

How Brazilian Judges Undermine the Rule of Law: A Critical Appraisal

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ABSTRACT

This article presents a brief description of the Brazilian judicial system followed by a critical explanation of why, as a rule, this system looks much better on paper than it is in practice. In doing so, it provides not only a general description of the judiciary in Brazil, but also explains its many problems associated with judicial delay, corruption, nepotism, and politicisation. These problems have hindered the realization of the rule of law by dramatically reducing the level of social confidence in the overall judicial system. Some specific suggestions and recommendations are provided with a view to remedial actions.

1. INTRODUCTION

Since it was enacted in October 1988, the *Constituição da República Federativa do Brasil* (Constitution of the Federal Republic of Brazil) has developed judicial independence and offered to the population a broader access to the courts. Over these last two decades, however, the level of distrust in the Brazilian judiciary has increased, the backlog of cases in judicial dockets has multiplied by a factor of ten, and as a consequence trial delays have more than doubled. These issues would seem to indicate that, since the country was re-democratised in 1985, the performance of

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the courts has paradoxically deteriorated, and judges have been constantly involved in practices of corruption, nepotism, and politicisation.

2. THE BRAZILIAN JUDICIAL SYSTEM

The Brazilian judicial system is a dual system incorporating federal and state courts as well as regular and specialised courts. The various divisions of the court system include a Supreme Federal Court, a Superior Court of Justice, Regional Federal Courts, Federal Labour Courts, Electoral Courts, Military Courts, State Courts and Federal District Courts.¹

Brazil's highest court is the *Supremo Tribunal Federal* (STF). It consists of eleven justices chosen by the President of the Republic from citizens over the age of thirty-five and under the age of sixty-five. STF judges are appointed by the President of the Republic following approval by a majority in the Senate. The STF sits in the Federal District of Brasília and has jurisdiction over the entire national territory. To preserve their independence, the justices are allowed to choose their *Presidente* (Chief Justice) for a period of four years, however re-election of the *Presidente* is forbidden.

The main function of the STF is to protect the Federal Constitution.² The Court has exclusive jurisdiction over constitutional matters related to direct actions of unconstitutionality; declaratory actions of constitutionality of federal and state laws or administrative acts and actions of unconstitutionality by omission.³ There is no litigation when STF judges adjudicate actions concerning the validity of laws in the abstract.⁴ The STF also has appellate jurisdiction to decide on issues of *habeas corpus*, mandate of security, and *habeas data* (a writ allowing citizens to access and correct personal information contained in records or databanks of public agencies) which have been decided, in the first instance, by any high court of appeal.

¹ Braz. Const., art. 92.

² Braz. Const., art.102.

³ Braz. Const., art.102, I, a.

⁴ These types of actions are explained in Section 5 of this article.

In addition, the STF has original jurisdiction to institute judicial proceedings and trials of criminal offences of the President of the Republic, the Vice-President, Ministers of State, members of the National Congress, the Procurator-General of the Republic and STF justices themselves.⁵

The STF also resolves disputes between foreign countries (or international organisations) and the federal or state government; disputes and conflicts between the federal government and states; between the federal government and Federal District and between states themselves as well as extradition requested by a foreign state, and conflicts of power between the Superior Court of Justice (STJ) and any other courts.⁶

Brazil's second-highest court, the *Superior Tribunal de Justiça: STJ* (Superior Court of Justice), consists of thirty-three judges, who are over the age of thirty-five and under the age of sixty-five, appointed by the President of the Republic. As occurs with STF judges, the Senate needs to approve the nomination of judges to the STJ. This nomination, however, must comply with two conditions: first, one-third must be chosen from judges of the Federal Regional Tribunals, and one-third from judges of the state High Courts (nominated according to a list of three names prepared by STJ judges); second, one-third, in equal parts, must be alternately chosen from lawyers appointed by the Bar Association and members of the Federal Public Ministry.⁷

The STJ is a new court established by the 1988 Constitution for the purpose of enforcing federal laws. It is primarily a court with powers of appellate jurisdiction. As a court of appeal, it decides cases in which the final decision of a lower-court judge is contested as being contrary to an international treaty or federal law; or because it upholds the validity of a state or local law that is alleged to be inconsistent with federal law; or because the decision is based on interpretation of the federal law that contradicts a previous STJ decision.

In the hierarchical system, below the STJ are *Tribunais Regionais Federais* (TRFs). Each TRF has at least six judges who are selected in the region where the court is located. There are TRFs in the cities of Rio de Janeiro, Brasília, São Paulo, Porto

⁵ Braz. Const., art.102, I.

⁶ Braz. Const., art.102, II.

⁷ Braz. Const., art. 104.

Alegre, and Recife. The President of the Republic appoints TRF judges from among citizens between the ages of thirty and sixty-five.

To assure lateral entry for these tribunals, one-fifth of all TRF judges are not career judges but lawyers from the Bar Association and prosecutors from the Federal Public Ministry who have been exercising that activity for at least ten years. Other judges come from the federal-court system, itself, as first-level judges commencing a formal judicial career. They are promoted on the basis of seniority and merit after having held office for a minimum of at least five years.

TRFs hear appeals on cases decided by first-level federal judges. They also deal with writs of security, *habeas corpus*, and *habeas data*, and against previous decisions coming from either the TRF itself or federal judges. A TRF may review its own decisions on criminal offences or *ações rescisórias* (rescissory actions). This enables the Court to revoke previous judicial decisions as well as revise first-level sentences. TRFs also determine matters in which any member of the Federal Public Ministry is involved as litigant.⁸

On the first (and lowest) level of the federal-court system are federal judges who sit alone and decide cases related to the federal government or any federal *autarquia* (a service-provider entity owned by, but independent of, the federal executive), or any federal public company. These judges also decide cases involving a foreign state (or international organisation) and any city or person living in Brazil, as well as the cases involving international treaties or contracts between the federal government or federal company and foreign state, or international organisations.

Brazil also has specialised labour courts to conciliate and resolve disputes between workers and employers and to decide on disagreements arising from labour relations and law.⁹ The main labour court is the *Superior Tribunal do Trabalho* (TST). It consists of seventeen judges who must be between the ages of thirty-five and sixty-five. They, too, are appointed by the President of the Republic after the Senate has approved their nomination. The President also appoints eleven TRT judges from

⁸ Braz. Const., art.108

⁹ Braz. Const., art.114.

among lawyers from the Bar Association and members of the *Ministério Público do Trabalho* (Labour Public Ministry).¹⁰ Below the TST are the *Tribunais Regionais do Trabalho* (TRTs), consisting of judges appointed by the President of the Republic from among professional labour judges. On the first level, career labour-judges with life tenure sit alone to decide on issues related to labour law.

An electoral-court system adjudicates on matters in relation to electoral disputes. Judges in this system come from other judicial courts and serve as electoral magistrates for at least two years but no more than four years.¹¹ The highest electoral court is the *Tribunal Superior Eleitoral* (TSE), which consists of at least seven judges chosen by secret ballot among the judges themselves. Three of these judges must come from the STF, two from the STJ, and the other two are appointed by the President of the Republic from among lawyers recommend by the STF.¹² TSE decisions can be appealed to the STF if the case involves a constitutional question, a request for *habeas corpus*, or mandate of security.

Below the TSE are *Tribunais Regionais Eleitorais* (TREs), consisting of seven members chosen either by secret ballot from state judges or by appointment by the President of the Republic from a list of lawyers recommended by state courts. At the baseline of the electoral-court system are electoral judges and electoral boards consisting of a state judge and four citizens, with the function of supervising the polls.

There are also military courts which try military personnel. The highest military court is the *Supremo Tribunal Militar* (STM). It consists of fifteen judges nominated by the President of the Republic following approval by the Senate. Three are admirals from the navy, four are generals from the army, and three brigadiers from the air force. They must be serving and be of high military rank. The other five STM judges are civilians over the age of thirty-five who are chosen under the following conditions: three must be lawyers whose legal career exceeds ten years; one, a career judge from the military lower courts, and one from the Military Public Ministry.¹³ Below the STM are Federal Military Councils, consisting of one career judge and several

¹⁰ Braz. Const., art.111.

¹¹ Braz. Const., art.121

¹² Braz. Const., art.119.

¹³ Braz. Const., art.123.

military officers. The number and rank of officers will vary according to the specific rank of the military person who is brought to trial.

The states of the Brazilian Federation also have military courts to carry out legal proceedings and trials of military policemen and military firemen for certain crimes defined by law. State military courts decide on the loss of military position, the rank of officers, and the grade of servicemen. Before the Constitutional Amendment n.45, of 8 December 2004, some cases of non-military crimes used to be judged by the corporative military justice. For instance, military courts decided cases in which a soldier killed a civilian. Since that time, only the crimes defined by law as being of a military nature are brought before the military justice. On the first-level, each state has a Council of Military Justice, and some states may also have a High Court of Military Justice to hear appeals from decisions of the former. Some, however, send military appeals directly to the TJ, the state's High Court of Justice.

On a state level, each Brazilian state has its own court system, pursuant to the federal and state constitutions. Although the states are organized and governed by the Constitutions and laws they may adopt, they have to respect the principles and legal norms of the Federal Constitution. Unlike the United States and Australia, the basic structure of state courts, and the legal guarantees of state judges, are both regulated in the Federal Constitution.

State-court systems deal with all matters which federal courts do not cover. The state's highest court is called the *Tribunal de Justiça* (TJ) and hears appeals from first-level state judges. In most of states, TJs are divided into *câmaras* (panels), or groups of *câmaras*, with the jurisdiction to hear appeals from first-level decisions. If a TJ has more than twenty-four judges, it may have a special body consisting of no more than twenty-five judges to manage the state court and represent the state judiciary to the government.¹⁴

On the first level of jurisdiction, the state judicial system is made up of state judges, special courts, and *juízes de paz* ('judges of the peace'). The territory of each state is

¹⁴ Braz. Const., art.93, XI.

divided into districts containing no less than two judges. States also have small-claims courts to decide less important matters according to oral and summary proceedings. Small-claims judges have conciliatory powers as well as jurisdiction to make determinations and make orders with respect to less serious civil suits and criminal offences. Small-claims decisions can be appealed to a panel of small-claims judges. Finally, at the lowest level of the state-court system are judges of the peace who are elected by direct, universal, and secret vote to a four-year term to perform acts of marriage and exercise conciliatory functions.

Crimes committed against human life are judged by the *Tribunal de Juri* (tribunal of the jury), consisting of one presiding judge and seven lay jury-members chosen by lot from a group of twenty-one citizens who have submitted their names to the court. Brazilian juries do not deliberate as a group. Once jurors are sworn in, each member of the jury is forbidden from communicating with anyone, including other jury members.

Each juror must individually decide whether or not the crime was committed and who has committed it, as well as the nature and gravity of the crime. Jurors are required to make their determinations by ballots, in response to questions formulated by the presiding judges. Since jurors vote individually, decisions do not require their unanimous consent. Appeal from a jury decision will only be heard if the appellate court considers the sentence to be contrary to the evidence on the face of the record.¹⁵

3. SELECTION OF JUDGES

Brazil has a career judiciary that allows lateral entry for the higher courts. Citizens between twenty-three and forty-five years of age, who have been practicing law for a period of at least two years, are entitled to become a judge after passing oral and written public examinations. The majority of new judges in Brazil are less than 30 years old.¹⁶ The law protects judges with irremovability, irreducibility of salary, and vitaliciety.¹⁷ Vitaliciety means that judges leave office only by retiring. With

¹⁵ For more information about the history and organization of the Brazilian judiciary, see Rosalina C. Araújo, *O Estado e o Poder Judiciário no Brasil* (2000).

