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Judicial Reform in Brazil

Keith S. Rosenn*

Judicial reform is currently a hotly debated topic in Brazil. The call for reform of the Brazilian judiciary, however, is anything but new. The Brazilian judiciary has been in a state of crisis since colonial days, and despite numerous attempts at reform, it remains in crisis.1 With the privatization of Brazil's state-owned enterprises, the growth of Mercosur, the urgent need to make Brazilian firms competitive in world markets, the emphasis upon attracting foreign investment, and the opening of Brazil's economy to foreign competition, Brazilian political leadership began to focus upon ways to reform Brazil's malfunctioning judicial system. Unfortunately, the proposed reforms are unlikely to cure the underlying problems of Brazil's judiciary, which are deeply embedded in a complex of constitutional, procedural, structural, economic, political, and cultural problems that are likely to be resolved, if at all, only over a period of many years.

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1. The constant complaints about the venality, unpredictability, and slowness in the colonial judiciary are documented in Stuart Schwartz, Sovereignty and Society in Colonial Brazil: The High Court of Bahia and Its Judges 1609-1751 (1973). For similar complaints about the judiciary during the Empire, see Thomas Flory, Judge and Jury in Imperial Brazil, 1808-1871: Social Control and Political Stability in the New State (1981). For more recent studies of the crises in the Brazilian judiciary, see Noeli Correia de Melo Sobrinho, O Advogado e a Crise na Administração da Justiça (1980); Luiz Flávio Gomes, A Dimensão da Magistratura no Estado Constitucional e Democrático de Direito 170-82 (1997).
In comparison with the judiciaries of many Latin American countries, Brazil's judiciary is in fairly decent shape. It is essentially a career judiciary, with some lateral entry at the higher levels. Judges have life tenure, except for a two-year probationary period for judges of the first instance, but retirement is compulsory at age seventy. Brazil's judiciary has many fine judges and enjoys substantial independence. Judges used to receive relatively decent salaries and generous retirement benefits, but judicial salaries have been frozen for several years under the Plano Real, causing a substantial decline in real income. Moreover, a proposed constitutional amendment, recently voted up favorably in one round by Congress, would reduce retirement benefits for the judiciary by about 30 percent. Although judges occasionally have been charged with corruption, the judiciary has not been plagued with widespread corruption charges. Yet no one would seriously claim that Brazil's judiciary functions effectively or efficiently.

Many of the legal system's principal problems do not stem from the judiciary. One of the principal sources of problems is the present Constitution, drafted by Congress itself and promulgated in 1988. It is a complex, convoluted, and detailed document, containing 245 articles and seventy transitory provisions. Many of these articles are lengthy and far ranging. For example, Article 5 has seventy-seven subdivisions and twenty-two subsections, guaranteeing a wide variety of individual rights, as well as regulating such diverse subjects as: extradition, remedies, legal aid, moral damages, criminal penalties, creation of associations, copyright, patents, trademarks, social function of property, attachment of rural property.

2. Judges at the entry levels are chosen by competitive examinations. These judges are promoted alternatively on the basis of merit and seniority. One-fifth of the judges of the Federal Regional Tribunals and the highest state courts must be selected from among members of the Public Ministry with ten years of service, and from lawyers with widely acknowledged legal understanding and unblemished reputations. CONSTITUIÇÃO FEDERAL of Oct. 5, 1988 [Constitution] [Const.Fed.] arts. 94, 107 (Braz.), translated in 3 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD Booklet 2, Release 96-7 (Gisbert H. Flanz ed., 1996). One-third of the members of the Superior Tribunal of Justice, Brazil's second highest court, are appointed by the President of the Republic. One-third must be chosen from among judges of the Federal Regional Tribunals, one-third from members of the highest state courts, and one-sixth from among government lawyers and members of the Public Ministry. Id. art. 104. Justices of the Supreme Federal Tribunal, Brazil's highest court, are appointed by the President with consent of the Senate and are chosen from citizens with notable juridical knowledge and unblemished reputations. Id. art. 101.

3. Id.

4. The President of the Brazilian Association of Magistrates reports that Brazilian judges experienced a 59 percent decline in real income because of the salary freeze. Sandra Sato, Reprovação e Salários Baixos Deixam Vagos 1,884 Postos, O ESTADO DE SAO PAULO (1997).

5. Id.

6. It is a widespread belief in Brazil that the courts apply the law, particularly the criminal law, unequally in a manner reflecting class biases. It is the poor who go to jail when convicted of crimes. The wealthy are generally believed to be governed by the law of impunity. Even if convicted, the day of reckoning can generally be averted by a process of dilatory appeals. Maria Tereza Sadek, Institutional Fragility and Judicial Problems in Brazil, in GROWTH AND DEVELOPMENT IN BRAZIL: CARDOSO'S REAL CHALLENGE 159, 167-69 (Maria D'Alva Kinzo & Victor Bulmer Thomas eds., 1995).

7. CONST.FED.

freedom of information, and juries. The constitutional text in many places contains specific rules normally found only in codes or regulations. It is a governmental straitjacket that has created serious problems of governability. It has already been amended twenty-three times, and it must continue to be amended if the government is to maintain monetary stability and its modernization program. Brazil's Constitution is also dirigiste, setting out ambitious goals and programs for reforming society. Virtually nothing is outside its global scope. Many of its norms, however, are not self executing. They either require complementary legislation to fill in certain missing elements, or they are programmatic, requiring administrative and material legislation in order to permit their implementation. Brazil's fractionalized Congress, however, does everything but legislate, leaving many critical constitutional provisions without needed implementing legislation.

The 1988 Constitution created a series of measures that have the potentiality to embroil Brazil's highest court, the Supreme Federal Tribunal (STF), in the middle of political controversies with Congress and the President. Articles 102 (a) and 103 of the 1988 Constitution permit the President of the Republic; the Procurator General of the Republic; the Executive Committees of the Federal Senate, Chamber of Deputies, or state legislatures; state governors; the Federal Council of the Brazilian Bar Association; any political party represented in Congress; and any syndical confederation or national class entity to bring an action directly before the STF challenging the constitutionality of any law or normative act in the abstract. This procedure deprives the STF of the opportunity to review opinions of lower courts, to review a factual record in which it can observe the effects of the statute on actual litigants, and of being able to decline to decide issues that are untimely or too sensitive on justiciability grounds. During the nine years and nine months that the present constitution has been in force, the STF has received 1,800 direct actions of unconstitutionality, and on average of one new action every two days.

