AN OVERVIEW OF BRAZILIAN CRIMINAL PROCEDURE

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I. INTRODUCTION

Brazilian criminal procedure is governed by the Code of Criminal Procedure (*Código de Processo Penal*) (hereafter the CPP),[1] by the Law of Penal Enforcement (*Lei de Execução Penal*) (hereafter the LEP),[2] by uncodified laws and by the laws of Judicial Organization. The CPP is a federal law applicable throughout the country. It was drafted under the influence of the dictatorial political thinking existing at that time by a commission composed of criminalists (the same Commission that drafted the Penal Code of 1940) rather than by proceduralists. As one might expect, the CPP not only contains archaic concepts, such as written rather than oral proceedings, but also treats defendants excessively harshly. In certain cases, defendants are assured an ample accusation rather than an ample defense.[3] In many situations, defendants are subjected to mandatory preventive detention, based solely upon the gravity of the offense, with the dangerousness of the accused being presumed *iuris et de jure*. The preventive detention provisions were modified by subsequent laws, particularly by Law No. 6.416 of 1977, which made preventive detention depend, in all cases, upon proof of its necessity. The archaic and dilatory written procedure, however, continues to hinder criminal courts throughout Brazil.

Certain laws have great importance to criminal procedure, such as the Electoral Code,[4] the code of Military Criminal Procedure,[5] the Narcotics Law,[6] the Press Law[7] and the law dealing with abuse of authority.[8] The procedure for

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1 Decree-Law No. 3.689 of Oct. 3, 1941.

2 The Law of Penal Enforcement is dealt with in Section VI, Enforcement, *infra*.

3 *See* CPP, art. 501.

4 Law 4.737 of Jy. 15, 1965.

5 Decree-Law No. 1.002 of Oct. 21, 1969.

6 Law No. 6.368 of Oct. 21, 1976.

7 Law No. 5.250 of Feb. 9, 1967.

impeachment of the President of the Republic and other high-level officials is provided for in Law No. 1.079 of April 14, 1950; impeachment of mayors and aldermen is set out in Decree-Law No. 201 of February 27, 1967. In addition, there are organic procedural sources, which include the Internal Rules of the higher tribunals, as well as those of the Federal Senate, the Chamber of Deputies and the State Legislative Assemblies, all of which contain subsidiary rules of criminal procedure.[9] Additional rules relevant to criminal procedure are contained in the law regulating the practice of law[10] and the law governing legal aid to the needy.[11]

The new Constitution now grants to the States the power to legislate concurrently with the Federal Government on procedural matters.[12] Even prior to the entry into force of the new Constitution, each State had the power to organize its own judicial system and to allocate jurisdiction among its organs, within the limits established by the Constitution. Thus, besides the above-mentioned federal laws and the law of organization of the federal court system, each State has its own law of organization of judicial organization. Superior to all of these is the Organizational Law of the National Judiciary, which sets up nation-wide rules for the entire judiciary.[13]

Because of its federal structure, Brazil has both state and federal court systems. The federal judicial system is composed of both special and ordinary courts. The special federal courts include the Military Courts[14] and the Electoral Courts,[15] which have jurisdiction to adjudicate military and electoral crimes, respectively. The ordinary federal judges and appellate courts have jurisdiction to adjudicate crimes of particular interest to the Federal Government.[16]

The state court system is composed of a Supreme Court, called the Tribunal of Justice, and judges of the courts of first instance. Some states also have one or more intermediate appellate courts, called the *Tribunal de Alçada,* which divides jurisdiction with the Tribunal of Justice in accordance with subject matter. At the level of the first instance, multi-judge tribunals are unusual; single-judge courts of the first instance are preferred. The collegiate courts of the first instance are the Tribunal of the Jury, which has jurisdiction over wilful crimes against human life, and the military Councils of Justice.

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[8] Law No. 4.898 of Dec. 9, 1965.

[9] *See* the references made by CPP, arts. 560, 618, 638, 666 and 667, as well as arts. 38, 73 and 79 of Law No. 1.079 of 1950.

[10] Law No. 4.215 of Apr. 27, 1963.

[11] Law No. 1.060 of Feb. 5, 1950.

[12] Const. of 1988, art. 24 (XI).

[13] Complementary Law No. 35 of Mar. 14, 1979.

[14] Const. of 1988, arts. 122-124.

[15] *Id.*, arts. 118-121.

[16] *Id.*, arts. 106-110.

Adoption of the accusatory system leaves the legislature with two options: either to give the victim or to some other person the right to bring a criminal action (which history has shown is not an ideal solution) or to create a governmental organ, necessarily separate and independent from the judge, to perform this function. Adoption of the second option explains the existence of the Public Ministry, a permanent institution, enjoying the same guarantees as the judiciary,[17] that is generally entrusted with "defending the juridical order, the democratic regime and indispensable social and individual interests."[18] With respect to criminal procedure, the Public Ministry has the right to prosecute public criminal actions (*ação penal pública*), and it functions as *custos legis* in private criminal actions (*ação penal privada*). In either case, its duty is to see that the law is observed. The Public Ministry is divided into federal and state entities, with the former working with the federal courts and the latter working with the state courts.

In addition to the Public Ministry, the new Constitution lists the Public Defender's Office as a "position essential to justice."[19] The Public Defender is responsible for "rendering legal advice to the needy and defending them at all instances... ."[20] In criminal proceedings, the defense of poor defendants, which is guaranteed at both the first and second instances, is carried out by Public Defenders.

II. FUNDAMENTAL PRINCIPLES

PRINCIPLE OF ACTUAL TRUTH

Brazilian criminal procedure, like civil procedure, is subject to certain fundamental principles, such as the initiative of the judge in the production of evidence.[21] Unlike civil suits, where in most cases the judge depends on the initiative of the parties, in criminal cases, by virtue of the principle of the "actual truth" (*verdade real*), judicial initiative is unrestricted. Judges may order production of all evidence capable of leading to the discovery of the actual truth.

PRINCIPLE OF LEGALITY

On the other hand, the interest of the government in the investigation of illegal acts and the punishment of those who commit them has led to the adoption of the *principle of legality*, which as a rule makes prosecution mandatory. The

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

[18] *Id.*, art. 127.

[19] *Id.*, title to Chapter IV.

[20] *Id.*, art. 134.

[21] These principles have already been examined by Professor José Carlos Barbosa Moreira in his article on civil procedure in this volume.

principle of legality imposes a duty on judges and courts to communicate to the appropriate authorities the existence of publicly prosecutable crimes.[22] The police authorities have the duty to begin an investigation to determine the facts.[23] The Public Ministry has the duty to prosecute the penal action, so long as there is reasonable evidence of commission of the crime and the identity of the perpetrator.[24] Only in the exceptional cases of conditional public prosecutions and private criminal actions may the victim prosecute a criminal action.

DUE PROCESS OF LAW

The Constitution enshrines certain principles that are of special importance for criminal procedure. One is *due process of law*, according to which "no one may be deprived of liberty or property without due process of law."[25] Taking into account the explicit and implicit guarantees of the Constitution, one can conclude that due process of law means, *inter alia*, the adoption of the adversary system, equality between the prosecution and the defense, and prior control over any punitive measures.