¹⁶ Megan J. Ballard, 'The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil' (1999) 17 *Berkeley Journal of International Law* 230, 245.

¹⁷ Braz. Const., art.95, I, II & III.

Amendment n.45, vitality is conditional on magistrates complying with their obligation to undertake courses and show their ability to exercise the judicial function.¹⁸

First-level judges are promoted by higher-court judges on grounds of seniority and merit. Promotion by merit is justified on the grounds of reliable performance of judicial functions and satisfactory results in officially recognised extension courses.¹⁹ On the second level, however, members of the Public Ministry and the Bar Association fill one-fifth of vacancies to *Tribunais de Justiça* (TJs) and *Tribunais Regionais Federais* (TRFs). Judges for the higher courts are chosen from a list of names that high-court judges are free to compile.²⁰ They prepare this list of names and send it to either the state governor or the President of the Republic, depending on whether they are state or federal judges.²¹

Except for teaching positions, judges are prohibited from holding any second, paid employment. As a further measure to insure neutrality, they are not allowed to receive court costs, participate in lawsuits, or engage in political activities.²² Also to buttress impartiality, judges are protected against unfair dismissal until compulsory retirement at the age of seventy, and cannot be transferred without their explicit consent. In fact, the Constitution also guarantees judicial impartiality by declaring that all judgments must be made public and all decisions justified, under penalty of nullity. The right to intimacy can be granted if it does not violate the more general principle of public interest to relevant information.²³

Brazilian judges elect their own directive bodies, draw up their internal regulations, organise their secretariats and auxiliary services, and establish conditions for leave, vacations, and other absences for themselves and their employees. The STF and other federal and state courts can also modify the number of judges, create or extinguish a court office, and increase the salary of judges and court employees.²⁴

¹⁸ Braz. Const., art.93, IV.

¹⁹ Braz. Const., art.93.

²⁰ Braz. Const., art.94.

²¹ Braz. Const., art.94, para 1.

²² Braz. Const., art.95.

²³ Braz. Const.; art.93, IX.

²⁴ Braz. Const., art.96.

Were it just a matter of financial resources, Brazil would possess one of the best and most efficient court systems in the world. The Brazilian judiciary receives more funds as a percentage of the budget than the judiciary of most developed countries.²⁵ Prior to the Amendment n.45, judges used to disrespect the budgetary limits of the judiciary by claiming that judicial independence gave them the right to do so. Thus the executive had to provide supplementary funds to the courts. Now, during the execution of the budget, there shall not be expenditures or assumption of commitments that exceed the limits established by the law of budgetary directives, except if authorized by special or supplementary credits.²⁶

Since the enactment of the 1988 Constitution, the states have increased court fees to finance numerous judicial privileges, including special medical plans for judges and expenses such as weekend retreats for judicial personnel.²⁷ Federal judges receive benefits such as a free, furnished apartment, a car with private driver, and a gasoline allowance.²⁸ While normal workers receive a thirty-day vacation, judges enjoy sixty days of annual paid vacation.²⁹

4. OTHER ASPECTS OF THE BRAZILIAN JUSTICE SYSTEM

The *Ministério Público* (Public Ministry - MP) is the organ responsible for the prosecution of crimes and representation of public interests on matters of justice and legality. Article 127 of the Federal Constitution describes the MP as ‘a permanent institution, essential to the jurisdictional function of the Brazilian state, with the legal duty to defend the juridical order, the democratic regime and the inalienable rights of the society and individuals’.

The MP comprises the Federal Public Ministry and State Public Ministries, which are separate and independent of one another.³⁰ Officers of the MPs, both federal and state, prepare civil investigation and lawsuits on issues involving public property, the

²⁵ William Prillaman, *The Judiciary and Democratic Decay in Latin America* (2000) 170.

²⁶ Braz. Const., art.99, paras 3, 4 and 5.

²⁷ Prillaman, *supra* note 25, 94.

²⁸ *Id.*, 86.

²⁹ *Id.*

³⁰ For more information about the Brazilian MP, see Júlio A. V. Lopes, *Democracia e Cidadania: O Novo Ministério Público Brasileiro* (2000)

environment and other diffuse interests of society. They also control police activities and have power to request investigatory procedures.³¹

Officers of the MP enjoy guaranteed life tenure after two years in office and are protected by law against reduction in salary. They are however prohibited from practicing as a lawyer, engaging in any political activity, working in a commercial firm or holding any other public position other than in teaching.³²

At federal level, the MP comprises the *Ministério Público Federal* (Federal Public Ministry), the *Ministério Público do Trabalho* (Labour Public Ministry) and the *Ministério Público Militar* (Military Public Ministry). The head of the Federal MP is the *Procurador Geral da República* (Procurator-General of the Republic) who is chosen by the President of the Republic for a two-year term from among career members of the MP who are over the age of thirty-five, subject to approval by the Senate. The President can remove a Procurator-General after authorisation by the Senate.³³

The Brazilian states also have their own *Ministério Público Estadual* (State Public Ministry). The State Procurator-General, appointed for a two-year term by the state governor, must come from a list of three career officers of the state MP. The governor is charged with appointing and dismissing the State Procurator-General, although the State Legislative Assembly approves such decisions.³⁴

In addition, the 1988 Constitution established the *Advocacia Geral da União* (Advocacy-General of the Union – AGU) to work on behalf of the federal government, in both a judicial and extra-judicial capacity. The AGU is responsible for a range of activities involving legal aid. Admission to the position of Advocate of the Union rests on public examination as well as the applicant's academic and professional credentials.³⁵ The President of the Republic is free to nominate the head

³¹ Braz. Const., Art, 129.

³² Braz. Const., Art. 128.

³³ Braz. Const., art.128.

³⁴ Braz. Const., art.128, para 3.

³⁵ Braz. Const., art.131.

of the AGU, the only restriction being that the Advocate-General be of at least thirty-five years of age.³⁶

The 1988 Constitution also establishes that federal and state governments must provide free of charge assistance to anyone with insufficient funds to litigate.³⁷ The *Defensoria Pública* (Public Legal Defence) is the state body charged with providing legal assistance to the disadvantaged.³⁸ Public legal defenders are legally protected with irreducibility of salary and stability in office after two years of holding office.³⁹

5. JUDICIAL REVIEW IN BRAZIL

The 1988 Constitution, by expanding the category of entities authorised to challenge the constitutionality of laws and administrative acts in the abstract, strengthened the power of STF judges to protect constitutional rights.⁴⁰ The system of constitutional justice in Brazil combines the incidental (and decentralised) model of judicial review of countries such as the United States and Australia with the abstract (and centralised) model of constitutional courts of European countries, for example, Germany, Italy, Spain, and Portugal.⁴¹

Under the decentralised model of constitutional justice, judges decide matters of constitutionality in the course of ordinary litigation initiated by private or public litigants. At any level of the court hierarchy, judges in Brazil have jurisdiction to declare that a law or administrative act is unconstitutional. This model has been present since the promulgation of the first Republican Constitution in February 1891.

Since 1964 however, the country has also possessed a control of constitutionality in the abstract. In such cases, the STF acts as a typical constitutional court, which as Alec S. Sweet explains, of all constitutional courts, 'is empowered to review

³⁶ Braz. Const., art.131, para 1.

³⁷ Braz. Const., art. 5, LXXIV.

³⁸ Braz. Const., art. 134.

³⁹ Braz. Const., art. 134.

⁴⁰ For more details on judicial review in Brazil, see Augusto Zimmermann, *Curso de Direito Constitucional* (4th ed, 2006) 307-328 & 567-615.

⁴¹ For a comparison between common law and civil law approaches to judicial review, see Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (1989). For a study of the constitutional courts in European countries, see Louis Favoreu, *Les Cours Constitutionnelles* (1996).

legislation before it has affected anyone negatively, as a means of eliminating unconstitutional legislation and practices *before* they can do harm'.⁴²

a. Incidental (and Decentralised) Judicial Review

In cases of decentralised judicial review, any judge in Brazil is allowed, at the behest of any litigating party, to disregard a statute or administrative act that is considered unconstitutional. This type of review allows each judge to behave as a sort of 'guardian' of the constitutional order. Any determinations of unconstitutionality, according to this procedure, result in *inter partes* effects, which mean that it binds only the litigating parties.

Unlike common-law countries, such determination on the invalidity of statutes does not operate as a binding precedent. The Senate, however, can convert incidental review into *erga omnes* (valid for all) decisions, once STF judges have decided on the unconstitutionality of a federal law. In such cases, the STF requests the Federal Senate to pass a resolution suspending the norm declared unconstitutional.⁴³

In order to protect citizens from arbitrary arrest, the writ of *habeas corpus* is invoked.⁴⁴ There is also a *mandado de segurança* (writ of security) which is filed for the protection of any legal right not covered by *habeas corpus*. This right, however, needs to be demonstrated by documents attesting situations of illegality or abuse of power.⁴⁵ The writ of security follows a summary proceeding, though such action has preference over any other action save for cases of *habeas corpus*.

Prior to the 1988 Constitution, injured citizens had to file their own writs of security, individually. But since the enactment of this constitution, political parties with representation in Congress, professional unions, and associations legally constituted

⁴² Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (2000) 34.

⁴³ Braz. Const., art.52, X.

⁴⁴ Braz. Const., art.5, LXVIII.

⁴⁵ Rosenn, Keith S., 'Judicial Review in Brazil: Recent Developments'. Updated and revised version of a paper originally submitted at the Latin American Studies Association Annual Meeting, Miami, March 2000.

and operating in the country for more than one year, are also authorised to lodge writs of security, collectively.⁴⁶

The 1988 Constitution also provides a legal remedy called *mandado de injunção* (writ of injunction) against any absence of law or administrative act preventing the regular exercise of constitutional rights and liberties as well as prerogatives related to matters of nationality and citizenship.⁴⁷ This writ allows citizens to seek remedies for the fruition of constitutional rights not yet regulated by complementary legislation. Thus, prisoners have, on one occasion, filed a writ of injunction against state authorities who did not implement the provision of Article 5 to the 1988 Constitution, which stated that female prisoners had the right to stay with their nursing children.⁴⁸

When the Court grants an injunction, the authority held responsible for the omission is advised to enact any measure rendering the constitutional right effective within thirty days. If the case relates to the necessity of complementary legislation, then judges can simply advise the legislators about their omission. Although injunctions were created for the purpose of reducing situations of non-enforcement of constitutional rights, judges have no authority under the constitutional principle of separation of powers to oblige legislators to produce legislation.⁴⁹

Citizens can also file popular actions to nullify administrative acts that are supposedly contrary to the public interest however popular actions need to deal with matters of culture and environment. Plaintiffs are exempt from court costs and the burden of defeat, unless they are guilty of bad-faith litigation.⁵⁰ Lower-court decisions dealing with popular actions can be appealed right through to the STF if such a decision can be contested in light of the 1988 Constitution.⁵¹

Similar to popular actions, public civil-actions aim to protect the environment, consumers, and properties with artistic, historical, or landscaping value. In contrast to popular actions, public civil-actions can only be proposed by the federal MP, state

⁴⁶ Braz. Const., art. 5, LXX.

⁴⁷ Braz. Const., art.5, LXXI.

⁴⁸ Braz. Const., art.5, L.

