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JUDICIAL REVIEW IN BRAZIL: DEVELOPMENTS UNDER THE 1988 CONSTITUTION*

Keith S. Rosenn**

I. INTRODUCTION

Brazil has an extensive and complicated system of judicial review. Brazil also has an enormous Constitution laden with specific individual rights and far reaching social and economic goals. Committing rights and goals to writing, however, even in a national constitution, does not ensure their respect by those administering government's daily operations. Because Brazil has an accessible judicial system, many of these constitutional violations are on the courts' dockets for judicial resolution. Since Brazil has only a minimal system of binding legal precedent, the courts decide the same constitutional issues many times over. In addition to consuming valuable judicial resources, this leads to conflicting interpretations of constitutional provisions. This article explains the intricate Brazilian system of judicial review and the changes wrought by the adoption of the 1988 Constitution and its numerous amendments. It also explores the serious problems that these constitutional changes have created for the judicial system and assesses the desirability of certain judicial reforms.

II. CONTOURS OF THE CURRENT CONSTITUTION

Brazil's present Constitution, adopted in 1988, was originally a complex, convoluted and detailed document, with 245 articles and 70 transitory provisions.¹ Today it is even more so, with 250 articles, 83

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1. The Brazilian Congress also served as the constituent assembly pursuant to Constitutional Amendment No. 26 of Nov. 27, 1985. All 559 members of the Congress, sitting in eight

transitory provisions, 14 unnumbered articles, and 37 amendments, with many more amendments under review.² Many of these provisions and amendments are lengthy and far ranging.³ The constitutional text in many places contains specific rules normally found only in codes or regulations.⁴

Brazil's Constitution is a governmental straitjacket that has created serious problems of governability.⁵ The "open list" proportional representation system, combined with over-representation of smaller, less populous states and lack of any means to exclude representatives from electorally insignificant parties,⁶ has made it extremely difficult to build stable majorities in Congress. It has also encouraged excessive executive intervention in the form of exchanging governmental favors to secure legislative votes.⁷ Congress has had to enact a series of constitutional amendments to enable the government to put its financial house in order and to continue to modernize.

Brazil's Constitution is also *dirigiste*, setting out ambitious goals and programs for reforming society with virtually nothing excluded from its global scope. Many of its provisions, however, are not self-executing. They either require complementary legislation to fill in certain missing elements, or they are programmatic, mandating directives

committees, and with considerable participation from diverse societal groups, drafted the Constitution over a nineteen-month period. The final version was promulgated on October 5, 1988. For an exposition of the drafting procedure and problems, see Keith S. Rosenn, *Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society*, 38 AM. J. COMP. L. 773, 775-777 (1990).

2. The latest amendment, No. 31, was promulgated on December 14, 2000. Six amendments, promulgated in 1994 under a special revision procedure, are numbered separately. My annotated translation of the Brazilian Constitution, incorporating all amendments through the end of December 2000, is published as Release 2000-2 in 3 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1-162 (Gisbert H. Flanz ed., 2001).

3. For example, Article 5 has 77 subdivisions and 22 subsections, guaranteeing a wide variety of individual rights, as well as regulating such diverse subjects as: extradition, remedies, legal aid, moral damages, criminal penalties, creation of associations, copyright, patents, trademarks, social function of property, attachment of rural property, freedom of information, and juries.

4. Keith S. Rosenn, *supra* note 1, at 778. See also Fábio Konder Comparato, *The Economic Order in the Brazilian Constitution of 1988*, 38 AM. J. COMP. L. 753, 769-770 (1990).

5. MANOEL GONÇALVES FERREIRA FILHO, *CONSTITUIÇÃO E GOVERNABILIDADE* (1995).

6. After adoption of the 1988 Constitution, Brazil enacted a new Election Law, Law No. 8.713 of September 30, 1993, which prohibited political parties that had not obtained at least three percent of the popular vote from operating in Congress. Unfortunately, this three percent limitation was invalidated by Brazil's highest court, the Supreme Federal Tribunal, in 1994. David Fleischer, *Beyond Colligate: Prospects for Consolidating Democracy in Brazil Through Political Reform*, in *CORRUPTION AND POLITICAL REFORM IN BRAZIL: THE IMPACT OF COLOR'S IMPEACHMENT* 49, 53-54 (Keith S. Rosenn & Richard Downes eds., 1999) [hereinafter cited as *CORRUPTION AND POLITICAL REFORM*].

7. Amaury de Souza, *Collor's Impeachment and Institutional Reform in Brazil*, in *CORRUPTION AND POLITICAL REFORM* 87, 88-89.

for substantive legislation and regulations.⁸ Brazil's fractionalized Congress, however, has left many constitutional provisions without the necessary implementing or complementary legislation.