The State may carry out a preliminary fact finding investigation in preparation for the proceeding, and may even do so in secret. What it cannot do in this investigation is to restrict, to limit or in any to affect adversely the freedom of the target of the investigation. The Constitution contains specific provisions providing that no one may be arrested except *in flagrante delicto*, or by a written and justified arrest warrant issued by a competent judicial authority, except in the cases of military offenses of strictly military crimes as defined by law;[26] that prisoners are guaranteed the right to know the identity of those responsible for their imprisonment;[27] and that prisoners have the right to the assistance of a family member and an attorney.[28] In order to have direct control over the legality of the act, the Constitution also requires immediate communication to the appropriate judge of the imprisonment of any person and the place where he is located.[29] The judge shall immediately release the prisoner if the detention is illegal,[30] or grant

[22] CPP, art. 40.

[23] *Id.*, art. 5 (I).

[24] *Id.*, art. 24.

[25] Const. of 1988, art. 5 (LIV).

[26] *Id.*, art. 5 (LXI).

[27] *Id.*, art. 5 (LXIV).

[28] *Id.*, art. 5 (LXIII).

[29] *Id.*, art. 5 (LXII).

[30] *Id.*, art. 5 (LXV).

provisional release to the prisoner when appropriate.[31] In addition, the Constitution grants *habeas corpus* as a specific remedy for violation of these rights.[32]

The Constitution provides that no one shall be tried or sentenced except by a competent authority.[33] This is the right to a "regular judge" (*juiz natural*),[34] guaranteed to the defendants by a Constitutional provision that states which are the ordinary and special judicial courts, and how generic jurisdiction to judge types of crimes is allocated among them. The federal and state legislatures have the power, within these generic limits on jurisdiction, to establish the specific jurisdiction of judicial bodies through the laws of judicial organization, but they may not — and here is the important part — create *ad hoc* bodies or designate *ad hoc* judges to try specific concrete cases.

THE RIGHTS TO REPLY AND TO A FULL DEFENSE

Article 5 (LV) of the Constitution guarantees to "those accused in general" the *right of reply* and the *right to a full defense*. In Brazilian criminal procedure, unlike many countries, the pre-trial investigation phase of a crime, including the preliminary taking of evidence, is fully adversary. Only the police investigation, which serves as the basis for the criminal proceeding but is separate therefrom, need not comply with the right of reply, since the actions carried out in this phase are not deemed part of the official phase of the judicial pre-trial investigation (*instrução criminal*). Since the prosecution is carried out by a technical body, the right of reply demands that the defendant be assisted by a defender with similar technical training. The assistance of counsel to the defendant, which in civil proceedings is a mere presupposition of the procedure, is a true precondition for a criminal proceeding, and any criminal proceeding where the defendant is not represented by a lawyer is invalid.

Full defense implies a greater guarantee than the right of reply. The State is only interested in convicting the guilty, not the innocent, and only in convicting them to the extent of their guilt. Thus it must make available to all the means and resources necessary for the full exercise of this right of self defense. Based upon this idea, the Code adopts certain institutions, such as the criminal revision (*revisão criminal*)[35] and request for a rehearing *en banc*,[36] which only a defendant may file. It is also because of this principle that the courts have deemed certain provisions of

[31] *Id.*, art. 5 (LXVI).

[32] *Id.*, art. 5 (LXVIII).

[33] *Id.*, art. 5 (LIII).

[34] In Brazilian law, the guarantee of a "natural judge" has two components. First, one is guaranteed a trial and protected from conviction by a bill of attainder. Second, one is protected against being tried by an *ad hoc* tribunal or judge.

[35] Code of Criminal Procedure, art. 621 et seq. A criminal revision can be brought at any time to correct or set aside a criminal conviction that is unappealable.

[36] *Id.*, art. 609.

the CPP that run contrary to the full defense of the accused, such as Articles 501 and 601, to have been revoked.

THE PRINCIPLE OF PRESUMPTION OF INNOCENCE

In accordance with Article 5(LVII) of the Constitution, "no one shall be considered guilty until his criminal conviction has become final and unappealable." This principle does not prohibit an accused or a defendant from being detained preventively, since the criterion for detention is *dangerousness*, not *guilt*; however, it does prevent an accused or suspect from being considered or *treated* as guilty before conviction. Thus, a judge may not, for example, increase a prison sentence based upon a criminal record of charges filed in other cases, but not yet tried; if he did so, he would be deeming the defendant guilty before conviction, an obvious violation of this constitutional principle.

III. THE GUILT DETERMINING PROCESS

PREPARATORY PROCEEDINGS

Cognitive proceedings[37] under the CPP can be reduced almost entirely to the guilt determining process (*processo de condenação*). Nevertheless, they also contain forms of declaratory actions and constitutive actions, which we shall examine when treating *habeas corpus* and the criminal revision, as well as provisional remedies, which will be treated later in a separate section.

A criminal prosecution cannot be started without some evidence of the commission of a crime and who committed it. The proceeding exists as a guarantee to the defendant but still imposes heavy burdens upon him. For this very reason, initiation of a prosecution requires a special condition,[38] arising out of the constitutional principles of presumption of innocence and liberty. This proof may consist of any evidence, gathered separately or from another proceeding, but it is normally furnished by the police investigation, which is an inquisitorial administrative proceeding.[39]

The principle of legality obliges the authority to conduct an investigation, *ex officio*, in public action crimes, but subordinates this proceeding to the decision of the complainant in private action crimes and conditional public crimes. The police, vested with investigative and coercive powers, not only collect evidence of the crime and of its perpetrator, which are indispensable for the filing of charges, but

[37] A cognitive proceeding is designed to produce a determination of which party should prevail on the merits. In Brazilian procedure, it is subdivided into three types of actions: declaratory (where only a declaration of rights is sought), condemnatory (where specific relief, such as damages, is sought), and constitutive (where creation, modification or extinction of a legal relationship is sought; i.e., a suit for divorce).

[38] *Id.*, art. 39 § 5.

[39] *Id.*, arts. 4 and 23.

also conduct (or at least should conduct) a complete investigation into the life of persons charged.[40] During the police investigation, there is no accused, but only a suspect, who is merely the subject of preliminary investigation. This is why the proceeding is inquisitorial and may be carried out in secrecy. These rules have not been modified by the new Federal Constitution, which grants the rights of adversary proceedings and full defense to *those accused*, during the *proceedings*[41] and *assures* the assistance of counsel to a *prisoner*.[42] The Constitution does not make the preliminary proceeding adversary. Since there is no formal *accusation* at this stage, there is no question of any right to a full defense.

CRIMINAL ACTION

The CPP provides for two types of penal actions, the public and the private. The public criminal action, begun by the filing of an accusation by the Public Ministry, is usually mandatory, but in some cases is conditioned upon the filing of charges by a victim or upon a request by the Ministry of Justice. The accusation must contain a description of the facts, with all their circumstances; a description of the accused; a characterization of the crime; and if necessary, a list of witnesses.[43] The description of the criminal act and its attribution to the person charged is the heart of the accusation, for the judge may not convict a defendant for acts for which he was not charged.

