rendered. Fee arrangements totally contingent upon the success of litigation are not used and would be regarded as a violation of the attorney's ethical duty to charge a fair amount for his services.

D. Legal Aid

Brazil's Constitution contains a guarantee that "Judicial Assistance will be granted to those who need it in the manner [established] by law."²⁰⁹ The basic statute regulating legal aid was enacted in 1950.²¹⁰ Unfortunately, for the great bulk of the Brazilian poor, the constitutional guarantee of judicial assistance remains illusory.

To secure legal aid, an indigent must file a petition with the judge declaring that he does not have sufficient assets to bear the expenses of the law suit.²¹¹ If the petition for legal aid designates a

207. The variation is determined by the attorney's zeal, the place where the services were rendered, the nature and importance of the case, and the time spent by the attorney. (CPC, art. 20, para. 3.) If the prevailing party is an indigent, his attorney's fees cannot exceed 15% of the amount of the recovery. Law No. 1.060 of 5 Feb. 1950, arts. 3 & 11.

208. For a typical minimum fee schedule, see Sindicato dos Advogados do Rio de Janeiro, *Manual de Custas Judiciais, Tabela Permanente de Honorarios Minimos* 43-53 (6th ed. 1984). The Brazilian Lawyers' Code of Professional Ethics, Section 8, recommends that lawyers enter into written fee arrangements with their clients and indicates that the contract may provide for fees based upon the result in the case. Moreover, Law No. 4.215 of 27 Apr. 1963, art. 91, para. 4, permits recovery of fees even without a written contract, with the amount to be determined by the value of the action.

209. Braz. Const. of 1969, art. 153(32).

210. Law No. 1.060 of 5 Feb. 1950. Other statutes provide for legal aid in special circumstances. The Law of Organization of Military Justice, Decree-Law No. 1.003 of 21 Oct. 1969, provides for appointment of counsel for those accused of military crimes, from among a group of military officers with law degrees and at least two years of practice. *Id.* at arts. 34-36. Law No. 5.584 of 26 June 1970, requires labor unions to provide legal aid to their members in disputes before the Labor Courts. The union, however, need not hire a lawyer; law students in their fourth year will suffice. If there is no union, legal aid is to be rendered by public prosecutors or public defenders. *Id.* at arts. 14, 15, and 17. Law No. 5.478 of 25 July 1968, provides for appointment of counsel and excuses payment of costs for needy persons in support actions. Arts. 1 & 2. In addition, the Statute of the Bar Association, Law No. 4.215 of 27 April 1963, obligates members of the bar to render legal aid if appointed by the court or by the bar association, unless they have just cause for refusing the appointment. *Id.* at art. 92.

211. Except in support suits, an indigent must attach to his petition a declaration issued by the police attesting to his indigency. An indigent's own declaration of need will suffice in a support suit. Law No. 5.478 of 25 July 1968, art. 1.

lawyer who expressly declares that he is willing to accept appointment, the judge must have just cause to refuse to appoint the indicated lawyer. In practice, the court-appointed attorney is almost always the person who prepared the indigent's petition for legal aid. If a judge decides to grant a legal aid petition that does not specifically designate an attorney, he will request a public legal aid agency (if one exists in his area) to name a lawyer to represent the indigent. If there is no such legal aid service, the judge will ask the bar association to designate a lawyer. In a municipality where there is no representative of the bar association to make assignments, the judge himself will nominate a lawyer to take the case. Theoretically, a lawyer so designated cannot refuse to take the assignment without excuse.²¹² In practice, however, no sanctions for an unjustified refusal are imposed.²¹³

Fourth and fifth year law students can be appointed as counsel for indigents.²¹⁴ Law students need not pass the bar examination if they complete a program of clinical training.²¹⁵ Several law schools have developed clinical programs that provide legal aid to the urban poor.

An indigent receiving legal aid is excused from payment of all judicial costs, charges, stamps, publication costs, witness fees, expert witness fees, and attorney's fees. On the other hand, lawyers' fees, expert witness fees, the costs of the proceeding, other charges, and stamps are to be paid by the losing party whenever the beneficiary of legal aid prevails. If an attorney representing an indigent prevails, the attorney's fee cannot exceed 15 percent of the recovery.²¹⁶

The sad truth is that Brazilian legal aid programs reach only a small fraction of those who need their services. Moreover, those for-

212. Law No. 1.060 of 5 Feb. 1950, art. 14, as amended by Law No. 6.465 of 14 Nov. 1977; Law No. 4.215 of 27 Apr. 1963, art. 92. But see *Justiça Pública v Juízo de Direito da Comarca*, 541 *R. Trib.* 393, 394 and 395 (Trib. Alçada Criminal S.P. 1980), three cases in which a judge halted criminal prosecutions because all of the practicing attorneys in the area refused to accept appointments to represent indigent criminal defendants. The appellate court took the position that responsibility for appointment was the state's, not the members of the bar who had refused appointment. Until the state could resolve the impasse, the appellate court astonishingly directed the trial judge to appoint knowledgeable lay persons to defend the indigent.