To deal with the problem of denial of constitutional rights because of the legislature's failure to enact needed implementing laws or rules, the Constitution created two new procedural institutions, the action of unconstitutionality for omission and the mandate of injunction. Article 103 of the Constitution confers original jurisdiction on the STF to issue a declaration of unconstitutionality for omission whenever it determines the "lack of

9. Id. art. 5.
12. For a more detailed critique, see Rosenn, supra note 8. My translations of and brief introductions to the amendments can be found in 3 Constitutions of the Countries of the World Booklet 2, Release 96-7 and Booklet 1, Release 97-6 (Gisbert H. Flanz ed., 1996).
15. Const. Fed. arts. 102(a), 103.
17. Id. art. 103.
measures to make a constitutional rule effective." The STF is charged with notifying the appropriate branch of government to adopt the necessary measures; if the offender is an administrative agency, the STF is to direct that the needed measures be adopted within thirty days. The mandate of injunction is to be issued by the STF whenever the President or Congress fails to adopt a regulatory or implementing rule making the exercise of constitutional rights or liberties impracticable. Both measures generated considerable litigation and considerable confusion. There is an inherent contradiction in giving courts responsibility for enforcing rights that need regulatory or implementing norms from the other branches of government: the courts cannot enact the necessary legislation themselves, nor can they order Congress to legislate.

Under the 1988 Constitution, most legislation has stemmed from the Executive. Article 62 of the Constitution grants the President the power to issue provisional measures (medidas provisórias) that have the force of law for thirty days in cases of relevancy and urgency. These measures are void ab initio unless ratified by Congress within thirty days. But Congress usually takes no action on these measures within thirty days, sometimes because the government maneuvers tactically to prevent a vote if there is substantial opposition to the measure. Brazilian presidents adopted the practice of reissuing provisional measures Congress failed to act upon, a practice deemed constitutional by the STF. Only if a measure is specifically rejected by Congress is the President barred from reissuing it. In addition, the Executive has been adding a clause validating all acts performed in reliance on prior provisional measures. The constitutionality of this practice is heatedly debated and causes a good deal of legal uncertainty. Its resolution presents the judiciary with a serious dilemma. On the one hand, the practice is obviously a misuse of a constitutional measure designed to permit temporary, emergency legislation. On the other

18. Id.
19. Id.
22. CONST.FED. art. 62.
23. Manoel Gonçalves Ferreira Filho, As Medidas Provisórias no Sistema Constitucional Brasileiro, Particularmente em Matéria de Direito Econômico, in ESTUDOS EM HOMENAGEM AO PROF. CAIO TÁCITO, supra note 21, at 455, 463.
24. ADIn 295-DF 06.22.1990; ADIn 1.454-DF 06.19.1996; ADIn 1.516-RO 03.06.1997; ADIn 1.397-F 04.28.1997, cited in Velloso, supra note 21, at 159-60. Between September 1988 and March 1998, four Brazilian presidents issued more than 1,640 provisional measures, the majority of which have been reissued, some a great many times. For example, Provisional Measure No. 1,481, which modifies the National Privatization Program, as of May 1997 was reissued 49 times. For the political implications of the practice, see Scott Mainwaring, Multipartism, Robust Federalism, and Presidentialism in Brazil, in PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA 55, 62-64 (Scott Mainwaring & Matthew S. Shugart eds., 1997).
hand, if the courts were to invalidate it, the country would be thrown into a state of legal paralysis, and the courts would have to solve the problem of how to make eggs out of a juridical omelette.

In addition, Brazil has obsolete basic codes. The Commercial Code, enacted in 1850, is hopelessly antiquated; most of the important commercial laws were enacted separately. The paternalistic Civil Code was already obsolete by 1917, when it went into effect. In November 1997, the Senate finally approved a new Civil Code, first submitted to Congress in 1975, approved by the Chamber of Deputies in 1984. Conflicts between the versions approved by the Senate and Chamber of Deputies must still be resolved. The Criminal Code and the 1941 Code of Criminal Procedure are both products of the Vargas dictatorship; many provisions are difficult to reconcile with the democratic Constitution of 1988. The most modern code is the 1973 Code of Civil Procedure, which also needs modernization. Some of this Code's many problems are discussed below.

I. The Proposed Reforms.

The two basic reforms currently being debated are the creation of binding precedents by Brazil's highest court, the STF, and the establishment of a National Judicial Council to supervise the judiciary. Like so many reforms in Brazil, both measures require constitutional amendments. The more likely reform to be enacted is the binding precedent constitutional amendment proposed by Senator Ronaldo Cunha Lima, which was approved on first vote by the Senate on August 28, 1997. This amendment, if eventually adopted, will make binding on all judges and state and federal governmental organs all decisions on the merits rendered by two-thirds vote of the members of the STF in direct actions of unconstitutionality and declaratory actions of constitutionality of laws and normative acts.

The second constitutional reform currently being considered is the creation of a National Judicial Council to institute a system of external control and supervision over the judiciary. The proposed amendment would create a fifteen member Council, thirteen of whose members would be members of the judiciary. The only outside members would be a representative of the Brazilian Bar Association (OAB) and one member of the Public Ministry. This measure was appended to a sweeping constitutional amendment authored by Deputy Hélio Bicudo in 1992, which proposed:

(1) eliminating all federal courts of the first instance, (2) eliminating all military courts, (3) eliminating from the labor court system the Boards of Conciliation and Judgment and class representatives, (4) changing state judicial organization, (5) changing the system for promoting judges, (6) requiring the Public Ministry to participate in the judicial entrance examinations, (7) changing the guarantee of life tenure, and (8) making appointments to the STF and the Superior Tribunal of Justice for limited periods.

