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The Brazilian Appellate Procedure through Common Law Lenses: How American Standards of Review May Help Improve Brazilian Civil Procedure

Cesar Zucatti Pritsch*

In this article, I discuss a flaw in Brazilian civil procedure observed in my practice as a Federal Labor Judge in Brazil, an issue that may be addressed by limiting appellate review in a similar fashion as the American courts do, using standards of appellate review. In Brazil, appellate courts tend to ignore the lower court's decisions, replacing them for the ruling they would have made had they been the original decision makers. A simple disagreement with the lower court's findings of fact or discretionary rulings, no matter how reasonable, is sufficient grounds for reversal. The lack of standards of review results in duplication of the trial court's work at the appellate level, and provides excessive incentives for the parties to appeal. Parties often gamble for a different judgment, given the high odds of reversal that result from the lack of deferential standards of review. With such restrictive standards, the quantity and processing time of appeals would likely decline, relieving the overburdened Brazilian courts. The introduction of standards of review in Brazil would not face legal impediments. They are consistent with

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constitutional due process guarantees, such as the reasonable duration of process, and with the recent statutory reforms that limit the types and scope of appeals, and strengthen precedents. Additionally, the lack of an express statutory basis does not prevent Brazilian courts from performing a more deferential appellate review, notwithstanding the desirability of a nationally binding statute or court regulation, to achieve consistency. Changes in legal culture, such as the long-standing unrestricted appellate review in Brazil, are not easy, but the resulting flood of often trivial appeals impose a change in that paradigm.

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I. INTRODUCTION

The standards of appellate review may help improve Brazilian civil procedure, by reducing the quantity and processing time of appeals, and by relieving the overburdened Brazilian courts. In Brazil, appellate courts tend to ignore the lower court's decisions, replacing them for the ruling they would have made had they been the original decision makers.¹ They do not defer to the trial judge's decision.² A simple disagreement in relation to the findings of fact, the application of the law to the facts, or discretionary rulings by the lower court—no matter how reasonable those were—is sufficient for an appellate panel to reverse them.³ Such a situation provides excessive incentives for the parties to appeal.⁴ Parties often gamble for a different judgment, given the high odds of reversal.⁵ Unrestricted appellate review also makes the Brazilian judicial procedure less efficient. Appellate judges repeat the work of the first instance courts, despite lacking the benefit of the immediate contact with the evidence and with the realities of the trial court.⁶ The use of more deferential standards to review the fact-findings, the application of law to facts, and the discretionary rulings of the trial courts, as done in

¹ Welber Barral & Rafael Bicca Machado, *Civil Procedure and Arbitration*, in INTRODUCTION TO BRAZILIAN LAW 195 (Fabiano Deffenti & Welber Barral eds., 2011).

² See generally Ben-Hur Silveira Claus et al., *A Função Revisora dos Tribunais: A Questão do Método no Julgamento dos Recursos de Natureza Ordinária* [The Appellate Courts' Revising Function: A Question of Method in the Judgment of Ordinary Appeals], in 6 REVISTA DO TRIBUNAL REGIONAL DO TRABALHO DA 14ª REGIÃO [14TH REGIONAL LABOR COURT L. REV.] 161 (2010) (Braz.), available at http://legado.trt14.jus.br/Documentos/Revista_TRT14_2010_n1.pdf.

³ See generally Barral & Machado, *supra* note 1, at 193-99.

⁴ *Id.* at 193 (stating that "appeals are used too often").

⁵ *Id.*

⁶ *Id.* at 195.

the American appellate courts, could help make Brazilian civil procedure faster, with a more efficient distribution of power between appellate and trial courts.⁷

In this article, I discuss an issue observed in my practice as a Federal Labor Judge (*Juiz do Trabalho*) in Brazil, which is common not only to the specialized civil procedure applied in the federal labor courts (*Justiça do Trabalho*), but also to the procedure of all civil jurisdiction Brazilian courts. We will first discuss the Brazilian law and scholarship, showing the lack of appellate standards of review in civil procedure. We will examine the unrestricted reviewing power of the appellate courts and its consequences, such as the excessive rate of appeals and the disregard of trial courts' decisions, resulting in duplicative work, delay, and decrease in quality of adjudication. We will propose that the American standards of review serve as an inspiration for the Brazilian appellate procedure, in order to improve speed, simplicity, and efficiency. We will then discuss the operation of these standards in reviewing conclusions of law, findings of fact, discretionary rulings, and mixed questions of law and fact. Finally, we intend to examine the applicability of those standards to Brazilian law, assessing whether they would face any constitutional or legal impediment, and whether their implementation would actually require a statutory change.

This policy article provides a window into Brazilian civil procedure, its problems, and the efforts to overcome them through judicial reforms aided by comparative law. It is consistent with the trend of approximation between the civil law and common law traditions. This article's goal is not to exhaust this intricate and sensitive theme, but only to raise awareness about it, contributing to the ongoing discussion about procedural law reform in Brazil.⁸

⁷ See generally Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 235-42 (2009) (discussing the problems that the American standards of appellate review are designed to address, which are analogous to the ones that the Brazilian justice system has to solve in order to improve appellate review).

⁸ Several reforms have been made in the last two decades to simplify appellate procedure, reducing the number of appeals and strengthening precedent, which have now been consolidated and extended in the new Code of Civil Procedure, enacted in 2015 and effective in March of 2016. See *infra* notes 171-79 and accompanying text.

II. THE CURRENT UNRESTRICTED BRAZILIAN APPELLATE REVIEW AND ITS CONSEQUENCES

A. *Brazilian civil procedure does not limit appellate courts' power to review the decisions below*

In Brazilian civil procedure there are no juries, all findings of fact and law are made by judges.⁹ The losing party may appeal as of right, and the appellate courts review de novo both law and facts.¹⁰ Appellate courts tend to ignore the lower judge's decisions, replacing them for the ruling they would have made if they were in the trial judge's position.¹¹ There is no law imposing standards of review or deference to discretionary rulings or fact-findings of the lower courts.¹²

The civil procedure applied in federal and state courts is governed by the national Code of Civil Procedure (*Código de Processo Civil*, hereinafter C.P.C.) and some non-codified federal statutes.¹³ A special summary version of civil procedure (labor procedure) is applied by the federal Labor Justice (*Justiça do Trabalho*) to labor and employment cases. The Consolidation of Labor Laws (*Consolidação das Leis do Trabalho*, hereinafter C.L.T.) contains the core provisions of labor procedure, which are supplemented by the rules of the common civil procedure.¹⁴

⁹ Keith S. Rosenn, *Brazil*, in 1 LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 191 (Herbert M. Kritzer ed., 2002). For questions of fact that require technical knowledge, the judge uses the help of a court nominated expert (*perito*), who will submit a written statement and usually will not testify in a hearing. Each party may also produce their own expert statement (*assistente técnico*) to corroborate or rebut the court expert's statement. See CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CODE OF CIVIL PROCEDURE] arts. 156, 465 (2015) (Braz.).

¹⁰ Rosenn, *supra* note 9, at 191.

¹¹ Barral & Machado, *supra* note 1, at 193.

¹² *Id.*

¹³ See generally C.P.C., *supra* note 9.

¹⁴ CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T.] [CONSOLIDATION OF LABOR LAWS], art. 769.

In Brazil, an appeal will generally have two effects,¹⁵ the reviewing effect (*efeito devolutivo*), which means the resubmission of the appealed issues to the judiciary,¹⁶ and the staying effect (*efeito suspensivo*), which prevents the enforcement of the judgment until the appeal is decided.¹⁷ Although civil appellate review is limited to the issues raised by the appellant, the powers derived from the reviewing effect are quite broad.¹⁸ The court's adjudicatory power over the appealed issues is not limited to what is expressly argued in the appellate briefs, but extends to all questions related to the matter.¹⁹ The appellate court may decide all questions and arguments raised in the proceeding below, even if they were not completely decided by the trial court or transcribed in the briefs.²⁰ Additionally, when a claim or defense is supported by more than one argument and the trial court rules favorably based on only one of them, the appellate court may review the other arguments.²¹ Finally, in the name of expediency, recent reforms have further broadened these powers of the appellate courts.²² When reversing a trial court's order that dismissed a claim without adjudication on the merits, the appellate court may proceed to a first-hand ruling on the merits, without first remanding to the trial court—as long as it is a question of law or the case is ready (“ripe”) for immediate adjudication.²³

¹⁵ C.P.C., art. 1012. See Welber Barral & Rafael Bicca Machado, *Civil Procedure and Arbitration*, in INTRODUCTION TO BRAZILIAN LAW 183, 195 (Fabiano Defenti & Welber Barral eds., 2011).

¹⁶ C.P.C., art. 1013.

¹⁷ See Barral & Machado, *supra* note 1, at 195. In the labor appellate procedure, the staying effect is exceptional. C.L.T., art. 899.

¹⁸ C.P.C., *supra* note 9, at art. 1002.

¹⁹ 3 MOACYR AMARAL SANTOS, PRIMEIRAS LINHAS DE DIREITO PROCESSUAL CIVIL [PRIMER ON CIVIL PROCEDURE LAW] 110 (7th ed. 1984) (Braz.).

²⁰ C.P.C., *supra* note 9, at art. 1013 § 1.

²¹ *Id.* at § 2.

²² See Keith S. Rosenn, *Civil Procedure in Brazil*, 34 AM. J. COMP. L. 487, 488 (1986).

²³ C.P.C., *supra* note 9, at art. 1013 § 3. The case is ready for immediate adjudication if the controversy is only a question of law or if it involves questions of law and fact capable of being proved by the evidence already produced to the records, without the need of further discovery or hearings. This is usually referred to as the ripe case theory (*teoria da causa madura*), and is very similar to the situation that triggers summary judgment in Brazilian civil procedure. See *id.* at

Neither the general jurisdiction civil courts nor the labor courts use standards that limit appellate review or that give deference to the decision of the court below.²⁴ Both the C.P.C. and the C.L.T. are silent in that matter.²⁵ The decision of the appellate court simply replaces the decision of the lower court below as to the issues on appeal, to which the appellate court has full adjudicatory power, as if it were the trial judge.²⁶ With equal powers to those that the trial court had when originally ruling, the appellate court decides both procedural issues (*errores in procedendo*) and on the merits (*errores in iudicando*).²⁷ This ample review permits the appellant to raise the illegality or unfairness of the decision below.²⁸ It also allows the appellate court to revisit all the evidence and findings of fact, and to either vacate or reform the decision.²⁹ The appellate court does not consider the findings of fact or law below as presumptively correct.³⁰ Since the entire record is in writing, and since additional evidence on appeal may be admitted only in case of force majeure,³¹ the appellate court tends to consider itself in as good a position as the trial judge to weigh the evidence, disregarding the importance of the witnesses' demeanor.³²

art. 355. See ARRUDA ALVIM, ARAKEN DE ASSIS & EDUARDO ARRUDA ALVIN, COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL [COMMENTS TO THE CODE OF CIVIL PROCEDURE] 1150 (2d ed. 2012) (Braz.).