The time in which to file the accusation is five days if the suspect is imprisoned, and fifteen if he is at liberty. After these periods have elapsed, the victim or his representative may file a subsidiary criminal charge within six months. The Public Ministry must either accept or reject this charge; in the latter case, the Ministry must present a substitute accusation and resume command of the case.[44]

A criminal conviction is also a civil judgment against the defendant. The victim, his legal representative or his heirs may seek civil execution of the judgment for redress of damages.[45] Because of this effect, once the charges have been filed by the Public Ministry in public action crimes, the victim may assist the prosecution.[46] In such case, the victim has the same rights guaranteed to any civil litigant. He may propose means of proof, participate in the collection of evidence, add charges to the accusation, support the Public Ministry's findings of fact and

[40] *Id.*, art. 6.

[41] Const. of 1988, art. 5 (LV).

[42] *Id.*, art. 5 (LXIII).

[43] CPP, arts. 41 & 44.

[44] *Id.*, arts. 29 and 38.

[45] *Id.*, art. 63.

[46] *Id.*, arts. 268-273.

arguments, and in some cases even appeal by himself from the decision of the first instance.[47]

The private criminal action is optional; therefore, the victim may tacitly or expressly waive it, may forgive the defendant, or, after the suit has been filed, permit it to be dismissed.[48] The victim, however, may not proceed with the action only in part, or divide it, or bring it against only one or some of those accused.[49] If this happens, a waiver against one is deemed a waiver as to all the others.[50] The private action must be filed within six months of learning the identity of the perpetrator[51] through a criminal complaint (*queixa crime*).[52] This complaint is similar to an accusation except that it is brought by the victim or a close relation instead of the Public Ministry.

ORDINARY PROCEEDINGS

The CPP has two forms of proceedings used for a large number of criminal offenses. One is the *ordinary proceeding*, which is used for crimes punishable by reclusion, and two is the *summary proceeding*, incorrectly listed among the special proceedings. This is the form commonly adopted for all crimes punishable by detention, as well as for penal infractions. Archaic, dilatory, and written writing, the *ordinary proceeding* is the basic form of proceeding under the CPP. It begins with the filing of an accusation or complaint (which the judge will only receive if the procedural prerequisites and preconditions for the action are present) and the service of process upon the defendant.

The defendant has the right to be personally served. If he resides in the territory over which the court has jurisdiction, he will be personally served with a court order.[53] If he is in the military or in prison, the accused will be served through a request to his commanding officer or the prison warden.[54] If he is known to be in a place outside the jurisdiction of the court, he will be served through a domestic letter rogatory (*precatório*), which is sent to a court in another state,[55] or by letter rogatory if abroad and charged with a crime punishable by reclusion.[56] If

[47] *Id.*, art. 271.

[48] *Id.*, art. 44 *et seq.*

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

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

[51] *Id.*, art. 38.

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

[53] *Id.*, art. 351.

[54] *Id.*, arts. 358 and 360.

[55] *Id.*, art. 353.

[56] *Id.*, art. 367.

he is in an unknown or inaccessible place, or if his identity is unknown, if he is in hiding, or if he is abroad and is charged with an offense not punishable by reclusion, he may be served by public notice.[57]

This fictitious form of service almost never comes to the attention of the person being served, since it is satisfied by affixing the notice to the courthouse door, which is not a place usually frequented by such persons. Only in state capitals, where there is an official government publication, must the notice be published in an official gazette.[58] Even then, such publication does not necessarily mean that the person being served will be aware of the notice.

Once served, if the defendant does not appear in court on the designated day, a default will be decreed; if he appears, he will be interrogated. In either event, he will be assisted by counsel of his own choice or by a public defender chosen by the judge (as required not merely by the guarantee of a full defense but also by the principle of adversary proceedings), who will have three days to file a preliminary defense.[59] Whether or not the defense is filed, the witnesses listed in the accusation or complaint will be heard within 20 days (if the defendant is in prison) or within 40 days (if he is at liberty); thereafter, the witnesses listed by the defense will be heard within the same time periods. Each side has a maximum of 8 witnesses.[60] Whenever possible, the judge shall hear the victim.[61]

Oral testimony is taken at evidentiary hearings presided over by the judge. Questions to the parties are propounded through the judge, who may reject them, since we have adopted the so-called "presidential" system rather than cross-examination. The parties may produce documents at any phase of the proceedings.[62] Besides documents and the types of evidence named in the CPP,[63] the law permits any type of evidence, so long as it is lawful and morally legitimate.[64]

The search for the actual truth means that the judge in a criminal proceeding participates significantly in the discovery phase. Notwithstanding, the burden of proof remains on the party making the allegation, as the CPP so states.[65] Moreover, if the judge does not order performance of some measure so as to clear up a doubt, the party that such evidence would favor will suffer the harm if it is lacking. Once

[57] *Id.*, arts. 361-363.

[58] *Id.*, art. 365, sole paragraph.

[59] *Id.*, art. 395.

[60] *Id.*, arts. 396-98.

[61] *Id.*, art. 201.

[62] *Id.*, art 231.

[63] Experts, recognition of persons and things, confrontation of witnesses and circumstantial evidence. Book I, Title VII.

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

[65] *Id.*, art. 156.

the evidence has been taken, each of the parties has access to the record for 24 hours in order to request supplementary measures,[66] and within three days thereafter, to submit written arguments.[67] If he determines that no other measures are necessary, the judge has 10 days in which to render his decision.[68] The rule of Article 501 of the CPP, which provided that the time periods for supplementary measures and arguments could run, except against the Public Ministry, while the record remained with the court clerk, has been revoked by the Constitution.

Adoption of the system of free determination (*livre convencimento*) gives the judge the freedom to choose in weighing the evidence; he is obliged only to give the reasons why he has reached a particular outcome. There are only two instances in which this system gives way to others: that of *inner conviction* (*íntima convicção*) and that of *legal proof (prova legal)*. The latter concept, which is severely criticized in the doctrine, applies to cases where the CPP provides that the criminal offense, where clues have been left, must be proven, under penalty of nullity of the proceeding,[69] by a report of the examination of the *corpus delicti*[70] or by subsidiary testimony.[71] The other exception is for decisions reached by the Tribunal of the Jury. Because of the way a jury functions, members of the jury are not permitted to give reasons for their decision, which is based upon their *inner convictions*.

THE SUMMARY PROCEEDING

The other type of proceeding common to a great number of infractions is the *summary proceeding*, which the CPP lists among special proceedings. The summary proceeding is itself divided into the summary proceeding for minor infractions, and the summary proceeding in the strict sense. The former was abrogated by the Constitution. The latter remains and is applied today to penal infractions and all crimes, punishable by detention, for which there is no special form of proceeding. The summary proceeding follows the steps of the *ordinary proceeding* until the questioning of the witnesses listed by the complainant, up to five in number. Thereafter, the proceeding goes to the judge for a type of corrective action,[72] at which time the judge designates a date for the hearing for discovery and decision. The CPP establishes a maximum period of 8 days, which as a rule is obeyed only when the defendant is detained, because of the excessive case load of the courts. After hearing the witnesses called by the defense, the taking of any

[66] *Id.*, art. 499.

[67] *Id.*, art. 500.

[68] *Id.*, art. 502.

[69] *Id.*, art. 564 (III) (b).

[70] *Id.*, art. 158.

[71] *Id.*, art. 167.