III. FORMS OF JUDICIAL REVIEW

Brazilian judicial review combines the decentralized, incidental form of judicial review of a common law country like the United States with the centralized, abstract form of judicial review of civil law countries such as Germany and Italy.⁹ Brazil's Constitution provides for both forms of judicial review. The constitutionality of federal, state or municipal laws or decrees may be challenged incidentally in the course of litigation before any state or federal court. In addition, the constitutionality of any law or decree may be challenged in the abstract directly before the Supreme Federal Tribunal (STF), Brazil's highest court, or, in certain cases, before the state supreme courts (Tribunals of Justice).¹⁰

A. *Review Incidenter*

Any state or federal court may determine the constitutionality of any law or decree incidental to deciding a concrete case. The constitutional issue may be raised by a party (including a third party), the Public Ministry,¹¹ or even the court itself *ex offi-*

8. Manoel Gonçalves Ferreira Filho, *Fundamental Aspects of the 1988 Constitution*, in A PANORAMA OF BRAZILIAN LAW 11, 13-16 (Jacob Dolinger & Keith S. Rosenn eds., 1992). According to a study done by Saulo Ramos, Minister of Justice in the Sarney regime, as originally enacted, Brazil's 1988 Constitution required enactment of some 285 ordinary laws and 41 complementary laws. "A Honra Substabeleceda," *Folha de São Paulo*, Sept. 16, 1990. Even today, a great many have not yet been enacted.

9. See MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 85-86 (1971).

10. Art. 125, § 2 of the Federal Constitution provides: "It is the responsibility of the States to institute an action of unconstitutionality for state or county laws or normative acts that contravene the State Constitution, prohibiting the conferral of standing to act on only one agency." State Tribunals of Justice have been given jurisdiction to hear direct actions challenging the constitutionality of state or county legislation as violative of the state constitution. For an exploration of direct judicial review in state supreme courts, see CLÉMERSON MERLIN CLÉVE, *A FISCALIZAÇÃO ABSTRATA DA CONSTITUCIONALIDADE NO DIREITO CONSTITUCIONAL BRASILEIRO* 391-406 (2d ed. 1999).

11. The Public Ministry is an autonomous career institution with no precise counterpart in common law countries, although it bears some similarity to the U.S. Justice Department or state prosecutor offices. The Public Ministry prosecutes crimes and represents the public interest in law and justice in civil matters. The Public Ministry may intervene in all cases involving status of persons, guardianship, incompetency, marriage, and any other matter of public interest. It has special responsibility for defending the legal order. See CONSTITUIÇÃO FEDERAL [FEDERAL CONSTITUTION] arts. 127-130 (Braz).

cio.¹² A judicial determination of unconstitutionality via review *in-cidenter* has only *inter partes* effects, meaning the court simply refuses to apply the offending law or decree to the case before it; thus, the decision is binding only upon the litigants. Although the Constitution states that tribunals may declare laws unconstitutional only by an absolute majority vote,¹³ the STF has held that a judge who sits alone has the power to declare a law or act unconstitutional.¹⁴ Collegiate tribunals, however, need an absolute majority of the full court or of a special organ of the tribunal to declare a statute unconstitutional unless the STF, sitting *en banc*, has already declared the statute unconstitutional.¹⁵

Generally, lower court decisions that resolve constitutional issues may be appealed all the way to the STF. The Constitution grants the STF the power to hear by extraordinary appeal (*recurso extraordinário*) any decision in sole or last instance that is: (a) contrary to a provision of the Constitution, (b) declares a treaty or federal law unconstitutional, or (c) upholds a law or act of local government challenged as violative of the Constitution.¹⁶ It also has jurisdiction to decide by ordinary appeal all denials of *habeas corpus*, writs of security, *habeas data* and mandates of injunction denied by superior tribunals, as well as political crimes.¹⁷

Historically, judicial protection of constitutional rights in Brazil, as in other Latin American countries, has been hobbled by lack of effective and speedy procedural devices. Ordinary actions typically involve delays of many years. These delays are exacerbated by an ap-

12. CLÈVE, *supra* note 10, at 98. Typically, the constitutional question is raised by means of a pleading called an exception or by way of defense, and the constitutionality of the offending statute or decree is not attacked directly; rather the attack is directed at the act or conduct based upon the offending law or decree. *Id.* at 91-92.

13. "Tribunals may declare laws or normative acts of the Government unconstitutional only by a vote of an absolute majority of their members or the members of their respective special body." CONSTITUIÇÃO FEDERAL art. 97.

14. Prefeitura Municipal de Goiatuba v. Prefeitura Municipal de Bom Jesus de Goiás, RE 89.553, Relator: Rafael Mayer, 97 R.T.J. 1191, 554 REV. TRIB. 253 (STF 1981).

15. CÓDIGO DE PROCESSO CIVIL [C.P.C.], Law No. 5.869 of January 11, 1973, art. 48; as amended by Law No. 9.756 of 1998, Diário Oficial da União [D.O.U.] of 18.12.1998. *See* cases cited in CLÈVE, *supra* note 10, at 107-108.