26. The judicial representatives would be the President of the STF, two judges from the Superior Tribunal of Justice, two judges from the Superior Electoral Tribunal, one judge from the Superior Military Tribunal, one judge representing the Federal Regional Tribunals, one judge representing the Regional Labor Tribunals, three judges representing the state Tribunals of Justice, and two judges representing the entire judiciary. Reporter's Substitute to the Proposed Constitutional Amendment No. 96 of 1992.
The Council of the (OAB) also proposed a series of judicial reform measures. These measures include:

(1) creating an external Administrative Control Council, (2) creating a Constitutional Court, (3) requiring governmental authorities to follow súmulas [a form of precedent explained below] of the superior tribunals, (4) eliminating class representatives as judges of the labor courts, (5) eliminating military tribunals, (6) designating judges with exclusive jurisdiction to resolve agrarian disputes, (7) replacing judicial life tenure with fixed terms, (8) prohibiting nepotism in designating judicial assistants, (9) requiring judicial candidates to have a minimum of five years of experience in the practice of law, (10) eliminating the privileged forum for judges accused of crimes, and (11) requiring that final judgments against the government be paid within sixty days.

Except for the creation of binding precedent and the elimination of class representatives from the labor courts, these proposed reforms have been received coolly by the judiciary and have not generated much political support.

II. The Need for Judicial Reform.

A. The Avalanche of Cases.

One of the principal reasons for the current crisis in the Brazilian courts is the huge increase in caseloads. At all levels of the system, with the exception of the military tribunals, judges are simply unable to cope with the sheer volume of cases assigned to them. Since the promulgation of the 1988 Constitution, which constitutionalized virtually everything anyone could think of in the Constituent Assembly, the number of cases filed in Brazilian courts has increased by more than a factor of ten, from about 350,000 cases in 1988 to more than 3.7 million in 1996.27 The Brazilian judiciary has only about 8,979 first instance judges, giving Brazil only one judge per 17,494 inhabitants.28 Germany, on the other hand, has one first instance judge for each 3,500 inhabitants; France, one judge per 5,600 inhabitants; Colombia, one judge per 5,894 inhabitants; and Argentina, one judge per 17,000 inhabitants.29 According to data collected by the STF, about 6 million cases are currently pending in Brazilian courts, an average of roughly 700 cases per judge.30 Other courts in Brazil are also being overwhelmed with cases. The Superior Tribunal of Justice, Brazil's second highest court, received 53,993 appeals in 1996, and the top labor court, the Superior Labor Tribunal, received a record 57,000 cases in 1996, having begun the year with a backlog of 100,000 undecided cases. To try to cope with the workload, the Tribunal drafted ten regular judges from the Regional Labor Tribunal and put them to work decid-

27. See Tribunais de Primeira Instância, 1 REVISTA CONSULEX 18 (Mar. 1997).
30. Tribunais de Primeira Instância, supra note 27.
ing appeals to the Superior Labor Tribunal.31 Plainly, Brazilian judges are awash in a sea of cases.

The sheer volume of cases is particularly acute for the STF, in which 26,921 new cases were filed in 1996. That year the Tribunal actually decided 31,283 cases, 9,807 with published opinions.32 In 1997, the STF decided 37,555 cases, an average of 102.9 per day, including weekends and holidays. In contrast, the U.S. Supreme Court for the 1996-97 term had a total of 6,739 cases on its docket; however, it granted review in only 3.04 percent of the new cases on its appellate docket and in only 0.25 percent of the cases on its miscellaneous docket. From its entire docket, the U.S. Supreme Court decided only eighty-seven cases with full opinion and three with unsigned per curiam opinions.33

Unlike the U.S. Supreme Court or the Argentine Supreme Court,34 the STF has no device like the writ of certiorari to enable it to pick and choose cases it deems worthy of review. Consequently, Brazil’s highest court hears a great many trivial cases. For example, the STF had to resolve a case of habeas corpus brought last year against President Fernando Henrique Cardoso by one Epaminondas Patriota da Silva, a seventy-seven year old inhabitant of the Rio favela of Rocinha, who allegedly read in a sensationalist scandal rag that President Cardoso had ordered all persons over sixty-five to end their lives by reporting to the municipal crematorium carrying eighteen liters of gasoline and a plastic bag for their ashes. Claiming that this supposed order violated his right to life, da Silva filed a preventative habeas corpus action directly against the President, thereby invoking the original jurisdiction of the STF. This frivolous case required twenty-three pages of proceedings, including hearing an opinion from the Procurator General of the Republic.35

Even though the Tribunal’s jurisdiction is largely confined to constitutional claims,36 this jurisdiction potentially encompasses almost all cases because the Constitution makes almost everything a matter of constitutional law. As Justice Sydney Sanches lamented, “the Supreme Federal Tribunal is becoming a small claims court.”37

One reason the STF can decide so many more cases than the U.S. Supreme Court is that normally only one or two of the eleven members of the STF actually read the briefs and