⁴⁹ See Regina Quaresma, *O Mandado de Injunção e a Ação de Inconstitucionalidade por Omissão – Teoria e Prática* (1999) 492.

⁵⁰ Braz. Const., Art.5, LXXIII.

⁵¹ Braz. Const, Art.102, III, a.

governments, city councils, public companies, mixed-capital companies and civil associations.⁵² Public civil-actions are lawsuits in which plaintiffs, in theory, act on behalf of the community. Thus, decisions on such actions produce *erga omnes* (valid for all) effects on the whole society and compensation for any damages are deposited in a state **fund** instead of going to the plaintiffs.⁵³

b. Abstract (and Concentrated) Judicial Review

STF judges are empowered by the 1988 Constitution to review legislation prior to its coming into effect. In such cases of judicial review of legislation, there is no adverse party, because this model of review rests on the judicial interpretation of legal norms in the abstract. Final decisions on direct actions produce *erga omnes* effects and cannot be appealed.

Direct actions of unconstitutionality challenge the consistency of legislation in light of the Constitution. The Procurator-General was, during the military government (1964-1985) the only authority with power to file actions of unconstitutionality. However, the 1988 Constitution extended that right to the President of the Republic, the Senate, the Chamber of Deputies, state legislatures, state governors, the Procurator-General of the Republic, the Federal Council of the Brazilian Bar Association, political parties with representation in the National Congress and national-union entities.⁵⁴

To avoid the proliferation of direct actions of unconstitutionality, the STF adopted the criterion of *pertinência temática* (thematic relevance).⁵⁵ Pursuant to this, the Court can refuse to decide on actions with no 'objective link' between the plaintiff's institutional duties and the content of the challenged legislation. This criterion, however, is not applied to actions filed by the Procurator-General of the Republic, the Bar Association, the Senate, the Chamber of Deputies, and political parties, because these entities are seen as possessing a broader interest in constitutional issues.⁵⁶

⁵² Federal Law 7.347/95

⁵³ Rosenn, 'Judicial Review in Brazil: Developments under the 1988 Constitution' (2000) 7 Southwestern Journal of Law and Trade in the Americas 291, 299.

⁵⁴ Braz. Const., art.103, I-VIII.

⁵⁵ Gilmar Ferreira Mendes, *Jurisdição Constitucional* (1996) 138.

⁵⁶ *supra* note 53, 301.

In relation to judicial proceedings for cases of constitutional review in the abstract, one STF judge is chosen to report on the case. He can dismiss the case if it involves frivolous issues. The Procurator-General is always invited to give his opinion. Likewise, the Advocate-General is called on to support the validity of federal laws and federal administrative acts. The STF might issue provisional injunctions and, if not an urgent issue, can give five days notice to the authority that issued the contested measure to respond to the request of provisional injunction.⁵⁷

The STF has taken a restrictive approach to direct actions of unconstitutionality in that it refuses to declare any legislation as partially unconstitutional. But the Court adopts the device found in American legal proceedings of declaring the constitutionality of a law only if applied according to a particular interpretation.⁵⁸ When this occurs, the STF gives an interpretation that is compatible with constitutional norms and principles. This technique, called *interpretação conforme a Constituição* (interpretation in conformity with the Constitution) is based on the reasonable assumption that lawmakers would never wish to deliberately enact legislation that is unconstitutional.⁵⁹

In 1993, an amendment to the 1988 Constitution established another action in the abstract: the declaratory action of constitutionality. It aims at resolving controversial issues in a short period of time. Declaratory actions work in a similar way to direct actions of unconstitutionality but with the ‘signal changed’. Whereas direct actions of unconstitutionality seek to have a legal norm declared unconstitutional, direct action of constitutionality aims to confirm the compatibility between a legal norm and the Constitution.⁶⁰

Finally, there is a third model of abstract review called the ‘declaratory action of unconstitutionality for omission’. It serves to provide regulation for situations demonstrating the ineffectiveness of constitutional norms. The proceeding intends to

⁵⁷ Braz. Const., Art.102, I, p.

⁵⁸ supra note 53, 303.

⁵⁹ supra note 55, 268-277.

⁶⁰ Gilmar Ferreira Mendes, *Direitos Fundamentais e Controle de Constitucionalidade* (1999) 346.

overcome legislative inertia by encouraging lawmakers and public authorities to make necessary provisions toward the practical implementation of these norms. If omission is related to the absence of administrative provisions, then the responsible authority is required by the Court to render the norm effective within thirty days.⁶¹ But if the omission comes from federal or state legislatures, the STF can only issue them with a notification of the omission. As professor Keith S. Rosenn explains:

*“Separation of powers principles prevent the courts from supplying the missing legislation themselves, and respect for a coequal branch of government counsels against trying to impose some form of sanctions against the legislature for not legislating.”*⁶²

6. PROBLEMS OF THE BRAZILIAN JUDICIARY

The Brazilian judiciary has long been in a state of crisis, and remains in such a state, despite several attempts at reforming it.⁶³ In relation to the lack of social confidence in the judiciary, Brazilians often believe that their magistrates punish wrongdoers inadequately. Instead, lenient sentences against dangerous criminals and certain categories of people, particularly the rich, politicians, and judges themselves, are applied. It is believed that these individuals are never suitably punished for breaking the law.

As evidence of this, in 1999, an opinion poll conducted by Garibaldi-Fernandez revealed that 74 percent of Brazilians have no faith in their country’s judicial system. Also, around 50 percent disagree with the opinion that magistrates normally punish the guilty and let the innocent go free. Finally, no less than 86 percent argued that people like judges are never adequately punished for disrespecting the law.⁶⁴ As legal professor William Prillaman explains:

“The result demonstrated declining confidence in the courts, increased cynicism about democracy and the rule of law, and increased tolerance for vigilante justice, nearly complete lack of faith in the judiciary, and prominent sentiments that democracy was not a real improvement over authoritarian rule... Brazil [has] seemed to be on the verge of serious

⁶¹ Braz. Const., art.103, para 2.

⁶² supra note 45.

⁶³ Keith S. Rosenn, ‘Judicial Reform in Brazil’ (1998) 4 Law and Business Review of the Americas 9, 19.

⁶⁴ Supra note 25, 95.

democratic decay, with the failure of the judiciary a critical factor contributing to the declining faith in the rule of law."⁶⁵

a. Judicial Delay

The results of a survey amongst lawyers, judges, and prosecutors, all academics from the Law Faculty at the Pontifical Catholic University of Rio de Janeiro, indicate that judicial delay is a major problem in the Brazilian judiciary.⁶⁶ Indeed, a case involving two soccer clubs from Rio de Janeiro illustrates the problem to a preposterous degree. The soccer clubs disputed the 1907 state championship title, only to have their lawsuit finally decided in 1996.⁶⁷

On average, it takes more than five years for a decision to be handed down in a lawsuit in Brazil. Some cases have been pending since the 1940s.⁶⁸ This indicates that legal disputes are not being effectively resolved. It can even suggest a breakdown in civil society, whereby civil contracts and other legal obligations are not being honoured as they would were the society under the law.⁶⁹

Excessive delays can certainly result in the denial of justice. The reason for long delays is found in the enormous imbalance between the number of lawsuits and the number of magistrates. There is also the problem regarding the 'generosity' of court appeals, as the 1988 Constitution allows almost every sentence to be appealed all the way up to higher courts, particularly the STJ and STF.

b. The Extraordinary Number of Lawsuits

Conservative statistics estimate the number of lawsuits awaiting final decision to be more than 50 million. Between 1995 and 1999, 32.2 million processes entered the

⁶⁵ Id., 6.

⁶⁶ Daniela Trejos Vargas, 'Civil Justice in the Americas: Lessons from Brazil' (2004) 16 Florida Journal of International Law 19, 19.

⁶⁷ Supra note 16, 251.

⁶⁸ Supra note 25, 90.

⁶⁹ An alternative explanation is that people in Brazil are litigious. This would imply that people in Brazil do not trust in the proper application of law by the judiciary. However, as can be seen from this article, the level of public confidence in the courts is low in the country. On the other hand, the backlog of cases on the judicial dockets can indicate a great incidence of bad-faith litigation, especially on the part of the public administration.

Brazilian courts. However, only 22.6 million of these were decided during the same period. This leaves a deficit of almost 10 million processes left unjudged.

Today, the deficit is even greater. The reason for this is that the higher courts have to constantly decide on the same legal issues. During the José Sarney government (1985-1990), for example, STF judges were forced to decide on the same matter, concerning the validity of compulsory loan, over 10,000 times. In 2004, these judges had a daunting 164,000 lawsuits to decide, to wit, 15,000 per judge.⁷⁰ It is humanly impossible for a small number of judges to deal with so many lawsuits. And, since the STF does not have a writ of certiorari to deal only with actions deemed worthy of review, its judges have to rely, to an excessive degree, on the work of their clerks who are obviously not as qualified as the judges themselves.

Another factor that aggravates judicial delay is bad-faith litigation. One of the worst bad-faith litigants at all its federal, state, and local levels is the government itself. Presumably, civil-law court-systems in other countries do not face the same problem of judicial delay due to state authorities being better payers to creditors. But in Brazil, a high percentage of lawsuits involve the bringing of organs of the public administration to court for their refusal to pay debts owed by the state. The main reason for such litigation, explains Rosenn, 'is the arbitrary opposition of the unjustified state resistance to legitimate pretensions manifested by citizens of good faith who see themselves forced, in view of this type of governmental behaviour, to go to the court, thereby generating multiplication of complaints against the Public Power'.⁷¹

The lack of a proper system of binding precedent also helps to explain the huge backlog and constant conflicts of judicial interpretation. One crucial aspect of the Anglo-Saxon doctrine of *stare decisis* is that similar cases must be treated in a similar manner. In the common-law system, rules of judicial precedent are far more strict than those of its civil-law counterparts. In fact, common-law courts are clearly bound to follow judicial precedent, which means that lower courts are compelled to obey

⁷⁰ Brooke Unger, 'Not-so-swift Justice: How to Reform Brazil's Justice', *The Economist*, 25 March 2004, 52.

⁷¹ *Supra* note 63, 27.

previous decisions if the facts are sufficiently similar. This produces the positive result of generating more legal certainty and predicability to court decisions.

In contrast, lower courts in Brazil are not compelled to follow higher-court decisions to the same degree. All the country had, until recently, was the institution of *súmula*, a system of minimum binding precedent which was instigated in 1964 by the STF and spread gradually to all higher courts. It consists of a numbered series of capsulated decisions prepared by the higher courts in order to summarise cases always decided upon in the same manner. Until any *súmula* is modified, lower courts are expected to adhere to its norms, but not obliged to do so. As Rosenn explains, 'norms are enshrined in the *súmula* only after the case law has 'firmed up' in a specific direction'.⁷² While a *súmula* is technically binding only to the court that has created it, failure by judges lower in the hierarchy to follow its rules usually ensures summary reversal, and yet, the main reason why this differs from the Anglo-Saxon institution of precedent is cultural. Many Brazilian judges do not feel morally compelled to obey precedent. They believe it is authoritarian to bind lower courts to the ruling of higher ones, and thus reduce their individual independence.⁷³

In addition, the lack of certiorari to allow judges to discard the most frivolous cases can result in bizarre situations. In 1997, a plaintiff filed a preventive habeas corpus to the STF because he heard that President Fernando H. Cardoso ordered citizens over sixty-five years old to bring fifteen litres of gasoline and plastic bags to the public crematorium. Instead of rejecting the case as absurd, it ended up receiving twenty full pages of proceedings and a hearing from the Procurator-General of the Republic.⁷⁴ This may possibly indicate that nobody had really read the application for habeas corpus.

