BRAZILIAN CIVIL PROCEDURE: AN OVERVIEW

José Carlos Barbosa Moreira

Professor of Law, State
University of Rio de Janeiro (UERJ)

I. INTRODUCTION

Civil Procedure in Brazil is essentially governed by the 1973 Code of Civil Procedure [hereinafter referred to as the CPC].[1] The CPC is a federal law, applicable throughout Brazil in both the federal and state courts. This is because at the time of its adoption, the Brazilian Constitution then in force provided that only the Federal Government could legislate with respect to procedural law.[2] This has been changed by the new Constitution, which went into force on October 5, 1988. Although Article 22 (I) reiterates the rule of the prior Constitution, Article 24 (XI) modifies it by granting concurrent lawmaking powers to the Federal Government, the States and the Federal District with respect to procedural matters. It must said, however, that thus far the States have been in no hurry to exercise such powers.

In addition to the CPC, a large number of laws, some predating and others postdating the CPC, govern particular proceedings for subjects closely related to civil procedure, such as legal aid,[3] regulation of the practice of law,[4] and regulation of the judiciary.[5] At the time of the adoption of the CPC, several of these laws were partially modified in order to make them consistent with the system adopted by the CPC.

II. AN OVERVIEW OF MODIFICATIONS MADE BY THE NEW CONSTITUTION

The rules of Brazilian civil procedure were modified somewhat by the Constitution of 1988. The most important changes fall into three groups: (1)

---

1 The CPC was adopted by Law No. 5.869 of Jan. 11, 1973, and as amended, went into force on Jan. 1, 1974.

2 Const. of 1967, with the redaction given to it by Amendment No. 1 of Oct. 17, 1969, art. 8 (XVII) (b).

3 Law No. 1.060 of Feb. 5, 1950.

4 Law No. 4.215 of Apr. 27, 1963 (Statute of the Brazilian Bar Association).

5 Complementary Law No. 35 of Mar. 14, 1979 (the Organic Law of the National Judiciary).

judicial structure and organization, (2) due process, and (3) creation of new procedures.

JUDICIAL STRUCTURE AND ORGANIZATION

First, the Constitution altered the structure and organization of the Judiciary. For example, it abolished the Federal Appellate Tribunal (*Tribunal Federal de Recursos*), which had been responsible for hearing substantially all appeals from decisions of federal judges of the first instance. This function is now exercised, in a decentralized form, by Regional Federal Tribunals (*Tribunais Regionais Federais*). The Constitution also created the Superior Tribunal of Justice (*Superior Tribunal de Justiça*), transferring to it some of the powers of the Supreme Federal Tribunal (*Supremo Tribunal Federal*), Brazil's highest Court, along with others that belonged to the extinct Federal Appellate Tribunal, and, to a lesser extent, the state tribunals. The Constitution also required the Federal Government (in the Federal District and the territories) and the States to create special courts for "civil cases of lesser complexity and criminal infractions of minor potential harm," along with the opportunity for appeals to be decided "by groups of judges of the first instance."[6]

EXPANSION OF DUE PROCESS

The Constitution also expressly enshrined a number of principles that prior Federal Constitutions had either omitted or protected solely for criminal procedure. The following guarantees are now constitutionally protected and therefore cannot be disregarded by procedural legislation, including civil procedure: the guarantees of "a regular judge", or a "court of law"[7], adversary proceedings and an opportunity for ample defense,[8] the inadmissability of evidence obtained by illegal means,[9] the right to a public trial[10], the obligation to give a reasoned judicial decision,[11] and due process.[12] It should be noted that none of these guarantees are absolutes, and the Constitution itself, in certain cases, reduces or restricts them.

---

[6] Const. of 1988, art. 98 (I).

[7] *Id.*, art. 5 (XXXVII and LIII).

[8] *Id.*, art. 5 (LV).

[9] *Id.*, art. 5 (LVI).

[10] *Id.*, arts. 5 (LX) and 93 (IX).

[11] *Id.*, art. 93 (IX).

[12] *Id.*, art. 5 (LIV).

CREATION OF NEW PROCEDURES

Finally, the Constitution has created new procedural concepts, such as the mandate of injunction (*mandado de injunção*),[13] habeas data,[14] and the special appeal.[15] The contours of other procedural institutions, such as the writ of security (*mandado de segurança*),[16] the popular action[17] and the direct action for the declaration of unconstitutionality,[18] were expanded. In addition, the new Constitution gave the public civil action, which is a restricted class action, constitutional status.[19]

RULES OF JUDICIAL ORGANIZATION AND INTERNAL COURT RULES

In addition to the Constitution and procedural laws, the rules of judicial organization of the Federal Government and the States, as well as the internal rules of the courts are also relevant for civil procedure. The rules of judicial organization normally regulate jurisdiction as a function of the amount in controversy and subject matter.[20] The Constitution itself authorizes tribunals to issue internal rules, "having due regard for procedural rules and guarantees of the parties" with respect to "subject matter jurisdiction and the functioning of the respective jurisdictional and administrative organs."[21] The internal rules usually contain the detailed norms governing the appellate process and causes of action within the original jurisdiction of the tribunals, matters that are otherwise treated only broadly by the procedural laws.

THE EVOLUTION OF THE EXTRAORDINARY APPEAL

Brazil basically follows the European procedural tradition. The historical roots of Brazilian civil procedure were watered in Portuguese law. Over the years, Brazilian civil procedure drew from other sources, particularly Italy, and, to a lesser extent, Germany. The draft of the present CPC was frequently inspired by

---

[13] *Id.*, art. 5 (LXXI).

[14] *Id.*, art. 5 (LXXII).

[15] *Id.*, art. 105 (III). The special appeal is actually a variation of the extraordinary appeal, whose scope was restricted.

[16] *Id.*, art. 5 (LXX), permitting the writ of security to be brought collectively.

[17] *Id.*, art. 5 (LXXIII).

[18] *Id.*, art. 103.

[19] *Id.*, art. 129 (III).

[20] CPC, art. 91.

[21] Const. of 1988, art. 96 (I) (a).

the Vatican's Code of Civil Procedure (*codice di procedura civile dello Stato della Città del Vaticano*), a little known law of high technical quality. The Portuguese Code was also an important model.