33. It also decided 81 cases by summary memorandum orders. The Court disposed of the other 6,517 cases by denial of certiorari, dismissal, or withdrawal. Calculated from statistics published in 66 U.S. L. Wk. 3136 (Aug. 12, 1997).
34. In its case law, the Argentine Supreme Court developed the concept of discretionary review similar to the U.S. Supreme Court’s certiorari. In 1990, Argentina legislatively adopted the writ of certiorari, formally granting the Supreme Court discretionary power to refuse to review on extraordinary appeal any case for lack of sufficient federal harm or when the questions raised are insubstantial or lack transcendence. Law No. 23.774 of Apr. 5, 1990, art. 2 (Arg.). See generally Adolfo Gabino Zulu, *El "Writ of Certiorari" y el Incremento de las Facultades Discrecionales de la Corte Suprema*, 1991-C REVISTA LA LEY 775.
36. Some matters over which the Constitution confers original jurisdiction on the STF, such as extradition, recognition of foreign judgments, and concession of letters rogatory, see Const.Fed. art. 102, have nothing to do with the Tribunal’s role in safeguarding the Constitution, nor are the matters sufficiently important to require that they be dealt with solely by the highest court.
records in each case. A case is assigned to one justice, called the reporter (relator), who studies it, explains it to his colleagues, and delivers his prepared vote. In certain types of cases, a second justice, called the reviewer (revisor), is assigned to assist and to confirm the work of the reporter. The justice to whom the case is assigned reports back orally to his colleagues as to what the case is about and delivers his vote; the other checks on the reporter. While the justices can stop the proceedings and ask to look at the file on their own, they normally do not, simply concurring in the reporter's vote. A second reason the STF can resolve more cases than its North American counterpart is that the former normally sits in panels of five, only occasionally sitting as a full court to resolve certain matters. A third reason the STF can resolve many more cases is that it has already decided most of the issues presented by the cases currently before it. According to recent testimony of the former President of the Supreme Court, Sepúlveda Pertence, the Supreme Court decided the question of the constitutionality of a compulsory loan, enacted by the Sarney regime, more than 10,000 times. Justice Pertence indicated that research conducted by the STF reveals that 90 percent of the appeals to the STF raise issues already decided by the Tribunal.

B. LACK OF BINDING PRECEDENT.

Judicial decisions do not have the force of binding precedents in Brazil. Consequently, the Brazilian courts are continually subjected to repetition of rejected legal contentions and conflicting interpretations of the same legal provisions. A sole exception was created by Constitutional Amendment No. 3, of March 17, 1993, which made definitive decisions of the STF on the merits in direct actions declaring the constitutionality of federal laws or normative acts binding precedents with respect to other organs of the Judiciary and the Executive. Curiously, however, decisions of the STF in direct actions declaring the unconstitutionality of federal laws or normative acts are not binding precedents.

Brazil does have the institution of the súmula, which began in the STF in 1964 and has since spread to other tribunals. It is a numbered series of capsulized legal rules, usually only one sentence in length, summarizing the holding of the court. These norms are enshrined in the súmula only after the case law has "firmed up" in a specific direction. Most deal with very ordinary questions of law. Typical is No. 554, which provides: "Payment of a check, issued without provision for funds, after receipt of the criminal accu-

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38. Reviewers are designated in cases involving rescissory actions, criminal revisions (the penal counterpart to the civil recissory action), extraordinary criminal appeals, original criminal actions, and declarations of suspension of rights. STF, Internal Rules, Art. 23.
40. Under the 16th Amendment to the 1946 Constitution, enacted in December 1965, and under the 1967 and 1969 Constitutions, the STF could declare any state or federal statute unconstitutional on its face in an action called a representation, which was filed as an original action in the STF by the Procurator General. Under this procedure, the STF's determination of unconstitutionality was binding erga omnes. See KENNETH L. KARST & KEITH S. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA 112-25 (1975). The representation was eliminated in the Federal Constitution of 1988.
42. Id. Each tribunal has its own rules for creating súmulas. Some require unanimous decisions or an absolute majority in at least two cases. The STF requires an absolute majority of the full court. STF, Internal Rules, art. 102 § 1.
sation is no obstacle to proceeding with the criminal action." These case law rules float freely, almost totally disembodied from the facts of the cases upon which they are based. These rules are technically not binding on judges lower in the hierarchy, but they are usually followed because failure to do so usually assures summary reversal. While the súmulas of other tribunals continue to grow, those of the STF have remained at 621 for the past thirteen years. The President of the STF recently announced plans, however, to revitalize growth of the Tribunal’s súmulas.

Brazil also has a special constitutional device for suspending laws that have been declared unconstitutional by the STF. Article 52(X) of the Constitution gives the Federal Senate exclusive power "to suspend enforcement, in full or in part, of laws declared unconstitutional by final decision of the Supreme Federal Tribunal." The Senate’s role is essentially ministerial; it may not redetermine the merits or refuse to suspend a law because it believes that the decision of the STF was erroneous. This provision, which first appeared the Brazilian Constitution of 1934 (art. 91,IV), has functioned as a device for converting the effects of certain decisions of the STF from inter partes into erga omnes.

C. BAD FAITH LITIGATION.

Lack of stare decisis by itself does not explain why the Brazilian STF, as well as the lower courts, have to decide the same issue hundreds or thousands of times. Other civil law countries operate absent the doctrine of stare decisis without experiencing this problem to the extraordinary degree it exists in Brazil. A very high percentage of these cases, particularly in the Tribunal Superior of Justice, involve cases in which an entity of the Brazilian government, often Social Security, is being sued, and the reason for continuing to appeal the same issue decided adversely many times is simply to forestall the inevitable day when the defendant will have to pay the money it owes. The current President of the STF recently identified the principal cause of the congested judicial dockets as:

The arbitrary opposition of the unjustified state resistance to legitimate pretensions manifested by citizens of good faith who see themselves forced, in view of this type of governmental behavior, to go to court, thereby generating multiplication of complaints against the Public Power.

Historically, the high rates of Brazilian inflation made it very advantageous for debtors to delay payment by litigating as long as possible. In 1981, however, Brazil enacted a statute requiring monetary correction of all judgment debts. The requirement of monetary correction of all judgments should have discouraged the practice of delay to repay in devalued currency. But the Brazilian Government flagrantly manipulated the official coefficients of monetary correction, wholly ignoring its moral obligation to compensate its bondholders and other creditors accurately for the loss in purchasing power in Brazilian currency. A 1993 study showed that the basic monetary correction coefficient, used to readjust National Treasury Bonds for inflation, lost 93 percent of their real value between

43. Súmula No. 554 of the STF.
44. See generally Rosenn, supra note 41, at 514.
47. Law No. 6.899 of Apr. 8, 1981 (Braz.).
1964 and November 1991. Consequently, it remained financially advantageous to continue litigating even when one knew the case would eventually be lost.