Another problem is that the 1988 Constitution seems to have considered every social, political, and economic issue to be within its purview. This has contributed to the increased workload of higher courts, particularly the STF. Since the enactment of the current constitutional text, even minor civil, family, and criminal issues have been

⁷² Supra note 45.

⁷³ Supra note 25, 81.

⁷⁴ Supra note 63, 25.

transformed into constitutional cases requiring the adjudication of the country's highest court. As a result, the STF has been 'overwhelmed with divorce settlements, bar fights, neighbourhood noise disputes, and a host of other marginal cases glutting the system'.⁷⁵

Finally, a significant cause of judicial delay is the doubtful legal nature of economic plans that have been introduced over the last few decades by the federal government. Since the 1980s, several heterodox plans aiming to regulate the national economy have created undesirable interference in the ongoing contracts, loans, and retirement pensions of civil servants. The result has been an avalanche of lawsuits contesting the validity of these economic measures. In 1990, a drastic economic measure freezing all national bank deposits for eighteen months resulted in more than 100,000 new lawsuits being brought to the federal judiciary.⁷⁶

c. The Lack of Judges

Brazil has just 14,000 judges per 175 million people, or one judge per 12,500 inhabitants. For purposes of comparison, Germany has one judge per 3,500; Argentina one per 9,000; France one per 5,600; and Colombia one per 5,800.⁷⁷ A 1995 survey among Brazilian judges indicated that 80% regarded the insufficient number of magistrates as the major cause of backlog and judicial delays.⁷⁸ Moreover, they commented that the system would need ten times more judges to meet the current staffing demands.

Although the country's rigorous entrance exam to a judicial career offers the advantage of avoiding the selection of ill-qualified judges, too much rigour has nonetheless created other sorts of inconveniences. We find in Brazil that every year there are many vacant positions for judges left unfilled because candidates fail to gain approval through public examination. Although the difficulty of the exam is looked

⁷⁵ Supra note 25, 166.

⁷⁶ Supra note 64, 31.

⁷⁷ See 'Report on Brazil'. Paper presented by the Brazilian branch of Transparency International to the II Global Forum on Fighting Corruption, Hague, May 2001, 6.

⁷⁸ Supra note 25, 93.

upon favourably, it is worth taking into consideration the relatively low quality of numerous law schools across the nation.⁷⁹

The heavy workload is, therefore, compounded by the fact that one-fourth of all court positions are vacant.⁸⁰ Judges must rely on the work of clerks in order to be acquainted with all the facts reported in the cases. This 'fatal' combination of overcrowded dockets and insufficient number of judges can result in clerks actually producing some of the court decisions. These staff members are poorly paid, less qualified than the judges, and, as is well-known in Brazil, some are quite keen to accept bribes from lawyers.⁸¹

d. The Excessive Number of Appeals

The right to court-appeal is obviously an important guarantee of judicial fairness. It prevents arbitrary rulings from becoming final decisions. However, the right of appeal is certainly not lacking in Brazil. On the contrary, the problem is an excess of appeals which prevents rapid resolution of litigation.

Bad-faith litigants can postpone final decisions by taking undue advantage of this generous appeals system. The United Nations Human Rights' Commission has already confirmed that courts in Brazil are indeed 'extremely slow', particularly because of the excess of guarantees created by the appeals system. Accordingly, this excessive number of appeals, including the inordinate number of cases decided by the Supreme Court, is currently responsible for significant judicial delays.⁸²

⁷⁹ Supra note 66, 22. The low quality of law schools is observed through their lower approval rate at admission exams for the Brazilian Bar Association.

⁸⁰ Id.

⁸¹ Joseph R. Thome, 'Searching for Democracy: The Rule of Law and the Process of Legal Reform in Latin America'. Paper prepared for the workshop on 'Reforma Judicial, Motivaciones, Proyectores, Caminos Recorridos, Caminos por Recorrer', Instituto Internacional de Sociología Jurídica, 6-7 April 1998, Oñati, Spain.

⁸² United Nations Press Release, 'United Nations Expert Concerned About Lack of Access to Justice in Brazil',

<<http://unhchr.ch/hurricane.nsf/0/B6518C5EA42005ABC1256F00386FBF?opendocument>> at 1 November 2004.

Brazil's judicial proceedings were once sarcastically described as 'developed in successive stages, interrupted at each step by appeals of interlocutory decisions, dragging itself slowly, far from the sight of the judge, growing fat within the belly of its tiresome record'.⁸³ First-level judges conduct all the steps in civil proceedings. As a result, they spend too much time on bureaucratic tasks instead of being involved in more relevant things such as studying the cases, hearing the parties involved, and writing final sentences.

Even non-definitive, first-level court decisions can be contested by the litigants by means of *agravo de instrumento* (interlocutory appeals) to the courts of appeal. While such appeals often do not suspend the course of actions, delay still occurs, because judges rarely pass final decisions until the higher courts send a bill of review on the issue.

In addition, dissatisfied litigants can appeal final, first-level decisions. If so, cases are decided by a group of three judges and, if the decision is unanimous, the party that lost the appeal can request *embargos infringentes* (rehearing en banc) from the court. This forces judges from the same court once again to decide on the same case.

If a legal case involves issues related to federal law, the party which lost a court appeal can file another appeal to the STJ. Since the federal system is highly centralised, almost every issue encompasses a discussion on federal legislation.⁸⁴ But if a case also deals with any subject mentioned in the Federal Constitution, then the litigant can equally file an extraordinary appeal all the way up to the STF. Since, as we have seen in an earlier chapter, the 1988 Constitution is an extremely lengthy and analytical document, almost every legal issue has become 'constitutionalised', and so able to be brought by litigants, at level of appeal, to the STF.

As one can expect, bad-faith litigants often prolong adverse final decisions by filing appeals to both of these higher courts. When this occurs, one court will be held in

⁸³ Machado Guimarães, 'O Processo Oral e o Processo Escrito' (1938) 74 *Revista Forense* 160, 162.

⁸⁴ For a deeper analysis of the Brazilian federal system, see: Augusto Zimmermann, *Teoria Geral do Federalismo Democrático* (2nd ed., 2005) 289-386.

abeyance until the other finishes deciding on its own matter, further delaying the final outcome of judicial decisions. Judicial delay, and the frequent use of appeals as a bad-faith manoeuvre to forestall the outcome of undesirable decisions, favour only the litigants with financial resources to pay for the best lawyers and wait long years until the final judicial ruling. According to Dalmo de Abreu Dallari, a well-known Brazilian law professor:

*“Having the same case decided several times does not necessarily mean the possibility of just decisions, although it seems to be quite clear that judicial delay, as a natural result of the proliferation of appeals, obviously generates economic consequences that favour only the most rich.”*⁸⁵

e. Corruption

The Brazilian judiciary has been so rife with corruption that years could be spent writing about them. The media has regularly reported corruption scandals among judges, but lawyers and legal scholars have not given the problem any serious attention. Although honest lawyers are also victims of such corruption, it seems that they avoid addressing the problem out of a reasonable fear of possible retaliation from disgruntled judges.

Corruption in the courts has been an historical problem, one that still manifests itself today. To give some idea of how deep-rooted corruption is, one need only mention the following story from colonial times. In 1676, a judge from the High Court of Bahia refused outright to vacate a house he rented, and subsequently refused the landlord being heard on the matter in ‘his’ court. Similarly, another judge from the same court refused for nine years to pay a debt, and afterwards used his position to stop his creditor filing a lawsuit against him.⁸⁶ Many were the judges who abused their position in order to favour relatives, friends, or other acquaintances accused of committing any crime. Indeed, as Rosenn well explains,

“The reputation of the colonial judiciary was one of inefficient venality. Lack of justice was a constant complaint in colonial Brazil even though apparently well-qualified magistrates were dispatched from Portugal to

⁸⁵ Dalmo de Abreu Dallari, *O Poder dos Juizes* (1996) 100.

⁸⁶ Stuart B. Schwartz, *Sovereignty and Society in Colonial Brazil: The High Court of Bahia and its Judges - 1609-1757* (1973) 325.

the benches. Justice was regularly bartered like any other commodity, though delivered more slowly... Supervision over notaries and judicial clerks was practically nil. Since these offices were frequently leased or subleased, sometimes for more than position's salary, the investment in the office was commonly recouped through acceptance of bribes."⁸⁷

Today's corruption in the Brazilian judiciary is certainly not restricted to court functionaries. Judges are regularly accused of participation in a vast range of corrupt activities, from diverting public funds to passing lenient sentences on dangerous criminals in return for bribes. In 2003, for example, the police found a judge from the Superior Court of Justice (STJ), Brazil's second-highest court, accepting bribes to give writs of habeas corpus to drug-dealers.⁸⁸

Four years earlier, in 1999, a state judge from Mato Grosso was killed only six weeks after denouncing other judges for accepting bribes from drug-dealers in exchange for a reduction in their criminal sentences.⁸⁹ Moreover, some judges and lawyers have been discovered participating in huge schemes to defraud the social-security agency by means of granting excessive awards to claimants.⁹⁰

Finally, as another example, the federal police (PF) arrested, in February 2005, the wife and the mother-in-law of the Chief Justice of the Regional Electoral Court (TRE) in Roraima state. They were both leading a criminal organization which, among other things, forged extra-time payments to court employees. They were using the husband's (and son-in law's) position to threaten with dismissal anyone who refused to provide them with at least half of their wages.⁹¹

It is also important to consider that trials of criminal offences in Brazil must be held within a certain period. The backlog of cases, however, has given judges the ability to dismiss old cases without any hearing. The practice has reportedly allowed corrupt

⁸⁷ Keith S. Rosenn, 'The Jeito: Brazil's Institutional Bypass of the Formal Legal system and Its Developmental Implications' (1971) 19 American Journal of Comparative Law 514, 521.

⁸⁸ Supra note 66, 22.

⁸⁹ 'The Price of Justice', Rice

University <http://www.owl.net.rice.edu/~poli354/990918_Brazil_courts.html> at 18 September 1999.

⁹⁰ Supra note 66, 22.

⁹¹ Jailton Carvalho, *Agora é na Justiça Federal*, O Globo, 11 February 2005, 15.

judges to deliberately delay criminal actions so as to have such actions dismissed as not having been dealt with within the stipulated time frame.⁹²

On the issue of budget, the 1988 Constitution gives the judiciary the power to prepare its own budget. Unfortunately, judges have not administered the judicial funds properly. In 1995, the new building of the STJ, a courthouse for just 33 magistrates, was finished at a cost of US\$170 million. Within the building there were far more empty rooms than used ones. The building has an indoor theatre, exercise rooms, two restaurants, a ballroom, a bar, and a swimming pool.⁹³

One might suspect that judges sanction the excessive costs of constructing and refurbishing courthouses in order to obtain a share of the proceeds. Indeed, a 1999 fact-finding enquiry carried out by the National Congress found at least two cases to endorse such suspicion.⁹⁴ Although judges had strongly opposed the congressional enquiry, declaring that elected politicians could not meddle in judicial affairs, the enquiry went ahead and found, among other things, that the then Federal Labour Court (TRT) Chief Justice in São Paulo state, Nicolau dos Santos Neves, became a millionaire by constructing a new courthouse for his labour court. The final cost of the TRT courthouse was at least ten times above the market rates. This enquiry also found that the Federal Labour Court (TRT) Chief Justice in Rio de Janeiro state, Mello Porto, had authorised projects at his court at costs that were 340 percent above the market rates.⁹⁵

f. Nepotism

Brazil has laws forbidding the practice of nepotism in all its governmental branches. And yet judges constantly abuse their position for the benefit of friends and relatives. People suspect that they illegally bypass the rigorous entrance exams for a judicial career by filling positions with unqualified family members.⁹⁶ Although such

⁹² U.S. Department of State, '2003 Country Reports on Human Rights Practices – Brazil', <<http://www.state.gov/g/drl/rls/hrrpt/2003/27888.htm>> at 25 February 2004

⁹³ Supra note 25, 88.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Id., 86.

schemes are extremely hard to uncover, there are several other pieces of evidence to indicate that nepotism is indeed a widely accepted practice amongst Brazilian judges.