In one sector, however, the decisive influence has been North American, which can be explained by the similarity in form of government between the two countries. After proclamation of the Republic in 1889, Brazil adopted a federal structure copied from the United States. Here, as there, procedural instruments were forged for control of the interpretation and application of legal norms issued by the Federal Government, which are dealt with in both countries by state as well as federal tribunals. This is the *raison d'être* of the so-called extraordinary appeal, in which one can still see traces of the U.S. writ of error and writ of certiorari. The Constitution of 1988 subdivided the extraordinary appeal, restricting its application to constitutional questions and transferring the remainder of its former applications to the "special appeal". This innovation was designed to alleviate the overburdened Supreme Federal Tribunal. Decisions of special appeals are heard by the Superior Tribunal of Justice instead of the Supreme Federal Tribunal.[22]

One can also discern the influence of North American law, probably in combination with others, in recent Brazilian procedural creations such as small claims courts[23] and the public civil action.[24]

III. SOME FUNDAMENTAL PRINCIPLES

Systematic examination of procedural legislation reveals the influence of principles that the doctrine identifies and catalogs under traditional labels. These labels reflect the working, within the culture, of not only ideologies but also philosophical, political, economic, social and even religious orientations. In a pluralistic environment such as Brazil, the convergence of diverse tendencies generally prevents these principles from becoming absolute. As in other countries, the pressures of practical convenience and necessity, which are hard to reconcile with extreme rigor in the application of these principles, contribute to their "relativization".

Hence, only in a few aspects of Brazilian civil procedure can one point to a particular principle as predominating without dissent. What generally occurs is a combination of variable proportions. Therefore, it should not be surprising that in certain areas the legal text has been subjected to divergent interpretations, invoking opposing principles, in accordance with the personal inclinations of the interpreters. Illustrative is the initiative of the judge in the pretrial fact-finding stage, which is usually construed either in very restrictive or very broad terms, depending upon the degree to which the author adheres to "the dispositive principle" (or, rather, to one of the versions habitually attributed to it).

---

[22] *Id.*, art. 105 (III).

[23] Law No. 7.244 of Nov. 7, 1984.

[24] Law No. 7.347 of July 24, 1985. See VIII, 2, *infra*.

THE BALANCE BETWEEN THE ORAL AND WRITTEN TRADITIONS

Brazilian civil procedure is not essentially oral in the classic sense of the expression. Except for summary proceedings[25] and those in small claims courts,[26] where the defendant defends himself orally, the entire pleading phase (*fase postulatória*), in which the parties present their positions to the judge, is in writing.[27] In certain cases, the judge may enter judgment without even holding a hearing. For example, if the evidence to be produced at the hearing is unnecessary because the controversy involves only questions of law, or because the case can be resolved on the basis of evidence already contained in the record, no hearing need be held.[28] Nevertheless, the core of orality, which consists of direct contact between the judge and persons who can provide information, is preserved. As a general rule, the parties and the witnesses testify in a hearing and are questioned by the judge.[29] If necessary, experts also clarify their reports at the hearing.[30] With few exceptions, the decision must be rendered by the same judge who presided over the hearing and received the evidence offered at that time.[31]

THE DISPOSITIVE AND INQUISITORIAL PRINCIPLES

Brazilian law has no uniform position with respect to the proper balance between judicial or party control of litigation. The "dispositive principle," frequently encountered in Brazilian doctrine, is ambiguous. It is customarily used with respect to diverse problems, such as the initiation of a proceeding, the limitation of the issues to be decided, or proof of relevant facts. Generally, it denotes the predominance of party control and the corresponding inhibition of judicial activism. The "inquisitorial principle" reflects the opposite tendency. With very rare exceptions, initiation of an action is left to the parties.[32] The plaintiff alone determines the object of his complaint and indicates the facts upon which it is based. A systematic review of various CPC provisions[33] reveals that the judge is prohibited from deciding anything not requested by the parties. The judge is also prohibited from basing his decision upon any facts that were not introduced by the parties.

---

[25] CPC, art. 278.

[26] Law Nº 7.244 of Oct. 7, 1984, art. 31.

[27] The pleadings usually consist of the complaint, answer, exceptions, and counterclaims.

[28] CPC, art. 330 (I).

[29] *Id.*, art. 336 *caput*.

[30] *Id.*, art. 435.

[31] *Id.*, art. 132.

[32] CPC, art. 262.

[33] *Id.*, arts. 128, 459, 460.

Judicial initiative in fact-finding is governed by Article 130 of the CPC, which confers upon the court the power to determine *ex-officio* or at the request of a party "the evidence necessary to conduct the proceeding". Some doctrinal writers interpret this provision restrictively, arguing that the existence of specific rules authorizing official initiative in certain cases would be superfluous if Article 130 were broadly construed. At the level of purely formal logic, however, this argument may be inverted. If the specific rules exhausted the subject, then the generic language of Article 130 would be unnecessary and meaningless. In reality, textual arguments are worth very little in this area. The disagreement with respect to fundamental principles is rooted in conceptual differences that lead each doctrinal current to give greater emphasis to different points. Moreover, in practice, for a number of reasons, the majority of Brazilian judges rarely exercise their powers, whether broadly or strictly construed, by taking any fact-finding initiatives. Instead, they almost always leave proof of alleged facts exclusively to the parties.

ADVERSARIAL PROCEEDINGS (Contraditório)

A fundamental guarantee of the parties is the right to have their case determined by adversarial proceedings. One aspect of this guarantee is granting both sides an equal opportunity effectively to influence the outcome by presenting arguments refuting those of their adversaries, by participating in evidence gathering, and by reacting against judicial acts contrary to their interests. Another aspect is prohibiting the judge from taking measures without knowledge of the parties or basing his decision on facts or proof on which the parties have not had the opportunity to be heard. In prior constitutions, this principle was expressly guaranteed only for criminal proceedings; in civil proceedings, it was left to ordinary legislation. The present Constitution, however, confers this guarantee broadly "on the litigants in administrative or judicial proceedings."[34] The guarantee of an adversarial proceeding is not deemed to be infringed if a party, who is empowered to act, fails to do so. Moreover, the guarantee may be attenuated or reduced in order to preserve competing values. For example, certain measures can be ordered without prior knowledge of the parties whenever justified by urgency and the practical necessity to make sure that they are effective. Under exceptional circumstances, the judge may exclude one of the parties from fact-finding if that party's presence would undermine the usefulness of the measure.

PUBLICITY AND SECRECY

The present Constitution requires that "all judgments by the Judiciary shall be public . . .; the law may, if the public interest so requires, limit the presence in certain acts of the parties themselves and their lawyers, or only the latter."[35] Article

[34] Const., art. 5 (LV).

[35] *Id.*, art. 93 (IX).