[72] The functions of this corrective action are to ensure the formal regularity of the proceeding, to determine those measures necessary to clarify the truth regardless of whether the parties have requested them, etc.

other evidence which may have been ordered by the judge, and oral argument by the parties, the judge renders his decision.[73] If he does not feel ready to do so, the judge may take another 5 days.[74] This form of proceeding, with certain modifications, should be the ordinary form adopted by the new Draft Code of Criminal Procedure, which has been under study by Congress and which will now undergo modifications because of the new Constitution.[75]

SPECIAL FORMS OF PROCEEDINGS

In addition to the two forms above, special forms of proceedings are found in the CPP and in uncodified laws. Those contained in the CPP generally follow, with slight modifications, the pattern of the ordinary proceeding, which is the basic proceeding of the CPP. Thus, in crimes against a person's honor, receipt of the complaint is preceded by an attempt to reconcile the parties.[76] A preliminary defense, which can lead to the rejection of the complaint, is available in impeachment offenses of civil servants.[77] In bankruptcy crimes and crimes against physical property, the modifications have to do with the preparatory phase of proceedings.[78]

Outside the CPP, certain uncodified laws are important for criminal procedure, such as the Press Law[79] and the Narcotics Law.[80] The Narcotics Law adopts a simplified form of oral procedure. Not only are the time limits shortened, but after the interrogation occurs, the initial defense is presented, and the corrective phase is finished, the judge must set the hearing for taking evidence and rendering judgment during the next eight days. At that hearing all evidence is heard, the parties make their oral arguments, and the judge renders his decision in writing, unless he does not feel it proper to do so at the time, in which case he has five more days. In addition, as indicated earlier, the Military Criminal Procedure Code and the Electoral Code respectively govern the proceedings in military and electoral crimes. In military justice, the court of the first instance is collegiate, formed by one judge who is a lawyer and several lay judges who are officers with a rank higher than that of the defendant.

A very special procedure is followed in wilful crimes against human life, which are tried before the Tribunal of the Jury. This procedure has two levels of

[73] *Id.*, arts. 538-39.

[74] *Id.*, art. 538 § 2.

[75] *See* Section VII, *infra*.

[76] *Id.*, arts. 520-22.

[77] *Id.*, arts. 514- 16.

[78] *Id.*, arts. 503-12 & 524-30.

[79] Law No. 5.250 of Feb. 9, 1967.

[80] Law No. 6.368 of Oct. 21, 1976.

judicial review of the charges: one upon receiving the accusation after the preliminary investigation; and the other, which precedes the determination of guilt, when evidence is taken before a judge, with the guarantees of an adversary proceeding and a full defense.[81] If, at this second stage, he feels there is sufficient evidence of the criminal act and that the defendant committed it, the judge will issue an indictment (*pronúncia*) against the defendant and set the case for trial before a jury. The indictment puts limits upon the scope of the jury's findings, because the jury cannot convict the defendant of any crime not listed therein, nor for a more serious crime than that contained therein. After the prosecution has presented its case, which must be in conformity with the indictment, and the defense has submitted its arguments, both of which are in writing, the date for trial is fixed. On that date, after oral presentation of the evidence, questioning of the defendant, and closing arguments by the parties (two hours for each, with another half hour for rebuttal and surrebuttal, if desired), the defendant is judged by the Tribunal of the Jury. This tribunal is composed of one professional judge (who presides) and seven lay jury members, chosen by lot from a list of 21 selected some days before. The jury decides whether a crime was committed, its nature, its gravity and who committed it. The Presiding Judge pronounces the verdict. A guilty verdict must accord with the jury's findings.

One characteristic of trial by jury in Brazil is that the jury is maintained sequestered and does not deliberate as a group. As of the moment they are sworn in, jurors cannot communicate with anyone, including each other. At the time of their decision, the jurors vote by placing secret ballots marked *yes* or *no* into an urn, in response to the issues formulated by the Presiding Judge.

Finally, persons who occupy the most important government positions, such as certain authorities of the three Branches of Government, are tried for common crimes before the appellate courts. The President of the Republic and high level administrative officials are tried for crimes of impeachment by one of the Houses of Congress, after the other House has decreed the accusation.[82] Mayors and aldermen are judged by ordinary courts for the same crimes.[83]

IV. PROVISIONAL REMEDIES

INTRODUCTION

Provisional remedies are designed either to guarantee compensation for the damage stemming from the criminal act, or to prevent an accused or defendant at liberty from placing at risk either compliance with any sentence that may eventually be imposed, or the public order.[84] The first type of provisional remedy

[81] CPP, arts. 394-405 and 406-08.

[82] Law No. 1.079 of Apr. 10, 1950.

[83] Decree-Law No. 201 of Feb. 27, 1967.

[84] Provisional remedies are covered by Titles VI and IX of Book I of the CPP.

includes restitution of stolen property, attachment orders and the legal mortgage.[85] The second type includes several forms of provisional arrest — arrest *in flagrante delicto*, preventive detention, imprisonment after indictment or after an appealable conviction, as well as conditional release, with or without bail (Title IX). Some of these measures result from a provisional proceeding, while others stem from merely administrative activity which is, however, always subject to subsequent judicial control through *habeas corpus*. Any of these measures is, today, strictly subordinate to the two presuppositions of preliminary measures: *fumus boni juris* (the probability of results in the principal case favorable to the one seeking the provisional remedy) and *periculum in mora* (the need for the measure).

As initially worded, the CPP treated provisional arrest in a severe, backward and unjustifiable manner, allowing its use or continuance without proof of its necessity, and even in some cases, in spite of proof that it was unnecessary. Today, after Law No. 5.349 of 1967 (which abolished mandatory preventive detention), Law No. 5.941 of 1973, and especially Law No. 6.416 of 1977, preventive detention is only ordered, and prison *in flagrante delicto* is only maintained, when necessary. For less serious offenses, the lack of need is presumed; for serious offenses, need is presumed. In any case — even in serious crimes — the accused, by proving he is not dangerous, may await trial at liberty.

PREVENTIVE DETENTION

In its original redaction, the CPP provided for mandatory preventive detention, which was ordered upon receiving the accusation, based only upon the seriousness of the crime. Since Law No. 5.349 of 1967, preventive detention requires proof of necessity and can be ordered only by a judge. Although he may order preventive detention without hearing the suspect or defendant, the judge's decision must be justified in writing under penalty of nullity.[86] The detainee can utilize the remedy of habeas corpus to correct any illegality or unfairness.[87]

Preventive detention, which is governed by Chapter III of Title IX of the CPP, may be ordered either during the police investigation or after the criminal proceeding has been formally initiated. It is decreed as a guarantee of public order, for the convenience of discovery of evidence, or to ensure the application of the criminal law, where there is prima facie proof of the crime and who committed it.[88] For such an order to be issued, commission of a wilful crime punishable by reclusion must be imputed to the detainee. For crimes punishable by detention, it must be shown that the suspect or defendant is a vagrant, that there is doubt as to his identity, or that he is a repeat offender.[89] During the course of the proceeding,

[85] CPP, Title VI, Chap. VI.

[86] *Id.*, art. 315.

[87] *Id.*, arts. 647-67.

[88] *Id.*, art. 312.