Now that quasi-monetary stability has arrived, one would expect that litigants, particularly the government, would pay up rather than litigate. If the government agency had the funds to pay, perhaps it would do so, but it frequently does not. For example, in August 1997, after more than forty years of litigation, a judgment finally became unappealable ordering the City of Teresópolis to pay more than 56 million reais (roughly U.S. $50 million) for expropriating a piece of property for a park in the center of the city in August 1951. Because the City has no funds to pay the award, it is considering returning part of the park to the heirs to satisfy the judgment.

Contemplation of the government's financial straits, in turn, raises a whole series of other problems that can only be mentioned. A great deal of the Brazilian economy is underground—estimates range from 15 to 50 percent—and is not taxed. The nontaxable underground economy pays some taxes, but not as much as it should. Cash 2 accounts, over invoicing exports, under invoicing imports, sales without fiscal receipts, and the like are common practices. The 1988 Constitution requires the federal government to deliver substantial portions of its tax revenues to the states and municipalities, but does not allocate commensurate expenditure items to state and local governments. Moreover, the Plano Real, Brazil's currently successful stabilization program, requires the federal government to forego inflationary financing.

The President of the Republic recently issued a decree that should not only reduce much of this problem, but also goes beyond the proposed binding precedent amendment with respect to federal administrative agencies. Article 1 of this decree requires that all organs of the federal public administration, both direct and indirect, obey all final decisions of the STF interpreting the text of the Constitution in an unequivocal and definitive manner. Once the case law of the STF has firmed up with respect to the constitutionality of a law or administrative act, the Federal Advocate General is required to publish in the Official Gazette a simulá to that effect. The Procurators General of the critical federal organs, like the Treasury and Social Security, are also directed to cease relying on laws and decrees whose unconstitutionality has been definitively determined by the STF.

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49. The obligation to correct the monetary amounts of judgments remains intact despite the Plano Real. See *Medida Provisória No. 1.540 of Dec. 18, 1996*, art. 15.


51. *Id.*


54. Decree No. 2.246 of October 10, 1997.

55. *Id.*, art. 2.

56. *Id.*, art. 4-6.
D. PROCEDURAL DEFICIENCIES.

The long delay in resolving cases has been a chronic problem in Brazil. Brazil inherited from Portugal an entirely written system of civil procedure derived from Roman and canon law. This system was colorfully characterized by Machado Guimarães as "developing in successive stages, 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."57 Despite adoption of a relatively modern code of civil procedure that places greater emphasis on orality, concentrates a great deal of the evidence gathering into a single hearing, and gives the judge greater powers to process cases more swiftly, Brazilian cases still grow fat within the belly of their tiresome records and still tend to move at a snail's pace.

An important qualification must be made for executory proceedings. Brazilian law creates a class of debts that are treated as the functional equivalent of a judgment. These include: (1) negotiable instruments, such as bills of exchange, promissory notes, checks, duplicatas (signed copies of invoices for the sale of goods that serve as trade acceptance bills); (2) obligations to pay a sum certain or deliver fungible goods, if embodied in a public instrument or a writing signed by the debtor and witnessed by two persons; (3) mortgages, pledges, or sums due under certain insurance policies; (4) unpaid rent; (5) judicial awards of costs or fees; and (6) tax debts. These classes of obligations create executory rights, and, like any judgment, may be enforced by an executory proceeding. In order to defend such an action, the defendant must submit to attachment of his funds or property within twenty-four hours after being served, which is a strong inducement to pay up or settle. Defenses are extremely limited, and executory actions are resolved speedily, generally within a few months.58

Many factors beyond the growth in volume of cases contribute to the delays of justice in ordinary actions, in which prejudgment attachment is not permitted. One is the multiplicity of appeals and recourses permitted by the procedural system. A fundamental tenet of the country's procedural law is the principle of the dual degree of jurisdiction. Any litigants dissatisfied with the decision of the trial judge or judge of the first instance is entitled to full review, essentially a trial de novo, before an appellate court or tribunal of the second instance.59 Consequently, even though 90 percent of first court decisions are confirmed on appeal, appeals are usually taken as a matter of course, which clogs up the system.

58. Law No. 9.079 of July 14, 1995, created a new monitory action (ação monitória) for payment of a sum of money or delivery of a fungible good or a determined chattel. This action may be brought by anyone relying on written proof that does not entitle the creditor to bring an executory proceeding. Once the complaint is in proper form, the judge must issue an order of payment or delivery within 15 days, unless the defendant sets forth a defense within the same time period. If unopposed, the defense will be converted into an executory right. If the defense is overruled, the court converts plaintiff's claim into an executory right permitting executory proceedings. See José Taumaturgo da Rocha, Ela, a Ação Monitória, Vista por Nós, os Brasileiros, 82 REVISTA DO PROCESSO 12 (1996).
59. There are three exceptions: (1) jury verdicts in homicide cases, which can be reversed by an appellate court, but must be remanded for a new trial; (2) small claims courts, in which the appeal is before a three-judge panel of the court of first instance rather than an appellate tribunal; and (3) cases invoking the original jurisdiction of the STF. DALMO DE ABREU DALLARI, O PODER DOS JUIZES 102-03 (1996).
During the course of the proceedings, lawyers may request interlocutory review of virtually any significant order, except those of the labor courts, by agravo de instrumento, a bill of review that requires no certification by the judge whose order is being appealed. Because this procedure has no suspensive effect, at least in theory, lawyers sometimes try to couple a bill of review with a writ of security, which does have a suspensive effect. Interlocutory appeals make resolution of the case at the level of the first instance take much longer, even if the interlocutory appeal has no suspensive effect, because busy judges often take no further action in a case until a bill of review is determined. If an appeal is not decided in a unanimous form, lawyers may petition for a rehearing en banc.

If the case presents an issue of interpretation of federal law, the dissatisfied litigant has a special appeal. If the case presents a constitutional issue, the dissatisfied litigant has an extraordinary appeal. Lawyers used to be able to file an extraordinary appeal to the STF in both types of cases. The 1988 Constitution, however, created the special appeal, which must be taken to the Federal Superior Court of Justice for issues of federal law, and restricted the extraordinary appeal to the STF to constitutional issues. This separation slowed the appellate process considerably, for cases often present both types of issues. In such cases, both appeals must be taken to different courts, with one held in abeyance until the other is resolved, further delaying the proceedings.