16. CONSTITUIÇÃO FEDERAL art. 102 (III). The extraordinary appeal is adapted from the writ of error in the original United States Judiciary Act of 1789. Cases coming up on extraordinary appeal constitute an exception to the principle that Brazilian courts may raise constitutional issues *sua sponte*. The STF has held that it cannot consider a constitutional issue on extraordinary appeal unless it was first raised in the courts below. RE 117805-PR, Relator: Sepúlveda Pertence, Decision of 5/4/93, DJU of 8/27/93; AGR 144816-5, Relator: Moreira Alves, DJU 4/12/96; AGR 155188-8, Relator: Celso de Mello, DJU 5/15/98.

17. CONSTITUIÇÃO FEDERAL art. 102 (II).

pellate process that permits a wide variety of dilatory measures, including interlocutory appeals. Consequently, lawyers have long sought creation of special remedies to assure speedy vindication of constitutional rights.¹⁸ During the nineteenth century, Brazilian courts expanded the writ of *habeas corpus* far beyond its Anglo-American moorings in an effort to protect individual rights through its swift summary proceedings.¹⁹ During the twentieth century, Brazil developed a variety of procedural devices that have facilitated incidental judicial review and made judicial protection of individual rights more effective.

1. Writ of Security (*Mandado de Segurança*)

After *habeas corpus* was eventually cut back to actual or threatened interference with one's ability to come and go, the 1934 Constitution created a new remedy called the writ of security. The writ of security can be brought to protect any liquid and certain right unprotected by *habeas corpus* against illegality or abuse of power by public authorities.²⁰ The writ of security, which has a preferential place on the docket and a summary procedure, combines a number of the features of the common law writs of injunction, mandamus, prohibition, and *quo warranto*. In theory, however, it cannot be used to challenge the constitutionality of a law in the abstract.²¹

18. Keith S. Rosenn, *Judicial Review in Latin America*, 35 OHIO ST. L. REV. 785, 791 (1974).

19. Phanor Eder, *Habeas Corpus Disembodied: The Latin American Experience*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 463, 465-69 (Kurt Nadelmann & John Hazard eds., 1961).

20. The requirement that the petitioner's right be "liquid and certain" is designed to insure that there are no factual disputes, for they would be difficult to resolve under the writ of security's summary procedure. The writ of security is regulated by Law No. 1.533 of December 31, 1951, D.O.U. 31.12.1951, as amended by Laws Nos. 4.166 of December 4, 1962; 4.348 of June 26, 1964; 6.014 of December 27, 1973; 6.071 of July 3, 1974; and 9.259 of January 9, 1996.

21. Reiterated decisions of the STF have held: "The writ of security will not lie against a law in the abstract." *Súmula* No. 266, SUMULA DA JURISPRUDÊNCIA PREDOMINANTE DO SUPREMO TRIBUNAL FEDERAL 87 (1988). (The institution of the *Súmula* is explained *infra* note 22.) Nevertheless, a strong doctrinal current, with case law support, permits use of the writ of security against a self-executing law. HELY LOPES MEIRELLES, MANDADO DE SEGURANÇA, AÇÃO POPULAR, AÇÃO CIVIL PÚBLICA, MANDADO DE INJUNÇÃO, "HABEAS DATA," AÇÃO DIRETA DE INCONSTITUCIONALIDADE E AÇÃO DECLARATÓRIA DE CONSTITUCIONALIDADE 38-39 (22nd ed. updated by Arnaldo Wald & Gilmar Ferreira Mendes, 2000); Sergio de Andréa Ferreira, *O Mandado de Segurança e o Ato Legislativo*, 231 REV. FOR. 35 (1970). Whether a law is self-executing is frequently a matter of debate. See, e.g., Vicente Alencar v. Presidente da República, M.S. No. 21.077, Relator: Celso de Mello, 132 R.T.J. 1136 (STF *en banc* 1990).

Prior to 1988, absence of an effective doctrine of *stare decisis*²² meant that every person injured by illegality or abuse of power had to bring his or her own writ of security. The 1988 Constitution created a collective writ of security, which is a kind of class action, but the members cannot represent the class, nor is consent of the membership required to bring the action. Standing is restricted to any political party represented in Congress, any labor union, class entity, or association to defend the rights of its members or associates. These entities may not file a collective writ unless they have been legally organized for at least one year.²³

2. The Mandate of Injunction (*Mandado de Injunção*)

The Congress that drafted the 1988 Constitution anticipated that its own inertia could create problems. Therefore, it created two new constitutional procedural institutions, the action of unconstitutionality for omission²⁴ and the mandate of injunction, to prompt it to act and to preserve constitutional rights until implementing legislation is enacted.

