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## Civil Justice Reform in the Americas: Lessons from Brazil

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Vargas: Civil Justice Reform in the Americas: Lessons from Brazil  
**CIVIL JUSTICE REFORM IN THE AMERICAS: LESSONS  
FROM BRAZIL**

*Daniela Trejos Vargas\**

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**I. AN OVERVIEW OF THE BRAZILIAN JUDICIAL SYSTEM**

As a federal state, the Brazilian judiciary system is comprised of the federal judiciary and several state judiciaries. State judiciaries have jurisdiction on cases between private parties, and cases involving the state government or any state agency or company.

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State judiciaries are comprised of the following bodies: 1) small claims courts (in most states), 2) district courts, and 3) courts of appeal. In some states, like São Paulo, there is more than one court of appeals: *Tribunais de Alçada* and *Tribunal de Justiça*.

The federal judiciary has jurisdiction on cases involving the federal government or any federal agency or company. It also receives all the social security claims.

A separate federal judiciary hears only labor law cases, both for private employees and for civil servants. The federal judiciary is comprised of the following bodies: 1) federal small claims courts (which are new), 2) federal courts, and 3) regional federal courts of appeal that sometimes have jurisdiction over more than one state. In 1988, the higher appellate system was unified at the federal level, with jurisdiction over appeals of special natures remitted both from the state courts of appeal and the federal courts of appeal. There are two higher courts: 1) a superior court of appeals and 2) the federal supreme court.

## II. WHAT ARE THE MAIN PROBLEMS OF THE BRAZILIAN JUDICIAL SYSTEM?

### A. *The Main Problem is Excessive Delay*

In a survey amongst practicing lawyers, judges, and prosecutors that comprise the law faculty of the Catholic University of Rio de Janeiro, there was a unanimous answer that the main problem of Brazilian justice at the moment is the excessive delay in the conclusion of a case. The problem with judicial delay can become, in fact, a denial of justice. The worst judgment by far is the one that never happens.

This problem is not exclusive to Brazil; rather, it is present in most countries. The direct reasons for judicial delay in Brazil are: 1) exponential increase in the number of lawsuits in the past years, 2) lack of judges, 3) insufficient specialization of courts which causes delay in decisions, and 4) a civil proceeding that permits a misuse of the appellate system to deliberately delay the outcome of a final judgment.

### B. *Exponential Increase in the Number of Lawsuits*

The various reasons for an exponential increase in the number of lawsuits are: 1) the redemocratization and the progressive awareness of citizenship; 2) the enactment of the Brazilian Consumer Code; 3) the various “economic stabilization plans” that have interfered with ongoing

contracts, loans, and retirement pensions of civil servants; and 4) a chaotic taxation system, with dozens of taxes and encumbrances that are constantly being contested by companies.

BRAZIL — CASES BEFORE STATE DISTRICT COURTS <sup>1</sup>		
Year	Cases Distributed	Cases Judged
2001	9,489,657	8,063,303
2000	9,463,246	6,164,532
1999	8,717,300	5,791,959
1998	7,719,169	5,188,146
1997	6,964,506	5,472,489

### C. Lack of Judges

At the moment, more than twenty percent of the existing judicial positions in civil courts in Brazil are vacant.

BRAZIL — NUMBER OF JUDGES IN LOWER COURTS – YEAR 2000 <sup>2</sup>			
Population	Number of Judges by Law	Number of Vacancies	Percent of Vacancies
State District Judges	6,819	1,325	20%
Federal Judges	1,103	337	30%
Labor Judges	2,288	555	25%
TOTAL POPULATION: 169,799,170			
RATIO DISTRICT JUDGES / POPULATION: approx. 1/30,000			

The reason for this great problem is twofold: 1) the economic crisis, both at the state and the federal level, has reduced recruitment in order to prevent an increase in payroll costs; and 2) not all positions for judges are filled because of insufficient approval of candidates. Recruitments are

1. The tables included here, as well as a wealth of additional information, are available on the Brazilian federal supreme court's web site. Supremo Tribunal Federal Web Site, available at <http://www.stf.gov.br> (last visited Oct. 28, 2003).

2. *Id.*

made through public examinations. Candidates must prove at least five years experience as members of the Brazilian Bar. Exams are very strict and an insufficient number of candidates are approved to fill all the vacant positions. This insufficient approval is due to several factors: 1) the low standards of many law schools in Brazil; 2) candidates have to engage in special study preparation in order to have a chance of success; and 3) well-prepared candidates do not see their public careers as economically worthwhile.

The same economic crisis that has reduced recruitment — that is, reduced the number of public contests for the judicial posts — has also led to a reduction in the salaries earned by public careers in law in Brazil, including judges, both at the federal and the state level. A lawyer in a medium to large law firm, with five years of practice, will probably earn more than the entry-level salary for a magistrate.