213. Vianna de Lima, *Organização Judiciária e Assistência Legal* 190 (1973). The fines provided for in Art. 14 of the Law 1.060 of 1950, as amended, would amount to a minimum of about U.S. \$30 to a maximum of about ten times that figure. The Bar Association also has the power to impose disciplinary sanctions. Law 4.215 of 27 Apr. 1963, arts. 92, 103 (XVIII), 107, and 108. Nevertheless, just cause for refusing an appointment includes "having expressed in writing an opinion contrary to the right being pleaded by the party needing assistance" or "a need to be absent for prior unpostponable professional or personal reasons." Thus, any lawyer refusing to accept an assignment would have little difficulty establishing just cause in the highly unlikely event of a disciplinary proceeding.

214. Law No. 5.478 of 25 July 1968, arts. 5 and 18.

215. Law No. 5.842 of 6 Dec. 1972. See also Provimento No. 40 of 24 July 1973, of the Federal Council of the Brazilian Bar Association (OAB).

216. See *supra* n. 207.

tunate enough to receive legal aid are likely to have very little contact with a lawyer. Most legal aid programs are badly underfunded and understaffed. Rio de Janeiro's relatively large state legal aid program completed 90,000 cases in 1976. But with only 160 attorneys, most of whom are part-time, it has been calculated that this means the program's lawyers averaged ten minutes per completed case.²¹⁷

XI. RECENT REFORMS

A. *Small Claims Proceedings*

In July 1979, Brazil resolved to try to deal with the pressing problem of bureaucratic inefficiency by creating a special Ministry of Debureaucratization. The first Minister of Debureaucratization was Hélio Beltrão, former Minister of Planning. Beltrão quickly identified one basic problem as the judicial process, which he characterized as "delayed and complicated, expensive and centralized, formal and pompous," well beyond the reach of the common people.²¹⁸ To remedy this deplorable situation, Beltrão proposed the creation of small claims courts, modeled along the lines of the United States, to provide speedy, inexpensive access to justice for the ordinary citizen. In 1984, Brazil adopted legislation authorizing the states, territories, and the Federal District to create small claims courts.²¹⁹

The jurisdiction of small claims courts is limited to cases involving less than twenty times the prevailing minimum wage (about U.S. \$1,000). Jurisdiction is further limited to suits brought to recover money, to secure delivery of a certain chattel, to secure performance of certain services, or to terminate or nullify a contract with respect to personalty or livestock. Specifically excluded from the court's jurisdiction are suits for support, bankruptcy, taxes, job-related accidents, and residual estates, as well as those involving a person's competency.²²⁰ Only individuals have standing to bring an action before small claims court.²²¹

The procedure for small claims courts is greatly simplified, with emphasis on informality and orality. The complaint need only state

217. See Trubek, "Unequal Protection: Thoughts on Legal Services, Social Welfare, and Income Distribution in Latin America," 13 *Texas Int'l L. J.* 243, 260 (1978). For a brief overview of legal aid in Brazil, see Knight, "Legal Services Projects for Latin America," in *Legal Aid and World Poverty* 77, 82-87 (Comm. on Legal Services to the Poor in Developing Countries, ed., 1974).

218. Interview with Helio Beltrão, "Juizado de Pequenas Causas," reported in 33 *R. Bras. Dir. Proc.* 215 (1982). See also Piquet Carneiro, "A Justiça do Pobre," 25 *Ajuris* 18 (July 1982).

219. Law No. 7.244 of 7 Nov. 1984. For critical analyses of this legislation, see Ornelas, "Juizado Especial de Pequenas Causas-Análise e Sugestões," 285 *R. For.* 45 (1984); Gomes da Cruz, "Reflexões sobre o Juizado Especial das Pequenas Causas," 285 *R. For.* 93 (1984); Leitão, "A Justiça dos Pobres e o Juizado de Pequenas Causas," 284 *R. For.* 491 (1983).