5 (LX) generally extends the rule of publicity of procedural acts, permitting the law to restrict it only "when the defense of privacy or social interest requires." The publicity of judgments in Brazil is understood in a generally applicable sense. To the contrary of what occurs in many countries, the deliberations of collegiate tribunals are normally held in public so that the opinions of the various judges participating in the decision become known. Certain proceedings are held "in camera" in which only the parties and their lawyers may be present at the hearing, consult the record and require certificates thereof. This occurs in family law cases, involving marriage, determination of parentage, separation of spouses, divorce, support, etc., where it is deemed necessary to protect the privacy of the persons involved, and those "in which the public interest requires."[36]

THE REQUIREMENT OF A REASONED DECISION

The duty of the court to set out the basis for its decisions, which had previously been required by ordinary legislation, has now become a constitutional obligation.[37] Any judicial decision that fails to set forth its grounds is null and void.

Customarily, one distinguishes between the *total absence* of grounds for a decision and the mere *insufficiency* thereof. Even though the minimum content necessary for decision to be considered well grounded is nowhere expressly set out, the CPC, in regulating the formal structure of judgments, mandates that in his opinion "the judge shall analyze the questions of fact and of law."[38] Another provision permits interlocutory orders to be justified "in a concise manner."[39] According to the doctrine and the case law, failure to set out the basis for a judicial decision is equivalent to the court's failure to examine an essential question, something capable of decisively influencing the decision, especially when it results in prejudice to a litigant. Mere deficiencies, however, do not constitute grounds for nullity.

In practice, opinions are frequently unsatisfactory. Judges do not always do a good job in attempting to justify their weighing of the evidence. Where the precarious nature of the justification for the decision is most apparent, however, is in judicial value judgments that imply political options in the broadest sense of the expression. This can be seen when courts try to make concrete vague legal concepts, such as public interest, good morals, or little value, or when they exercise discretionary powers conferred by law. Nevertheless, it is precisely here, given the judge's breadth of choice, that the requirement that his decision be reasoned has the greatest significance as a guarantee for the parties.

[36] CPC, art. 155 & sole para.

[37] Const. of 1988, art. 93 (IX).

[38] CPC, art. 458 (II).

[39] *Id.*, art. 165 (*fine*).

FREE OR PREDETERMINED EVALUATION OF THE EVIDENCE

In Brazilian civil procedure, the courts are generally free to evaluate the evidence.[40] Serving as counterweights, as guarantees for the parties, are the obligations to set forth the grounds for judicial decisions[41], and the prohibition against taking judicial notice of facts not proven in the record, even though known in some other way by the judge, unless they are "notorious".[42] The present Constitution expressly makes illegally obtained evidence inadmissable.[43]

The text of the CPC contains traces of the old system under which the weight of the evidence was predetermined by law. For example, Article 357 provides that: "If subscribed to by the parties, a document prepared by an incompetent public official, or without observance of the legal formalities, has the same probative value as a private document." The main provision of Article 374 provides that: "A telegram, cable or other means of transmission has the same evidentiary value as a private document if the original on file at the transmitting station has been signed by the sender." Similarly, Article 401 provides that: "Exclusively oral evidence shall only be admitted in contracts whose value does not exceed 10 times the highest minimum wage in the country at the time the contract was celebrated." Provisions of this type are regrettable, for they hinder the correct determination of the truth of the facts. *De lege ferenda*, they should be eliminated.

IV. THE STRUCTURE OF PROCEDURE IN THE FIRST INSTANCE — THE COGNITIVE PROCEEDING (Processo de Conhecimento)

Brazilian law distinguishes among three types of proceedings, in accordance with the nature and purpose of the activities carried out in court. One is the cognitive proceeding, which seeks a court judgment accepting or rejecting a request that recognizes or produces a certain juridical effect for the plaintiff. Two is the executory proceeding (*processo de execução*), which seeks to execute a judgment against the defendant or any extrajudicial instrument treated as equivalent to a judgment by law. Three is the provisional proceeding (*processo cautelar*), which seeks ancillary measures designed to protect the effectiveness of the measures imposed in the other two types of proceedings.

There are various types of cognitive proceedings, and they utilize diverse procedures. The most common is the ordinary proceeding, which can be divided into two types: complete and abbreviated. Two is the summary proceeding. Three are the various types of special proceedings, some of which are regulated in the

[40] *Id.*, art. 131 (first part).

[41] *Id.*, art. 131, (second part). *Cf.*, notes 37-39 *supra*, and the text thereto.

[42] "Notorious facts" are common knowledge, facts that any persons with normal sources of information would ordinarily be expected to know (*e.g.*, the date of national holidays, the election of the President of the Republic, a widely reported train accident).

[43] Const. of 1988, art. 5 (LVI).

CPC, and some of which are regulated in separate legislation enacted prior or subsequent to the CPC. In legal terminology, the ordinary and the summary proceedings are combined under the rubric of "common procedure".[44] In reality, only the ordinary proceeding is a subsidiary source of regulation for the others.[45] Correctly viewed, summary proceedings are special proceedings applicable to amounts in controversy below a certain limit,[46] or that deal with certain matters independently of the amount in controversy.[47]

THE ORDINARY PROCEEDING

The complete version of the first instance ordinary proceeding is divided into four phases. The first, denominated the pleading stage, is totally written. The actions of the parties predominate as they explain their respective positions to the judge. The plaintiff does so in his initial complaint.[48] The defendant does so in his responsive pleading, which must be filed within 15 days.[49] This can take three forms: answer, exception, or counterclaim.[50] The difference between the answer and exception is purely formal; it survives by force of tradition and does not appear to be justified *de lege ferenda*. Allegations of judicial bias or relative incompetency (*i.e.*, curable incompetency) must be pled by exception.[51] All the other defenses, whether they go to the merits or contain only preliminary objections, must be alleged in the defendant's answer.[52] The counterclaim is readily distinguishable from the other two forms of response. The counterclaim is not properly a means of defense, but a distinct action, proposed in the same proceeding, by the defendant against the plaintiff, with a natural inversion of the reciprocal positions in all respects.

The role of the judge in this first phase is not entirely passive, for the defendant cannot be served without judicial approval of the complaint. After the complaint has been filed, the judge examines it to verify whether it satisfies the legal requirements, and he has the power to reject it in certain cases.[53] If he accepts the complaint, the judge orders service on the defendant,[54] an act normally

[44] CPC, art. 272.

[45] *Id.*, art. 273.

[46] *Id.*, art. 275 (I).

[47] *Id.*, art. 275 (II).

[48] *Id.*, art. 272.

[49] *Id.*,art. 297.

[50] *Id.*, art. 297.

[51] *Id.*, art. 304.

[52] *Id.* art. 300.

[53] *Id.*, art. 295.