The mandate of injunction is a misnomer unrelated to the Anglo-American remedies of mandamus or injunction. The "mandate of injunction shall be issued whenever lack of regulatory provisions make exercise of constitutional rights and liberties and prerogatives inherent in nationality, citizenship or sovereignty infeasible."²⁵ This poorly drafted constitutional provision has created considerable confusion. The constitutional remedy has yet to be regulated, but the STF has decided that the mandate of injunction is self-executing and should be governed by the procedure for the writ of security until Congress adopts a specific implementing statute. Any court considering a request for issuance of a mandate of injunction has to consider the per-

22. Since 1964, Brazil has a form of precedent called the *súmula*, which consists of numbered black letter rules of law. These rules summarize the court's case law resolutions of particular legal issues. These case law rules are enshrined in *súmulas* only after the court's position has been clearly shaped by several panel decisions or an *en banc* decision. Each court has its own rules for creation of *súmulas*; the STF requires an absolute majority of the entire Tribunal. Once a rule has been placed in the *súmula*, any contrary argument on the point will be summarily rejected unless the court is prepared to change the *súmula*. The STF has not added a new *súmula* since 1984.

23. CONSTITUIÇÃO FEDERAL art. 5 (LXX). Article 82(IV) of the Consumer Protection Code, Law No. 8.078 of September 11, 1990, D.O.U. of 12.09.1990, imposes a similar one-year durational requirement in order for an association to be able to bring a class action in defense of consumer rights.

24. The action of unconstitutionality for omission is discussed *infra* at note 90 and the text thereto.

25. CONSTITUIÇÃO FEDERAL art. 5 (LXXI).

plexing dilemma of whether a constitutional rule is self-executing or not. If it is self-executing, then the mandate of injunction should be denied. But if it is not self-executing, it must be because regulation is needed. Since it is not the function of courts to issue administrative regulations, the mandate of injunction places judges in the uncomfortable position of attempting to enforce constitutional rules that require regulation without the benefit of such regulation.²⁶ For example, Article 192, § 3 of the Constitution limits the maximum interest rate that can be charged in Brazil to twelve percent in real terms. The STF has repeatedly held that this provision is not self-executing and has denied attempts to implement it through the mandate of injunction.²⁷ Except for rare situations, such as where the STF has been able to borrow a damage remedy from ordinary law,²⁸ the mandate of injunction has been ineffective.²⁹

3. *Habeas Data*

Brazil's 1988 Constitution borrowed the procedural device of *habeas data* from the Portuguese Constitution. This action permits litigants to discover information that the government has about them in its data banks and to rectify that data if incorrect.³⁰ Brazil adopted *habeas data* as a reaction against the abuses of the military governments, which secretly gathered and stored data about Brazilians without affording any hearing or opportunity to challenge the accuracy of the information. Not until 1997 did Congress pass a law regulating

26. See IRENEU STRENGER, MANDADO DE INJUNÇÃO 37-39 (1988).

27. E.g., *Carvalho Café e Alimentos, Ltda. v. Congresso Nacional*, MI No. 335, Relator Celso de Mello, 200 R.D.A. 237 (STF 1994); *Companhia Teperman de Estofamentos v. Congresso Nacional*, MI No. 520-6 SP, Relator Celso de Mello, 203 R.D.A. 248 (STF 1995).

28. An example of this exceptional area is where mandates of injunction were filed against Congress, requesting enactment of legislation implementing the right conferred by Article 8, § 3 of the Transitional Constitutional Provisions Act. This provision states that economic reparations shall be granted, in accordance with a law enacted by Congress within twelve months after the Constitution's entry into force, to all citizens who had been prevented from practicing specific professions by military resolutions adopted during the 1964 military takeover. Initially, the STF gave Congress a period of forty-five days to issue the required legislation. That proved ineffective, and five years after the period by which Congress was supposed to have had enacted the necessary legislation, the STF decided to allow the plaintiffs in the mandate of injunction suits to seek indemnification from the Government in accordance with ordinary law. See *Estéfano Prokopovicz et al. v. Congresso Nacional*, MI No. 355, Relator: Celso de Mello, 200 R.D.A. 234 (STF 1994) and cases cited therein.

29. Brazilian jurists are divided on this question. See Adhemar Ferreira Maciel, *Mandado de Injunção e Inconstitucionalidade por Omissão*, 304 REV. FOR. 3, 9-10 (1988); Celso Agrícola Barbi, *Mandado de Injunção*, 305 REV. FOR. 17 (1989).