[89] *Id.*, art. 313.

the judge may revoke the order if the reasons for it no longer exist, and may reorder it if justified.[90] In no case, however, may preventive detention be ordered if there is evidence that the act was committed justifiably, so as to decriminalize it.[91]

ARREST IN FLAGRANTE DELICTO

Although expressly permitted by the Constitution,[92] arrest *in flagrante delicto* is today surrounded by special constitutional guarantees that seek to avoid, insofar as possible, arbitrary violence against the individual. These include assurance that the prisoner will have access to family and an attorney, the right to identify the person responsible for the arrest, the duty of the police to communicate immediately the fact of an arrest to the judge, who can order release if improper.[93] Arrest in *flagrante delicto* is covered by Chapter III of Title IX of the CPP, which states that any person *may* and that police authorities and officers *must* arrest someone who is committing a criminal infraction,[94] which is the true *flagrante delicto*. Such arrest is also valid for a person who has just committed such an offense and has been pursued in circumstances in which one can presume that he committed it, or who is found soon thereafter with instruments, weapons, objects or documents that impose the same presumption, which are instances of fictitious *flagrante delicto*.[95] Upon presentment of the prisoner to the authorities, a *warrant* of detention *in flagrante* will be issued. This warrant must obey certain formal requirements, under penalty of being an invalid coercive provisional measure.[96]

OTHER FORMS OF PROVISIONAL ARREST

The arrest of a defendant is possible in two other sets of circumstances: (1) when a judge indicts the defendant, and (2) when a judge renders an appealable judgment convicting the defendant. In the first case, which occurs in cases tried before the Tribunal of the Jury, the defendant is arrested after his guilt is indicated in a preliminary judicial proceeding conducted with the guarantees of the adversary system and a full defense.[97] In the second case, the arrest occurs after conviction when the defendant appeals the decision.[98] In both cases, given the constitutional

[90] *Id.*, art. 316.

[91] *Id.*, art. 314.

[92] Const. of 1988, art. 5 (LXI).

[93] *Id.*, art. 5 (LXII) to (LXV).

[94] CPP, art. 302 (I).

[95] *Id.*, art. 302 (II) to (IV).

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

[97] *Id.*, art. 408 §§ 1 & 2.

[98] *Id.*, art. 594.

principle of the presumption of innocence,[99] it has been understood that the judge must justify the need for the detention order.

TIME LIMITS

The law does not establish any maximum period for provisional arrest, but rather subordinates it to the seriousness of the crime, as do the laws of other countries. When an accused or defendant is provisionally detained, the law not only shortens most procedural time limits, but also orders the release of the prisoner if these are exceeded. For example, the police investigation of a detained suspect must end in 10 rather than 30 days;[100] the indictment must be filed within 5 rather than 15 days;[101] and the prosecution and defense witnesses must be heard within 20 rather than 40 days.[102] Most courts have correctly held that the time limits should be separately counted, and that there is an illegal constraint upon the accused whenever any one of them has been exceeded. Some courts have held, however, that illegality only occurs if the total period of detention exceeds 81 days, that being the sum of all periods until the rendering of the judgment.

Conditional liberty, a provisional measure less onerous than provisional detention, may be granted, when certain prerequisites have been satisfied, to a defendant who has been arrested *in flagrante delicto*, indicted, or criminally convicted. Conditional liberty is sometimes guaranteed by a bond, which the CPP incorrectly designates as bail.[103] Strictly speaking, conditional liberty is not available in cases of preventive detention. After Law No. 6.416 of 1977, our legislation became one of the most liberal, permitting conditional release whatever the crime committed and, in the final analysis, as shall be seen, without the guarantee of bail.[104] For illicit acts punishable by a fine or imprisonment not greater than 3 months, the law absolutely presumes the lack of need for provisional imprisonment unless the accused is a vagrant or repeat offender. This means that a suspect who is at large cannot be arrested, and one arrested *in flagrante delicto* can be placed at liberty without any bond being posted.[105] For acts punishable by imprisonment for no more than two years, the law presumes, in the absence of evidence to the contrary, that the accused or defendant is not dangerous; thus, he may receive conditional release under bond *unless* there is evidence that he is a repeat offender of a willful crime, is a vagrant or beggar, has committed a crime

[99] Const. of 1988, art. 5 (LVII).

[100] CPP, art. 10.

[101] *Id.*, art 46.

[102] *Id.*, art. 401.

[103] *Id.*, arts. 330-31.

[104] *Id.*, art. 310.

[105] *Id.*, art. 321.

that generated a public outcry, or, in general, any of the reasons justifying preventive detention are present.[106]

The suspect or defendant free on bail is subject to certain obligations, such as appearing before the authorities when necessary, not changing residence without notice, not committing another infraction, etc.[107] Noncompliance signifies return to prison and forfeiture of half of the amount of the bail bond.[108] The bond amounts, which vary according to the seriousness of the offense and the assets of the perpetrator, continue to be trivial and insufficient for their purported purposes. An indigent detainee who satisfies the requirements of Articles 323-24 of the CPP may be placed in conditional liberty under the same obligations without posting bail.[109] The same is true for an accused or defendant in whose favor *there is evidence* that he committed the act under justifiable conditions.[110]

The major novelty introduced by Law No. 6.416 of 1977, is that it permits the detainee, even in serious and very serious crimes (those in which the minimum imprisonment is at least two years) to be granted conditional release. All that is needed is proof that if at liberty, the detainee will not place at risk either the course of the proceedings, the application of the law or public order.[111] This is the great new feature of Law No. 6.416 of 1977, since we have thereby adopted, in all its purity, the principles that orient provisional measures. For provisional detention mere proof of the criminal act is not enough; proof of the need for such a measure is also necessary. In cases of more serious crimes, this is presumed, but, in all cases, the law permits proof to the contrary.

The above-cited law has practically done away with bail. If, in any hypothesis, including in the most serious crimes, the accused or defendant can obtain conditional release without bail, it makes no sense to require that he post bond for less serious crimes. As a consequence, someone who obtained provisional release under bail because he committed a less serious crime[112] where *there is no evidence* to his disfavor, may receive back the bond he posted, as soon as *he proves* that he has the right to the measure.[113] Law No. 6.416 of 1977 contains another contradiction. Someone who commits a less serious infraction and is granted conditional release under bail is subject to numerous obligations.[114] On the other hand, if he commits a serious or very serious crime, besides not needing to secure

[106] *Id.*, art. 323.

[107] *Id.*, arts. 327, 328 and 341.

[108] *Id.*, art. 343.

[109] *Id.*, art. 350.

[110] *Id.*, art. 310.

[111] *Id.*

[112] *Id.*, arts. 322-24.

[113] *Id.*, art. 310.

[114] *Id.*, arts. 327, 328 and 341.

his liberty by posting a bond, he is obliged only to appear at the procedural events.[115] This should be corrected in the new Code.

V. APPEALS

INTRODUCTION

The existence of the dual instance in our legal system allows the reexamination of all judgments, generally by a higher level court, but in some cases by the same court. For such purposes, the losing party or the one that incurs an incumbrance has available the extraordinary and special appeals provided for in the Constitution,[116] as well as common ordinary appeals, special ordinary appeals and special actions, all of which the CPP designates and treats as appeals. The category of common ordinary appeals includes the ordinary appeal (*apelação comum*), the recourse in the strict sense (*recurso*), the witness letter (*carta testemunhável*) and various types of bills of review (*agravos*). The category of special ordinary appeals includes the appeal against a jury verdict manifestly contrary to the evidence in the record, the motion for a new jury, the request for clarification (*embargos de declaração*), the request for a rehearing *en banc* (*embargos infringentes*) and the request for a declaration of nullity (*embargos de nulidade*).