The recruitment system for judges has been severely criticized by many specialists in Brazil. Ivan Ferreira, of PUC-Rio, points out that the requirements and the exam that gives access to the career are the same for all judges, irrespective of the fact that the judge will work in a small claims court or a district court.

Access to the courts of appeal and to the higher courts do not require any further examination or specialization course. Suggestions have been made in favor of a less rigorous system for positions in small claims courts. Promotion to the position of district judge and then to the courts of appeal would not only be through years of service but would also include assessment of judgments and qualifying examinations.

#### *D. Insufficient Specialization of Courts and Judges*

As mentioned, all judges are subject to a public examination that deals with all areas of law. During their professional careers, they will be appointed to a series of different courts and have to deal with a wide variety of cases.

Specialization of courts by subject matter permits judges to become familiar with the issues that are brought to a court for decision and allows them to become specialists in those fields. Increased specialization leads to more technical and speedier decisions. As mentioned earlier, labor issues have separate courts and are part of the federal judiciary system. The federal court system only specializes courts with respect to criminal and civil issues. A more detailed specialization is found in state court systems, but only in larger districts.

In the District of Rio de Janeiro, for instance, civil courts have become more specialized by subject matter, including specializations in taxation,

public registries, civil issues, family, succession–inheritance, and bankruptcy. The bankruptcy courts have now been transformed into corporate courts, dealing not only with bankruptcy and reorganization issues but also with business transactions, which before were distributed to the civil courts. This new specialization is beneficial to the plaintiffs, assuring better judgments.

### E. *Excessive Use of Appeals*

Brazilian civil procedure is of European origin, largely based on written arguments. The judge conducts all steps of the proceedings. For this reason, the judge issues several interim judgments during the proceedings, besides the final judgment. These interim appeals can suspend the proceeding until its judgment by the state or federal court of appeals.

Besides the interim appeals, state courts of appeal also receive an overwhelming number of appeals from the final judgment of district judges. There is virtually no barrier to appeal from the final judgment.

BRAZIL — CASES BEFORE STATE COURTS OF APPEAL <sup>3</sup>		
Year	Cases Distributed	Cases Judged
2001	796,422	626,773
2000	789,422	590,869
1999	694,026	548,313
1998	542,984	447,348
1997	499,723	442,242

The final judgment, in cases against the federal union or the state, irrespective of the outcome of the decision, is subject to a mandatory appeal to the state or federal court of appeals, and, almost always, to one of the higher courts.

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3. *Id.*

BRAZIL — CASES BEFORE THE SUPERIOR COURT OF JUSTICE <sup>4</sup>		
NUMBER OF JUSTICES: 33		
Year	Cases distributed	Total of Cases Judged (Includes Interim Appeals)
2001	184,478	198,613
2000	150,738	154,164
1999	118,977	128,042
1998	92,107	101,467
1997	96,376	102,054

The Brazilian Federal Supreme Court is no exception. Besides constitutional matters, it decides a great number of appeals that originate from federal courts of appeal, state courts of appeal, and even from labor courts of appeal if a constitutional matter is at stake.

BRAZIL — CASES BEFORE THE FEDERAL SUPREME COURT <sup>5</sup>			
NUMBER OF JUSTICES: 11			
Year	Total Cases Distributed	Percentage of Cases that are Interim Appeals	Inconstitutionality Cases Judged
2001	89,574	58.6%	278
2000	90,839	65.2%	196
1999	54,437	54.5%	189
1998	50,273	52.1%	229
1997	34,289	49.2%	249

The positive aspect of a liberal system of appeals preserves the due process of law. However, the negative aspect also exists in its misuse by parties to deliberately delay the outcome of the lawsuit.

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4. *Id.*

5. *Id.*

### F. *Corruption: Is it a Major Problem in Brazil?*

Here, we must distinguish between direct corruption and indirect corruption, such as lobbying of influential lawyers and former judges. Indirect corruption, in my view, is a perverse corollary of judicial delay.

Overall, it can be observed that corruption is not a major problem in the Brazilian judicial system. It has been dealt with in a serious manner in the past several years. Accusations against judges involved in illegal acts are consistently being investigated and many judges in the past few years have been convicted due to inappropriate behavior. For example, a justice has just been suspended from the superior court of justice due to accusations of deals with drug traffickers. Moreover, several judges and lawyers have been convicted due to their involvement in schemes to defraud the social security service by charging exorbitant indemnifications to claimants.