30. CONSTITUIÇÃO FEDERAL art. 5 (LXXII). *Habeas data* is very similar to the U.S. Freedom of Information Act.

habeas data.³¹ Before one may file an action of *habeas data*, the law requires both that the individual make a specific request to the agency or registry that is the depository of the data, seeking to inspect or rectify the data record, and that the agency deny the request, or that fifteen days pass without a response. The action for *habeas data* has a docket priority above all actions except *habeas corpus* and the writ of security, and is to be decided within twenty-four hours after distribution by the clerk to the judge. The institution has worked reasonably well in protecting certain aspects of privacy.³²

4. The Popular Action

The 1934 Constitution created the popular action, making all citizens private attorneys general to protect the common wealth. Originally, any citizen had standing to bring an action to void any act or administrative contract that injured the public patrimony.³³ In 1965, however, this constitutional action was regulated by a statute designed to discourage such actions. The law defined the kind of injuries that could be redressed by the popular action narrowly and required plaintiffs to pay: (1) the initial costs, (2) the defendant's attorney's fees if the suit was unsuccessful, and (3) ten times the normal costs if the suit was deemed frivolous.³⁴ Conversely, the 1988 Constitution has expanded the popular action to include not only acts that tend to injure the public patrimony, but also to include acts that injure administrative morality, the environment, and historic and cultural patrimony.³⁵ Moreover, unless suing in bad faith, the plaintiff is relieved of the burdens of paying costs and the defendant's attorney's fees in the event the plaintiff loses.³⁶

Like the writ of security, the popular action cannot be used to challenge the constitutionality of a law in the abstract. The popular action, however, can be used to challenge the constitutionality of a

31. Law No. 9.507 of November 12, 1997, D.O.U. of 13.11.1997.

32. See Milton Fernandes, *O "Habeas Data" como Defesa à Ameaça Tecnológica*, 704 REV. TRIB. 63 (1994).

33. CONSTITUIÇÃO FEDERAL of 1934, art. 113 (38). See generally, JOSÉ AFONSO DA SILVA, *AÇÃO POPULAR CONSTITUCIONAL: DOCTRINA E PROCESSO* (1968); HELY LOPES MEIRELLES, *supra* note 21; J.M. OTHON SIDOU, "HABEAS CORPUS," *MANDADO DE SEGURANÇA, MANDADO DE INJUNÇÃO, "HABEAS DATA," AÇÃO POPULAR* (4th ed. 1992); NAGIB SLAIBI FILHO, *AÇÃO POPULAR MANDATÓRIA* (1990).

34. Law No. 4.717 of June 29, 1965, arts. 10 & 13, D.O.U. of 05.07.1965.

35. CONSTITUIÇÃO FEDERAL art. 5 (LXXIII). There is also a public civil action for damages caused to the environment and consumers regulated by Law No. 7.347 of July 24, 1985, D.O.U. of 25.07.1985.

36. *Id.*

self-executing law.³⁷ If the merits are finally resolved in a popular action, the court's decision has *erga omnes* effects. If another citizen were to bring a similar action based upon the same facts, the defendant would be entitled to have the second suit dismissed because of *res judicata*.³⁸ Because the popular action has no summary procedure or docket preference, proceedings tend to drag on interminably.

5. The Public Civil Action

The public civil action is a class action for damages caused to the environment; consumers; property or rights with artistic, historic, touristic or landscaping value; and any other diffuse rights or collective interests. It may also be brought for damages resulting from violations of laws protecting the public or popular economy.³⁹ Unlike class actions in the United States, Brazilian law does not permit individual members to represent the class, and damages awarded in the public civil action are deposited in a government-administered fund rather than going to individual class members.⁴⁰ The public civil action may be brought by the Public Ministry, the Union, any State or municipal government, and any quasi-autonomous governmental entity, public firm, foundation, mixed-capital company, or association, provided that its institutional purposes include protection of the diffuse interests for which the public civil action will lie, and that it has been in existence for at least a year. Like the popular action, the public civil action cannot be utilized to declare the unconstitutionality of law in the abstract.⁴¹ These public civil actions have become increasingly important in Brazil for protection of consumer and environmental interests. Unfortunately, they may not be used to resolve disputes about taxes, social security matters, or certain retirement benefits.⁴²

37. J.M. OTHON SIDOU, *supra* note 33, at 502. See also HELY LOPES MEIRELLES, *supra* note 21, at 146-147.

38. HELY LOPES MEIRELLES, *supra* note 21, at 145.

39. The public civil action was created by Law No. 7.347 of July 24, 1985, D.O.U. of 25.07.1985, as amended by Law Nos. 8.078 of September 11, 1990; 8.884 of June 11, 1994; 9.494 of September 10, 1997; and Provisional Measure No. 2.102-28 of February 23, 2001.

40. See Antonio Gidi, *Class Actions in Brazil*, 11 DUKE J. COMP. & INT'L L. ____ (2001) (forthcoming). Articles 81 and 82 of the Consumer Protection Code, *supra* note 23, also regulate class actions for the protection of consumer rights and expand the concept of the class action. See ARRUDA ALVIM, THEREZA ALVIM, EDUARDO ARRUDA ALVIM & JAMES MARINS, *CÓDIGO DO CONSUMIDOR COMENTADO* 347-381 (2d ed. 1995); Carlos Roberto Barbosa Moreira, *O Processo Civil no Código do Consumidor*, 63 REV. PROCESSO 138, 140-143 (Jy.-Sept. 1991).