APPEAL (Apelação)

The most important form of seeking review of a decision under the CPP is the appeal, which lies from final decisions or those with the force of final decisions[117] so long as no recourse in the strict sense is provided for. The appeal is generally voluntary; only in two instances is an appeal mandatory.[118] In these two cases, the judge must submit his decision to the next higher court for review, and the judgment will not become final until such review occurs. Normally, both the complainant and the defendant can appeal. In public criminal action crimes, if there is no appeal by the Public Ministry, the victim may appeal.[119] The appeal is filed by a petition or motion on the record,[120] in which the party indicates his dissatisfaction and states whether he appeals from part or all of the first level decision.[121] Only after the appeal is received is the docket opened to the parties to file their arguments.[122] In accordance with the CPP provisions, once the time to file

[115] *Id.*, art. 310.

[116] These are covered by the distinguished Professor José Carlos Barbosa Moreira in his article on Civil Procedure.

[117] *Id.*, art. 593(I) & (II).

[118] Law No. 1.521 of 1951, art. 7.

[119] CPP, art. 598.

[120] *Id.*, art. 578.

arguments has expired, the record is submitted to the higher court, with or without these arguments.[123] It is understood, however, that this rule does not apply to the defendant, in view of the constitutional rule of a full defense. The appeal is assigned to one of the chambers of the appellate tribunal and, after an opinion by the Public Ministry,[124] the record is reviewed by the Reporting Judge and the Revising Judge within ten days.[125] A third Judge, called the *vogal*, participates in deciding the appeal. If it deals with a penal infraction or a crime punishable only by detention, the appeal will be decided after being reviewed only by the Reporting Judge, and the time periods are reduced by one half.[126]

Within the limits defined by the original charge (the court can not examine new charges) and by the grounds for the appeal (nor can it go beyond the requests from the parties or the prosecution), the tribunal has broad freedom to review the proceeding, with powers to reexamine issues that have been considered and examine those which could have been but were not examined at the first instance. The appellate tribunal can treat the facts from a different juridical viewpoint from that contained in the accusation or complaint. It may not, however, convict the defendant for an act other than that described in the initial charge, even a less serious offense.[127] Based upon Article 617, which expressly prohibits, in any situation or hypothesis, *reformatio in peius*, it has been understood that the CPP implicitly sanctions *reformatio in melius*. Contrary to the opinion expressed by the majority of legal scholars, the Federal Supreme Court has been deciding that it is possible to grant the defendant on appeal more than he requested, but it is not possible, however, to modify the decision in his favor when only the prosecution has appealed.

If the appeal deals with a preliminary matter — *e.g.* a motion to annul a judgment, granting the appeal will annul the judgment and cause the case to be remanded to the lower court for a new decision. In this case, if only the defendant appealed, any new decision cannot place him in a worse position. If the appeal deals with the merits, the tribunal can modify the decision within the limits of the requests.

Due to the sovereign nature of jury verdicts, when a decision from the Tribunal of the Jury is appealed, the appellate tribunal can only modify the decision in relation to the decision rendered by the presiding judge, and only to

[121] *Id.*, art. 599.

[122] *Id.*, art. 600.

[123] *Id.*, art. 601.

[124] *Id.*, art. 613 (III).

[125] *Id.*, art. 613 (I) & (II).

[126] *Id.*, art. 610.

[127] *Id.*, art. 617.

correct an error or injustice in his application of the penalty. The tribunal can only make the judgment correspond to what the law establishes and what the jury found.[128] If the appeal claims that the decision by the jury was manifestly contrary to the evidence in the record,[129] granting of the appeal signifies only the vacating of the decision and retrial of the appellant by the same Tribunal of the Jury. A second appeal on this ground may not be taken after retrial before the Tribunal of the Jury.[130] The Tribunal may also vacate the decision and remand the defendant to a new trial.[131] Appeal of a judgment absolving the defendant does not prevent the defendant from being immediately placed at liberty.[132] On the other hand, appeal of a judgment condemning the defendant has no suspensive effect on detention unless the defendant is either a first offender with no criminal record, convicted of a crime not punishable by imprisonment, or convicted of a bailable offense and such bail is posted.[133]

RECOURSE IN THE STRICT SENSE (Recurso)

The recourse, which in civil procedure is a form of bill of review (*agravo*), should be limited to interlocutory decisions. Under the system of the CPP, however, it can be used to challenge not only interlocutory orders, but also decisions of dismissal and final judgment expressly mentioned in Article 581. The recourse is the type of appeal that lies, *e.g.*, from a decision refusing to indict, a habeas corpus decision, or a decision absolving a defendant before trial (definitive decisions). It also serves the function of bringing before a higher court tribunal an appeal not allowed by the court below.[134] The principle characteristic of the recourse is the opportunity for reconsideration. Before it goes up to the appellate tribunal, the recourse goes to the judge who rendered the decision for reconsideration.[135] If he maintains his decision or retracts it (from the new decision the same recourse is available to the aggrieved party), the record goes to the judicial body that judges the recourse. This is, as a rule, an appellate tribunal, but it may be the court's presiding judge or a judge from a higher-level court than the judge rendering the decision.[136]

[128] *Id.*, art. 593 §§ 1 & 2.

[129] *Id.*, art. 593 (III) (d).

[130] *Id.*, art. 593 § 3.

[131] *Id.*, art. 593 (III) (a).

[132] *Id.*, art. 596.

[133] *Id.*, art. 594.

[134] *Id.*, art. 591 (XV).

[135] *Id.*, art. 589.

[136] *Id.*, art. 582.

OTHER ORDINARY APPEALS

If the judge does not allow the recourse in the strict sense, or if he in some other way prevents it from proceeding, the aggrieved party may utilize the *witness letter* (*carta testemunhável*), a form of appeal of Portuguese origin and which is similar to the English writ of procedendo. The letter, requested from the court clerk, necessarily brings a denied appeal to the attention of the next higher court.[137]

In addition, the Code contains a type of *undesignated* bill of review (*agravo inominado*), which is available in cases where an appellate tribunal has original jurisdiction. It lies when the reporting judge receives or rejects the initial complaint; when he grants, denies or fixes the amount of bail; and when he orders preventive detention or does not order the carrying out of some measure of production of evidence.[138] The procedure for this bill of review is contained in the internal rules of the tribunals. As a general rule, all such court rules permit this bill against an order by the reporting judge that preliminarily rejects a request for a hearing *en banc* (*embargos infringentes*), and some of them permit it generally for all orders by reporting or presiding judges.

After providing that all procedures under situations where it applies shall be judicial and shall be heard by an Enforcement Court, the new Law of Penal Enforcement (LEP) states that "decisions rendered by the judge may be appealed by bill of review without suspensive effect."[139] The failure to give this bill of review a specific name has led the doctrine to call it the bill of execution (*agravo em execução*). The lack of rules as to how to proceed under it has led scholars to opine that those governing the Civil Procedure Code's bill of review (*agravo de instrumento*) should be followed, since these are similar to those for the bill with the same name that appears in the Draft Code of Criminal Procedure.[140]

SPECIAL ORDINARY APPEALS

In addition to the special appeal based upon the allegation that the decision of the jury was manifestly contrary to the evidence in the record, the CPP provides for three types of special appeals: the request for a new jury, the request for clarification and the request for a rehearing *en banc*. The request for a new jury has very particular prerequisites. It can only be filed by the defendant, and only once, upon his first having been convicted by the Tribunal of the Jury of an offense punishable by imprisonment equal to or greater than 20 years.[141] If the defendant meets these prerequisites, the presiding judge of the tribunal grants the request and sets a new trial for the defendant, in which none of the jury members from the first

[137] *Id.*, arts. 640 and 643.