²⁴ See Barral & Machado, *supra* note 1, at 193.

²⁵ See generally, C.P.C., *supra* note 9; C.L.T., *supra* note 14.

²⁶ C.P.C., *supra* note 9, at art. 1008.

²⁷ SANTOS, *supra* note 19, at 112.

²⁸ See Barral & Machado, *supra* note 1, at 194-97.

²⁹ NELSON NERY JUNIOR & ROSA MARIA DE ANDRADE NERY, CÓDIGO DE PROCESSO CIVIL COMENTADO [CODE OF CIVIL PROCEDURE ANNOTATED] 887, 893 (11th ed. 2010) (Braz.). See also CARLOS HENRIQUE BEZERRA LEITE, CURSO DE DIREITO PROCESSUAL DO TRABALHO [COURSE OF LABOR PROCEDURAL LAW] 565 (3d ed. 2005) (Braz.); MAURO SCHIAVI, MANUAL DE DIREITO PROCESSUAL DO TRABALHO [MANUAL OF LABOR PROCEDURAL LAW] 804 (7th ed. 2014) (Braz.).

³⁰ Rosenn, *supra* note 22, at 508.

³¹ C.P.C., *supra* note 9, at art. 1014.

³² See Rosenn, *supra* note 22, at 508.

Even with the new C.P.C. recently passed by the Brazilian Congress and submitted to the President for final approval,³³ (to be in effect after one year), the imposition of stricter standards of appellate review is not one of the projected changes. The new code repeats the pertinent language of the current C.P.C.³⁴

Despite many recent procedural reforms, Brazilian appellate review is still within the civil law pattern.³⁵ The lack of deference to the findings of the court below is not exclusive to Brazil. It is a typical feature of civil law jurisdictions, where the decision of the reviewing court generally replaces that of the lower court, instead of

³³ The project was approved in the Senate, Projeto de Lei do Senado (PLS) 166 (Braz. 2010), received amendments by the House of Representatives, Projeto de Lei da Câmara dos Deputados (PLC) 8046 (Braz. 2010), returned to the Senate, and was then sent to the President for approval on February 13, 2015. *See SUBSTITUTIVO DA CÂMARA DOS DEPUTADOS n° 166, de 2010, AO PLS n° 166, de 2010 – CÓDIGO DE PROCESSO CIVIL*, SENADO FEDERAL, http://www.senado.gov.br/atividade/materia/detalhes.asp?p_cod_mate=116731 (last visited Mar. 9, 2017) (illustrating the legislative history of Senate Bill 166). *See also* Kelly Buchanan, *FALQs: New Brazilian Code of Civil Procedure*, LIBRARY OF CONGRESS (Sept. 1, 2015), <https://blogs.loc.gov/law/2015/0/falqs-new-brazilian-code-of-civil-procedure/>.

³⁴ See the comparative table with the provisions of the current code compared to the versions of both chambers of Brazilian Congress and the final version approved. The project was approved in the Senate, Projeto de Lei do Senado (PLS) 166 (2010) (Braz.), received amendments by the House of Representatives, Projeto de Lei da Câmara dos Deputados (PLC) 8046 (2010) (Braz.), returned to the Senate and was sent to the President for approval on 2/13/2015. *Quadro comparativo do Código Processo Civil Projecto de Lei do Senado n° 166, de 2010*, SENADO FEDERAL, http://www.senado.gov.br/atividade/materia/detalhes.asp?p_cod_mate=116731 (last visited Mar. 9, 2017). *See also* Senado Federal [Brazilian Senate], *Novo CPC: mudanças que buscam agilizar processo entram na reta final para sanção* [New CPC: changes that seek to streamline process enter the final stretch for sanction], SENADO NOTÍCIAS, <http://www12.senado.gov.br/noticias/materias/2015/02/13/novo-cpc-mudancas-que-buscam-agilizar-processo-entram-na-reta-final-para-sancao> (last updated July 22, 2015).

³⁵ *See generally* Rosenn, *supra* note 22. *See also infra* notes 171-79 (discussing recent reforms that brought Brazil many steps closer to the common law tradition, but not involving standards of review).

remanding for further proceedings.³⁶ Rather than being primarily a method of correcting mistakes of law—as in common law jurisdictions—in the civil law tradition appeals are usually considered a right, which includes the mere reconsideration of factual and legal issues.³⁷ In a civil law jurisdiction, an appellate court is generally expected to reexamine all the evidence and independently reach its own conclusion about the truth of the facts and their legal significance.³⁸

B. Consequences of the unrestricted scope of appellate review in Brazil

In Brazil, appeals are used excessively, burdening the entire system.³⁹ The vast majority of the trial courts' orders are appealed, causing appellate judges to be overwhelmed by the sheer number of cases they have to decide every year, as the following statistics illustrate:⁴⁰

³⁶ Peter E. Herzog & Delmar Karlen, *Attacks on Judicial Decisions*, in 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, CIVIL PROCEDURE ch.8 ¶ 3 (Mauro Cappelletti ed., 1982).

³⁷ JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION 121 (3d ed. 2007)

³⁸ *Id.*

³⁹ *When Less is More*, THE ECONOMIST (May 21, 2009), <http://www.economist.com/node/13707663> (explaining that the reason why Brazil's courts are the most overburdened is due to the limitless right to appeal).

⁴⁰ CONSELHO NACIONAL DE JUSTIÇA [NATIONAL COUNCIL OF JUSTICE], JUSTIÇA EM NÚMEROS 2013: JUSTIÇA DO TRABALHO [THE JUDICIARY IN NUMBERS 2013: LABOR JUSTICE] 111, 117, 120, 240, 249 (2014) (Braz.); CONSELHO NACIONAL DE JUSTIÇA [NATIONAL COUNCIL OF JUSTICE], JUSTIÇA EM NÚMEROS 2013: JUSTIÇA FEDERAL [THE JUDICIARY IN NUMBERS 2013: FEDERAL JUSTICE] 87, 91, 93, 99, 183, 187 (2014) (Braz.); CONSELHO NACIONAL DE JUSTIÇA [NATIONAL COUNCIL OF JUSTICE], JUSTIÇA EM NÚMEROS 2013: JUSTIÇA ESTADUAL [THE JUDICIARY IN NUMBERS 2013: STATE JUSTICE] 121, 115, 130, 136, 139, 274, 280 (2014) (Braz.), available at http://www.cnj.jus.br/images/programas/justica-em-numeros/jn2014_completo.zip. See also Barral & Machado, *supra* note 1, at 193.

Appeals Against Brazilian Trial Court Decisions - 2013	Labor Justice	Federal Justice	State Justice
Rate of External Appeals from Trial Court Decisions	69.1%	18.9%	8.4%
Success Rate of Appeals from Trial Court Decisions	52.5%	39.5%	36.2%
New Cases per Appellate Judge	1,226	3,726	1,294
Total Workload per Appellate Judge (including cases pending from previous years)	2,119	12,619	2,712
Total Appeals Decided	642,760	469,174	2,122,148
Total Appeals Filed	648,478	499,244	2,098,490

As to the Labor Justice, more than two thirds of the trial court orders are appealed.⁴¹ The odds are high for at least a partial reversal of the decision below, 52.5%.⁴² On the plaintiffs' side, that adds up a very strong incentive to appeal, along with the fact that most of the plaintiffs are exempted from judicial costs,⁴³ and that they usually retain their attorneys on a contingency fee basis.⁴⁴ Thus, plaintiffs at the Labor Justice have good chances of improving their positions on appeal at almost no cost, a perfect combination to allow excessive and sometimes meritless appeals. On the other hand, employers—the typical defendants before the Labor Justice—do not fit the costs exemption rule, they must deposit a bond of approximately \$ 3,000 (that goes towards payment in case the judgment is affirmed) and they pay their attorney's fees during the litigation.⁴⁵ Experience

⁴¹ JUSTIÇA EM NÚMEROS 2013: JUSTIÇA DO TRABALHO, *supra* note 40, at 240.

⁴² *Id.* at 249.

⁴³ Mostly, they have lost their jobs and have no income or earn low wages, fitting the poverty requirement for the exemption (*justiça gratuita*). See CNJ Serviço: quem tem direito à Justiça gratuita?, CONSELHO NACIONAL DE JUSTIÇA (June 01, 2016), <http://www.cnj.jus.br/noticias/cnj/82962-cnj-servico-quem-tem-direito-a-justica-gratuita>.

⁴⁴ *C.f.* Rosenn, *supra* note 22, at 519 (“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.”).

⁴⁵ C.L.T., *supra* note 14, at art. 899, § 1 (establishing that in order to appeal, the parties must deposit a bond corresponding to the amount of the judgment, up to ten times the monthly minimum wage, currently circa \$ 300). Even though such appeal bond rule does not make any distinction among the parties, practice shows

shows that employer-defendants are less likely than plaintiffs to appeal reasonable judgments, given the costs of continuing the suit. However, too often defendants also do appeal reasonable decisions, to gamble with high odds of succeeding, and to perform a convenient procrastination of payment (post-judgment interests are much lower than average market interest rates for loaning the same amount of a given judgment).