41. HELY LOPES MEIRELLES, *supra* note 21, at 203.

42. Provisional Measure No. 2.102-28 of February 23, 2001.

6. Senate Suspension

The Brazilian Constitution contains an unusual mechanism for converting certain of these *inter partes* decisions of unconstitutionality into decisions with *erga omnes* effects. Whenever the STF has definitively determined that a federal, state or municipal law or decree is unconstitutional,⁴³ the Constitution confers upon the Federal Senate the power to enact a resolution suspending, in whole or in part, the unconstitutional legal norm.⁴⁴ This resolution neither revokes nor annuls the law or decree; it simply makes it ineffective against everyone from that date forward. Once it has suspended an unconstitutional law or decree, however, the Senate may not revive it, either in whole or in part.⁴⁵ Nevertheless, the Constitution does not require that the Senate suspend the offending norm, and the Senate has occasionally declined to do so. For example, the Senate refused to suspend certain articles of a federal statute requiring contributions to the Fund for Social Investment (FINSOCIAL)⁴⁶ for two reasons: (1) the STF declared the law unconstitutional only by a six-to-five vote, and (2) suspending the revenue measure would have serious fiscal repercussions for the Treasury.⁴⁷ The STF has held that the Senate has discretion as to whether and when to suspend a norm definitively declared unconstitutional by the STF.⁴⁸

B. Review *Principaliter*

The Brazilian Constitution confers original and exclusive jurisdiction on the STF to decide the constitutionality of laws or decrees in the abstract in three types of proceedings. These are the direct action

43. The STF sits in panels, and its decisions are sometimes inconsistent. The term "definitive" implies a series of decisions, but no particular number of decisions is required. Normally the President of the STF will not send an opinion to the Senate until after the case law has "firmed up," which signifies that the STF has decided several cases concluding that a particular norm is unconstitutional. See Ada Pellegrini Grinover, *Controle da Constitucionalidade*, 90 REV. PROCESSO 11, 12 (Apr./Je. 1998).

44. CONSTITUIÇÃO FEDERAL art. 52(X). This provision originated in the Constitution of 1934, art. 91 (IV).

45. *Engenharia Souza e Barker Ltda. et al. v. Senado Federal*, RMS No. 16.512, Relator: Oswaldo Trigueiro, 38 R.T.J. 5 (STF 1966), translated in KENNETH L. KARST & KEITH S. ROSEN, *LAW AND DEVELOPMENT IN LATIN AMERICA* 119-124 (1975).

46. Created by Decree-Law No. 1.940 of May 25, 1982, D.O.U. 26.05.1982, FINSOCIAL is a percentage levy on the gross receipts of firms selling merchandise, financial institutions, and insurance companies. The Fund is used to finance investments for financial assistance in food, public housing, health, education and support for small farmers.

47. RE 150.764-1, discussed in CLÈVE, *supra* note 10, at 276.

48. CLÈVE, *supra* note 10, at 121.

of unconstitutionality, the declaratory action of constitutionality, and the action of unconstitutionality for omission.

1. The Direct Action of Unconstitutionality

The Constitution explicitly confers original and exclusive jurisdiction upon the STF to decide direct actions of unconstitutionality challenging federal or state laws or normative acts.⁴⁹ Under prior constitutions, the Procurator General of the Republic was the only person who could bring such an action, then called a representation.⁵⁰ The 1988 Constitution significantly expanded the list of those entitled to bring a direct action of unconstitutionality to include the President of the Republic, the Executive Committee of either the Federal Chamber of Deputies or Senate, the Executive Committee of the legislature of any State or the Federal District, the Governor of any State or the Federal District, the Federal Council of the Brazilian Bar Association, any political party represented in the Federal Congress, and any syndical confederation or national class entity.⁵¹ To avoid being flooded with direct actions of unconstitutionality, the STF has developed a doctrine of "thematic relevancy" (*pertinência temática*), denying standing to some constitutionally designated classes of plaintiffs by insisting upon an objective link between the plaintiff's institutional duties and the challenged norm. Thus, the STF has denied standing to the executive committee of a state legislature to challenge the constitutionality of federal legislation and National Monetary Council Resolutions dealing with rural credit.⁵² Similarly, the STF denied standing to the National Confederation of Industry to bring a direct action challenging the constitutionality of a federal statute requiring legal entities to use lawyers to register their bylaws or changes therein as there was an insufficiently close link between the purpose of the con-

49. CONSTITUIÇÃO FEDERAL art. 102 (I)(a). In addition, the highest state courts, called Tribunals of Justice, may hear representations, direct actions of constitutionality that could lead to federal intervention in the states, or state intervention in the municipalities. *Id.* arts. 34 (VII), 35 (IV), and 36 (III).