Indeed, examples of nepotism taking place in the judiciary are reflective of the absurd. In 1999, for example, the Chief Justice of the Regional Federal Court (TRF) in Amazonas state named, without public examination, his own son as the director of that court.⁹⁷ In that year, audits from Paraíba state, one of the country's poorest regions, discovered that 160 out of the 565 state-court employees were relatives of judges.⁹⁸ The Chief Justice of Paraíba's High Court had employed seven of his adult children at that courthouse.⁹⁹ But he is by no means the champion of nepotism in Brazil's judiciary. The undisputed champion is instead Severino Marcondes Meira, a federal labour judge from Paraná state who in 2002 had no less than 63 relatives employed in his courthouse, including his wife and four adult children.¹⁰⁰

This being the case, one may suggest that what Brazil really needs is a 'tougher' law against nepotism in the judiciary. But such a law already exists at federal-court level. In 1997, the National Congress introduced a federal law prohibiting all federal judges from employing relatives, including in-laws. Before the anti-nepotism bill was enacted, judges staged a work-stoppage in protest, arguing that this would violate Article 37 of the Constitution which states that federal employees can hire subordinates of personal confidence.¹⁰¹ Although their protest failed to derail the enactment of the legislation, judges decided not to contest the measure on legal grounds. Instead, they have since been cheating the law by engaging in the quid pro quo of naming the relatives of other judges to fill positions on their own staff and vice-versa.¹⁰²

⁹⁷ *Id.*, 104.

⁹⁸ Katheryn Gallant, 'The Art of Stealing', *Brazzil Magazine*, <<http://www.brazzil.com/content/view/8430/54/>> at 1 March 2002

⁹⁹ *Supra* note 25, 87.

¹⁰⁰ *Supra* note 98.

¹⁰¹ *Supra* note 25, 87.

¹⁰² *Ib.*, 104.

g. Politicisation

In Brazil, the last days of military government (1964-1985) coincided with an incredible rise of politicisation in the judiciary. Since the 1980s, many judges have coalesced around the idea of ‘alternative law’. Judges who embrace ‘alternative law’ normally argue that the judiciary should cater to the expectations of the ‘marginalised’ and ‘oppressed’ in society, by resisting what they regard as ‘wooden and violent generalities of the state law’.¹⁰³

According to Professor Megan J. Ballard, a more dogmatic interpretation of alternative law ‘posits that judicial power ought to be rallied to the service of poor masses in their struggles’. However, as Ballard points out, ‘detractors argue that alternative law will lead to anarchy because it encourages judges to consider themselves to be above the law and the sole interpreters of popular will’.¹⁰⁴

Nonetheless, the *Movimento de Juízes Alternativos* (*Movement of Alternative Law Judges*) has been Brazil’s most influential school of legal thought. The Movement has its own journal, collective meetings, and, as Tamara Lothian points out, ‘a degree of influence upon the judiciary as well as a legal academy that far outreaches the American critical legal studies movement and its European counterparts’.¹⁰⁵ The idea of applying ‘alternative law’ is so popular in Brazil that a survey of state judges in Rio de Janeiro revealed that 62 percent have decided cases based on alternative-law tenets.¹⁰⁶ Another survey found that 83 percent of all judges of the country think that the courts should not be impartial and should always be used as political tools for social transformation.¹⁰⁷

When Brazilian judges in the survey were presented with the basic choice of applying a clear legal norm and promoting their own vision of ‘social justice’, three-quarters

¹⁰³ Tamara Lothian, ‘The Democratized Market Economy in Latin America (and Elsewhere): An Exercise in Institutional Thinking Within Law and Political Economy’ (1995) 28 *Cornell International Law Journal* 211, 211.

¹⁰⁴ *Supra* note 16, 244 & 245.

¹⁰⁵ *Supra* note 103, 211.

¹⁰⁶ *Supra* note 16, 256.

¹⁰⁷ *Id.*

expressed their preference for the latter over the former.¹⁰⁸ In doing so, they argue, the courts would be morally bound to ‘play an active role in reducing social inequalities’.¹⁰⁹ This is, for instance, how a judge from the Supreme Court (STF) describes his peculiar way of deciding cases: ‘Whenever I face a controversial case, I do not look for the dogma of the law. I try to create within my human character a more adequate solution’.¹¹⁰

Indeed, a basic principle of alternative law is to never look for the ‘dogma of the law’ as alternative-law lawyers tend to regard the idea of judicial neutrality as a ‘bourgeois myth’.¹¹¹ For alternative-law proponents, judicial impartiality will result in ‘servile utilization’ of the courts by the ruling economic classes.¹¹² Thus law professor Antônio Alberto Machado, the head of the Centre for Alternative Law Studies at the State University of São Paulo (Unesp), argues that judges need to be entirely free to deconstruct positive laws as means ‘to change the social order (*mudança da ordem*) and [as a result] bring about human emancipation’.¹¹³

Behind the exhortations of the great majority of alternative-law lawyers we often find the post-modern doctrine of philosophers like Jacques Derrida, for whom there is no fixed meaning in language, including in the language of the law.¹¹⁴ Since the post-modernist axiom denies the possibility of any legal objectivism, it affects the ideal of the rule of law because no legal certainty is possible if knowledge is always considered an entirely subjective matter.¹¹⁵

Judges who accept this axiom repudiate objectivity in legal provisions. They argue that legal interpretation is entirely subjective and, accordingly, that every judge

¹⁰⁸ See Armando Castelar Pinheiro and Célia Cabral, ‘Credit Markets in Brazil: The Role of Judicial Enforcement and other Institutions’. Paper prepared as part of the research project ‘Institutional Arrangements to Ensure Willingness to Pay in Financial Markets: A Comparative Analysis of Latin America and Europe’, carried out by The Centre for Studies of State Reform, from Getúlio Vargas Foundation (CERES/EPGE/FGV), December 1998.

¹⁰⁹ *Supra* note 17, 256.

¹¹⁰ *Id.*, 230 (quoting STF Justice Marco Aurélio Mello, from an interview to *Isto É*, a popular magazine, 1999).

¹¹¹ *Id.*, 244 & 245.

¹¹² Antônio Alberto Machado, ‘O Direito Alternativo’ <<http://www.neda.ubbi.com.br/direitoalternativo.pdf>> at 16 June 2006

¹¹³ *Id.*

¹¹⁴ See Jacques Derrida, *Force de Loi* (1994).

¹¹⁵ Suri Ratnapala and Gabriël A. Moens, ‘Law as a Knowledge Process’, in *Jurisprudence of Liberty* (S. Ratnapala and G. A. Moens eds., 1996) 85.

should be free to decide cases on the basis of ‘the best interests of the oppressed classes’.¹¹⁶ This is so because the idea of law as a mere instrument of oppression has deeply permeated some strands of post-modern critical theory. According to Ratnapala and Moens, ‘postmodernists revive the ancient philosophical scepticism about the possibility of any objective knowledge... Thus, knowledge is seen as a form of power. This view radically undermines the idea of law as rules capable of being objectively determined and impartially applied to ascertainable facts’.¹¹⁷ A good example of this alternative-law position is expressed in the following excerpt from an article written by law professor Paulo Roberto Pereira de Souza, formerly the chancellor of the State University of Maringá:

“In our postmodernist society, we are seeing a true revolution in law... The installation of judges with new powers resulting from this process has allowed judges to make advanced decisions going against unjust norms that conflict with public interest. There is no law, no legal norm or statute that justifies fraud of the public interest.”¹¹⁸

The installation of such ‘new powers’ is found nowhere in the constitutional order. If so, this idea of ‘new powers’ is basically unconstitutional. It means, in practical terms, the replacement of the rule of law by the rule of judges. In fact, the premise that judges better know what is best for the public interest is an arrogantly elitist and utterly undemocratic postulation. It basically implies that the people’s representatives in parliament know less about matters of ‘public interest’ than unelected judges. What is more, as Brian Z. Tamanaha explains:

“All legal systems rely upon judges possessing the integrity not to exploit the latent indeterminacy in language and legal rules. Judges must be committed to fidelity to the law, and must have as their primary interpretive orientation to seek out the correct understanding of the legal rules.”¹¹⁹

As observed, the major goal of the alternative-law movement is the use of the judiciary as an instrument for radical social transformation.¹²⁰ The means through which this objective is to be reached is by subversion of so-called ‘dominant

¹¹⁶ Supra note 17, 244 & 245.

¹¹⁷ Suri Ratnapala and Gabriël A. Moens, ‘Law, Legal Theory, and Liberty’, in *Jurisprudence of Liberty*, supra note 116, 3.

¹¹⁸ Paulo Roberto Pereira de Souza, ‘Constitutionalism in Brazil’ (2004) 16 *Florida Journal of International Law* 155, 158.

¹¹⁹ Brian Z. Tamanaha, *On the Rule of Law* (2004) 88.

¹²⁰ Supra note 112.

discourses' of the state law. Judges who embrace such idea are less concerned about legal interpretation than they are about deconstruction of the whole legal system, a system they regard as being merely an instrument for domination by the economic elites.

According to José de Oliveira Ascensão, a legal scholar at the prestigious University of Lisboa, alternative law wishes to 'deconstruct' the state legal order so as to apply new rules that judges themselves believe to represent 'better solutions for the exploited classes'.¹²¹ The Portuguese law professor also states that constant 'alternative' decisions have already transformed the Brazilian judiciary into a sort of 'lottery', where nobody is able to reasonably predict the final result of any judicial decision.¹²²

Since the law is broadly seen as only serving the interests of the economic ruling groups, alternative-law lawyers label as 'elitist' any literal interpretation of positive laws. They state that judges ought to have total freedom to create 'new laws' so as to liberate 'oppressed classes' from state law.¹²³ These 'new laws', of course, do not come from the state legal system, but are declared 'parallel' and 'insurgent' to this.¹²⁴

Naturally, one may suggest here that Brazil's social inequalities could possibly justify a more politically active role for the judiciary. But we only need point to the research that found that the Brazilian judiciary is directly responsible for the reduction of Brazil's domestic private-sector investment by around 15 percent of the GDP to disabuse anyone of such a notion.¹²⁵ One of the main reasons for such a reduction of investment is the perceived lack of law-enforcement of contracts by the country's judiciary. Indeed, a June 2006 article published by *The Economist* explicitly says that

¹²¹ See José de Oliveira Ascensão, 'Direito Alternativo' <<http://faculdademarista.com.br/argumentum/volume1/Ascensao.htm>> at 16 June 2006

¹²² Id.

¹²³ Id.

¹²⁴ Marco Aurélio Ventura Peixoto, 'Direito Alternativo: Uma Tentativa de Impedir a Modernização do Direito?' <<http://www1.jus.com.br/doutrina/texto.asp?id=37>> at 13 June 2006.