As to the State and Federal Justice systems, the apparent low rate of appeals is misleading and deserves qualification. Those percentages are not based only on the rate of appeals against the main trial court orders. An infinity of minor interlocutory decisions are also counted in the pool of appealable decisions, causing the relative rate of appeals to look smaller. If the percentages counted only the appeals from the main decisions, such as injunctions or final trial court orders, the rate would likely be similar to that of the Labor Justice. That is shown by the high absolute number of new appeals that both federal and state appellate judges face every year—in fact more than the ones assigned to the labor appellate judge.⁴⁶

A simple calculation illustrates the gravity of the situation. If each labor or state appellate judge receives more than 1,200 new cases a year, in order to keep up with the incoming flow of work (and hopefully reduce the pending docket from previous years), each judge will have to write at least three or four opinions a day, 7 days a week, 365 days a year. This workload pressure is even higher when discounting vacation periods and weekends, and when considering the time dedicated to oral arguments, to review, debate and join or dissent from opinions of the same panel peers, and to attend to en banc or administrative court duties. Federal judges face even more cumbersome problems. The number of new cases and pending appeals in federal court is three times the amount presented in labor and state courts.⁴⁷ Despite the fact that a considerable amount of the

that, because most of the plaintiffs that sue at the Labor Courts are unemployed or near-minimum-wage workers, they usually file their complaints *in forma pauperis*, and therefore may comfortably appeal without posting any bond.

⁴⁶ JUSTIÇA EM NÚMEROS 2013: JUSTIÇA FEDERAL, *supra* note 40, at 87; JUSTIÇA EM NÚMEROS 2013: JUSTIÇA ESTADUAL, *supra* note 40, at 130.

⁴⁷ Compare JUSTIÇA EM NÚMEROS 2013: JUSTIÇA FEDERAL, *supra* note 40, at 91, with JUSTIÇA EM NÚMEROS 2013: JUSTIÇA DO TRABALHO, *supra* note 40, at

issues in federal appeals are repetitive questions of law⁴⁸—which are faster to solve because of the application of the court's precedents—the numbers suggest that the federal appellate court system is also under great workload pressure.

A final caveat in relation to the numbers mentioned above is that the nationally averaged data about solved cases and new cases may also be misleading. Although the appellate courts are adjudicating at approximately the same rate as new appeals are filed, when considered as a group (which would in theory at least prevent the system's collapse), each court has a very different performance. Despite national efforts to level the courts' structure and resources, and to demand more and more productivity, some courts are thriving while others are falling behind. In 2013, 60% of the state appellate courts solved fewer appeals than the number of new appeals filed in the same period.⁴⁹ The same happened to the labor appellate courts in 50% of the Brazilian states and 80% of the federal appellate courts.⁵⁰ Thus, there is urgent need for measures that will relieve appellate courts of Brazil and give them room for performing better.

The situation illustrated above is the result of a complex array of factors, one of them being the lack of stricter standards of appellate review, which is the focus of the present study. Other factors include, for instance, the provisions of the C.P.C. and C.L.T., which allow different and successive appeals; the usual lack of binding precedents allowing for the proliferation of disagreements between

117, and JUSTIÇA EM NÚMEROS 2013: JUSTIÇA ESTADUAL, *supra* note 40, at 136 (12,619 new cases in Federal Justice, as compared to 2,110 in Labor Justice and 2,712 in State Justice).

⁴⁸ Those repetitive questions of law used to be appealed over and over, in part because of the traditional lack of binding precedent in Brazilian law. This situation has been subject to reforms in the last two decades that made available several procedural tools for solving these repetitive appeals, and for strengthening precedents, progressively departing from the typical civil law tradition. As the table above shows, however, those reforms were not sufficient to solve the problem of excessive appeals and other flaws of Brazilian judicial system. With the new C.P.C. in effect, besides keeping the recently reformed provisions, Brazil will finally be adopting the stare decisis principle, aiming to make litigation faster and cheaper, avoiding duplicative work in adjudicating the same legal issues. *See generally infra* notes 102-110 and accompanying text.

⁴⁹ *See* JUSTIÇA EM NÚMEROS 2013: JUSTIÇA ESTADUAL, *supra* note 40.

⁵⁰ *See* JUSTIÇA EM NÚMEROS 2013: JUSTIÇA FEDERAL, *supra* note 40.

lower and higher courts; the low costs for filing an appeal; and the insufficiency of the penalties for meritless appeals.⁵¹ Further, in some cases, such as in judgments above a certain value against public entities, appellate review is even mandatory (*remessa necessária*).⁵² When the parties themselves do not appeal, the trial judge is required to submit the case to the appellate court and cannot enforce the judgment unless the order is affirmed by the appellate court.⁵³ Nevertheless, among all those factors, the unrestricted appellate review is one of the major reasons for the congestion in courts, and it has not yet been subject to any attempt of legislative reform.

Because of this unrestricted power of reviewing the decisions of trial courts, appellate judges tend to discard the lower court's reasonable findings and rulings, unless these are exactly the same ones the appellate judges would have reached if they were the original

⁵¹ Barral & Machado, *supra* note 1, at 193. In relation to the traditional lack of binding precedent and the progressive introduction of stare decisis, see *supra* note 27, *infra* notes 102-110, and accompanying text. As to the lack of deterrence against meritless appeals, see Barral & Machado, *supra* note 7, at 193. In relation to the excessive opportunities to appeal, in 2005 the art. 522 of the former C.P.C. was amended to restrict interlocutory appeals (*agravo de instrumento*) to situations when the lack of immediate appeal may cause serious and difficult-to-repair harm. CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CODE OF CIVIL PROCEDURE] art. 522 (1973) (Braz.). Interlocutory decisions that do not cause such harm may be challenged with a written objection is allowed (*agravo retido*), to be examined by the appellate court along with the eventual appeal from the final decision. Within the specialized civil procedure applied to the labor courts, appeals are less numerous. Interlocutory appeals were never permitted. To preserve an error for appeal, the aggrieved party must object (*protesto anti-preclusivo*) verbally in writing. The merits of an interlocutory decision are reviewed only upon an appeal from the final judgment. See C.L.T., *supra* note 14, at art. 893. The new C.P.C. will also go further limiting the situations where an appeal is possible.

⁵² C.P.C., *supra* note 9, at art. 496.

⁵³ *Id.* This is true unless the decision was based in the superior courts' precedents, or unless the judgment is below a certain value, which was previously equivalent to \$18,000.00. Such low value caused most of the judgments against government entities to be appealed, making governments some of the main "clients" that overload the courts. That problem is addressed by the new C.P.C., which raises such threshold to approximately \$27,000.00 for municipalities, \$135,000.00 for states, and \$270,000.00 for the federal government. *Id.* at art. 496 § 3.

judge.⁵⁴ That approach ignores that all application of law carries some inherent subjectivity and discretion, and that the function of the appellate courts is to review, and not to retry the case.⁵⁵ As some Brazilian labor judges noted:

Despite the inherent interpretative activity in the application of law, some appellate opinions seem more like a new trial court decision than an act of revision because they virtually ignore the first instance decision. They transcribe the main statements of the pleadings and examine the facts and evidence, as if the appellate court was the first recipient of the evidence and of the procedural debate. It is as if the laborious work from which the trial court decision resulted could be simply disregarded. Such an attitude stems from a misunderstanding about what is the revising function of the appellate courts (object), a misconception that also reflects on their decision-making process (method). The result that follows from the use of this method of adjudging an appeal is inevitably the increase in the number of reversals of the first instance decisions. It could not be any different. The method itself induces reversal because it overlooks an inherent feature of the legal phenomenon: the interpretative nature of the application of law, and the necessary discretion of the decision-maker.⁵⁶

This undervaluing of the first instance decisions creates excessive incentives for the parties to appeal. Given the high rate of reversions, losing parties likely view the appeal as an opportunity to have their case decided by a panel where the judges may simply disagree with the lower court's ruling. Since, in Brazil, the costs of appeal are not high and sanctions for meritless appeals are not commonly sustained,⁵⁷ the losing party is tempted to take her chances on

⁵⁴ Rosenn, *supra* note 22, at 508 (explaining that the appeal is a trial *de novo*, and any findings of fact or law by the lower court are not presumptively correct).

⁵⁵ See generally Claus et al., *supra* note 2.

⁵⁶ *Id.* at 179-80.

⁵⁷ Barral & Machado, *supra* note 1, at 193.

an appeal, no matter how reasonable the appealed decision was. With more incentives to appeal, cases that could end in a much shorter time are dragged through an often-lengthy sequence of appeals.

The greater quantity and length of appeals, duplicating the work done at the trial courts, tends to overburden the already congested appellate courts, causing delay and the decrease in quality of appellate decisions. In Brazil, appellate judges amount to approximately twenty percent of the totality of the judges.⁵⁸ If most of the cases decided below are to be tried *de novo* at the appellate level, the much fewer appellate judges, naturally, will be unable to repeat the lower courts' work. As an inexorable result, either the adjudication of appeals takes longer, or the quality of review decreases, because of the shorter time appellate judges dedicate to each case, and with the excessive delegation to multiple law clerks.

One of the main justifications for the right to appeal is its function as a procedural safeguard to protect citizens from error and injustice in trial court decisions.⁵⁹ However, it is pointless to try to achieve such goal through an ample unrestricted review by appellate courts equally prone to error due to the same congestion faced at the lower level. It ends up that the more procedural safeguards created to prevent error (more types of appeals or more sweeping appellate review), the more inherently unfair the system ultimately becomes. The lengthier and more numerous appeals tend to affect disproportionately the parties who are not economically able to endure a lengthier and costlier process. The excess of safeguards turns against the system.⁶⁰

An unrestricted review of the facts by the appellate courts—distant from the evidence—without deference to the trial court's findings, also contradicts the immediacy principle.⁶¹ According to this traditional principle of procedural law, the decision-maker should

⁵⁸ See Rosenn, *supra* note 9, at 192-94.

⁵⁹ See SCHIAVI, *supra* note 29, at 17.

⁶⁰ Claus et al., *supra* note 2, at 187 (quoting MAURO CAPPELLETTI, PROCESO, IDEOLOGIAS E SOCIEDADE 278-79 (1973) (Arg.)).

⁶¹ Herzog & Karlen, *supra* note 36, at ch. 8 ¶ 59.

preferably have direct contact with the evidence, to be better positioned to decide.⁶² When the case reaches the appellate level, a full review of the findings of fact based merely on the written records sacrifices the immediacy between the evidence and the decision-maker.⁶³ The appellate judges cannot mentally transport themselves to the situation of the trial courtroom. The transcripts and other written records are insufficient to convey the complex facts that happen at a trial, as a judge present *in loco* would perceive.⁶⁴ This is especially true for the first-hand impressions acquired from directly observing and listening to the witnesses' testimony.⁶⁵ Because the trial judge is better positioned to assess a witness's credibility, his or her decision should deserve deference.