[138] *Id.*, art. 557.

[139] Law No. 7.210 of Jy. 11, 1984, art. 197.

[140] The Draft Code is discussed *infra* in Section VII.

[141] CPP, art. 607.

trial may participate. As can be seen, this is a form of appeal from one court *a quo* to another court *a quo*. Because the appeal can only be filed by the defendant, the new trial cannot — although there are illustrious opinions to the contrary — impose upon the defendant a more serious penalty than he received at the first trial.

If a decision, either at the lower court or appellate level, is ambiguous, obscure, contradictory or omissive, a request for clarification (*embargos de declaração*) may be filed within two days, through a petition setting out the reasons and directed to the judge or tribunal rendering the decision.[142] A decision granting the request will ordinarily be limited to clarifying or completing the decision, without modifying the merits. On occasion, however, once the omission has been corrected, it may be necessary for the sake of coherence to change the content of the challenged decision. This is the position of the tribunals including the Federal Supreme Court.

Whenever a decision against a defendant on an appeal or recourse, is decided by non-unanimous vote, whether the dissent relates to the merits or only to a procedural matter, the defendant may file a motion for a rehearing *en banc*, called *embargos infringentes* when on the merits, and *embargos de nulidade* when on procedural matters. These *embargos* existed at the time of the Portuguese Ordinances, but were not originally adopted by the CPP.[143] The new decision must confine itself within the limits defined by the diverging opinions. Given the chance for reconsideration and/or remand of the appeal, the composition of the body judging the appeal is important. For appellate tribunals, this composition is left to local laws of judicial organization. In some tribunals that sit in panels of at least five judges, those who rendered the challenged decision also hear the appeal; in other tribunals, all the judges of other rehearing are new to the case, which is the modern trend.

HABEAS CORPUS AND CRIMINAL REVISION

The CPP further classifies as appeals the special actions of habeas corpus and criminal revision. In some cases, habeas corpus does function as an appeal, but in reality it is a summary action, the remedy provided in the Constitution to guarantee freedom of movement.[144] Like the writ of security (*mandado de segurança*) in civil procedure, habeas corpus is available when the alleged right is clear and certain. A habeas corpus proceeding begins upon filing the writ. Its nature will be preliminary, substantive or simply declaratory, depending upon the person filing it.

In setting out the cases in which habeas will lie, the CPP expressly excludes cases of disciplinary punishment,[145] but the tribunals have held that this rule only prohibits review of the fairness of the action, not that of its extrinsic legality. The

[142] *Id.*, arts. 382, 619-20.

[143] They were added to CPP, art. 609, by Law No. 1.720 (B) of Nov. 3, 1952.

[144] Const. of 1988, art. 5 (LXVIII).

[145] CPP, art. 647.

judiciary should not intervene in the internal functioning of other branches of government, but it can and should restore freedom of movement when the act restricting it is plainly illegal. A question about which there is less agreement is whether habeas will lie in the case of violence or coercion caused by a private person, since the provisions of the CPP only deal with actions by the authorities. In our view, the answer has to be yes, since the Constitution, when including this judicial measure, speaks generically of *illegality* or abuse of power. Although a private person cannot commit an abuse of power, he can do something illegal. Moreover, historically, the writ was much used in Brazil to solve certain serious social problems involving the restrictions imposed by large landowners in the interior upon the liberty of their employees.

The habeas corpus procedure is extremely summary and does not permit dilatory measures. Upon filing the petition, which can be done by anyone, the person filing the petition must prove the allegations. After filing, the judge or tribunal may order physical presentment of the prisoner (which is rarely done) or order the coercive authority to provide information about the facts on an urgent basis[146] (which is almost always done). The court decides soon after. If the person suffering the constraint is poor, the court of the second instance, if the case, may order the production of the original record.

The petition for habeas corpus is judged by one of the higher tribunals whenever the coercive act is performed by an authority whose acts submit it to such jurisdiction.[147] In all other cases, the decision is taken by a judge of the first instance. In appellate tribunals, the petition is assigned to one of the chambers or panels and is judged at the first session thereof. In granting an order to cure illegality, the judge or tribunal may release the prisoner or determine that he may not be arrested; it may vacate a lower court decision and order another decision[148]; it may acquit someone who has been convicted; or it may determine a stay of investigation or proceeding in progress.[149] The nature of the action — preliminary, substantive or merely declaratory — therefore depends upon the relief requested.

The *criminal revision*, also treated by the CPP as a recourse, is a constitutive action,[150] for the purpose of correcting, in the defendant's favor, a judicial error in terminated cases. It lies against a sentence of conviction that has become final, whether or not all possible other appeals have been exhausted.[151]

When dealing with review of the decisions of the Federal Supreme Court, the 1946 Constitution implicitly prohibited the criminal revision *pro societate*. The present Constitution does not contain that rule, but the CPP expressly forbids such

[146] *Id.*, art. 662.

[147] Const. of 1988, arts. 102 (I) (d), 105 (I) (c), 108 (I) (d), etc.

[148] CPP, art. 652.

[149] *Id.*, art. 651.

[150] A constitutive action seeks to create, modify or extinguish a status or legal relationship.

[151] CPP, art. 621.

review, even when a decision favorable to a defendant was obtained based upon false evidence. The laws of other countries permit review in such cases, and its adoption in Brazil seems advisable.

The revision may be requested before or after the sanction has ended[152] so long as there is still some interest to be protected. It may be sought by the convicted person himself, without the aid of counsel. If the convicted person is dead, his next of kin may request it.[153] It will be judged by the full tribunal, or if there is more than one tribunal chamber or panel, by a group of chambers of the tribunal that rendered the decision under attack, or would have jurisdiction to do so if there had been an appeal.[154] If the petition is not rejected preliminarily -- in which case a bill of review lies to the court --, it is submitted to the Procurator of Justice office for 10 days, and thereafter will be studied for the same time period by the reporting and revising judges. The revision should only be granted if the error of the decision under attack is *evident*, or because it is contrary to the law or to the evidence in the record, or based upon false evidence, or if, after the decision, new evidence has appeared in favor of the defendant.[155] If the petition for revision is granted, the tribunal may change the classification of the act, acquit the defendant, modify the penalty in his favor, or annul the proceeding.[156] In this last event, the record is remanded to the original judge for a new decision, which can in no way worsen the sanction imposed in the reviewed decision.[157]

VI. ENFORCEMENT

Penal enforcement is governed by the 1984 Law of Penal Enforcement (LEP)[158] and by a few provisions of the CPP not revoked by that law. The LEP contains administrative rules, substantive criminal law rules and criminal procedural rules. A part of enforcement activity is connected to administrative measures and therefore remains the function of the penitentiary authorities; however, this ought not to lead to sacrifice of the rights or a prisoner not affected by the sentence of conviction and not affected by his behavior during the enforcement of the penal sanction.