Even after a case is finally decided by the STF or the highest court to which it can be appealed, one can file a rescissory action to attack the final judgment collaterally. This action is often used in Brazil to further delay matters after all appeals have failed. As the author has written previously, "[t]he breadth of the grounds [for doing so] 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."

Brazil currently has no procedural device enabling the STF to skip the intermediary courts in order to resolve an important national issue quickly. This problem became apparent during the recent privatization of the state mining company, Companhia Vale do Rio Doce (CVRD), whose auction had to be suspended on four successive days because of an estimated 135 lawsuits filed in the lower courts throughout the country. These suits were possible because Brazil has a popular action that can be brought by any citizen, irrespective of whether that citizen has any personal stake in the controversy, to annul any acts that tend to injure the public patrimony, administrative morality, and the environment. Some thirty-five preliminary injunctions suspending the privatization were actually issued beforehand, and one was even issued immediately after the auction, suspending the auction's effect until the injunction, like the others, was ultimately quashed by a higher

60. See generally Const.Fed. arts. 102(III) and 105(III).
61. Rosenn, supra note 41, at 512.
62. Constitutional Amendment No. 7 of April 13, 1977, promulgated under a military government, created an institution called the evocation (avocatória), which permitted the STF, at the request of the Procurator General of the Republic, to transfer to its original jurisdiction and to suspend the effects of any decision rendered in any case involving immediate danger of serious injury to public order, health, security, or finances. It was not retained in the 1988 Constitution. De Abreu Dallari, supra note 59, at 65-66.
63. Const.Fed. art. 5 (LXXIII). Unless the suit is brought in bad faith, the plaintiff is exempt from the normal requirement that the losing party must pay costs and the winning party's attorney's fees. Id.
By way of contrast, when an Argentina lower court first issued a preliminary injunction blocking a privatization, the Argentine Supreme Court on its own adopted a *per saltum* procedure, taking over the litigation directly and sparing Argentina the type of international embarrassment Brazil experienced in the CVRD litigation.

Brazil still has no general class action device, which means that the great bulk of lawsuits still have to be litigated individually. The CPC requires that groups of people who suffer the same injury to bring their own individual actions for redress. In 1985, Brazil created a class action for environmental or consumer protection cases, but standing to bring such an action is restricted to civil associations, foundations, the Public Ministry, governmental agencies, and government-owned companies, a limitation that makes little sense. Moreover, any damages awarded go to a governmental agency for reconstituting damaged property rather than to members of the class. A further expansion of class actions resulted from Article 5(LXX) of the 1988 Constitution, which created a collective writ of security. A writ of security (*mandado de segurança*) combines features of the common law writs of prohibition, quo warranto, mandamus, and injunction. The collective writ of security may be brought by any political party represented in Congress, any union, business syndicate or association to defend the rights of its members, but it has not been particularly useful as a collective vehicle for challenging unconstitutional taxes or similar burdens. Brazil has hundreds of thousands of taxpayer, labor, and social security cases that could be disposed of in single class actions or by consolidation if the procedural legislation were revised to permit it. For example, currently pending are more than 100,000 lawsuits filed against the Brazilian Government by persons whose deposits were frozen for 18 months in the Federal Savings Bank in 1990 by the harebrained Collor Plan. All involve the same issue: whether the rate of monetary correction on the deposits should be 84.32%, the inflation rate determined by the Consumer Price Index, or the 41.24% variation in the National Treasury Bonds.

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68. A writ of security may be brought to protect any liquid and certain right not protected by habeas corpus from illegal action or abuse of power by a governmental authority. Const.Fed. art. 5 (LXIX).


E. **EXTERNAL JUDICIAL COUNCIL.**

Under the military government, Brazil had a National Council of the Judiciary, created by Constitutional Amendment 7 of 1977 and the 1979 Organic Law of the National Judiciary. Its seven members were drawn solely from members of the STF. The Council had limited powers, mainly to investigate disciplinary claims against lower court members. It could, however, with concurrence of the Procurator General, decide whether to allow judges to remain in active service or force them to retire.

Depending upon how it is staffed and administered, the proposed outside review council might well produce several advantages. First, it might be a useful tool in disciplining wayward judges, who are often forgiven their trespasses in the interest of corporatist solidarity. Second, it might have greater credibility than the judges themselves in making the case to Congress for allocation of greater resources to the judiciary. Third, such review council might develop more sophisticated systems for monitoring judicial performance than presently exist. Fourth, it might do a better job at curtailing nepotistic appointments within the judiciary.

On the other hand, granting an outside organ powers to discipline judges might well destroy judicial independence. Such independence is vital to the effective functioning of the judiciary and, unfortunately, is in short supply in much of Latin America. The risk, particularly when multiplied by the disastrous consequences if it comes to pass, seems far too great in comparison with the modest gains likely to ensure from creation of such a council.

A possible alternative, suggested by Deputy Jairo Carneiro, Reporter of the House Special Commission on Judicial Reform, is to permit judges to be impeached for misconduct. This might result in removal of a few dishonest or incompetent judges, but impeachment is a much too unwieldy and time-consuming process for disciplining a large cadre of professional judges. Moreover, it might become a highly politicized process.

III. **Needed Judicial Reforms.**

A. **DISCRETIONARY REVIEW.**

To the outside observer, some types of judicial reform needed by Brazil seem fairly obvious. For example, what the STF really needs is a reform that permits it to pick and choose the cases it wishes to decide. Argentina adopted the writ of certiorari, and it makes good sense for Brazil to do so as well. The Constitution's jurisdictional grant to the STF is far too broad. Granting the STF discretionary power to decide what to hear is a sensible and obvious solution. The reason such a proposal does not seem to be seriously urged is cultural, based partly upon a distrust of judges and partly upon the notion that legal questions need to be resolved at the highest level.
B. BINDING PRECEDENT.