Surely, the assessment of witness's credibility does not rely entirely on demeanor. The internal consistency of the testimony, interest in the outcome of the litigation, and the capacity to observe and report correctly are factors that do not necessarily require personal observation by the fact finder. Corroboration and contradiction of the witness's testimony by other evidence also do not depend on demeanor. However, many issues of fact do depend upon weighing conflicting testimonies, where the witness's demeanor plays a great part in the credibility assessment, which cannot be captured in a written record and conveyed to the reviewing court.⁶⁶ An appellate court relying solely on the record is handicapped in deciding issues of fact.⁶⁷

Additionally, the unrestricted appellate review hinders the enforcement of procedural rules. The high reversion rate of reasonable

⁶² LEITE, *supra* note 29, at 566.

⁶³ Herzog & Karlen, *supra* note 36, at ch. 8 ¶ 59.

⁶⁴ *Id.*

⁶⁵ See Claus et al., *supra* note 2, at 176-77.

⁶⁶ Herzog & Karlen, *supra* note 36, at ch. 8 ¶ 59. Additionally, even though testimonies may also be recorded on video and accessed online, only a few trial courts have adopted such practice. One of the issues raised against this practice is that the review of the recorded testimonies would be also very time consuming and duplicative of the trial court's work, not furthering the goal of reducing congestion. Thus, almost always the Brazilian appellate judges will rely only upon the written records to decide and are not in an ideal position to appraise the witnesses' credibility.

⁶⁷ *Id.*

discretionary rulings reduces the effectiveness of the judge's attempts to deter misbehavior or procrastination. Much of the necessary decision power is transferred to appellate judges, despite their distance from the realities of the trial court.

This is especially true with interlocutory decisions. When the court grants leave for interlocutory appeals (*agravo de instrumento*),⁶⁸ the lenient standard of review and high rates of reversal deprive the trial judge of the necessary coercive power to enforce good faith in the proceedings. When interlocutory decisions are not immediately appealable and the party files a mere objection (*agravo retido*⁶⁹ or *protesto anti-preclusivo*,⁷⁰ to be reviewed later, along with the appeal on the merits), the problem is less egregious. In this case, the only immediate way to challenge them is the writ of mandamus, which in Brazil is stricter in scope.⁷¹ Notwithstanding, parties still may procrastinate the compliance to injunctive orders—which in Brazil are coerced through per diem fines (*astreintes*), but not imprisonment—expecting to have them dissolved by the appellate court pursuant a writ of mandamus.

When an appeal from final judgment is filed, procedural issues not yet resolved and appropriately preserved are also decided.⁷² At this juncture, the interlocutory decisions become appealable and thus now vulnerable to the unrestricted review by the appellate court. For instance, rulings excluding a witness or an expert written opinion (because irrelevant, duplicative or unnecessary) is often reversed and the case remanded so that the trial court hears that evidence and amends its decision appropriately. A higher degree of deference to the trial courts discretionary procedural decisions would

⁶⁸ See Barral & Machado, *supra* note 1, at 196-97

⁶⁹ *Agravo retido* is the objection from an interlocutory decision in the general civil procedure. *Id.*

⁷⁰ *Protesto anti-preclusivo* is the objection from an interlocutory decision in the specialized labor procedure.

⁷¹ When no appeal is immediately available, an interlocutory decision may also be challenged through the writ of mandamus (*mandado de segurança*), if it violates certain and definite rights (*direito líquido e certo*), a much stricter scope of review than in interlocutory appeals. See Lei No. 1.533, de 31 de Dezembro de 1951, Diário Oficial da União de 31.12.1951 [D.O.U.] arts. 1-3 (Braz.). See also *infra* note 94, and accompanying notes.

⁷² See *supra* note 51 (interlocutory appeals).

reduce these duplicative proceedings and discourage the parties from insisting on irrelevant or excessive evidence. Another example is when an appellate court reviews the application of procedural sanctions. It tends to presume the good faith of the sanctioned party and too often reverse the sanctions under a *de novo* standard of review, instead of presuming that the trial judge ruled correctly (because closer to the situation) and deferring to such decision.

III. AMERICAN STANDARDS OF APPELLATE REVIEW

The American standards of review are consistent with the Brazilian trend of reforms to make litigation faster, cheaper and more efficient.⁷³ They could inspire legislative change, or even persuade the courts to create, through precedent, a self-restrained approach to appellate review. One of the main shortcomings of the civil law legal systems is the deep disregard for the first instance courts' decisions and the glorification of appellate courts, a defect not present at the Anglo-Saxon common law system.⁷⁴ The pragmatism embodied in the American standards of appellate review would increase the respect for the facts found by the trial courts and focus appeals mostly on errors of law. In the American legal system, appellate courts do not adjudicate disputes between parties; they only review decisions of other courts about those disputes.⁷⁵ Similarly to appeal in Brazil, it encompasses only the issues raised by the appellants that were sufficiently preserved for review and that actually affect the rights of parties, not the so-called harmless errors.⁷⁶ However, the American appellate courts are further limited by the standards of review,⁷⁷ a feature not present at the Brazilian appellate procedure.

A standard of review is “the level of deference given by the reviewing court to another tribunal’s action or ruling,”⁷⁸ a “measuring

⁷³ See *infra* notes 171-79 and accompanying text (reforms and current debates on Brazilian civil procedure law).

⁷⁴ Claus et al., *supra* note 2, at 187 (quoting MAURO CAPPELLETTI, PROCESO, IDEOLOGIAS E SOCIEDADE 278-79 (1973) (Arg.)).

⁷⁵ Peters, *supra* note 7, at 235.

⁷⁶ See Walter H. Sargent, *The Meaning of Standard of Review*, APPELLATE PRACTICE IN FEDERAL AND STATE COURTS § 3.01 (2014).

⁷⁷ *Id.*

⁷⁸ *Id.*

stick” that defines the depth of review and assigns power among judicial actors.⁷⁹ Appellate courts’ authority over a trial court’s ruling is limited by the standards of review, requiring appellate judges to use self-restraint in their own decision-making.⁸⁰

The reasons usually raised for use of standards of review in the American legal system include the balance of power among judges, the efficiency of the judicial system, consistency and predictability.⁸¹ First, while the trial court judge is better suited as a first-hand observer, fact finder, and litigation manager, the appellate court is focused in ascertaining whether the trial court correctly applied the law.⁸² Standards of review help judges respect each other’s strengths, assigning balanced power among judicial actors and force the appellate court to recognize that the decision reached below should be the final unless containing a harmful error.⁸³ Second, a deferential standard of review furthers judicial economy, protecting the appellate court’s time and resources.⁸⁴ Standards of review prevent the repetition of the trial on appeal, simplify and improve the review process.⁸⁵ By reducing the number of issues on appeal, the appellate court may spend more time on a careful review of the issues on appeal.⁸⁶ Third, a standardized review process helps reach consistency between the decisions, as each appellate judge sees the appealed issues from the same angle.⁸⁷ Finally, standards of review provide predictability and notice to the parties interested in appealing of what to expect on appeal.⁸⁸ A more realistic view about the

⁷⁹ Steven Alan Childress, *Standards of Review Primer: Federal Civil Appeals*, 229 F.R.D. 267, 268-69 (2005) (quoting John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 Sw. L.J. 801, 810 (1976)).

⁸⁰ Peters, *supra* note 7, at 235.

⁸¹ *Id.* at 238-42.

⁸² *Id.* at 235.

⁸³ *Id.* at 235-36, 238.

⁸⁴ *Id.* at 240-41.

⁸⁵ *Id.* at 241.

⁸⁶ Peters, *supra* note 7, at 241.

⁸⁷ *Id.*

⁸⁸ *Id.* at 241-42.

chances of winning makes it less likely that a frivolous appeal is filed, and encourages appellate settlements.⁸⁹

The standards of appellate review are far from being a precise test or formula. Many nuances or shadings of a spectrum pass under each single standard of review phrase.⁹⁰ Most of the jurisdictions apply four major standards of review as markers along this spectrum.⁹¹ A legal error is reviewed *de novo* (anew) with the trial court's decision receiving little, if any, presumption of correctness or deference.⁹² In reviewing the trial judge's fact-findings, a more deferential "clearly erroneous" standard of review is applied.⁹³ "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."⁹⁴ Even more deference is given to jury fact-findings, which are reviewed for substantial evidence—"such relevant evidence as a reasonable person mind might accept as adequate to support a conclusion."⁹⁵ Finally, the most lenient standard is abuse of discretion, often used to review procedural matters decided by the trial court,⁹⁶ which may be found when the decision is clearly unreasonable or arbitrary.⁹⁷

A. *Questions of law*

In the American judicial system, the trial court judge's determinations of law are not entitled to any formal deference by appellate courts, which is called a review *de novo* (anew).⁹⁸ For the parties

⁸⁹ *Id.* at 241.

⁹⁰ *See id.* at 243.

⁹¹ *Id.*

⁹² Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIRCUIT B.J. 279, 282 (2002).

⁹³ *Id.*

⁹⁴ *Id.* (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

⁹⁵ *Id.* (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)).

⁹⁶ Peters, *supra* note 7, at 243.

⁹⁷ *Id.* Casey, Camara & Wright, *supra* note 92, at 286.

⁹⁸ *Id.*

wishing to appeal, that is the easiest hurdle to overcome, theoretically a fresh start where the debate begins “anew.”⁹⁹

The use of the term *de novo* is actually a misnomer, implying that there is a determination of the matter “as if it had not been heard before and no decision had been rendered.”¹⁰⁰ *De novo* review actually means that the appellate court has the power and competency to reach a different conclusion with no particular deference the decision below,¹⁰¹ independently reviewing conclusions of law and reversing them when there is a legal error.¹⁰² However, an appellate court does not “start from scratch,” but rather starts with careful consideration of the trial court’s work.¹⁰³ The lower court’s “view of the legal effect of the fact pattern before it is not to be lightly disregarded.”¹⁰⁴ There is a presumption that the trial court’s decision was correct, which most appellants fail to overcome. Additionally, a particular judge’s reputation or expertise may incline an appellate court to review this judge’s legal determinations with more or less confidence,¹⁰⁵ and a well-written trial court opinion examining thoroughly the law on a new issue may be very persuasive.¹⁰⁶

B. *Questions of fact*

In the American federal civil procedure, in which many state court systems are also inspired, the trial judge’s “[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”¹⁰⁷ As the Supreme Court stated, “[a] finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction

⁹⁹ Sargent, *supra* note 76, § 3.04.