The principle of *legality of penal enforcement*, today proclaimed throughout the world, prevents the enforcement of penal sanctions from being subjected to arbitrary decisions by the directors of penal institutions that degrade the nature of

[152] *Id.*, art. 622

[153] *Id.*, art. 623.

[154] *Id.*, art. 624.

[155] *Id.*, art. 621 (I), (II) & (III).

[156] *Id.*, art. 626.

[157] *Id.*, art. 626, sole paragraph.

[158] Law No. 7.210 of July 11, 1984.

enforcement. According to Article 81 of the Spanish Penal Code, sanctions must be enforced in the manner provided in laws and regulations.

Brazilian penal legislation contains three types of imprisonment: reclusion, detention and simple imprisonment. In addition to the fine, it also has three types of sanctions that restrict rights: rendering community services, temporary interdiction of rights and weekend limitations. In accordance with the new General Part of the Criminal Code, fines are imposed in the form of fine-days, each of which corresponds to what the convicted person earns in a day. If the fine is not paid within a ten-day period, the fine will be levied on by the Public Ministry, with the judgment of conviction serving as an executable instrument.[159] The fine can be converted into detention if a solvent convict does not pay it or prevents execution on it. Each fine-day will correspond to one day of prison, up to the maximum of one year.[160]

A person sentenced to imprisonment may begin to serve his sentence — depending upon the nature and duration thereof and the qualities of the defendant — under a closed, semi-open or open system. During this period, he is subject to *progression* (transfer to a less rigorous system).[161] If he is serving the sentence in a closed or semi-open system, the convict has the right to *redeem*, through labor, part of the time to be served.[162] This is done at the rate of one day's sentence for every three days worked.[163] The sanction of prison in an open system may be *converted* into a sanction that restricts rights if the convict has already served more than one-fourth of his sentence and his background and personality recommend this course.[164] In the opposite fashion, sanctions restricting rights and penalties of fines can also be *converted* into deprivation of liberty.[165] The penalty of deprivation of liberty of a prisoner who becomes mentally ill will be *replaced* by security measures.[166]

Once certain prerequisites have been satisfied, a defendant sentenced to prison for at least two year may be conditionally released on parole.[167] Once at liberty, as occurs in the case of a defendant granted conditional suspension of the sanction (a legal doctrine similar to the French and Belgian *sursis*),[168] the parolee

[159] LEP, art 164.

[160] Penal Code, art. 51 and § 1.

[161] *Id.*, arts. 33-37.

[162] LEP, art. 126.

[163] *Id.*, art. 126 § 1.

[164] *Id.*, art. 180.

[165] *Id.*, art. 181 (2).

[166] *Id.*, art. 183.

[167] Penal Code, art. 83.

[168] Penal Code, art. 77.

remains subject to certain obligations, under penalty of having his parole revoked.[169]

Throughout the enforcement period, a convict retains certain rights, gains or loses others, and is subject to specific duties. For example, during the time he is serving a prison sentence, the prisoner may also suffer other sanctions, such as the suspension or restriction of certain rights, or receive benefits, such as the granting of certain favors. Thus, it seems obvious that the granting, suppression or limitation of any benefit or right or a prisoner ought to be and is subject to a decision of an enforcement judge. One must avoid any lack of conformity between what was determined in the judgment and what occurs during the serving of the sentence, between what the law guarantees to a convict and what he in fact receives in prison.

The new LEP has *judicialized* the enforcement process, insofar as possible, by establishing that criminal jurisdiction of judges and tribunals will be exercised over the enforcement process in conformity with the LEP and the CPP. The summary judicial proceeding it sets up begins *ex officio*, upon request by the interested party, his representative or next of kin, the Penitentiary Council or the administrative authority.[170]

Once the petition or directive has been docketed, the Public Ministry and the interested party will be heard, if they have not requested the measure. If it becomes necessary to take oral or expert testimony, the judge will so determine, deciding after its production.[171] A bill of review without suspensive effect, can be taken from decisions rendered in the Enforcement Courts.[172]

VII. INNOVATIONS UNDER STUDY

The Draft Code of Criminal Procedure, based upon a preliminary draft by Professor José Frederico Marques, contains certain innovations that should certainly be adopted by the new Code. The principal ones refer to the form of proceeding and to provisional imprisonment. Review of this Draft Code by Congress was interrupted by preparation of the new Federal Constitution. This review should now be accelerated by the need to adapt criminal procedure to the new constitutional provisions.

The Draft Code proposes simplification of the procedural system, with the institution of more summary forms, such as the extremely summary action (*procedimento sumaríssimo*) used for less serious infractions and traffic violations. It also would create a first instance collegiate judicial body to hear appeals from decisions.

[169] Penal Code, arts. 78, 79 and 85.

[170] LEP, art. 195.

[171] *Id.*, art. 196.

[172] *Id.*, art. 197.

The Draft Code also includes provisions designed to strengthen preventive imprisonment with respect to dangerous delinquents who have committed crimes of robbery, extortion, kidnapping, rape, drug trafficking and, above all, those committed by bands or gangs. These provisions would mean, as in the laws of other countries, such as the recent Portuguese Code, that preventive detention would be ordered for those charged with these crimes unless there is abundant evidence that, notwithstanding the gravity of the offense, the person charged is not dangerous.

Among the measure defended by those who have studied the question of combating such crimes, was *preventive imprisonment* in a strict sense, carried out by determination of the police, after the *in flagrante delicto* period and immediately communicated to the judge. In other countries, as is well known, such an arrest and imprisonment may be maintained without notice to the judicial authorities for 24 hours (France), 48 hours (Italy and Portugal) or 72 hours (Spain). This type of imprisonment can no longer be adopted. Prior Constitutions prohibited arrests after the *in flagrante delicto* period, except upon a written order of a *competent authority*, without specifying what that was. The present Constitution, however, while maintaining the rule, requires that the written ordered be issued by and supported by an opinion from a *judicial authority*.[173]

In a contrary sense, the Draft Code introduced the *conditional suspension of the proceeding*, designed to avoid the imprisonment of defendants in less serious offenses, and, at the same time, to speed up the proceeding so that the problem can be solved practically at the time the charge is filed. This proceeding permits the judge, when he receives the accusation, before or after interrogating the defendant, to suspend the proceeding for a period of from two to four years, and place the defendant under a system of probation, so long as: the imputed act is punishable with a small sanction (not greater than imprisonment for one or two years); the defendant is not a repeat offender of wilful crime; and the culpability, prior record, social behavior and personality of the perpetrator, as well as the motives for and the circumstances surrounding the crime, indicate that probation is desirable. If probation is granted, the defendant will be asked, in the presence of counsel, if he accepts probation and its conditions. If he refuses, the criminal proceeding continues. If he accepts, he will be placed on probation. Once the period of probation ends without being revoked because the defendant has complied with its conditions, the proceeding will be declared extinguished without any judgment on the merits. This institution, upon the suggestion of Professor Ada Pelligrini Grinover, was introduced into the Draft of a Model Code of Criminal Procedure for Latin America, and has just been adopted, under the name of "temporary suspension of proceedings," by the recent Portuguese Code of Criminal Procedure.[174]

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[173] Const. of 1988, art. 5 (LXI).

[174] Decree-Law No. 78/87 of Feb. 17, 1987, art. 281 *et seq.*