## III. WHAT HAS ALREADY BEEN DONE TO MODERNIZE BRAZILIAN CIVIL PROCEDURE AND PROVIDE SOLUTIONS TO THESE PROBLEMS?

### A. *Computer-Aided Solutions*

Computer-aided solutions have been a great improvement for the work of the courts, the lawyers, and general public. These solutions have expedited decisions and have facilitated access to information on the proceedings. Remote access to courts works extremely well in Rio de Janeiro, but not in São Paulo. Higher courts publish information on-line such as decisions and the current status of proceedings that are still being judged.

Computer-based information has also been used in all areas of the Brazilian government in order to assure transparency in governance, public procurements, and access to information. In the judicial system, computer-based information has had a direct benefit in the combat against petty corruption. Reducing access of the public to the court clerks also reduces the possibility of unethical means of expediting certain procedures (the Brazilian *jeitinho* — or “urgency fee”). An urgency fee can be from a box of chocolates for the court clerk, a Christmas present, or even straightforward money given by law firms to make sure their proceedings are given the highest priority.

### B. *Summons of the Parties by Registered Mail*

Historically, summons of the parties was done personally or by a court officer. Reform has permitted summons made by registered mail. As a result, the reform has reduced this burden from court officers who now can be directed to perform other duties.

### C. *Changes in the Appellate System*

There have been changes in the appellate system through reform of the legislation of civil procedure. Recent changes in the Code of Civil Procedure, in 2001, reduced the number of cases suspended through interim appeals. In enforcement of judgments, there also is a tendency not to give a suspensive effect to the appeals by the debtor if enforcement means the debtor will make payments.

### D. *Increase in the Number of Small Claims Courts*

There has been an increase in the number of small claims courts, both in state level and in the federal level. These small claims courts are already organized in most states of the federation.

### E. *Alternative Dispute Resolution*

Mediation is provided by judicial assistance in poor communities. The experience of PUC-Rio has been used in assisting the needy in the Rocinha slum in Rio de Janeiro. The “Counter of Rights” (Balcao de Direitos) of the Viva Rio Project — a human rights NGO — provides legal assistance and information for the needy. Currently, there is also a progressive increase in the number of commercial cases solved by arbitration.

## IV. WHAT IS BEING SUGGESTED FOR THE REFORM OF THE JUDICIARY IN BRAZIL?

One suggestion aims at improving access to judicial service with the increase in the number of small claims courts, including a proposition to eliminate the necessity of having a lawyer in the proceedings. Small claims courts did not succeed at their main goal, which was to give access to justice to the poorer portion of the population. Small claims courts, geared to be the “Judiciary of the Poor,” are in fact the “Judiciary of the Middle Class.”

Another suggestion to improve access to judicial service is by introducing a mandatory mediation proceeding before access to courts, as

was done in Argentina. Experience of the PUC community service in the Rocinha compound with mediation by law students ended in amicable settlements of ninety percent of the cases.

Reducing the use of appeals for the deliberate purpose of delaying the proceedings is another suggestion. Fewer appeals with suspensive effects will improve the judiciary in Brazil. The transformation of the federal supreme court into a solely constitutional court will also aid in positive reform.

A further suggestion for the reform of the judiciary in Brazil is to expedite the final enforcement of final judgments, when condemnations are solely the obligation to make payments. What do judges want? Approval of the “binding precedent,” which will void access to the judiciary in cases where there is already a settled judgment by the higher courts. Lawyers are against this because it can lead to a denial of justice. What do lawyers want? More expedited proceedings, and the implementation of the “external control of the judiciary,” aiming at improvement of judicial services.

## V. CONCLUSION

Magical solutions for the problems of the judiciary and for judicial reform must be taken with a grain of salt. José Carlos Barbosa Moreira, former magistrate at the Court of Appeals of the State of Rio de Janeiro and professor *emeritus* of civil procedure at the State University of Rio de Janeiro, points out the existence of several “myths” about judicial reform.<sup>6</sup>

First, many think we should pursue fast judgments: “the faster the better.” However, this may jeopardize due process of law. Some proceedings do take time. Thus, we should pursue better judgments, not just faster judgments.

Second, we may look for a magic formula, an “abracadabra” solution. However, there are no easy answers. Changes must be made, but they will come on a trial and error basis. Some will work, some will not.

Third, it is a misperception that foreign models are always better: “the neighbor’s grass is always greener.” We must be wary of importing foreign models that are not compatible with our legal traditions.

The final myth is that the solution to any problem is to simply change the law. Not all problems of civil law countries originate in the law. Before changing the law, it is important to do surveys to detect the problems and to look for possible solutions.

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6. José Carlos Barbosa Moreira, *O Futuro da Justiça: Alguns Mitos*, in REVISTA DE PROCESSO 229 n.102 (1999).