[54] *Id.*, art. 285.

performed by a court official,[55] who must notify the defendant of the contents of the summons. This consists of the necessary elements to permit preparation of the defense.[56] The law permits service by mail, but only when the defendant is a merchant or industrialist domiciled in Brazil,[57] a limitation that is unnecessarily restrictive. If the defendant is unknown or unidentified, as well as in other cases expressly provided for, service may be made by publication.[58] In such cases the service is published in the official gazette and at least twice in a local newspaper, if there is one.[59]

THE CORRECTIVE PHASE

Once the pleading phase has been closed, the judge must order measures designed principally to regularize the proceedings, correcting any defects.[60] This activity culminates with the so-called "conclusive opening order (*despacho saneador*"), in which the judge decides whether to have experts, sets the date for the hearing, and determines what evidence must be produced.[61] In practice, especially when experts have been designated, the date for the hearing is set in another occasion, frequently far in the future, at least in the busy courts.

THE DISCOVERY PHASE

The discovery phase is clearly differentiated from the others whenever expert proof is required, but otherwise, its individuality is less clear. For example, in principle, documentary evidence should be produced by both parties at the pleading stage: by the plaintiff with his complaint, and by the defendant in his response.[62] In practice, however, judges tend to tolerate introduction of documentary evidence at a later phase, even when not justified by some special circumstances. As a rule, the testimony of the witnesses (and, eventually, the clarification of the expert reports) is taken at the hearing.[63] The judge has no prefixed time for his inspection of persons or things; he can do this at "any phase of the proceedings".[64] In addition to the types of evidence expressly regulated in the

---

[55] *Id.*, art. 224.

[56] *Id.*, art. 225.

[57] *Id.*, art. 222.

[58] *Id.*, art. 231.

[59] *Id.*, art. 232 (III).

[60] *Id.*, art. 323 *et seq.*

[61] *Id.*, art. 331.

[62] *Id.*, art. 396.

[63] *Id.*, art. 336, *caput.*

[64] *Id.*, art. 440.

CPC, Brazilian law permits "all legal measures, as well as those morally legitimate."[65] As has already been indicated, the Constitution makes illegally obtained evidence inadmissible.[66]

THE HEARING (Audiência)

The hearing for discovery and judgment initially includes an attempt at conciliation, so long as one is dealing with rights that can be subject to compromise.[67] If this fails, the court proceeds to hear all testimony, in the following order: clarification by the experts, testimony of the parties, and finally testimony from witnesses.[68] All questions are asked through the judge,[69] who may reject questions proposed by the lawyers for the parties. The judge can also ask his own questions to clarify the facts, but this initiative is seldom employed. Nothing resembling the cross examination of Anglo-Saxon law exists in Brazilian civil procedure. Once the fact-finding phase ends, the court permit the lawyers an opportunity for oral argument.[70] The judgment should either be rendered in the hearing itself (which happens only rarely and in very simple cases), or within a period of ten days,[71] a limit which unfortunately is not honored in a great many cases.

ABBREVIATED ORDINARY PROCEEDINGS

The "abbreviated" version of the ordinary proceeding corresponds to summary judgment in U.S. practice. The judge enters a judgment disposing of the case at the stage in the proceedings when he would normally declare the opening phase concluded and set the case for a hearing.[72] This abbreviation is done whenever it is useless or unnecessary to continue with the case. Continuation is useless when there is an unremovable obstacle to judgment on the merits, such as the presence of an incurable nullity or because the plaintiff lacks standing. Continuation is unnecessary when the record already contains all of the elements necessary for the judge to reach his decision, making the taking of additional testimony superfluous.

---

[65] *Id.*, art. 332.

[66] *See* note 9, *supra.*

[67] CPC, art. 447.

[68] *Id.*, art. 452.

[69] *Id.*, arts. 413 & 344.

[70] *Id.*, art. 454.

[71] *Id.*, art. 456.

[72] *Id.*, arts. 239 *et seq.* "A judgment according to the stage of the proceedings"

DEFAULT JUDGMENTS

A special case for dispensing with the necessity for a hearing is default. If the defendant fails to present a defense, the facts alleged by the plaintiff are, as a rule, deemed to be true.[73] This does not necessarily mean that the defaulting defendant will always lose. The complaint may still be rejected without a judgment on the merits because of some preliminary defect that the judge can take cognizance of *ex officio*. If resolution of the dispute depends upon a question of law, which the court can always decide freely, the default does not prevent the judge from deciding in favor of the defendant.

SUMMARY PROCEEDINGS

The summary proceeding is characterized, in theory, by its extreme compactness. The defendant is summoned to appear at the hearing, at which he may offer a written or oral defense.[74] After an attempt at conciliation, if appropriate, the evidence is received, followed by oral argument by the lawyers.[75] The judge is supposed to render his decision either at the hearing or within five days.[76] Especially in the busiest courts, the reality of the courtroom is quite distant from the law on the books. Article 280 of the CPC mandates that all acts, from the bringing of the action until judgment, must be realized within a maximum period of 90 days, but this time frame is almost never respected. Various factors contribute to the distortion of summary proceedings, from defects in its legal formulation — principally relating to the cases to which it applies — to the overloaded status of many of the courts. Often, one prefers to utilize an ordinary proceeding, which, strictly speaking, conflicts with the system of the CPC, but this has not been deemed grounds to nullify the proceeding.

Book Four of the CPC deals with a certain number of special proceedings. Others, as has been pointed out, are governed by separate laws — among them, some of great importance, such as expropriation,[77] the writ of security,[78] the popular action,[79] an action of support,[80] the eviction action,[81] the public civil

[73] *Id.*, art. 319.

[74] *Id.*, art. 278.

[75] *Id.*, arts. 278, § 1 & 280.

[76] *Id.*, art. 280, 2d part.

[77] Decree Law No. 3.365 of Je. 21, 1941.

[78] Law No. 1.533 of Dec. 31, 1951, as amended.

[79] Law No. 4.717 of Je. 29, 1965.

[80] Law No. 5.478 of Jy. 25, 1968.

[81] Law No. 6.649 of May 16, 1979.

action.[82] With respect to these actions, the rules of the CPC are applied in a subsidiary fashion whenever compatible with the specific legal treatment given to these actions. The special proceedings governed by the CPC are grouped in two categories: "contentious"[83] and "voluntary jurisdiction".[84] According to the predominant opinion in the doctrine, the second category encompasses cases in which there is no dispute to be resolved, but mere participation of the State, by means of the judiciary, in private juridical acts for reasons of convenience and opportunity. Careful review, however, reveals that the Code has not followed rigorously logical criteria in its division of the subject matter, allowing itself to be guided, at least in some cases, by purely practical considerations.