¹²⁵ Arnaldo Galvão, 'Lentidão e Burocracia Comprometem a Justiça', *O Estado de S. Paulo*, 11 April 1999, 6.

the Brazilian courts ‘cannot be counted on to uphold contracts’.¹²⁶ Moreover, *The 2006 Index of Economic Freedom* from *The Heritage Foundation* and *The Wall Street Journal* went to observe that ‘a lax enforcement of laws’ and ‘judicial inefficiency’ constituted ‘serious obstacles’ to long-term investment in Brazil.¹²⁷

This perception that judges do not properly apply the law has discouraged private investment and reduced the willingness of debtors to pay creditors. Potential creditors are now reluctant to lend money to entrepreneurs (and the poor), as they reasonably conclude that judges will be unwilling to protect them from any opportunistic behaviour from their borrowers. Even when the legal norm is broadly regarded by commercial lawyers as being absolutely clear about a creditor’s right, judges may prefer not to enforce it.¹²⁸ Housing mortgages, which are very important for the working class, scarcely exist in Brazil because judges are broadly recognized as being reluctant to allow the banks to foreclose.

While judicial independence is essential to check governmental arbitrariness, judges must not abuse the principle so as to obstruct government policies they personally (and ideologically) dislike. In 1997, however, the power struggle between the government and highly politicised judges led to several suspensions of the auction of the CVRD, the world’s largest iron-ore mining company. They were suspended because judges issued injunctions for minority groups who were ideologically opposed to any form of privatisation. Some, however, used the technical argument that the prospectus should have been published in popular tabloids and not only in business publications, despite jurisprudence from higher courts to the contrary. As Rosenn explains:

“The auction to privatize the state mining company... had to be suspended on four successive days because 135 lawsuits were filed throughout the country, resulting in thirty-five preliminary injunctions barring the sale. One belated injunction was issued after the auction had been held. All were eventually quashed by higher courts, but only after

¹²⁶ ‘Slow! Government Obstacles Ahead’, *The Economist*, <http://www.economist.com/world/la/PrinterFriendly.cfm?story_id=7065735> at 15 June 2006

¹²⁷ 2006 Index of Economic Freedom (Marc A. Milles et al eds., 2006) 120.

¹²⁸ *Id.*, 18.

causing Brazil considerable international embarrassment for permitting a judicial circus."¹²⁹

In the same way, politicised judges also tried in 1998 to block the sale of Telebrás, a publicly owned telephone company. The government, however, had on this occasion organized an 'army' of 700 lawyers for the battle at the courts, ready to challenge and repel last-minute injunctions.¹³⁰ In fact, those judges who fought against the sale ignored its clear benefits for the working people. With the sale, the cost of a new telephone-line dropped dramatically, from US\$1,200 to just US\$65. What is more, as reported, a great part of the profits from the sale was allocated to public education.¹³¹

Another good example of politicisation is the way some judges interpret the meaning of 'social function' with regard to property. It is true that the 1988 Constitution discusses the need for property to respect 'social function'. But this basic law is silent on what social function actually means. What the law instead does is explicitly declare that citizens have the constitutional right to preserve and inherit property. It even states that property rights constitute 'fundamental rights' of the citizen.

The 1988 Constitution also states that property can only be taken away from its owner in extraordinary situations of 'relevant public interest'. If so, expropriation needs to be carried out by the government by providing 'fair compensation in money'.¹³² In fact, there is even a *cláusula pétrea* ('stone clause') in Article 60 of the Brazilian Constitution, which forbids any amendment aiming to restrict individual rights such as those applying to property rights.

Despite all this, and the fact that one of the most accepted principles of dealing with apparent contradictions is to see whether there is any way of reconciling the seemingly inconsistent provisions, some judges have interpreted 'social function' to mean the judicial redistribution of property. Thus, a judge from Rio Grande do Sul state, Luis Christiano Enger Aires, decided on 15 October 2001 to reject a farmer's request to regain his own farm that had been invaded by social activists of a radical

¹²⁹ Supra note 53, 305.

¹³⁰ Supra note 16, 253.

¹³¹ Robert Levine, *History of Brazil* (1999) 143.

¹³² Braz. Const., art. 5, XXII, XXIII & XXX.

organization known as Landless Movement (MST).¹³³ He argued in his ‘legal’ reasoning about a supposed conflict between the farmer’s property right and the right of land invaders to a ‘worthy life’, and, accordingly, rejected the right of the farmer by upholding the latter. The State High Court (TJ) subsequently confirmed the controversial decision in an appeal. Such rulings sparked general protests throughout the region, as can be gauged by the editorial of the state’s leading newspaper:

“The invasions of property that have been taking place over the last few days have once again confirmed the aggressive, illegal, and arrogant manner in which they are normally performed. But there is now a new factor in this whole matter. It is the alternative content of judicial decision, and more specifically their purely ideological content.

“On behalf of civilized life, we should never regard as natural and acceptable the idea that judges, whose main function is the administration of justice, can decide to arbitrarily confer to themselves the power of absolute arbiters of what law is... By undermining a basic right of the Constitution, judicial rulings have made the case for land reform even more explosive. What should be done through fair legal reasoning and common sense has now become an insoluble problem, and almost certainly a dangerous focus for more violence and illegality.”¹³⁴

In reality, people in Brazil tend to see judicial trials as usually uncertain and unjust. A 1991 poll conducted by the national public-opinion agency (IBGE) found that 30% of Brazilians do not have faith in judges and support vigilante justice.¹³⁵ These people believe that judges have failed them, and have decided to support a ‘parallel system’ of ‘real justice’ to deal with problems like criminality. In a study on vigilante justice, the sociologist José de Souza Martins observed:

“In the lynchings that occur in capital cities, the poor and working-class demonstrate their will. They are their own judges, rendering decision about the crimes to which they are subjected, in so doing demonstrating the importance to them of recovering a predictable system of formal justice.”¹³⁶

Although judicial politicisation is surely not the only reason for ‘popular justice’, it can nonetheless be argued that judges might contribute to this problem by bringing

¹³³ ‘Decisão de Risco’, Zero Hora, 19 October 2001, 2. See also: Cristiano Rosa de Carvalho, ‘O Fim do Estado de Direito no Rio Grande do Sul’, Polícia e Segurança Pública <<http://www.policiaeseguranca.hpg.ig.com.br/artigos.htm>> at 09 September 2005

¹³⁴ ‘Elemento Complicador’. Editorial from Zero Hora, 23 October 2001, 2

¹³⁵ Paul Chevigny, *Edge of the Knife: Police Violence in the Americas* (1995) 158.

¹³⁶ José de Souza Martins, *Lynchings – Life by a Tread: Street Justice in Brazil*. Quoted from: Chevigny, *supra* note 135, p.157.

about uncertainty and unpredictability in the formal legal system. If trials are normally seen as unavoidably uncertain and not objectively just, then, argues High Court of Australia judge Dyson Heydon, ‘the chances of peaceful settlement of disputes are reduced and the temptation to violent self-help increases’.¹³⁷

7. REFORMS

On 8 December 2004, Congress enacted the Constitutional Amendment n.45, to produce significant changes in the judicial system. Nearly all Articles of the Brazilian Constitution, from Article 92 to Article 135, were changed. Some of the reforms suggested in this section were therefore implemented by this amendment which is known in Brazil as *Reforma do Judiciário* (Reform of the Judiciary).

a. Binding Precedent

Although a better system of binding precedent could contribute to harmonising judicial decisions on matters of law and constitutionality, a 1993 survey of Brazilian judges found that 66.1 percent were opposed to binding precedent, even for the STF decisions.¹³⁸ They argued that binding precedent would ‘petrify’ the legal order, not allowing lower courts to satisfy the evolving basic needs of society.¹³⁹ When the executive proposed in 1997 a constitutional amendment for the creation of binding precedent, judges denounced this well-intentioned effort as an ‘arbitrary attempt’ to curtail the right of each judge to be entirely free from ‘hierarchical constrictions’.¹⁴⁰

Despite renewed protests from judges, on 8 December 2004, the Congress enacted an amendment which provides for a better system of binding precedent. The Constitutional Amendment n.45 adds Article 103-A to the 1988 Constitution, allowing the STF by its own initiative, or at the request of entities that can also file actions of unconstitutionality, to create a *súmula vinculante*. Every *súmula vinculante* must deal with the validity, the interpretation, and the efficacy of laws which might

¹³⁷ Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (January-February 2003) *Quadrant*, 10.

¹³⁸ Instituto de Estudos Econômicos, Sociais e Políticos de São Paulo, ‘A Crise do Judiciário vista pelos Juizes’ (1994), *Relatório de Pesquisa* n.10.

¹³⁹ *Supra* note 16, 262.

¹⁴⁰ *Supra* note 25, 97.

have provoked legal uncertainty and the proliferation of lawsuits. Any administrative act or judicial ruling that contradicts a *súmula vinculante* must be nullified, and any lower-court judge who refuses to comply with this must be subject to administrative penalties.

Prior to this amendment, only decisions by the STF on direct actions of unconstitutionality and declaratory actions of constitutionality had the force of binding precedent.¹⁴¹ *Súmulas* from the STF were applied as a minimum-binding system, serving only to advise other judges that the highest court had exhaustively decided a particular legal issue. They had no binding effect because there were no administrative penalties for flouting them.

It is likely that the new *súmula* will enable greater harmony among judicial decisions and bring more predicability to the law. Predicability is an important principle of the rule of law because it provides citizens with reasonable security in their expectations of the conduct of others, particularly public officials. On the other hand, however, *súmulas* themselves will not help the court system solve the problem of delay because litigants may file appeals regardless of first-level decisions based on *súmula*. The reason for appealing against a decision based on *súmula* is obviously bad-faith litigation on the part of litigants who file court decisions in order to forestall final decisions.

b. Avocatória (Removal Procedure)

On not-so-rare occasions, controversial issues have taken a long time to be finally decided by the courts. Since the STF cannot by itself transfer important issues to its own jurisdiction, situations of undesirable legal uncertainty have occurred. The lack of removal procedure was a clear problem during privatisation auctions in the 1990s, when highly politicised lower-court judges issued preliminary injunctions that blocked those auctions.¹⁴²

¹⁴¹ Braz. Const. art. 102, para 2 & Federal Law n.9.868/99.

¹⁴² Supra note 54, 305.

In 1977, the military government had enacted a constitutional amendment establishing a removal procedure called *avocatória*. The procedural device enabled STF judges, at the request of the Procurator-General, to transfer to its jurisdiction all the cases pending before the lower courts that involved ‘immediate danger’ of ‘serious injury’ to public order, to public health, to public security, and to public finance. Those involved in drafting the 1988 Constitution rejected *avocatória* as a supposedly ‘authoritarian’ instrument which limited the power of lower courts, however President Fernando Collor de Mello (1990-1993) tried unsuccessfully to have the removal procedure resurrected.

Eventually, in 1999, Congress successfully enacted a federal law regulating a constitutional provision which gives STF judges the power to examine any claim of non-compliance with a fundamental precept derived from the 1988 Constitution.¹⁴³ This federal law, Law No.9.882, restored *avocatória* under a different name: *arguição de descumprimento de preceito fundamental* (‘allegation of disobedience to a fundamental precept’). The procedure is applied if there is no other remedy to cure the harm. If so, the STF might then declare this disobedience of a fundamental precept so as to suspend proceedings of any lawsuit before the lower courts, or to suspend the effects of any judicial decision unless it is a final decision with no possibility of further appeal (*res judicata*).¹⁴⁴

Entities with authority to argue disobedience to a fundamental precept before the STF are also allowed to file actions of unconstitutionality and declaratory actions of constitutionality: These entities are the President of the Republic, the Directing Board of the Federal Senate, the Directing Board of the Chamber of Deputies, the Directing Board of a State Legislative Assembly or of the Legislative Chamber of the Federal District, a State Governor or the Governor of the Federal District, the Attorney-General of the Republic, the Federal Council of the Brazilian Bar Association, a political party with representation in Congress and a trade union or nation wide professional association.