¹⁰⁰ Casey, Camara & Wright, *supra* note 92, at 291.

¹⁰¹ *Id.*

¹⁰² Childress, *supra* note 79, at 274.

¹⁰³ Casey, Camara & Wright, *supra* note 92, at 291 (quoting *Key Pharms. v. Hercon Labs. Corp.*, 161 F.3d 709, 713 (Fed. Cir. 1998)).

¹⁰⁴ *Id.* (quoting *Fina Research, S.A. v. Baroid Ltd.*, 141 F.3d 1479, 1481 (Fed. Cir. 1998)).

¹⁰⁵ Sargent, *supra* note 76, § 3.04.

¹⁰⁶ Casey, Camara & Wright, *supra* note 92, at 290.

¹⁰⁷ Fed. R. Civ. P. 52(a)(6).

that a mistake has been committed.”¹⁰⁸ A reviewing court should not reverse the finding of the trial judge “simply because it is convinced that it would have decided the case differently.”¹⁰⁹ Actually, if the finding is reasonable in light of the record, the appellate court “may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.”¹¹⁰

That applies also to physical or documentary evidence, not only witness credibility. Deference to trial court is not due only to its superior position to assess credibility, but also because of its expertise in fact-finding and to the division of labor between the courts, avoiding the duplication of efforts.¹¹¹ However, the Supreme Court recognizes that even more deference is due under the clearly erroneous standard to findings based upon the credibility of witnesses.¹¹²

The question, under a clear error standard, is not whether the findings were correct, but rather whether they were clearly wrong.¹¹³ As it is a very lenient standard, when the trial court’s fact-findings are unfavorable, in a settled area of the law, there is little chance to win on appeal.¹¹⁴ An appellant would have to show that the findings “lack any rational connection to the record or that the vast weight of the evidence” to render a finding certainly wrong, which is rare.¹¹⁵

C. *Jury findings*

While the clearly erroneous standard of review applies to bench trial findings of fact, the findings by the jury are more difficult to set aside, being reviewed under the substantial evidence test.¹¹⁶ Jury findings of fact are generally insulated from review by the Seventh Amendment, which states, “no fact tried by a jury, shall be otherwise

¹⁰⁸ United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

¹⁰⁹ Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985).

¹¹⁰ *Id.* 573-74

¹¹¹ Sargent, *supra* note 76, § 3.04).

¹¹² *Id.* (referencing Anderson, 470 U.S. at 575).

¹¹³ Casey, Camara & Wright, *supra* note 92, at 299.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 307.

re-examined in any Court of the United States, than according to the rules of the common law.”¹¹⁷ According to the Federal Rule of Civil Procedure 50, a finding by a jury cannot be set aside unless there is “no legally sufficient evidentiary basis for a reasonable jury to make such a finding.” To assess such sufficiency the court should review “all of the evidence in the record, drawing all reasonable inferences in favor of the jury’s verdict without making credibility determinations or weighing the evidence.”¹¹⁸

This sufficiency test is often referred to as “substantial evidence.”¹¹⁹ Substantial evidence is such relevant evidence taken from the record as a whole that might be accepted by a reasonable mind as adequate to support the finding under review.¹²⁰ It does not imply a great quantity or strength of evidence, just enough evidence allowing reasonable minds to disagree (thus a proper issue for the jury to decide), and not a mere “scintilla of evidence,” which is insufficient to present a question for the jury.¹²¹ The test only requires reasonableness from the jury.¹²² If a finding is unreasonable (impartial reasonable minds could not differ as to its erroneousness), then such finding becomes reversible.¹²³

However, the jury verdict is not itself the object of the appellate review. Rather, the object of review is the trial court’s ruling on the motion for judgment as a matter of law, where the sufficiency of the evidence supporting that verdict was challenged.¹²⁴ Thus, even though such ruling is technically a legal determination, reviewed *de novo* by the appellate court, it is unlikely to be reversed on appeal because it depends on the highly deferential standard of review, requiring mere sufficiency of the evidence.¹²⁵

¹¹⁷ U.S. Const. amend. VII.

¹¹⁸ Sargent, *supra* note 76, § 3.04 (citing Fed. R. Civ. P. 50 and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149-51 (2000)).

¹¹⁹ Casey, Camara & Wright, *supra* note 92, at 286.

¹²⁰ *Id.* at 308 (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

¹²¹ *Id.* at 309.

¹²² Childress, *supra* note 79, at 331.

¹²³ Childress, *supra* note 79, at 331.

¹²⁴ Sargent, *supra* note 76, § 3.04.

¹²⁵ *Id.*

D. Mixed questions of law and fact

Mixed questions of law and fact are “questions in which historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.”¹²⁶ Therefore, the “mixed question” is what remains after the historical facts and the applicable rule of law was established under their respective standards of review—the application of such rule to the facts.¹²⁷ There is “no rigid rule” about what standard of review to apply to mixed questions.¹²⁸ A “deferential review of mixed questions of law and fact is warranted when it appears that the district court is ‘better positioned’ than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine.”¹²⁹

Usually, the free review of legal conclusions while deferring to underlying facts may be the clearest way to approach mixed findings.¹³⁰ For instance, in Eighth Amendment cases, whether a fine is excessive requires the application of a constitutional standard to the concrete facts, which is reviewed *de novo*.¹³¹ Some courts say that the application of law to fact is freely redone on appeal, which makes sense if law is made in the process, but often the application is simply the fact-finding function that the Federal Rule of Civil Procedure 52 protects.¹³² These courts probably meant that application of law is reviewed *de novo* where the court develops the legal standard.¹³³

As one commentator proposed, based on the Supreme Court precedents, a mixed finding of law and fact should be reviewed free of the restrictions of Rule 52(a) when this finding requires the refinement or interpretation of a complex legal rule in the application

¹²⁶ Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982).

¹²⁷ Sargent, *supra* note 76, § 3.04 (citing United States v. McConney, 728 F.2d 1195, 1200-02 (9th Cir. 1984) (en banc)).

¹²⁸ *Id.*

¹²⁹ *Id.* (quoting Salve Regina College v. Russell, 499 U.S. 225, 233 (1991)).

¹³⁰ Childress, *supra* note 79, at 276 (citing Miller v. Fenton, 474 U.S. 104 (1985)).

¹³¹ *Id.* (citing United States v. Bajakajian, 524 U.S. 321, 337 n.10 (1998)).

¹³² *Id.*

¹³³ *Id.* (citing Miller v. Fenton, 474 U.S. 104 (1985)).

of that rule to clear historical facts.¹³⁴ If the rule, although undisputed in the abstract, is uncertain or bound up with sensitive matters of public political policy, the appellate courts are competent to review it broadly, furthering its institutional and corrective function.¹³⁵ However, upon the application of a definite and noncontroversial legal rule to complex findings of fact, where trial court's articulated findings may not represent fully the complex bundle of evidentiary data and credibility determinations, the appellate court generally is not in a good position to review the legal characterization of such historical facts.¹³⁶ The application of such legal rules to the facts should be characterized as factual inferences, and its appellate review should be subject to the restrictions of Rule 52(a).¹³⁷

E. Discretionary rulings

In deciding procedural matters—such as discovery disputes, trial schedules, motions for continuances, objections, equitable relief or sanctions—there is usually no one right way to rule. The trial court has a range of alternatives that are permissible under the legal rule and appellate courts ordinarily defer to a discretionary ruling unless it is outside such acceptable range—where the trial court “abused” its discretion.¹³⁸ The term “abuse” of discretion does not mean bad faith, or outrageousness in the trial court’s ruling, and does not imply that an appellate court will reverse only gross errors.¹³⁹ All it means is that an appellate court cannot set aside a discretionary judicial ruling, unless it has a “definite and firm conviction that the

¹³⁴ *Id.*

¹³⁵ Charles Richard Calleros, *Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases-Limiting the Reach of Pullman-Standard v. Swint*, 58 TUL. L. REV. 403, 425 (1983).

¹³⁶ See Childress, *supra* note 79, at 276.

¹³⁷ *Id.* at 275

¹³⁸ Sargent, *supra* note 76, § 3.04 (citing *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642, (1976) (“the question is not whether the appellate court would have taken the same action; it is whether the trial court abused its discretion in doing so”) and *Pierce v. Underwood*, 487 U.S. 552, 559 n.1 (1988) (“It is especially common for issues involving what can broadly be labeled ‘supervision of litigation’ . . . to be given abuse-of-discretion review”).

¹³⁹ *Id.* (quoting *In re Josephson*, 218 F.2d 174, 182 (1st Cir. 1954)).

court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.”¹⁴⁰

An appellate court will be predisposed to affirm such decision. The abuse of discretion standard reflects the rationale that discretionary decisions are best left to the trial court, given this court’s superior knowledge of the record, proceedings, and people in the case, and given that an abstract legal rule cannot anticipate all the infinite variety of situations in which such decisions may arise.¹⁴¹ Typically, a discretionary decision will be reversed when the trial court did not conform to enunciated standards in exercising its discretion (for example, granting a preliminary injunction and ignoring the traditional four-factor test),¹⁴² when it based its decision on a legal error or on incorrect factual findings, or when it failed to explain the reasons for its decision.¹⁴³

IV. APPLYING THE AMERICAN STANDARDS OF APPELLATE REVIEW TO BRAZILIAN CIVIL PROCEDURE

A. *Would standards of review be useful to improve Brazilian civil procedure?*

To assess the applicability of standards of review to Brazilian civil procedure, the first question is whether they would be useful—whether they would help to achieve the goals of procedural law, such as fairness, expediency and efficiency. The answer is affirmative. Although these standards are not part of the present Brazilian legal culture, the problems that they are designed to solve in the United States are also present in Brazil.¹⁴⁴ A more rational division of labor between trial and appellate courts avoiding the duplication of efforts would also be welcome in Brazil, where most of the cases adjudged at first instance courts are appealed, overburdening the courts.¹⁴⁵ The Brazilian judicial system would also largely

¹⁴⁰ *Id.*

¹⁴¹ See Casey, Camara & Wright, *supra* note 92, at 310.

¹⁴² *Id.* at 311 (citing *Chrysler Motors Corp. v. Auto Body Panels of Ohio, Inc.*, 908 F.2d 951, 954 (Fed. Cir. 1990)).