With the exception of peculiarities that almost always occur in the initial phase, a large part of the special proceedings of contentious jurisdiction falls within ordinary proceedings. Others differ from this scheme to a greater or lesser extent. In the area of voluntary jurisdiction, one can distinguish between a basic procedure[85] and several other proceedings, which, by their extremely variable characteristics, cannot be reduced to a common model.[86]

V. EXECUTORY PROCEEDINGS

Given the difference in purposes between executory and cognitive proceedings, it is easy to understand why the structure of the former differs considerably from that set out in the prior paragraphs. Executory proceedings are designed to carry out concrete acts to change a factual situation into what it ought to be in accordance with the terms of the judicial decision or another instrument to which the law attributes a similar effect.[87] Judgments may be executed in two instances: when there is a final judgment for purposes of *res judicata*, which means there can be no further appeal, or where the appeal taken does not have a suspensive effect. In the second case, however, execution is regarded as having a provisional effect and will be undone if the judgment is modified or vacated. The party seeking execution of the judgment must post bond guarantying that he will repair any damages caused to the other party, and he may not do anything that implies transference of property. Nor can funds judicially deposited be obtained without giving proper security.[88]

[82] Law No. 7.347 of Jy. 24, 1985.

[83] CPC, Title 1 of Book 4. Contentious proceedings are adverse in nature.

[84] CPC, Title 2 of Book 4. Voluntary jurisdiction consists of non-adversarial proceedings.

[85] Regulated in the CPC, arts. 1.104 *et seq.* and applied in the absence of specific rules. *Id.*, art. 1.103.

[86] *Id.*, chapters II to XI of Title II, Book IV.

[87] For example, a bill of exchange or promissory note. CPC, art. 585 (I).

[88] *Id.*, art. 588.

At times, a judgment does not fix an amount that must be paid nor specify the object of the judgment. In this case, to begin execution, one must seek "liquidation" of the judgment through a proceeding that varies in accordance with the characteristics of the case. In the least favorable case, one must allege and prove "new facts." In this situation, article 609 of the CPC adopts ordinary proceedings, which brings with it the inconvenient repetition of going back through the cognitive proceeding, with the regrettable delay in satisfaction of the creditor's rights. Without doubt, this is one of those "points of strangulation" in Brazilian Civil Procedure.

Execution can take the form of different kinds of performance. The debtor can be required to pay the creditor a sum of money, which is the most frequent case, or he may be required to deliver a thing, or to practice a type of act (physical or juridical) or to abstain from performing one. Obviously, the same means can not be used to obtain these varying goals; hence, there are a number of distinct forms of execution. The CPC specifically regulates "execution for delivery of a good,"[89] "the execution of obligations to do or not to do something,"[90] and "execution for a certain quantity." This latter form of execution has two forms, depending on whether the debtor is solvent[91] or insolvent.[92] The latter is a universal type of execution (in the sense that it is carried out to benefit all the creditors with executory instruments and includes all the debtor's property subject to execution), and is like bankruptcy, which in Brazilian law is reserved for commercial debtors. Under certain circumstances, namely when the performance sought has become impossible (*e.g.*, because the property has vanished), certain types of execution can be converted into execution for a certain quantity, so that damages can at least be compensated by the pecuniary equivalent of performance. Therefore, in relation to these "specific" enforcement measures, execution for a certain quantity assumes the role of "generic" execution, even though it is as specific as any other, so long as the performance required is pecuniary.

All these types of execution have a common features. No executory act may be practiced before service of process on the debtor, who is given a period of time to fulfill his obligation. Only after failure to fulfill that obligation may a creditor, under the direction of the judge, take measures designed to secure what the creditor would have obtained had the debtor voluntarily performed his obligation.

Theoretically, this is relatively easy in cases of "execution for delivery of property." One simply seeks to place at the creditor's disposal the property to which he is entitled. In most cases, this is achieved by issuing a writ of possession for real property or a writ of replevin for personal property.[93]

---

[89] Book II, title II, chapter II, art. 621 *et seq.*

[90] Book II, title II, chapter II, art. 632 *et seq.*

[91] Book II, title II, chapter IV, art. 646 *et seq.*

[92] Book II, title IV.

[93] CPC, art. 623.

Executing on obligations to perform an act is more complex. One has to distinguish between cases demanding performance of a physical act, such as completing a work of construction or rendering a service, and others where the plaintiff seeks to have the defendant execute a contract or make a promise. For this second group of cases, limited to execution based upon a judgment, the solution is ingenious and practical. If the defendant does not voluntarily comply with the decision, upon becoming final and nonappealable, the judgment itself has precisely the effects that the unexecuted contract or promise would have produced.[94] This makes any other judicial measures superfluous; hence, there is no real executory proceeding. If the contract requires registration at some public agency, the creditor can register the judgment itself, by means of a certificate taken from the record, in lieu of the contract. The cases of material acts comply with the last subdivision. When the practical result sought by the creditor can be achieved through substitution of another person for the recalcitrant debtor, it is lawful for the creditor to request that the work be performed or the service rendered by a third party at the expense of the debtor.[95] At times, however, there can be no substitute for the action of the debtor himself, namely if only he is authorized by law to perform an act, or if he was contracted to perform that act because of specialized individual qualities, such as artistic capacity, as in the case of a famous painter obliged to paint a painting. In such cases, the refusal of the debtor makes specific execution impossible, and the only solution is to convert it into a generic execution for recovery of a certain quantity of damages.[96] With respect obligations to refrain from doing something, the Code is only concerned with the case in which the creditor, if at all possible, seeks to undo something which has been performed illegally by the debtor.[97] One can easily see that this case is really one of execution of an obligation to perform.

The inability of mechanisms of execution in certain cases to furnish the creditor a useful result suggests the use of alternative techniques to the drafter of procedural legislation. These techniques are designed to compel the debtor himself to perform his obligation, threatening him with disagreeable consequences if he persists in his omission. Brazilian law contains nothing that corresponds in its breathe to the Anglo Saxon concept of *contempt of court*. The Constitution only permits, in an exceptional capacity, civil prison of the debtor for non-payment of support or for breach of trust.[98] The first exception, which is relevant for our theme is regulated in a special chapter of the Code entitled "Execution for Performance and Support."[99] Other than this, the only coercive means that can be used is a fine, improperly denominated "pecuniary penalty" in arts. 644 and 645 of the CPC,

---

[94] *Id.*, arts. 639 and 641.

[95] *Id.*, arts. 633 *et seq.*

[96] *Id.*, art. 638, sole paragraph.

[97] *Id.*, arts. 642 and 643.

[98] Constitution of 1988, art. 5 (LXVII).

[99] CPC., art. 733, §§ 1 to 3, Chapter 5 of Title 2, Book 2.

whose characteristics are similar, in a certain manner, to the *astreinte* of French law, its probable model.