The ‘allegation of disobedience to a fundamental precept’ offers the benefit of allowing the highest court of the land to rapidly decide on the most controversial

¹⁴³ Braz. Const., art. 102, para 1.

¹⁴⁴ Supra note 43.

issues.¹⁴⁵ The measure serves to avoid an undesirable multiplication of lower court decisions that have a high probability of being subsequently rejected by higher courts. According to renowned lawyer Gilmar Ferreira Mendes, the main reason for this is to avoid contradictory decisions on issues of extreme importance. Such decisions can lead to undesirable juridical chaos if not rapidly decided on by the highest authority.¹⁴⁶

c. **Certiorari**

Unlike judges from the U.S. Supreme Court, judges of the STF do not have the writ of *certiorari* to enable them to select cases deemed worthy of review. In practice, the lack of *certiorari* obliges the STF to decide thousands of frivolous cases on a monthly basis.¹⁴⁷ Thus, an STF Justice, Sidney Sanches, has argued that the country's highest court has now become very much like a small-claims court.¹⁴⁸

As seen in the chapter on Brazilian constitutional history, the Brazilian Constitution is a lengthy and convoluted document. Therefore, the STF is in great need of establishing the writ of *certiorari*, so as to give its judges the power to deal with only the most relevant cases. These cases would be those that the STF judges would consider worth the time and effort of the country's highest court.

Because the jurisdiction of the STF is indeed too broad, the writ of *certiorari* is obviously a natural and sensible solution to this sort of problem. This solution would probably also help reduce the perception among Brazilians that, in order to be fair, every case needs necessarily to be decided at the highest level of jurisdiction.

Ironically, this perception has been responsible for the rejection of the writ of *certiorari*, although it could be really useful for a high court constantly deciding on cases of minor importance. In response to this situation, Rosenn notes: 'the reason such a proposal does not seem to be seriously urged is cultural, based partly upon a

¹⁴⁵ See Daniel Sarmiento, 'Apontamentos sobre a Arguição de Descumprimento de Preceito Fundamental' in *Arguição de Descumprimento de Preceito Fundamental* (A.R. Tavares and W.C. Rothenburg eds., 2001).

¹⁴⁶ Gilmar F. Mendes, *Direitos Fundamentais e Controle de Constitucionalidade* (1999), 360.

¹⁴⁷ See Eduardo Oinege Eduardo, 'Exaustos Meritíssimos', *Veja*, 26 March 1997, 109.

¹⁴⁸ *Supra* note 70.

distrust of judges and partly upon the notion that [all] legal questions need to be resolved at the highest level'.¹⁴⁹

d. Reduction in the Number of Appeals

The problem of judicial delay is aggravated by an indulgent system of court appeals. If people must have the right to appeal from first-level sentences, excessive appeals can result in bad-faith litigation; defendants have misused the 'generous' court-appeal system as a way of postponing final rulings. To counter the issue of dilatory litigation, and reduce the volume of cases, the courts could impose harsher penalties on those who litigate in bad faith. In other words, judges must be willing to punish those abusing the appeals system.

As indicated earlier in the chapter, litigating parties are allowed to file interlocutory appeals against non-definitive, first-level decisions. This obviously provokes delay, as first-level judges often do not pass final rulings until the high court sends a bill of review. The elimination of these appeals would certainly expedite the resolution of lawsuits by the first-level courts. Another non-essential appeal that is often used by bad-faith litigants to this purpose is *embargos infringentes* (rehearing en banc). This also provokes judicial delay because it forces the same court to judge a case for the second time. The abolition of this avenue of appeal would go a long way toward reducing the problem.

Another solution to this problem is to restrict the instances in which parties can file extraordinary appeals to the STF. Although the jurisdiction of the highest court is limited to constitutional issues, this potentially encompasses almost everything. The 1988 Constitution is a lengthy (dirigiste) and convoluted document based on 'ambitious goals and programs' for society, so that very little escapes from its global scope.¹⁵⁰

In this sense, an appeal to this court should only be allowed for issues involving truly constitutional matters. A matter is truly constitutional if it is related to the

¹⁴⁹ Supra note 45.

¹⁵⁰ Supra note 63, 21.

organization of the Brazilian state. Such appeals to the STF would, therefore, be restricted only to lawsuits involving fundamental issues of the constitutional order. Such issues are explicitly mentioned by the 1988 Constitution as associated with the federative form of State; the direct, secret, universal and periodic vote; the separation of Government Powers and individual rights and guarantees. These issues are constitutionally protected with 'stone clauses' by Article 60, paragraph 4, of the Brazilian Constitution, which forbids any proposal of amendment that is aimed at abolishing them.

e. Respect for the Rule of Law

The rule of law means the existence of clear, stable, general norms, which must apply equally to everyone regardless of a person's social status or position in the public administration. Characterized in this way, the rule of law stands in opposition to extemporary decisions expressing the mere personal will of judges. In other words, this legal ideal cannot be truly developed if judges pass rulings without being respectful of the existence and content of legal rules. Because of this, explains the Italian political philosopher Pasquale Pasquino:

*"[T]he person who judges exercises, in a sense, the most worrying power of all. In daily life it is not the legislator who renders judgement or passes sentence, but the judge... The judge protects the citizen from the caprices and arbitrary will of the legislator, just as the existence of the law protects the accused from the caprices and arbitrary will of the judge."*¹⁵¹

In a system that truly adheres to the rule of law, citizens must be endowed with the basic right to submit their complaints before the impartial adjudication of an independent, law-abiding judicial system. In addition, access to the courts must be provided without long delays, corruption, or excessive legal costs in filing any lawsuit as such issues would turn even an 'enlightened' legislation into a dead letter.

For this reason, central to the rule-of-law tradition is the conviction that a division of governmental functions constitutes 'a critical aspect of every system of government

¹⁵¹ Pasquale Pasquino, 'One and Three: Separation of Powers and the Independence of the Judiciary in the Italian Constitution', in *Constitutional Culture and Democratic Rule* (J. Ferejohn, J.N. Rakove and J. Riley eds., 2001) 211.

which hopes to combine efficiency and the greatest possible exercise of personal freedom'.¹⁵² The idea rests upon the reasonable understanding that whenever the power of the state becomes too highly concentrated in the hands of an individual or political agency, the risk of arbitrariness subsequently increases. A truly independent judiciary might, therefore, compel all the state authorities to respect the proper limits of legality. Law professor Brian Z. Tamanaha reveals the rationale for such a division of government powers as follows:

*“Freedom is enhanced when the powers of the government are divided into separate compartments – typically legislative, executive, and judicial (horizontal division), and sometimes municipal, state or regional, and national (vertical division)... This division of powers promotes liberty by preventing the accumulation of total power in any single institution, setting up a form of competitive interdependence within the government.”*¹⁵³

Consequently, some may consider that a full separation of powers, as is the case in the United States, is essential to the rule of law. However, it is important also to consider that the British system, for instance, does not separate the executive branch (Cabinet) from the legislative branch. Moreover, the British Parliament is historically considered the High Court of Parliament, the highest court in the land. The executive, however, does not interfere in the day-to-day workings of the courts, and the tenure of judges is also protected from undue political pressure.¹⁵⁴

Although the adjudicating function is a normal reality throughout history, having existed since the establishment of the first human societies, judges have historically been subject to direct political interference by governments. This direct subjection to the political ruler has the obvious potential to undermine all prospects of impartial administration of justice according to the law. Arguably, only the members of a truly independent judiciary could be enabled, in due conscience and freedom, to ‘reprimand the government and even force it to obey the law and redress injustice’.¹⁵⁵

It was only in the beginning of the eighteenth century that judges in Britain finally began to acquire a few, albeit essential, guarantees of independence from the

¹⁵² Vile, M.J.C.; *Constitutionalism and the Separation of Powers* (2nd ed., 1998) 261

¹⁵³ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004) 35.

¹⁵⁴ Samuel E. Finer, *Comparative Government* (1970), 148.

¹⁵⁵ R.C. van Caenegem, *An Historical Introduction to Western Constitutional Law* (1995) 15.

government. In 1701, the Act of Settlement conferred on judges the right to stay in office *quam diu se bene gesserint* (as long as acting with diligence). It also required that their salaries be determined only by means of statutory provision. Ever since, the law in Britain regulates both tenure and removal of magistrates, and requires the assent of both Houses of Parliament for their impeachment.

But even if an independent judiciary might serve as the ultimate guarantor of the rule of law, ensuring that no-one can violate laws with impunity, independence by itself does not guarantee impartiality.¹⁵⁶ Independence without strict impartiality can make judges a law unto themselves. The legal system needs, therefore, to ensure that the arbitrators (i.e., judges) will not themselves become too arbitrary. Judges must be guided by legal norms and principles every time they pass their rulings.¹⁵⁷ Even if constitutionally secured, judicial independence ‘does not necessarily deliver impartial law enforcement, which is one of the things we hope to gain from the rule of law’.¹⁵⁸ In fact, the reality of the rule of law in Brazil shows that too much judicial independence can actually transform the courts into a bureaucratic oligarchy devoid of accountability to the citizen.

In this sense, a judicious reform for the Brazilian judiciary would be to convince judges that they also need to remain under the rule of law. ‘Unless corruption or ineptitude pervades the judiciary’, argues Tamanaha, ‘the rogue judge will be checked... by... other judges, either sitting on the same panel or at high levels of appellate review’.¹⁵⁹ And yet, one might say, some judges in Brazil still need to learn that the rule of law implies that nobody, not even a judge, has the right to ignore basic legal norms. However, it may be said that placing judges under the rule of law requires a radical change of mentality in the dominant culture.

¹⁵⁶ For examples of independent but partial judiciaries, see José Maria Maravall, ‘Rule of Law as a Political Weapon’ in *Democracy and the Rule of Law* (J.M. Maravall and A. Przeworski eds., 2003) 261-315.

¹⁵⁷ J.R. Lucas, *The Principle of Politics* (1966) 24.

¹⁵⁸ Martin Krygier, ‘The Rule of Law: A Abuser’s Guide’. Paper presented at the 13th Annual Conference on ‘The Individual vs. the State’, Central European University, Budapest, 10-11 June 2005, 19.

¹⁵⁹ *Supra* note 153, 88.

Primarily, Brazilian judges will have to reconsider the role of the judiciary as an independent body for the administration of justice according to law. Judges who abuse their position in order to satisfy their personal interests cannot possibly be described as equitable upholders of the legal system. In fact, as Chief Justice Murray Gleeson from the High Court of Australia explains,

*“Judges are appointed to interpret and apply the values inherent in the law. Within the limits of the legal method, they may disagree about those values. But they have no right to throw off the constraints of legal methodology. In particular, they have no right to base their decisions about the validity of legislation upon their personal approval or disapproval of the policy of the legislation. When they do so, they forfeit their legitimacy.”*¹⁶⁰

In conclusion, the power of judges to ‘create’ laws is not to be exercised in absolute dissonance with the existing norms and principles of the state legal system. ‘Since [every judge] is bound to administer justice *according to law*, including legislation of which he may disapprove’, explains the British constitutional lawyer T.R.S. Allan, ‘he must faithfully accord every Act of Parliament its full and proper application’.¹⁶¹ This means that, to become an institutional support for the rule of law, courts must be non-partisan in the political process.