¹⁴³ *Id.*

¹⁴⁴ See Barral & Machado, *supra* note 1, at 193.

¹⁴⁵ Compare *id.*, with Sargent, *supra* note 76, § 3.04 (quoting Anderson, 470 U.S. at 573, 575).

benefit from the recognition that the trial court is in a better position to assess the credibility of witnesses, and its proximity to the record, proceedings, and people in the case, recommend deference to its reasonable findings of fact and discretionary choices. As it happens in the United States, lower odds of reversing reasonable trial court decisions would reduce the incentives to appeal and cause a natural selection of the stronger cases to be appealed.¹⁴⁶ That would save precious judicial resources, which could be directed to performing a faster and better adjudication of the more meritorious appeals.

As to the *de novo* standard applied in reviewing questions of law, that is already the rule in Brazil—except that in Brazil this is usually the only standard, an unrestricted review with no deference to the lower court's decision, even in factual or discretionary matters.¹⁴⁷ That standard should be maintained in relation to questions of pure interpretation of the law. Deferring to the diverse and possibly conflicting interpretations of a rule of law given by several trial courts, no matter how reasonable these interpretations may be, would naturally result in uncertainty and counter the trend of unifying precedents in Brazil.¹⁴⁸ Claimants in similar factual situations would likely yield inconsistent results in different courts under the same rule of law.¹⁴⁹ Divergences in the interpretation of the law naturally arise between the courts, and appellate review is needed exactly to ensure precedent uniformity, and the resulting equal treatment of the citizens.¹⁵⁰ Further, resolving disagreements in interpretation of the law reduce uncertainty as how it is to be applied, one of the major causes of litigation.¹⁵¹ An unrestricted *de novo* review of legal issues, in that sense, furthers the goal of obtaining consistent and uniform interpretation of the law across the country, in harmony with the effort to unify judicial precedents.

As to the substantial (or sufficient) evidence standard, despite its usefulness as part of a comparative study of the American appellate

¹⁴⁶ See Casey, Camara & Wright, *supra* note 92, at 310.

¹⁴⁷ Rosenn, *supra* note 22, at 507.

¹⁴⁸ See Herzog & Karlen, *supra* note 36, at ch. 8 ¶ 90.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

system, this standard is not really applicable to the civil appellate procedure in Brazil, where the jury is restricted to homicide cases.¹⁵²

In relation to discretionary decisions, though, the need for change is urgent. Trial court judges are not supposed to be automata governed in every minute detail by exhaustive rules. There are legitimate discretionary choices to be made within the limits of the law, and the reviewing courts should not be fast to interfere.¹⁵³ The American “abuse of discretion” standard appropriately respects these legitimate choices, and reinforces the institutional strengths of both the appellate and trial courts. The trial judge is responsible for keeping the court’s docket under control, ensuring quality and reasonable processing speed.¹⁵⁴ The judge’s procedural discretionary decisions, within the legally permissible range, are based in his or her experience as to what is effective to balance expediency, fairness, and the enforcement of good faith during proceedings.¹⁵⁵ Therefore, when a panel of appellate judges substitute a reasonable discretionary choice of the trial judge for the one they would have made if they were the trial judge, they end up harming the effectiveness of the whole system.¹⁵⁶ That results from the unnecessary duplication of the work and because parties and attorneys start to perceive the trial judge as powerless, just a passage to the real decision makers, the appellate judges. As in the United States, the Brazilian

¹⁵² Rosenn, *supra* note 22, at 191.

¹⁵³ Herzog & Karlen, *supra* note 36, at ch.8 ¶ 104.

¹⁵⁴ *Id.*

¹⁵⁵ Since discretionary rulings are frequently interlocutory decisions, the restriction of interlocutory appeals acts to give some deference to these rulings. *See id.* In the Brazilian general civil procedure, interlocutory appeals are permitted only when the lack of immediate appeal may cause serious and difficult-to-repair harm, while in labor procedure they are never available, and parties sometimes try to use the much stricter writ of mandamus, *see supra* note 42. A writ of mandamus is often used to bypass such restriction, but its scope of review much stricter (clear and certain right), giving deference to the trial court’s discretionary rulings, but only until the correspondent objections to these rulings are reviewed together with the appeal from final decision. Therefore, despite being initially protected from attack, many interlocutory decisions are easily overturned on the final appeal, such as decision excluding evidence (*cerceamento de defesa*), and sanctions for bad-faith litigation (*litigância de má-fé*).

¹⁵⁶ Herzog & Karlen, *supra* note 36, at ch.8 ¶ 90.

appellate courts should be predisposed to affirm reasonable discretionary decisions, absent a clear error of judgment.

For analogous reasons, the findings of fact of trial judges should not be disturbed unless clearly erroneous. The American formulation avoids the easy reversion simply because the appellate panel is convinced that it would have decided differently.¹⁵⁷ In an overburdened system, as in Brazil,¹⁵⁸ ignoring the reasonable factual findings of the trial judge is a luxury that reduces the efficiency of the proceedings, while adding very little in terms of fairness to the system. Who can say that the right finding of fact is that of the appellate judges and not the reversed one, of the trial court? The rationale for the unrestricted review is that possible errors—committed by overburdened trial judges—would likely be corrected by a panel of more experienced judges. However, such argument fails where the system itself causes these appellate judges to be equally or even more overburdened, and where they have the disadvantage of not being able to observe the witnesses. Thus, a finding of fact should rarely be reversed—only when such finding is clearly wrong, lacking any rational connection to the record or to the vast weight of the evidence.

Finally, the so-called mixed questions of law and fact raise the greatest challenge, because there is no uniform rule to their standard of review.¹⁵⁹ In the United States, courts have been dealing with the issue for decades, and it is part of the American legal culture.¹⁶⁰ The lack of consistency does not defeat its application, as courts are used to developing legal concepts by slowly refining them through binding case-by-case precedents, a typical feature of the common-law system.

However, when it comes to transporting such legal concept to another country, consistency is key—or at least a clear and workable

¹⁵⁷ *Id.*

¹⁵⁸ See Keith S. Rosenn, *Judicial Reform in Brazil*, 4 NAFTA: L. & BUS. REV. AM. 19, 27 (1998) (explaining the “extraordinary degree” of the problem that exists in Brazil).

¹⁵⁹ Casey, Camara & Wright, *supra* note 92, at 316-17. The application of a rule of law to the historical facts found to be true, after those have already been established under their respective standards of review. See *supra* notes 76-83 and accompanying text.

¹⁶⁰ *Id.* at 319.

rule. In Brazil, courts sometimes also introduce and refine legal concepts through the progressive build-up of precedents. Despite the fact that these precedents were not usually binding, they were always persuasive and often ended up codified by the legislators.¹⁶¹ Thus, the issue here is not whether the Brazilian have the power to adopt and refine a new idea, but whether this idea is sufficiently clear and persuasive at the outset to conquer sufficient support and ensure its adoption.

The application of law to facts is inherent to any judicial decision. Usually, the decision will hinge on whether a rule applies to a specific type of factual circumstance, a determination that, by itself, might be useful to defining the reach of such rule for application in future cases. In other cases, the application of law to the facts is more of a case-by-case fact-intensive assessment of peculiar circumstances in light of a well-defined legal standard.¹⁶² If application of law to facts were always reviewed *de novo*, it would leave very little room for deference to the reasonable decisions of the trial judges in those fact-intensive cases where they are better positioned to decide and that bear little interest for the unification of precedents.¹⁶³ On the other hand, using a “clearly erroneous” standard for all mixed questions of law and fact would swallow the rule of *de novo* review for questions of law, since all law suits involve the application of rules of law to facts.¹⁶⁴ It would also give excessive deference to trial courts, compromising the consistency of the system by allowing reasonable, but divergent, decisions to be shielded from reversal, something that the recent reforms in Brazilian civil procedure are exactly trying to eliminate.¹⁶⁵

¹⁶¹ Precedents in Brazil are still considered persuasive authority, except for the binding *súmulas* or for the precedent unification tools recently introduced. That situation will change when the new C.P.C. comes into effect, in 2016, introducing *stare decisis* as a general principle in Brazilian civil procedure. *See infra* notes 171-79 and accompanying text.

¹⁶² Casey, Camara & Wright, *supra* note 92, at 318.

¹⁶³ *Id.* (citing *Miller v. Fenton*, 474 U.S. 104, 114 (1985)).

¹⁶⁴ *C.f. id.* at 318-19.

¹⁶⁵ *Id.*

The Supreme Court of the United States acknowledges that there is “no rigid rule” about mixed questions standard of review.¹⁶⁶ The Court stated that a “deferential review of mixed questions of law and fact is warranted when it appears that the [trial] court is ‘better positioned’ . . . to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine.”¹⁶⁷ That seems to be the clearest enunciation of a workable rule as to the review of the trial judge’s application of law to facts. Presumptively, there will be a predominant legal question reviewed *de novo*, but when it is a case-by-case fact-intensive determination of no interest for precedent unification and refinement, the lower decision should receive deference and not be disturbed unless “clearly erroneous.”

B. Is it possible to apply the American standards of appellate review to Brazilian civil procedure?

After establishing the convenience of using standards that limit appellate review, making the system more rational and effective, the next question is whether their introduction in the Brazilian legal system would face any impediment. The answer is negative because there is a favorable environment for changes in Brazilian civil procedure, the lack of a correspondent statutory rule does not prevent appellate judges from performing a more deferential review, and there is no conflict with any constitutional principle or statutory provision.

1. Receptivity of the Brazilian legal system to solutions based on comparative law

In Brazil, there is a favorable environment for changes that promote efficiency in civil procedure, including ideas based on comparative law. The last twenty years have seen several reforms focusing on the limitation of appeals and a progressive march towards precedent unification and binding effect. Additionally, there is a de-

¹⁶⁶ *Ornelas v. United States*, 517 U.S. 690, 701 (1996) (Scalia, J., dissenting); see *Casey, Camara & Wright*, *supra* note 92, at 318.

¹⁶⁷ *Sargent*, *supra* note 76, § 3.04 (quoting *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991)).

bate on the necessity of empowering the trial courts by giving deference to their reasonable decisions, and a national policy of the judiciary branch to empower the trial courts by balancing budget and infrastructure, and by encouraging innovative practices.