Imposition of a coercive fine depends upon request of the plaintiff[100] and must appear in the judgment that ends the cognitive proceedings.[101] It is owed for each day of delay of performance of judgment, starting from the end of the period assigned to the loser to comply with his obligation.[102] Its value bears no necessary relationship to the obligation itself. Its purpose is not to compensate the creditors patrimonial loss, but to put the enough pressure on the debtor to overcome his resistance to compliance.

The efficacy of this mechanism is limited by several factors, principally the economic situation of the debtor. A threat of this type may turn out to be insufficient for a wealthy person or meaningless for a pauper. Judges should be granted greater discretion in fixing the amount. They should also be permitted to adjust it over time for changing circumstances. The fine should be applicable *ex officio*, independently of the request of the creditor. On the other hand, since it does not have the purpose of compensation, but is designed to insure the practical efficacy of the judgment it does not appear reasonable that the proceeds of the fine should be granted to the creditor but rather collected by the public treasury.

This consideration is obviously not applicable to "execution for a sum certain," which is the most frequent, if also the most complex, mode of execution. The complexity results basically from the fact that, at least in majority of the cases, the debtor does not have what the creditor seeks to have in transfer, i.e., *money*. One then has to convert into money property the debtor may own. This is normally done by selling the debtor's property to third parties.

Such conversion requires a series of measures that imposes upon executory proceedings an intricate and irregular rhythm. First of all, the debtor's goods one intends to sell must be attached. The act of sequestration is called "attachment" (*penhora*) where the debtor is solvent,[103] and "marshalling" (*arrecadação*) where the debtor is insolvent.[104] The attached assets will later be sold at public auction.[105] Since, however, there are previous indispensable formalities, notably the appraisal of the goods[106] and notice of auction through publication,[107] it is necessary for a considerable amount of time to pass before attachment and auction. In the meantime, the goods remain in judicial custody.[108] This arrangement has several

[100] *Id.*, art. 644.

[101] *Id.*, art. 645.

[102] *Id.*, art. 644.

[103] *Id.*, arts. 659 *et seq.*

[104] *Id.*, art. 751 (II).

[105] *Id.*, arts. 686 *et seq.*, 766 (IV).

[106] *Id.*, arts. 680 *et seq.*

[107] *Id.* arts. 686 and 687.

variations. One results from the possibility of the creditor receiving in payment the asset that has been sequestered instead of selling it to a third party.[109] Another variation, rare in practice, consists in granting the creditor, not title to the property, but rather the right to use it economically for the period necessary to satisfy the debt.[110] Except for these two variations, the final stage "execution for a sum certain" consists of payment of the creditor with the result of the auction.[111] If there are more than one creditor, which almost always happens in the case of the insolvent debtor and the enforcement proceeding is universal, the problem arises of how to divide the proceeds among them. This is a probable source of disputes that contribute to further delaying the proceeding.

The debtor, when served with a writ of execution, may conceivably have a legitimate reason for challenging it. The proper way for him to proceed is by raising objections (*embargos*), which the procedural system of the CPC treats as a cause of action.[112] When execution is based upon a extrajudicial instrument, the debtor may base the *embargos* on any matter that he could allege in a defense in cognitive proceedings.[113] Since there has already been a judicial determination in a case where one is seeking execution of a judicial judgment, it would not be reasonable to afford an opportunity for a new broad discussion of the merits. Thus, as a rule, the debtor only alleges intervening facts in his *embargos*. The sole exception, provided for in CPC, art. 741 (I), is the case where he has not been legally served or not served at all in the cognitive proceedings which then went on in his default. In this case, in the eyes of the law, the defect is so serious that it may be raised even after the judgment has become final, that is definitive for the purposes of execution. Then, if the *embargos* are accepted, not only the execution, but also the cognitive proceedings will be deemed void *ab inito*.

VI. PROVISIONAL PROCEEDINGS

The Code dedicates Book III to the regulation of provisional proceedings, which it deems ancillary to the other proceedings, cognitive proceedings and executory proceedings, whether realized before or during the respective course of these proceedings.[114] According to the widely prevailing viewpoint, provisional measures are temporary in character, designed to assure the practical efficacy of other judicial measures, and are justifiable when there is a showing of the probable

[108] *Id.*, art. 666.

[109] This process of adjudication or award is permitted by article 714 of the CPC only in the case of real property where no bidder appears at the public auction.

[110] This is called the usufruct of the real property or the firm, provided for in CPC, arts. 716 *et seq.*

[111] *Id.*, art. 709.

[112] *Id.*, Book II, Title III.

[113] *Id.*, art. 745.

[114] *Id.*, art. 796.

existence of a prima facie case (*fumus boni juris*) and grounds to fear that delay in the principal case will cause grave harm or make compensation difficult or even impossible (*periculum in mora*).

VII. APPELLATE PROCEDURES

1 — In Brazilian civil procedure, the general rule is to permit the review of judicial decisions, normally by a higher level court. There are even instances — such as a decision annulling a marriage (Art. 475-I) — in which such review is mandatory, so that the judge must remit the record to the higher court, even if no appeal is filed. In most cases, however, the review is instigated by the lodging of an appeal, an opportunity granted not only to the parties but also to third parties potentially damaged by the decision, and to the Public Ministry, in cases where it acts as a guardian to ensure the application of the law (Art. 499 § 2) *e.g.* in cases involving the interests of incompetents (Art. 82 - I).

The number of appeals is great. Decisions of lower courts are, with very few exceptions, appealable; through an appeal (*apelação*) from a judgment, that is a decision which ends a first instance proceeding, whether or not the merits are judged (Art. 513 and 162 § 2); or through a writ of error (*agravo de instrumento*) from an interlocutory order, that is one by which the judge resolves an ancillary question during the course of the proceeding (Arts. 522 and 162 § 2). But decisions rendered by appellate courts, on appeals or writs of error, can in turn be appealed, although naturally on fewer grounds. It is not uncommon for a question decided by a lower court judge in some proceeding to pass through two, three or even more reviews.

2 — *Appeal.* As stated previously, appeal is the recourse which generally lies against a decision, whether the judge hasdecided the merits of the case or whether the decisions limits itself to disposing of the case for some other reason (*e.g.* incurable voidness, lack of one or more parties in interest). The difference lies in that, in the second group of cases, if the decision is reversed, the record must be remanded to the lower court, so that it may proceed to a judgement on the merits. This is because, on appeal, the court may only decide "controverted matters" (Art. 515) and there could obviously be no controversy over merits which have not yet been judged. On the other hand, while hearing an appeal, the court always has the power to decide any issues raised and debated at the first instance, including those which the lower judge may not have decided (Art. 515 § 1), so that it can happen that the appeal may be granted or denied on different grounds from those relied upon below (Art. 515 § 2), and a judgment on appeal can concur only in the result reached there.