220. Law No. 7.244 of 7 Nov. 1984, art. 3, para. 1.

221. *Id.*, art. 8, para. 1.

the names and addresses of the parties, a succinct version of the facts, the relief sought, and the value of the case.²²² The defendant can be served with process by mail, and his answer may be oral. Within 10 days from the filing of the complaint, a conciliation session is to be scheduled. If a settlement is produced, it will be reduced to writing, confirmed by the court, and become subject to execution. If conciliation fails, the parties can opt for arbitration or for immediate trial. In the latter event, all proof and argument occurs at the public hearing. Each side is limited to three witnesses. Any morally legitimate means may be used to prove allegations, and oral proof need not be reduced to writing.²²³

It is still too soon to tell how successful this measure will be in providing Brazil's average citizen with speedy, inexpensive justice. Pilot projects in the states of Parana, Rio Grande do Sul, and Sao Paulo have worked so well that the government recently announced plans to create small claims courts in eighteen additional Brazilian states.²²⁴

B. *Class Actions*

One serious deficiency in Brazilian civil procedure has been the lack of a class action device. The CPC requires groups of persons who suffer the same injury to bring their own individual actions for redress.²²⁵ This deficiency in Brazilian procedure was partially remedied in 1985 by enactment of a law creating a class action to protect the interests of environmental, cultural, and consumer groups. This statute specifically authorize class actions for only three types of injury: (1) to the environment, (2) to the consumer, and (3) to property and rights with artistic, aesthetic, historic, touristic, or scenic value.²²⁶

This new action, borrowed from the U.S. class action, makes significant innovations in Brazilian civil procedure. It not only recognizes diffuse interest that previously could not be defended in a single legal action, but it also obviates the need for joinder of plaintiffs, a requirement that severely limits the effectiveness of the writ of security.

Unfortunately, standing to bring a class action is restricted to civil associations, foundations, the Public Ministry, federal, state, or municipal governments, independent governmental agencies (*autarquias*), government-owned companies, and mixed capital (public/private) companies,²²⁷ a limitation that makes little sense. Moreover,

222. *Id.*, art. 15.

223. *Id.*, arts. 17, 19, 23, 25, 28, 31, 33-35 and 37.

224. *Gazeta Mercantil*, 13 Jan. 1986, at 25, col. 8.

225. The Corporation Law, however, permits shareholder derivative suits. Law No. 6.404 of 15 Dec. 1976, art. 159, §§ 3-5. It also permits fiduciary agents to bring suit as a representative of debenture holders. *Id.*, art. 68, § 3.

226. Law No. 7.347 of 24 July 1985, art. 1. See also *Gazeta Mercantil*, 5 Aug. 1985, p. 23, col. 5.

227. Law No. 7.347, art. 5. Any such entity must have been chartered for at least

any damages awarded in a class action do not go directly to the successful plaintiff. Instead, damage awards go into a special fund administered by a governmental agency for the purpose of reconstituting damaged property.²²⁸ While this scheme may have some rationality for environmental and aesthetic types of class actions, it makes little sense for consumer suits. The new law is expected to pave the way for class actions by consumer and environmental groups, overcoming one of the limitations of the "representation" actions.²²⁹ The class action goes beyond the "popular action" in that private collective interests may be protected. The court can prevent harm to the class by orders similar to injunctions, and the judgment has an *erga omnes* effect unless it is denied for failure of proof.²³⁰

While the class action is a welcome innovation, it is too narrowly confined. Other groups with similar injuries, such as taxpayers, prisoners, or victims of deprivations of civil rights, ought to be permitted to bring class actions. Successful plaintiffs ought to be able to recover damages directly as to give them a greater incentive to sue. It is hoped that these extensions will soon follow.

XII. CONCLUSION

Brazil has a sophisticated and well-developed system of civil procedure that applies uniformly throughout the country. In many respects, it has the most modern system of civil procedure in Latin America, displaying much greater emphasis on orality and concentrating much of the evidence-gathering function into a single hearing resembling an Anglo-American trial. Brazil has also granted more powers to the judge to control the proceedings and to obtain evidence than one normally finds in civil law countries. In addition, Brazil has developed several important procedural institutions for judicial protection of constitutional rights, such as habeas corpus, the writ of security, representation, the popular action, and the class action.