For roughly two decades, Brazilian civil procedure has been a laboratory for reforms that attempted to remove the causes that prevented the judiciary from providing a fast, inexpensive and effective service. Precedents of the Supremo Tribunal Federal (S.T.F.)¹⁶⁸ and the Superior Tribunal de Justiça (S.T.J.)¹⁶⁹ became basis for summary rejection of *agravos*¹⁷⁰ based on conflicting jurisprudence. They also became basis for summarily granting the *agravos* and the underlying appeals when the appealed decision is inconsistent with such precedents.¹⁷¹ Additionally, all appellate courts were granted the power to summarily dismiss appeals clearly inadmissible, meritless or against precedents of the same court or of the superior courts.¹⁷² In 2005, an amendment to the Constitution brought greater changes to the judiciary branch, including the limited introduction

¹⁶⁸ The S.T.F. is the constitutional court of Brazil. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 102. (Braz.).

¹⁶⁹ The Superior Tribunal de Justiça (S.T.J.) is the highest court for issues of federal non-constitutional law. *See* C.F., *supra* note 168, at art. 105.

¹⁷⁰ *Agravos* here are limited appeals against decisions of intermediate appellate courts that dismissed extraordinary or special appeals. The extraordinary appeal (*recurso extraordinário*) is directed to the S.T.F. and is restricted to direct offenses to the constitution (it cannot be, for instance, a violation to federal law that only indirectly also violates de Constitution). *See id.*, at art. 102, III. The special appeal (*recurso especial*) is directed to the S.T.J. and is restricted to violations of treaties and federal law, as well as inconstant interpretation of federal law between intermediate appellate courts. *See id.*, at art. 105, III.

¹⁷¹ Both extraordinary and special appeals are subject to an initial screening (*exame de admissibilidade*) at the intermediate appellate courts, who may dismiss them for non-compliance with their legal requirements. Such decision is not final, and the party may still challenge it with an *agravo*, a limited appeal that takes such screening directly to the S.T.F. or S.T.J. C.P.C., *supra* note 9, at art. 1042.

¹⁷² C.P.C. (1973) *supra* note 51, at art. 557, §1º-A, *introduced by* Lei no. 9.756, de 17 de Dezembro de 1998, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] (Braz.). Besides the S.T.J., the other Brazilian superior courts are the Tribunal Superior do Trabalho (T.S.T., labor jurisdiction), Tribunal Superior Eleitoral (T.S.E., elections) and Tribunal Superior Militar (T.S.M., for military cases). C.F., *supra* note 168, at art. 92.

of binding precedent for the S.T.F., the *súmula vinculante*¹⁷³—a nationally binding version of the decades-old practice of creating black letter rule statements that summarize the main legal principles repetitively held in the S.T.F. opinions.¹⁷⁴ The same amendment also introduced the general repercussion (*repercussão geral*) requirement to all the extraordinary appeals, allowing the S.T.F. to pick only the more relevant cases and mandating the application of its constitutional issue holding to all the similar cases pending in the country.¹⁷⁵ Additionally, the current C.P.C. was changed so that the parties cannot appeal a trial court decision that is consistent with the *súmulas* of the S.T.F. and S.T.J.,¹⁷⁶ and cases may be summarily dismissed by trial courts when the controverted issue is a pure question of law already ruled unfavorably by that same court.¹⁷⁷ In 2014, similar

¹⁷³ C.F., *supra* note 168, at art. 103-A, introduced by amend. 45 (2004).

¹⁷⁴ “Brazil does have the institution of the *súmula*, which began in the S.T.F. [Brazilian Supreme Court] 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 accusation 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.” Keith S. Rosenn, *Judicial Reform in Brazil*, 4 NAFTA: L. & BUS. REV. AM. 19, 26-27 (1998) (citations omitted). The Brazilian legal system—as the civil law systems in general—traditionally did not adopt the stare decisis principle. Departing from this tradition, in an effort to reduce congestion of the intermediate and superior appellate courts, there have been legislative reforms strengthening precedents, such as the creation of the S.T.F. binding *súmulas*, as well as reforms that gave the other high courts’ *súmulas* the effect of barring appeals when the decision below is consistent with a *súmula*. See *supra* notes 101-104, and accompanying text. Finally, the approved new C.P.C. completes the transition to binding precedents, similarly to common law jurisdictions, effective in March of 2016. See *infra* note 110 and accompanying text.

¹⁷⁵ C.F. *supra* note 168, at art. 102 §3, introduced by amend. 45 (2004); C.P.C., *supra* note 9, at art. 1035 (Braz.).

¹⁷⁶ C.P.C. (1973), *supra* note 51, at art. 518 §1, introduced by Lei no. 11.276, de 7 de Fevereiro de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] (Braz.).

¹⁷⁷ C.P.C. (1973), *supra* note 51, at art. 285-A, introduced by Lei no. 11.277, de 7 de Fevereiro de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] (Braz.).

tools to reduce the number of appeals and unify precedents were introduced into the labor procedure.¹⁷⁸ Finally, the procedural code itself was entirely revamped.

The recently approved New C.P.C. not only embraces the improvements mentioned above, but goes a great step further, addressing many of the long debated problems of Brazilian civil procedure. One of its main new features is the attachment of binding effect to the appellate and high court opinions, in a similar fashion as the common law countries, a major approximation of Brazil to that legal tradition.¹⁷⁹ Thus, there is no reason to believe that the adoption of common law inspired standards of review would face any rejection because of its foreign origin. Brazil has long departed from being a traditional civil law jurisdiction and is quite open to solutions that may be found in other legal systems, as the reforms mentioned above exemplify.

Further, Brazilian judges have been raising a debate over the need, not only for change of legislation, but also for awareness of the roles of trial and appellate courts, where appellate courts review and not retry the case, deferring to the trial courts' reasonable decisions.¹⁸⁰ A similar thesis has been approved by a significant amount of federal labor judges in 2012, during the 16th National Congress of Labor Judges (CONAMAT).¹⁸¹

¹⁷⁸ Lei no. 13.015, de 21 de Julho de 2014, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] (Braz.).

¹⁷⁹ See Senado Federal [Brazilian Senate], *Exposição de Motivos [Advisory Committee Notes]*, ANTEPROJETO DO NOVO CÓDIGO DE PROCESSO CIVIL [PROJECT OF THE NEW CODE OF CIVIL PROCEDURE] 11-33 (2010) (Braz.), available at <http://www.senado.gov.br/senado/novocpc/pdf/anteprojeto.pdf> (last visited Nov. 16, 2014). See also C.P.C., *supra* note 9, at art. 1013 § 1.

¹⁸⁰ See generally Claus et al., *supra* note 2.

¹⁸¹ "Systemic deference to trial court decisions. Reviewing function of the appellate courts. Respected the conviction and independence of each judge, the Labor Courts will defer to the credibility assessment of witnesses by the trial courts. The lack of systemic deference to the decisions of the trial judge contributes decisively to the congestion of the appellate courts. The principle of immediacy leads to the presumption that the credibility assessment of witnesses by the trial judge is appropriate. Measures shall be taken to enhancement systemic deference to the first instance decisions (translation by the author)." Available at <http://anamatra.tempsite.ws/conamat2012/tesesaprovadasconamat.asp>, last access in 11/15/2014.

Lastly, the idea of empowering the trial courts as a means to make the entire system more efficient is also in harmony with the public policy set by the National Council Justice (CNJ),¹⁸² the National Policy of Priority Attention to the First Instance Courts (*Política Nacional de Atenção Prioritária ao Primeiro Grau de Jurisdição*). That policy involves the coordination of local and national actions to balance budget and workforce between the first instance and the appellate courts. It also aims to provide adequate infrastructure and information technology to trial courts, encourage trial judges to participate in the administration of the judiciary, and reward the best practices and innovative projects that further the policy.¹⁸³

2. Inexistence of constitutional or legal impediments to the use of restrictive standards of review in Brazilian civil procedure

The lack of a statutory rule introducing and regulating standards of appellate review does not prevent judges from applying a deferential review based on a systematic interpretation of the legal system, notably constitutional principles. On the other hand, no constitutional principle or statutory provision bar the immediate adoption of such standards by the Brazilian courts. However, a statutory change expressly introducing them in the Brazilian civil procedure would ensure the uniform adoption, best furthering the goal of reducing the burden on appellate courts and improving the efficacy of the entire system.

Even though in Brazil it is not possible to find entire bodies of law created by judges in the vacuum of statutory rules, such as in the common law countries, Brazilian judges do have a great deal of

¹⁸² The *Conselho Nacional de Justiça* is the highest administrative and disciplinary organ of the Brazilian judiciary, and it is made of fifteen members: one justice of the S.T.F., one of the S.T.J. and one of the T.S.T., three appellate and three trial court judges, two prosecutors, two attorneys and two citizens of notable legal knowledge. See *Composição atual*, CONSELHO NACIONAL DE JUSTIÇA, <http://www.cnj.jus.br/sobre-o-cnj/composicao> (last visited Nov. 26, 2014).

¹⁸³ CNJ, Resolution 194 (2014) (Braz.), available at <http://www.cnj.jus.br/atos-administrativos/atos-da-presidencia/resolucoespresidencia/28659-resolucao-n-194-de-26-de-maio-de-2014> (last visited Nov. 15, 2014).

liberty to interpret the existing law and to fill gaps in creative manners, as the circumstances require. The French Revolution's dogma that the Judiciary branch should only apply—and not interpret—the law designed by the Legislative branch has long been proven impracticable and abandoned. In Brazilian current post-positivist and neo-constitutionalist legal culture,¹⁸⁴ judges are expected to ensure full normative force to the constitutional principles. Using them as a compass while filling the gaps in the legal system, judges are free to interpret the existing statutes in light of such principles or even to find those statutes void when they violate a constitutional principle.¹⁸⁵ Here, the observance of standards of review furthers a constitutional right—the right to a reasonable duration of process and to the means that will ensure its celerity, especially when the Brazilian Constitution states that fundamental rights and guaranties are immediately applicable.¹⁸⁶ Additionally, it is not uncommon that new legal concepts and institutes in Brazil are, in a first moment, discussed in scholarship and introduced in vanguard decisions, only later earning progressive support and being formally codified. Judges in Brazil usually cite scholarship (*doutrina*) for support on issues with no statute on point, and both scholarship and judges do use comparative law as a source. Comparative law is indeed expressly listed as a gap-filling source of law by the C.L.T.¹⁸⁷

Additionally, there is no constitutional or legal impediment to the adoption of standards of review in Brazil. There is neither an express or implied constitutional principle, nor statutory provisions

¹⁸⁴ See Luís Roberto Barroso, *Neoconstitucionalismo e constitucionalização do Direito. O triunfo tardio do Direito Constitucional no Brasil*. 10 JUS NAVIGANDI 851 (Nov. 1, 2005) (Braz.), available at <http://jus.com.br/artigos/7547>.