Adoption of the proposed constitutional amendment creating a limited and very narrow concept of precedent is a step in the right direction, but it will hardly solve the problem of the huge volume of cases. Ironically, adoption is being opposed by a number of judges, including the present Chief Justice, on the ground that having to follow precedent undermines the independence of the judiciary. Even without a formal requirement to follow precedent, judges tend to follow the decisions of higher courts and of their own courts. Unfortunately, the attention being given to this proposal diverts attention from the types of reform that might make a serious dent in Brazil's real judicial reform problems.

Decree No. 2.346 of October 10, 1997, requiring the Public Administration to follow all STF decisions that definitively declare laws and acts unconstitutional, is far broader in its sweep and much more likely to reduce court congestion by eliminating dilatory actions and appeals by federal agencies.

C. REDUCING CASELOADS.

One promising way to cut back on the huge volume of cases is for the government or business groups to conduct a well-publicized campaign to persuade Brazilians to resort to alternative dispute mechanisms, such as arbitration and mediation, rather than litigation. Judicial efforts at conciliation recently became mandatory for a wide variety of cases. Amendments made in 1994 to the Code of Civil Procedure (CPC) now require judges to attempt to resolve most cases by conciliation. The Small Claims Law and the Law of Special Civil and Criminal Courts both provide for conciliation by the judge or by nonjudicial conciliators, as well as for the option of arbitration, and require the judge to instruct the parties about the advantages of conciliation or arbitration. Brazil recently enacted a new Law of Arbitration, which makes arbitration far more attractive by eliminating the need to have a specific post-dispute submission and judicial confirmation of arbitral awards. While Brazilians have a good deal of experience with conciliation, they have relatively little experience with arbitration and mediation. A substantial effort should be made to educate potential litigants about the respective advantages of each. Greater use of alternative dispute mechanisms should be particularly useful in labor cases, the great bulk of which now go to the labor courts.

71. Art. 125 (IV) of the CPC, added by Law No. 8.952 of Dec. 13, 1994, directs the judge to attempt to conciliate the parties at any stage of the proceedings. Art. 331 of the CPC, as modified by Law No. 8.952 of Dec. 13, 1994, requires the judge to set a conciliation hearing for all cases that cannot be disposed of summarily as a matter of law if they involve "available rights" (direitos disponíveis). Arts. 447 and 448 of the CPC already required the judge to attempt to conciliate the parties at the start of the hearing stage (audiência) for cases involving family matters and patrimonial rights created by private law. "Available rights" are equivalent to patrimonial rights created by private law. Cândido Rangel Dinamarco, A Reforma do Código de Processo Civil 121 (2d ed. 1995).

72. Law No. 7.244 (Small Claims Law) of Nov. 7, 1984, arts. 22-23 (Braz.); Law No. 9.099 (Law of Special Civil and Criminal Courts) of Sept. 26, 1995, arts. 21-24 (Braz.).

73. Law No. 9.307 (Law of Arbitration) of Sept. 23, 1996 (Braz.).
A second way to cut back on the volume of cases is for judges to be more liberal in imposing sanctions against those who litigate in bad faith and those who abuse dilatory procedures. Sanctions for bad faith and dilatory litigation were provided in the original version of the 1973 CPC; an effort was made in the 1994 reforms to make sanctions more explicit and more acceptable.\textsuperscript{74} Sanctions can also be imposed against offending lawyers, as well as their clients.\textsuperscript{75} To be effective, however, judges have to be willing to crack down on those abusing the system.

A third way to reduce the number of cases that need to be tried is to adopt plea bargaining. Civil law countries, such as Italy and Colombia, recently adopted this common law institution.\textsuperscript{76} Brazil recently adopted a form of plea bargaining for minor offenses,\textsuperscript{77} and should consider extending this institution to more serious offenses as well.

A fourth way to reduce the number of cases is for governmental entities to do a better job of obeying the Constitution and the law. A great many complaints are filed simply because some governmental agency or entity failed to do what the Constitution or the law requires.

D. INCREASING THE NUMBER OF JUDGES.

Brazil needs to hire more judges. This is always, by itself, an insufficient solution, but Brazil plainly needs many more judges than it presently has. Stiff competitive examinations and poor legal education, however, result in very low pass rates. In 1995 the State of São Paulo had 3,232 candidates take the judicial entrance exams, but only seventy-one were approved, a 2.2 percent pass rate.\textsuperscript{78} In 1996, 2,649 (22.78 percent) of the first instance judicial positions were vacant,\textsuperscript{79} in part due to the low pass rates, and in part due to the lack of attractive compensation for well-qualified lawyers.

In addition, Brazil is currently wasting one of its most valuable resources, its retired judges. The combination of mandatory retirement at age seventy and generous early retirement provisions results in the loss of some of the most qualified and experienced members of the Brazilian judiciary. Financial or other incentives need to be developed to encourage judges eligible for retirement to continue to decide cases, or at least to help settle them. Judges who have reached seventy, but who would like to continue to work as judges, ought to be able to do so if they are physically and mentally able. Brazil ought to create a category of senior status judges who would not occupy regular positions, but who would be permitted to work as much as they wished.\textsuperscript{80}

\textsuperscript{74} DINAMARCO, supra note 71, at 60-65.
\textsuperscript{75} Law No. 8.906 of July 4, 1994, art. 32.
\textsuperscript{77} Law No. 9.099 of Sept. 26, 1995, arts. 72-76.
\textsuperscript{78} 1 REVISTA CONSULEX 18 (Mar. 1997).
\textsuperscript{79} The vacancy rate for judges of the second instance was much lower; 78 positions, or 4.42 percent of the total, were vacant. SUPREMO TRIBUNAL FEDERAL BANCO NACIONAL DE DATOS DO PODER JUDICIÁRIO (1996).
\textsuperscript{80} Such positions would be analogous to those of senior judges in the U.S. federal judiciary; the assistance of these judges is invaluable to the federal courts in the United States.
E. PROCEDURAL REFORM.