These are characteristics of the so-called "remand effect" of an appeal. It also normally has an "abeyance effect" (Art. 520) in relation to the enforceability of the decision appealed from. For example, in cases where relief is ordered, enforcement measure cannot be taken until the appeal has been decided. There are only a few exceptional cases (Art 520) where the appeal does not hold enforcement in abeyance, *e.g.* when the decision order the defendant to pay support (Art 520 - II).

An appeal is filed by a petition submitted to the court rendering the decision (Art 514), which may deny it, if in its opinion one of the prerequisites for granting it is absent (for example, if it was untimely filed); however, the judge may not deny an appeal simply because he feels the appellant has no case. The opposing party (appellee) has an opportunity to present an answer (Art. 518). The record on appeal is sent to the appellate court, where it is studied by a reporting judge (*"relator"*) and — except in summary proceedings — by a revising judge (*"revisor"*) (Arts. 549 and 551), and then decided by a three-judge panel — the first two and a third, who is called a voting judge (*vogal*). The attorneys for the parties have the right to oral argument of their briefs (Art. 554). When the court's decision is split rather than unanimous, yet another review, by a panel with a greater number of judges, can be sought by the losing party with a view to vindicating the position of the dissenting judge (motion for rehearing en banc — *embargos infringentes* — Arts. 530 *et seq.*)

BILL OF ERROR (Agravo de Instrumento)

Interlocutory orders are reviewable through the filing of a writ of error within 5 days (Art. 523). The writ only permits review of the specific issue involved in the order; and even this is only possible after the lower court judge has reconsidered his decision, which he may alter (Art. 527). The filing of the writ, although it in fact adversely affects the proceeding, does not, according to the law, suspend the running thereof, (Art. 497), nor prevent the order from being immediately complied with, in the absence of a contrary order by the judge upon motion by the party filing the writ, which is provided for in certain limited cases (Art. 558).

In most cases, the writ goes to the higher court in the form of a separate record, with copies of the decision appealed from the other relevant matters (Arts. 523 III, 524 and 527 § 3). The hearing and decision of the writ follow rules resembling those for an appeal, with two exceptions: there is no revising judge, nor are the parties' attorneys granted oral argument at the hearing (Art. 554). Notwithstanding, if the appellant prefers, the writ of error, rather than being immediately heard by the higher court, may remain "held in the record" for judgment before any eventual appeal against the decision is heard (Art. 522 § 1). This special procedure has the advantage of avoiding formalities and expenses; on the other hand, if the court finds in the appellant's favor, the granting of the writ can frequently mean that all activity after the order has been wasted.

THE SPECIAL APPEAL AND THE EXTRAORDINARY APPEAL

The Federal Constitution and federal laws can be applied by both federal and state courts. The objective of creating a method of overseeing this application, capable of avoiding no only incorrect decisions but also the prevalence of inconsistent interpretations — which would in practice fracture the unity of federal law — led various republican Constitutions to confer upon the Supreme Court the authority to review the decisions of other courts, when challenged on the above grounds. The proper way to solicit such review was the extraordinary appeal.

So as to diminish the workload of the Supreme Court, the 1988 Constitution subdivided this legal figure, preserving the former name for reviews in which *constitutional* matters are alleged (Art. 102 III) and ascribing to the special appeal — to be heard by the Superior Court of Justice (Art. 105 - III) — the functions of upholding the validity and uniform interpretation of federal *laws* (and treaties). This solution has both advantages and inconveniences; of the latter, perhaps the most serious is the greater complexity of the proceeding and the consequent delay in arriving at final judgment, when the interested party wishes to raise simultaneous constitutional issues and issues of federal law not of a constitutional level. He must then file both appeals, one of which must naturally be held in abeyance until the other is decided, thus making two successive stages necessary, where formerly there was only one.

The special appeal and the extraordinary appeal have the common characteristic of only involving questions of (federal) *law*. Neither grants the court the possibility of reviewing the evidence, or of construing the facts differently from the lower court's decision. Neither has any abeyance effect; and the decision, in both cases, is not limited to the reversal and remand of the lower decision when reversible error in a question of law is found: the Court re-judges the matter, as it deems correct, and its decision *replaces* that of the lower court. In this fashion, the role of the Federal Supreme Court or Superior Court of Justice is closer to that of the U.S. Supreme Court than to that traditionally played, under the (nowadays somewhat modified) classical system by the French *Cour de Cassation* and others which used it as a model.

OTHER MEANS OF CHALLENGING JUDICIAL DECISIONS

Even though they are abundant, appeals are not, in Brazil, the only means capable of challenging judicial decisions. In this context, brief reference must be made to the action to reopen a judgment-rescissory action (*ação rescisória*) and the writ of security (*mandado de segurança*).

The action to reopen a judgment — in practice, quite difficult to win — may be used to invalidate final judgments on the merits (CPC Art. 485) by alleging the existence of one of the serious defects which are specifically listed in the law, for example: absolute lack of jurisdiction of the court (Art. 485 - II);violation of *res judicata* (Art.485 - IV); violation of the literal language of a law (Art. 485 - V); false evidence (Art. 485 - VI). Such a possibility, however, is limited in time: the law requires the action to be brought within two years after the decision became final (Art. 495). Thereafter, even a totally defective judgment cannot be set aside.

The writ of security is a remedy provided in the Constitution (Art. 5 - LXIX) to protect a "sure and certain rigth": (that is, one arising from a fact capable of immediate documentary proof) harmed or threatened with harm by an illegal act, or a misuse of power by a government official or by a legal entity attributed with governmental powers. It was primarily created to oversee the legality of acts emanating from the Administration, but practical necessities have extended its use to cases in which the illegality or abuse of power arise in the judicial branch. Law No. 1.533 of 1951, Art. 5-II precludes, in terms, the granting of a writ of security against any judicial measure which can be appealed under procedural laws; case

law, however, has tempered the rule, and has permitted the filing for a writ whenever, because it does not have any suspensive effect, the appropriate appeal does not have the virtue of preventing enforcement of the decision from causing serious damage which would be impossible or difficult to repair. In practice, there is a certain tendency towards overuse; but the large number of writs of security against judicial acts is also due, at least in part, to the lack of capability of the system of appeals—notwithstanding the abundance thereof — to provide litigants with adequate protection under the normal means of opposition.