50. The Procurator General heads the Public Ministry. He is appointed by the President of the Republic with the consent of an absolute majority of the Senate for a two-year renewable term. The President must appoint someone who is a career member of the Public Ministry over the age of 35. CONSTITUIÇÃO FEDERAL art. 128, § 1. Under prior Constitutions, the President could dismiss the Procurator General at will, but he does not have that authority under the present Constitution.

51. CONSTITUIÇÃO FEDERAL art. 103 (I) to (VIII).

52. *Mesa da Assembléia Legislativa do Estado de Mato Grosso do Sul v. Presidente da República e Banco Central do Brasil*, ADIn No. 1.307-MS, Relator: Francisco Rezak, 159 R.T.J. 771 (STF *en banc* 1995).

federation and the statute they were challenging.⁵³ On the other hand, the doctrine of thematic relevancy is not applied to direct actions brought by the Procurator General, the Council of the Brazilian Bar Association, or political parties, all of which are deemed to have a generalized interest in constitutionality.⁵⁴

While the STF normally sits in panels of five, a minimum of eight ministers is required to vote on direct actions of unconstitutionality. At least six votes are needed to declare a statute or decree unconstitutional.⁵⁵ In a direct action, the STF decides the constitutionality of the challenged law or decree in the abstract.⁵⁶ Technically, there are no adverse parties in direct actions of unconstitutionality. The plaintiffs have the right to be heard, but frivolous actions will be summarily dismissed by the reporter to whom the case is assigned.⁵⁷ The governmental organs that drew up the challenged laws or acts will normally be asked to render information to the STF but not to defend the norm or their own interests.⁵⁸ The Procurator General must file an opinion with the STF; however, third parties may not intervene.⁵⁹ The Advocate General of the Union has the responsibility of defending the challenged law or decree.⁶⁰

The STF takes a restricted view of its interpretive powers in direct actions of unconstitutionality, characterizing its role as simply that of a "negative legislator."⁶¹ Thus, the STF refuses to declare a law partially unconstitutional or to interpret it to change its meaning on the theory that it would be acting as a positive legislator if it did so.

53. Confederação Nacional da Indústria v. Presidente da República e Congresso Nacional, ADIn No. 1.194-DF, Relator: Maurício Corrêa, 162 R.T.J. 857 (STF *en banc* 1996).

54. Carlos Antonio de Almeida Melo, *Algumas Questões Objetivas sobre Ação Direta de Inconstitucionalidade*, 36 REV. INFORM. LEGIS. 111, 117-118 (No. 142, Abr./Je. 1999). For a summary of the STF's case law on standing to bring direct actions of unconstitutionality, see LUIS ROBERTO BARROSO, *CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL* 236-38, note 31 (1998).

55. Law No. 9.868 of November 10, 1999, art. 23, D.O.U. 11.11.1999; Internal Rules of the STF, arts. 143 and 173, at <http://gemini.stf.gov.br/>.

56. Keith S. Rosenn, *A Comparison of the Protection of Individual Rights in the New Constitutions of Colombia and Brazil*, 23 U. MIAMI INTER-AM. L. REV. 659, 685 (1992).

57. Law No. 9.868 of November 10, 1999, art. 4, D.O.U. of 11.11.1999. This dismissal may be appealed to the full STF. The reporter system is explained *infra* at note 107 and the text thereto.

58. Sydney Sanchez, *Aspectos Processuais do Controle de Constitucionalidade*, in 2 ESTUDOS EM HOMENAGEM À GERALDO ATALIBA 602, 609 (Celso Antonio Bandeira de Mello ed., 1997).

59. Law No. 9.868 of November 10, 1999, art. 7, D.O.U. of 11.11.1999.

60. CONSTITUIÇÃO FEDERAL art. 103 § 3.

61. Procurador-Geral da República v. Presidente da República e Congresso Nacional, ADIn No. 896-DF, 159 R.T.J. 111, 121 (STF *en banc* 1993) (Vote of Rel. Moreira Alves).