Nonetheless, Brazil's system of civil procedure has not functioned well. Its biggest defect is that it generally moves at a snail's pace. There is much truth to the maxim that justice delayed is justice denied. One can readily identify several defects in the Brazilian system of civil procedure that are largely responsible for the mammoth delays. First, the system permits such a multiplicity of appeals, particularly interlocutory appeals, that a litigant, if so inclined, can delay proceedings for lengthy periods. Second, collateral attacks on final judgments are permitted in too many circum-

1 year prior to suit and must have among its institutional purposes the protection of the environment, consumers, or artistic and cultural patrimony. *Id.*, art. 5(I) and (II).

228. *Id.*, art. 13.

229. See *supra* n. 200.

230. Law No. 7.347, art. 16.

stances.²³¹ Third, the system constantly attempts to deal with the problem of delay by prescribing rigid time periods during which judges must perform certain tasks and render decisions. Such time constraints are flagrantly disrespected, for they are unrealistic for complex litigation and for judges in urban areas with congested dockets.²³² The principle that time limits for judges can be disregarded is not easily cabined, however, and once established for complex litigation, it quickly spreads to simple litigation. The precedent of the judiciary disregarding the law is not a felicitous one, and it feeds back into the serious and more generalized problem of disrespect for law in Brazil.²³³ The problem would be better handled by differentiating cases on the basis of complexity and setting up an incentive system to reward judges who churn out certain quantities of high quality work. One also needs substantial increases in the number of judges in urban centers, and a judicial supervisory committee or ombudsman with power to transfer cases from judges unable or unwilling to decide them within a reasonable time.

Another defect is that the CPC provides for myriad special actions, with a bewildering multiplicity of special procedures. Book IV of the CPC sets out special procedures for a number of specific actions.²³⁴ These actions are treated specially for a variety of reasons, mainly historical.²³⁵ The detailed pleading requirements for these special actions are reminiscent of the forms of action at common law. A failure to plead correctly, however, does not under Brazilian law result in an outright dismissal. So long as no prejudice to the defendant occurs, pleading defects can be cured.²³⁶ Nevertheless, Brazil would be much better off eliminating most of the special procedures.

Excessive formalism is still one of the biggest problems with Brazil's civil procedure. Complaints should not have to be prescreened by judges before they can be served, and service by registered mail should be extended to individual litigants. Plaintiffs should be able to amend freely the amount of damages they seek,

231. Similar criticisms are frequently made by Brazilian scholars but to little avail. See, e.g., the penetrating criticism of Bermudes, 7 *Comentários ao Código de Processo Civil* 207 (2d ed. 1977).

232. Brazil is a huge country, with vast differences among its various regions. One of the benefits of its federal system ought to be to permit local authorities to develop different types of solutions most appropriate to local conditions. Imposing a uniform system of procedure upon the entire court system, both state and federal, may be unwise. See Bicudo, *O Direito e a Justiça no Brasil* 104-06 (1978).

233. See Rosenn, *supra* n. 205 at 35-39.

234. Some of the more significant actions with special procedures contained in Book IV of the CPC are: payment into court (art. 890); deposit (arts. 901-06); cancellation of bearer instruments (arts. 907-13); an accounting (arts. 914-19); ejectment (arts. 926-31); trespass (arts. 932-33); to block construction (arts. 934-40); adverse possession (arts. 941-45); partition (arts. 946 et seq.); inventory and distribution of a decedent's estate (arts. 982 et seq.).

235. Pontes de Miranda, 8 *Comentários ao Código de Processo Civil* 3 (1977).

236. CPC, art. 250.

and the unfair practice of charging costs as a percentage of the damages alleged should be abandoned.

Litigation needs to be made less costly for the litigants. Presently all but the very rich and the very poor are effectively precluded from litigating. Even then, indigents are often effectively precluded from litigating by the sporadic and often non-existent legal aid system. More resources need to be allocated to create an effective national public defender and legal aid system. More resources need to be allocated to create an effective national public defender and legal aid system.

More resources need to be allocated generally to the judicial system. The federal government allocates much less than one percent of its budget to the judiciary, and the percentage has been declining steadily. All but a few Brazilian states spend less than one percent of their budgets on their judiciaries. Perhaps the biggest problem in the administration of justice in Brazil today is directly linked to the insufficiency of governmental resources devoted to the judiciary. The clerks are badly underpaid and supplement their salaries with payments from litigants. This petty corruption undermines the integrity of the judicial system and substantially delays the litigation process. Eradication of this corruption is never easy, but payment of adequate salaries, prosecution and dismissal of offenders, and computerizing the distribution and progress of cases would help significantly.