VIII. SOME RECENT INNOVATIONS

1 — The Brazilian legislator has not been remiss in efforts to improve the workings of civil procedure, sanctioning innovations tending to correct or mitigate defects such as the excessive slowness and complexity of lawsuits, as well as creating new instruments designed to ensure greater effectiveness to judicial services, especially in areas where failures have been most egregious. The desire to simplify inspired, for example, the creation of a special procedure to be followed in "small claims courts"; these are, with few exception, those actions based upon material amounts in question of less value than that of twenty minimum salaries upon the date of filing, where the claim seeks a payment in money, the delivery of certain personal property or the fulfillment of an obligation to perform by a manufacturer or supplier of consumer goods or services, or yet again the rescission or declaration of nullity of a contract covering chattels or livestock (Law 7244 of 1984, art. 3). The procedure is simple and is by choice directed towards the obtaining of an amicable solution. The complaint can be made orally, in which case it will be reduced to writing by the court clerk (Art. 15 § 1). Except upon appeal, the parties can appear personally, without attorneys (Arts. 9 and 41 § 2). Access to small claims court does not depend, in first instance, upon the payment of costs, fees or any expenses.

The legislative sanctioning of this procedure was preceded by more or less formal test procedures, with good results in several States. At the time of Law No. 7244, there was no way to compel the states to create small claims courts, so that the federal law- giver limited itself to fixing the procedure which should be followed if it were created. The 1988 Constitution made the creation of such courts obligatory upon both the Union (in the Federal District and Territories) and the States (Art. 98 - I). So far, however, very few concrete steps towards compliance with the norm have been initiated, and the norm itself has no date by which it must be implemented. This experiment deserves attention and support, although it should not be expected to produce prodigious results; it must be borne in mind, *inter alia*, that Law No. 7.244 only authorizes special proceedings for the ordinary action, and provides that enforcement of the judgment therein "shall be carried out in the appropriate ordinary court" (Art. 40) using one of the above described means (*supra*, part X) with all the difficulties inherent, for example, in the enforcement "of a sum certain".

2 — One of the areas which has felt most intensely the concern with greater efficacy for judicial safeguards is that of so-called "diffuse" and "collective" interests, which are characterized, on the one hand, by the great number (albeit

indeterminable or indeterminate) of parties in interest, and on the other hand, by the indivisibility of the object (*e.g.* preservation of ecological balance, protection of the landscape, the environment, historical and artistic landmarks). Brazilian legislation has for some time provided for a citizen's suit (*ação popular*), called for in prior Constitutions and regulated by Law No. 4717 of 1965, which could be brought by "any citizen" seeking to invalidate an action causing damage to the public patrimony, such being understood as the totality of "interests and rights with economic, artistic, aesthetic, historic or touristic value" (Law No. 4717). A need was felt, however, for an instrument which could be wielded by legal entities and not only by individuals (who re frequently at a significant disadvantage before powerful political and economic foes) and one which permitted the decision to order the violator of rigths to perform an act or abstain therefrom.

Partly with the objective of filling in these gaps, Law No. 7347 of 1985 created the public interest suit, designed t=for the combatting and prevention of damage to the environment, to consumers, to rights and interests of artistic, aesthetic, historic, touristic and scenic value, and to any other diffuse or collective interest (Art. 1, I to IV). The action may be filed by the Public Ministry offices (acting *parens patriae*) of the federal, state and municipal governments, by agencies, authorities, government-owned companies, foundations, quasi-governmental companies, and by private associations which have been in existence for more than one year and which include the protection of such interests among their institutional objectives (Art. 5). The law permits the granting of a preliminary order, to restrain or cause to cease, immediately, any damage which threatens to be irreparable (Art. 12). When the defendant is sentenced to pay a sum of money, the amount received reverts to the benefit of a fund whose resources are to be used for restoration of the damaged property (Art. 13).

The public interest suit has now been given Constitutional authority. The 1988 Constitution refers to it when listing the institutional attributes of the Public Ministry, as follows: "to conduct civil inquests and public interest suits, for protection of public and societal interest, the environment and other diffuse and collective interests" (Art. 129, III). It is expressly provided that the power of the public Ministry to act *parens patriae* does not exclude third parties from so acting, under legal and Constitutional provisions (Art. 129, 1).

3 — As has already been mentioned (Part I - 2 (c) *supra*), included in the new procedural concepts created by the Constitution now in force, are the mandate of injunction, the writ of *habeas data*, and the class action form of the writ of security.

The first is provided for in Art. 5 - LXXI, "whenever the lack of regulatory rules makes unfeasible the exercise of constitutional rights and liberties and of the privileges inherent to nationality, sovereignty and citizenship". The imprecise wording of this text, which has given rise to debates and controversies, is in large part responsible for the timid and clumsy way in which this instrument has so far been used by the judiciary. The constitutional provision should be construed as empowering the judge to formulate a mandate containing those "regulatory rules" which are lacking, and to apply them to the concrete facts before him; the rules must be applicable only to the specific cause, and cease to be in effect when the appropriate government body issues rules for general application. Thus understood,

the new remedy can be considerably useful in preventing the continuation of a state whereby through the inaction of a governmental entity, rules granting rights and privileges in general, remain "frozen" for want of indispensable regulations: e.g. those required under Art. 10 of the Federal Constitution, which "ensures employers and employees the right to participate in the formation of official groups in governmental entities where their professional or social security rights are to be discussed and determined."

Habeas data, under Art. 5 - LXXII, serves to ensure access to information concerning the person of the petitioner, which is on file at data banks or registries of governmental or public nature and for "the correction of data, whenever this is preferable to a judicial or administrative proceeding *in camera*." The creation of this remedy was obviously inspired by the desire to avoid the continuation of practices common under the authoritarian regime from 1964 to 1984, when information gathered and stored in secret by governmental bodies was frequently used against citizens, without any possibility of the person directly interested having access to the means to combat the information.

The creation of the class-action form for the writ of security has had a greater practical effect than the other two measures. The writ, already described *supra* (part IV) is a procedural remedy long incorporated into the pharmacopeia of Brazilian law, and has a long and brilliant record of service. Until 1988, however, it was available for the protection of *individual* rights, harmed or threatened with harm by an illegal or abusive action of the authorities. It happened not infrequently that, because the basic legal situation was common ground for an entire class of interested parties (taxpayers, civil servants, businessmen) the filing of writs by several (perhaps numerous) members thereof, either singly or in groups, gave way to a multiplicity of suits, with the risk of overburdening the judicial branch and having contradictory decisions on the same legal question. Now, the matter can be submitted *en bloc* to the judiciary and be resolved in one decision, applicable to all the members of the class. The following are authorized to bring a class-action writ of security: any political party represented in the Federal Congress; labor unions, employers' syndicates; or any other association legally in existence and functioning for one year, in the defense of the interests of its members or associates.