Existing procedural legislation needs reform to eliminate the multiplicity of appeals and recourses available in Brazil. One appeal is sufficient. In many instances, depending upon the court and the type of action, litigants actually have three or four bites at the apple. Moreover, there is no requirement that the losing party post an appeal bond. Imposing such a requirement, particularly in cases involving money judgments, would both discourage frivolous appeals and help insure the collectability of judgments. Elimination of the number of appeals, however, is probably not possible until people have confidence in their judges, particularly judges of the first instance. This confidence is not likely to happen until one changes the recruiting and incentive systems, and perhaps improves legal education in general and judicial education in particular.

Second, the excessive formalism, which permeates the entire procedure, needs to be pruned from the system. Complaints now must be reviewed by the judge before they can be served to make sure they are in proper form. Rigid time periods are set for when judges must perform certain tasks and render decisions. These are, for many cases, wholly unrealistic, and they are flagrantly disregarded. Insufficient flexibility is built into the system, and the spectacle of judges flagrantly disrespecting the law is not a wholesome one. What is needed is an external control agency that can evaluate the complexity of cases and establish realistic time constraints based upon types of cases and overall case loads.

On the other hand, Brazil has been taking a number of steps to make its procedures more flexible and rapid. Article 330 of the 1973 CPC enabled the judge to issue summary judgment whenever the issues presented were either purely legal or mixed questions of law and fact that required no additional proof, or the defendant failed to appear. A 1994 reform created a form of quick pretrial relief called "anticipated jurisdictional protection" (tutela jurisdiccional antecipada), which resembles the common law preliminary injunction. In cases in which the proof is sufficient to convince the judge that the allegations of liability in the complaint are true and there is either a likelihood of irreparable harm or the defendant appears to be abusing his right of defense, the judge may provisionally grant all or part of the relief requested in the complaint at the pre-trial phase.

Third, the wisdom of a uniform federal system of procedure for a nation as big and as diverse as Brazil needs reconsideration. One of the advantages of a federal system is that states should be free to experiment with new and different ways of solving problems. Different regions, with different procedural demands, might be better served with different rules of civil procedure.

Fourth, federal jurisdiction needs rethinking to eliminate the trivial cases. Presently, the federal courts have jurisdiction over all cases in which the federal government has an interest, regardless of how small.

Fifth, the class action needs to be generalized and expanded. Narrow standing limitations need to be eliminated so that it becomes an effective vehicle for disposing of hundreds of thousands of taxpayer or citizen actions that could be disposed of in a single lawsuit.

Sixth, judges need to take a more active role in pushing cases along rather than sitting back passively. The small claims courts, which have worked very successfully, need to be further expanded so that all states have them.

82. See DINAMARCO, supra note 61, at 138-59.
F. Modernization.

More resources need to be allocated to the judiciary so that all cases can be filed and located electronically. Some Brazilian courts are making progress toward modernizing their archaic system of processing cases by instituting the use of computers, but the pace is still slow. Generally, proceedings are still filed manually and are sometimes lost. In 1994 Article 170 of the CPC was modified to permit use of any modern technique of recording testimony or documents in any court.

Although the top federal courts have most impressive courthouses, the physical facilities in which many of the lower court judges work, particularly at the state level, leave much to be desired. Brazil historically has spent less than 1 percent of GNP on the judiciary. This figure must be increased. Clerks need to be paid adequately so that the practices of paying speed money, delay money, disappear money, or find money vanish. Judges need to choose their staffs on the basis of ability to help resolve cases rather than hiring one another’s spouses and relatives. Legal aid needs significant improvement so that the poor can have access to the courts other than as criminal defendants. The labor courts need to be totally overhauled, as does the existing labor legislation. This might well lead to elimination of the separate structure of labor courts, but, at a minimum, should result in elimination of the lay class judges, who are simply a needless expense.

G. Constitutional Reform.

Constitutional reform is needed to prune back the excesses of the Constituent Congress of 1988. Constitutions should be frameworks for governance, not detailed codes or regulations. Because the present Constitution spells out in incredible detail the current organization of the judiciary and its jurisdiction, virtually any significant judicial reform requires a constitutional amendment.

H. Judicial Training.

Before assuming the bench, Brazilian judges need more practical experience and training than most current judges received. Requiring at least five years of law practice before becoming a judge, as the Brazilian Bar Association recommends, is a desirable reform.

Brazilian judges also need better training and more continuous legal education. Article 93(IV) of the Constitution calls for the establishment of official courses for preparation and perfection of judges as requisites both for becoming a judge and for being promoted in the judicial career. While some judicial training schools have been established, there is considerable room for improvement.

83. Const.Fed. art. 93 (IV).
I. PUBLIC RANKING OF JUDGES.

A career judiciary with life tenure tends to be insulated from useful feedback from the public it serves. Brazil should experiment with a system in which practicing members of local bar associations anonymously rank the performance of lower court judges. Members of the bar practicing in the locale are the most knowledgeable persons to evaluate the judges' caliber of performance. Peer pressure and the fear of negative publicity attached to a poor showing might well make judges perform their judicial duties more diligently. This proposition would certainly be reinforced if poor bar ratings became a factor in promotion decisions.

J. RESPECT FOR THE RULE OF LAW.

Brazilian courts need to do much more to instill respect for the rule of law. The ordinary courts need to assume a more active role in controlling the police, who have often been out of control. Currently, disciplinary offenses of the military police are shunted to the military tribunals, in which very few convictions are obtained. Allegations of misconduct by the military police should be tried by the civil tribunals. In addition, constitutional rules on tenure need modification so that the "bad apples" can be removed from police ranks.

Most importantly, Brazil needs to do much more to instill at an early age that the law is to be obeyed and its guardians respected. It would help a great deal to establish the tradition that the government is not above the law. Giving judges the same kind of contempt powers that common law judges have might be a critical reform, but it might also produce a disastrous backlash if government officials were actually jailed for contempt.

IV. Conclusion.

Creating an effective and efficient judiciary in a country like Brazil is a complex, long-term undertaking. Even when one can identify precisely what the problems are, securing agreements as to the necessary reforms and persuading people to implement them can be extremely difficult. The problems are systemic, and one cannot simply focus upon one problem that is inextricably related to three other problems and pretend that the latter do not exist.