¹⁸⁵ See, e.g., Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INTL. & COMP. L. REV. 331, 356 (2012).

¹⁸⁶ See C.F., *supra* note 168, at art. 5, LXXVIII, included by amend. 45 (2005) (“To all, in judicial and administrative proceedings, are assured a reasonable duration of proceedings and the means to guarantee the celerity of proceedings”); *id.* at art. 5, § 1 (“The provisions that define the fundamentals rights and guarantees have immediate application”), available at <http://www.v-brazil.com/government/laws/constitution.html> (last visited Nov. 26, 2014).

¹⁸⁷ C.L.T., *supra* note 14, at art. 8.

that bars the adoption of standards of review by the Brazilian courts. Let us examine the issue in face of the judge's independence guarantee, the double degree of jurisdiction principle, and the language in the C.P.C. that regulates appeals.

Standards of review do not affect judicial independence. As one of the guarantees of a democratic regime, judicial independence aims at providing judicial decisions free from pressure, be it from the organized society, from political or economic interest groups, or from other courts.¹⁸⁸ In Brazil, judicial independence is embodied in the judgeship guarantees of life tenure, irremovability, irreducibility of pay,¹⁸⁹ and immunity as to the content of the judicial opinions.¹⁹⁰ A limitation of the appellate review power does not affect the judges' independence because it merely changes the distribution of that decision power between judges. It does not subject them to pressure or undue influence to decide in a certain way or another. Just as the binding *súmulas* allocate more power to the S.T.F.,¹⁹¹ eliminating the lower courts' power to ignore the S.T.F.'s *súmulas*,¹⁹² here there would be a reduction of the decision power of appellate courts and the correspondent increase at the trial courts, whose decisions would more likely be final.

Standards of review also do not affect the double degree of jurisdiction principle, because it does not mean that appeals are unrestricted or that every decision is necessarily appealable, but merely the possibility of judicial review by higher courts. It cannot be taken

¹⁸⁸ See generally Jorge Luiz Souto Maior & Marcos Neves Fava, *A Defesa de sua Independência: Um Dever do Magistrado*, 123 REVISTA DE DIREITO DO TRABALHO 67 (2006) (Braz.).

¹⁸⁹ C.F., *supra* note 168, at art. 95.

¹⁹⁰ Lei Complementar no. 35, de 14 de Março de 1979, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] art. 41 (establishing that judges cannot be punished or prejudiced due to their opinions or content of their decision, except in case of improbity or excesses in language).

¹⁹¹ See *supra* notes 173-74 and accompanying text (binding *súmulas*). C.F., *supra* note 168, at art. 103.

¹⁹² *Id.* Under an overreaching comprehension of what independence of the judiciary means, causing cases on issues already pacified by the S.T.F. to be dragged up for years only to be later reversed by the S.T.F.

too far, causing unnecessary delay, which especially benefits delinquent debtors.¹⁹³ Although courts and scholarship are split on whether this principle has constitutional status or not, it is generally agreed that it is not absolute. The legislation may establish conditions for appeals (*pressupostos de admissibilidade*), such as posting a bond (*depósito recursal*), or even may eliminate certain appeals, such as with some small claims.¹⁹⁴ Extensive changes have already limited the scope of appeals in light of higher courts' precedents.¹⁹⁵ The double degree principle does not conflict with the standards of review when many other restrictions have already proven its relativeness. Additionally, standards of review do not even restrict parties from appealing, but only change the thought process of the decision-makers, reducing the likelihood of reversals.

Finally, there is no language in the Brazilian civil procedure rules that prevent the use of standards of review. The reviewing effect (*efeito devolutivo*)¹⁹⁶ means only that an appeal has the effect of resubmitting a case to the judiciary branch after a final judgment.¹⁹⁷ It does not relate as to whether the decision method of the appellate courts is unrestricted or more deferential. Similarly, when art. 1008 of the C.P.C. mentions that the decision proffered by the appellate tribunal replaces the appealed trial court decision, it also does not touch upon the method through which the appellate ruling is reached. It merely indicates that the source of authority is now the appellate decision, and not the appealed one, even if the appellate court simply confirmed the decision below.¹⁹⁸ It is generally understood that the appellate courts have full adjudicatory power over the issues raised on appeal, as if it were the trial judge.¹⁹⁹ However, such power is not granted by the procedural statute, it is a mere consequence of the lack of an express restriction of the method of review.

¹⁹³ SCHIAVI, *supra* note 29, at 806.

¹⁹⁴ *Id.* at 809.

¹⁹⁵ *Novo CPC: mudanças que buscam agilizar processo entram na reta final para sanção*, *supra* note 34.

¹⁹⁶ *See supra* notes 7-14 and accompanying text (reviewing effect).

¹⁹⁷ Barral & Machado, *supra* note 1, at 195.

¹⁹⁸ NERY JUNIOR & NERY, *supra* note 29, at 886.

¹⁹⁹ *See supra* notes 16-18 and accompanying text (broad adjudicatory powers of appellate court). *See* Rosenn, *supra* note 22, at 508.

Therefore, nothing in the procedural legislation bars the adoption of standards of review.

3. Does the introduction of appellate standards of review in Brazil require legislation change?

After assessing the utility and possibility of introducing standards of review in Brazilian civil procedure, the final issue is whether it would require a change in the current legislation.

The answer is negative.

Since there is no constitutional or legal impediment, judges are free to pursue a systematic interpretation that provides immediate application to constitutional principles, such as the reasonable duration of process.²⁰⁰ Judges must fill the gaps of the system to ensure full normative force these constitutional principles.²⁰¹ In light of that constitutional canon and considering the allocation of the task of hearing witnesses at the trial level, the principle of immediacy (between the evidence and the decision-maker) requires that the assessment of the evidence by the trial judge is presumed correct.²⁰² Additionally, procedural law allows the judge discretion as a tool to deal with the variable factual situations that arise in a process. The best choice for the trial court may be one, and for the appellate panel another, despite both being correct.²⁰³ Allowing this mere divergence to cause the reversal of a reasonable decision is a waste, violating the principles of the reasonable duration of process, judicial economy, and efficiency.²⁰⁴

A systematic interpretation of the Brazilian legal system, informed by the comparative law discussed in this article, leads to the presumption of correctness of the reasonable trial court's findings of fact and discretionary rulings. As a result, the use of the standards

²⁰⁰ See *supra* notes 184-186 and accompanying text (judicial interpretation enforcing constitutional principles).

²⁰¹ See Barroso, *supra* note 185 and accompanying text.

²⁰² See *supra* note 181 and accompanying text (presumption of adequate credibility assessment of witnesses by trial judge).

²⁰³ See *supra* note 138 and accompanying text (range of correct alternatives in a discretionary decision).

²⁰⁴ C.F., *supra* note 168, at art. 37.

of review clearly erroneous and abuse of discretion is available even without change in current Brazilian legislation.

Despite the possibility, however, the introduction of appellate standards of review through judicial interpretation might initially bring inconsistency when adopted by some appellate courts' panels and not by others, yielding disparate results. Such problem though, could be solved in relatively short time with the unification of such precedents through the edition of a *súmula* for that issue, which would then be followed by the entire appellate court (and in 2016, when the new C.P.C. comes into effect, binding also all subordinate lower courts). A connected solution would be its inclusion in the court's Internal Regiment (*Regimento Interno*).²⁰⁵ Finally, though statutory change expressly introducing standards of review is not essential, it would be desirable, ensuring their consistent adoption, furthering the goal of improving the efficacy of the entire system.

V. CONCLUSION

Any change in legal culture is difficult, especially when such change affects a long-standing feature, such as the unrestricted appellate review. However, the recognized shortcomings of that system, clogged with often trivial or meritless appeals, impose a change in the paradigm.

Brazilian civil procedure does not limit appellate court's powers to review the decisions below, which are made *de novo* on both law and facts. With broad reviewing powers, appellate courts tend to ignore the lower court's decisions even when absolutely reasonable, replacing them for the ruling they would have made if they were a new trial court decision, and not a revision. That misconception results in a method of adjudging that inevitably increases the number of reversals. The high rate of reversals creates excessive incentives to appeal, making the proceedings longer, the number of appeals higher, and the work duplicative of what have been already done at the trial courts, overburdening the system and wasting valuable resources. It also transfers the decision power to the appellate courts—

²⁰⁵ Internal rules of an appellate court, which include procedural matters.

who are not as well-positioned to assess witness credibility—and makes it more difficult for the trial judge to enforce procedural rules.

The American standards of review are a possible solution for these problems, promoting the efficiency of the system, with a well-balanced allocation of power between the courts in respect to fact-findings and discretionary rulings. Standards of review are the level of deference given by the reviewing court to another tribunal ruling. A legal error is reviewed *de novo* (anew) with no deference, the trial judge's fact-findings are not disturbed unless clearly erroneous, and the discretionary rulings are affirmed unless there is abuse of discretion. The application of law to facts (mixed question of law and facts) is usually reviewed *de novo*, except when such application is very fact-intensive and not contributive to clarifying the legal doctrine.

The introduction of appellate standards of review in Brazilian civil procedure would not face any impediment. They are consistent with constitutional due process guarantees, such as the reasonable duration of process, and with the recent statutory reforms that limit the number and scope of appeals, and strengthen precedents. Additionally, the lack of an express statutory rule does not prevent Brazilian appellate judges from applying a more deferential standard of review. The systematic interpretation of the Brazilian legal system, informed by the comparative law, leads to the presumption of correctness of the reasonable trial court's findings of fact and discretionary rulings, which should merit deference. Although the introduction of these standards through judicial interpretation might initially bring some inconsistency, their inclusion in the court's internal regiment or the use of precedent unification tools could provide the desired consistency. Further, statutory change limiting appellate review would be the most desirable option, ensuring uniform adoption nationally and furthering the goal of reducing congestion and improving the entire system.