In this sense, realizing the rule of law in Brazil would imply its judges assuming a greater commitment to the application of positive laws. Since many of the country’s magistrates seem to balk at the prospect of abiding sincerely by the state law, they normally approach the application of legal rules in terms of a mere commodity, there to be manipulated. Due to such an historical absence of regard for the rule of law, certain practices of Brazilian judges have the potential to destroy even the most positive aspects of the constitutional order, particularly judicial accountability and impartiality.

One can even accept that a judge may sometimes need, for reasons of ambiguity, vagueness, inconsistency, or ‘gap’, to complement the legal order with innovative rulings, but it does not follow from this that he or she is authorized to blatantly ignore any law enacted by the elected parliament, just because he or she may not particularly

¹⁶⁰ Murray Gleeson, *The Rule of Law and the Constitution* (2000) 134.

¹⁶¹ T.R.S. Allan, ‘Legislative Supremacy and the Rule of Law’ (1985) 44 *Cambridge Law Journal* 111, 130.

appreciate its provisions. The case against this anti-legal judicial attitude has been placed in classical terms by the late U.S. constitutionalist Thomas M. Cooley:

*“The property or justice or policy of legislation, within the limits of the Constitution, is exclusively for the legislative department to determine; and the moment a court ventures to substitute its own judgement for that of the legislature, it passes beyond its legitimate authority, and enters a field where it would be impossible to set limits to its interference, except as should be prescribed in its own discretion.”*¹⁶²

f. External Control

Judges in Brazil acquired from the 1988 Constitution an impressive degree of administrative, financial, and disciplinary independence.¹⁶³ Thus the courts acquired rights to prepare their own budget, organize their secretariats, and draw up their internal regulations. Since then, they have been able to strike down any act of questionable legality enacted by the public authorities. Such independence, however, may paradoxically be seen as having not been altogether beneficial for the rule of law. A question currently being raised in the country is whether or not its judiciary has now become an entrenched ‘bureaucratic oligarchy’ devoid of any accountability.¹⁶⁴

On the other hand, there is also the present concern over signs that the government wishes to exercise an undue control over judicial decisions. For instance, the Lula da Silva administration pushed for the establishment of a body of administrative and disciplinary control over judges called the National Council of Justice (CNJ). As justification for a body such as this, the executive suggested that the courts are an ‘impenetrable black box’ that resist social change and are rife with corruption.

But if corruption justifies such an instrumentality, then the other branches of the federal state are more in need of this sort of external control than the judiciary itself. The unceasing series of corruption scandals currently affecting the Lula administration demonstrate that corruption is not a vice limited to the judiciary. The

¹⁶² Thomas M. Cooley, *Principles of Constitutional Law* (1898) 158.

¹⁶³ Braz. Const., arts. 96 & 99.

¹⁶⁴ *Supra* note 25, 85.

Government says that judges are not willing to be accountable, but the reality is that neither do the politicians.¹⁶⁵

To justify external control, the federal government complains about problems of judicial slowness and delay.¹⁶⁶ But it ignores the fact that the executive itself is partially responsible for such problems as well. No less than 70% of all cases decided by the higher courts involve cases where the executive branch (in all its federal, state, and local levels) is litigant, as either plaintiff or defendant. Indeed, a significant cause of judicial delay is the resistance by state authorities to comply with legitimate claims of honest citizens, as we have seen earlier in this chapter.

The institution of the CNJ basically means the re-establishment of an external body of control over judges that the military government had created in 1977. Some suggest that authoritarianism was only definitively 'buried' in Brazil once the National Congress abolished such control in 1987, reinstating independence to the Brazilian judiciary.¹⁶⁷ In fact, the constitutional lawmaker considered the CNJ opposed to judicial independence, and the STF agreed with the opinion on two different occasions, ruling out state laws which planned to create a similar sort of external control over state judges.

At first, the proposal to re-establish the CNJ sparked outcry from most judges and lawyers. Maurício Correa, formerly the Chief Justice of the STF, commented that the government seemed with this to 'regard the courts as mere (political) assistants to the executive'.¹⁶⁸ He commented that the Lula administration likes to make statements about the supposed supremacy of the executive over the legislative and judicial branches. Indeed, the President declared at a seminar held by the National Confederation of Industries (CNI):

¹⁶⁵ The Lula administration is currently responsible for the biggest series of corruption scandals in Brazil's history. It has directly been implicated in all sorts of felonious behaviour, including bribery, fraud, vote buying, theft of public funds, failure to report illicit campaign financing, and, last but not least, support to international terrorist groups. See Augusto Zimmermann, 'The Left-Wing Threat to Brazil's Democracy' (2006) 68 *National Observer* 48.

¹⁶⁶ Carmen Gentile, 'Brazil's Lula Ready to Take on Courts', *Washington Times*, <<http://washingtontimes.com/upi-breaking/20040203-041318-8950r.htm>> at 3 February 2004

¹⁶⁷ 'Controles Inaceitáveis', editorial, *Jornal do Brasil*, 4 February 2004, A2.

¹⁶⁸ Carlos Chagas, 'Brazil: Ex-Chief Justice Assails Lula', *Brazzil Magazine*, <<http://www.brazzil.com/content/view/1999/51/>> 1 July 2005

*“You can be certain that neither rain nor frost, nor Congress nor Judicial branch will prevent this government from making the country occupy the outstanding place it should never have ceased occupying.”*¹⁶⁹

Many lawyers agreed that the CNJ represents a contradiction to the concept of judicial independence. Those who agree with this notion include some of the most renowned lawyers in Brazil such as Ives Gandra da Silva Martins, Manoel G. Ferreira Filho, Francisco Rebouças, Alexandre de Moraes, Francisco Martins, and Cândido Rangel Dinamarco. In brief, they all argue that an outside review council violates a *cláusula pétrea* (‘stone clause’) in the 1988 Constitution, which states that no amendment to the original constitutional text can abolish the rigid separation of powers. They explain that this outside body, with powers to discipline all judges, undermines such separation of powers. Indeed, as Rosenn explains:

*“[Judicial] independence is vital to the effective functioning of the judiciary and, unfortunately, is in short supply in much of Latin America. The risk, particularly when multiplied by the disastrous consequences if... [CNJ] comes to pass, seems far too great in comparison with the modest gains likely to ensue from creation of such a council.”*¹⁷⁰

Advocates of external control argue, on the other hand, that the CNJ can actually be a valid mechanism to discipline wayward judges who otherwise would be protected by the corporatist interests of other court members. Thus, the CNJ could be, they claim, the best way to monitor judicial performance.

They also argue that judicial independence cannot serve as an excuse for irresponsibility, therefore, the CNJ could even be seen as a ‘democratic prerequisite’ in terms of insuring that a judge’s misbehaviour or omission will not longer go unpunished. One who enthusiastically supports this view,, Professor Dalmo de Abreu Dallari, maintains that the CNJ can somehow ‘transform the judiciary into a truly democratic power’.¹⁷¹

It was as a result of the constitutional amendment n.45, of 8 December 2004, that the CNJ became a reality. The council has been conceived as an external body to the court system, with full powers to oversee internal court rules and handle complaints

¹⁶⁹ ‘Lula Afronta Poderes e Diz que Só Deus Impedirá Êxito do País’, Folha de S. Paulo, 25 June 2003, A9.

¹⁷⁰ Supra note 63, 32.

¹⁷¹ Dalmo de Abreu Dallari, O Poder dos Juizes (1999) 74.

against all members or organs of the judiciary, including its auxiliary services, employees, and agencies rendering notarial and registry services. Under this amendment, Article 93, provision VIII, states that a judge can be removed, placed on paid availability, or compulsorily retired, by the decision of the majority of CNJ members. Article 103-B is quite similar to this and states that the council has the power to control the administrative and financial acts of the courts as well as 'the fulfilment of functional duties' by all members and bodies of the Judicial Power.

The CNJ comprises not just members of the judiciary but also members appointed by the Chamber of Deputies and the Federal Senate, as well as representatives of the Bar Association and the public prosecution (Ministério Público). It may assume jurisdiction over disciplinary proceedings and determine removal, leave or retirement of any judge and court employee, as well as apply other administrative sanctions against any member of the judiciary.

A crucial aspect of judicial independence in Brazil is that judges can decide cases against parliamentary statutes and presidential decrees of questionable constitutionality. In 1990, for instance, the STF overruled Provisional Measure n.190, as judges found it to be a barely modified version of another measure previously rejected by the National Congress. With the federal legislature out of session, unable to overturn this measure, the STF safeguarded the rule of law by declaring the presidential manoeuvre unconstitutional.

As judicial corruption and arbitrariness are natural obstacles to the realization of the rule of law, there is indeed a need to provide institutional checks that guarantee better accountability from the Brazilian judiciary. Since the CNJ can contribute to undue external interference on the courts, a safer mechanism to combat judicial corruption and arbitrariness would be the institution of parliamentary impeachment of any judge for misconduct. In such cases, substantial parliamentary majorities could be authorized to remove any dishonest or incompetent judge. A three-fifths majority, for instance, would better avoid the risk of political persecution, because it would then require both government and opposition to consent to impeachment. Naturally, 'a

legislative policy of initiating impeachment proceedings against activist judges as scare tactics should be considered as a factor in the evaluation'.¹⁷²

8. CONCLUSION

In Brazil, the courts acquired from the 1988 Constitution a considerable degree of autonomy on administrative, financial, and disciplinary grounds. This fact is quite unique in the context of Latin America, a region with deeply rooted problems of political (and constitutional) stability. Since then, Brazilian judges have acquired the capacity to strike down any act of questionable legality from both the legislative and the executive branches.

Ironically, however, judges in Brazil are now seen by the society as being completely devoid of any accountability. A question currently being raised is whether or not the 1988 Constitution went too far in this matter of judicial independence, as the courts have now been plagued by corruption, nepotism, inefficiency and politicisation. As a means of attenuating these problems, institutional reforms were suggested. Some of these reforms have already been implemented by Amendment n.45 of November 2004. This amendment, as noticed in this article, produced significant changes in the court system, providing, among other things, a better system of binding precedent.

Because the 1988 Constitution is recognised as being a lengthy and convoluted document, one important suggestion is that appeals to the Supreme Court be restricted to issues considered to be of high importance to the nation's political organization. Such issues are those that the 1988 Constitution explicitly considers 'fundamental' to its democratic framework, namely, a federative form of State, a direct, secret, universal and periodic vote, the separation of government powers and individual rights and guarantees. Article 60, paragraph 4, protects these as 'stone clauses',

¹⁷² Maria Dakolias and Kim Thachuk, 'Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform' (2000) 18 Wisconsin International Law 353, 404.

prohibiting any proposal of constitutional amendment that is aimed at abolishing them.

Naturally, new procedural mechanisms such as the certiorari and binding precedent could also minimise the problems of judicial delay and politicisation. Some such mechanisms have already been adopted. However, new institutional reforms and constitutional amendments alone will not solve the historical trouble with the management of the judicial crisis. Such crisis has existed for many centuries and is rooted very deeply in extra-legal patterns of socio-political behaviour. As such, they cannot be modified merely by legislation as a change in mentality is also required.