On the other hand, the STF has adopted from U.S. and German constitutional law the device of declaring a statute constitutional only if interpreted in a particular manner.⁶² If it decides that a law or decree is unconstitutional in a direct action of unconstitutionality, the STF does not need to send the decision to the Senate for suspension of the unconstitutional norm. The STF's decisions on constitutionality, unconstitutionality, and constitutional interpretation are binding upon the entire federal and state judiciaries, as well as upon the federal, state, and municipal governments.⁶³ Technically, however, the STF does not revoke the offending norm; it simply suspends it indefinitely.⁶⁴

The STF has the power to issue provisional remedies in direct actions of unconstitutionality. Except during a period when the Tribunal is in recess, such measures may be issued only by an absolute majority of the STF. Normally, before issuing a provisional remedy, the STF will give the authorities that issued the law or decree five days to respond, but their input can be dispensed with in cases of exceptional urgency. The reporter will normally hear from the Procurator General and the Advocate General of the Union within three days. A provisional remedy issued by the STF has *erga omnes* effects. Provisional measures usually operate prospectively only, but the STF has the power to make them retroactive.⁶⁵

One would expect to find that the STF has been overwhelmed with direct actions of unconstitutionality, in light of the fiendish complexity and specificity of the Brazilian Constitution and the breadth of the rights contained therein.⁶⁶ This has not been the case. Of the 90,839 cases distributed by the STF in 2000, only 257 were direct ac-

62. *Governador do Estado do Amazonas v. Governador do Estado do Amazonas*, Assembléia Legislativa do Estado do Amazonas, ADIn No. 491, 137 R.T.J. 90, 99-100 (STF *en banc* 1991) (Vote of Rel. Moreira Alves); *Governador do Estado do Espírito Santo v. Assembléia Legislativa do Estado do Espírito Santo*, ADIn No. 1344, 205 R.D.A. 196, 200-201 (STF *en banc* 1995) (Vote of Rel. Moreira Alves). In the United States, this technique is usually called interpretation to save a statute from constitutional doubts. In Brazil, it is called "interpretation in conformity with the Constitution." See Sydney Sanchez, *supra* note 58, at 613.

63. Law No. 9.868 of November 10, 1999, art. 28, sole paragraph, D.O.U. of 11.11.1999. The constitutional text is somewhat narrower, making the STF's definitive decisions on the merits in actions declaring the constitutionality of only federal laws or normative acts binding *erga omnes*. CONSTITUIÇÃO FEDERAL art. 102, § 2.

64. Carlos Antonio de Almeida Melo, *supra* note 54, at 116.

65. Law No. 9.868 of November 10, 1999, arts. 10-12, D.O.U. of 11.11.1999.

66. For more detailed criticism of the great specificity and complexity of the Brazilian Constitution, see Keith S. Rosenn, *supra* note 1, at 777-793.

tions of unconstitutionality.⁶⁷ Between 1989 and 2000, the STF decided 1110 direct actions on the merits, an annual average of 92.5 actions.⁶⁸ This is a substantial increase over the number of representations that were filed under prior constitutions,⁶⁹ but that is to be expected in view of the significant expansion of the groups with standing to bring such actions. One would also expect to find many direct actions dealing with truly important national issues, but most do not. Most direct actions deal with fairly narrow or parochial issues and are often disposed of on quite technical grounds. Nevertheless, the direct action of unconstitutionality has become a useful device for political parties who lost in Congress; the concession of a preliminary injunction can have very important ramifications by providing the winning plaintiff with political leverage. The mere threat of a direct action of unconstitutionality may inspire the majority to negotiate with the smaller political parties.⁷⁰

2. The Declaratory Action of Constitutionality

A constitutional amendment adopted in 1993 conferred original and exclusive jurisdiction upon the STF to hear “actions declaring the constitutionality of federal laws or normative acts.”⁷¹ On its face, the declaratory action appears redundant with the direct action of unconstitutionality. Indeed, it has been dubbed “nothing more than a direct action of unconstitutionality with the signal changed.”⁷² Nevertheless, that change in signal is important, for the declaratory action’s *raison d’être* was a concern with the lack of a procedural device enabling the government to petition the STF to resolve sensitive legal issues quickly and authoritatively.

67. Banco Nacional de Dados do Poder Judiciário, Supremo Tribunal Federal—Processos Registrados, Distribuídos, e Julgados por Classe Processual, at <http://www.stf.gov.br/bndpj/STF1C.htm>.

68. STF-Movimento Processual nos Anos de 1940 a 2000, at <http://www.stf.gov.br/bndpj/STF1A1B.htm> (last modified February 1, 2001). In addition, the STF decided 1145 requests for preliminary relief, an annual average of 104.1 cases. *Id.*

69. In the fifty-four years the institution of the representation was operative (1934-1988), the STF received 1692 representation petitions, an average of 31.33 per year.

70. Inocência Martíres Coelho, *Constitucionalidade/Inconstitucionalidade: uma Questão Política*, REV. JUR. VIRTUAL, No. 13 (Je. 2000) at http://www.planalto.gov.br/ccivil/_03revista/Rev_21/Revista_21.htm].

71. CONSTITUIÇÃO FEDERAL art. 102 (I) (a), as amended by Constitutional Amendment No. 3 of March 17, 1993, art. 1.

72. Gilmar Ferreira Mendes, in *AÇÃO DECLARATÓRIA DE CONSTITUCIONALIDADE 5* (Ives Gandra da Silva Martins & Gilmar Ferreira Mendes eds., 1994), cited in CLÈVE, *supra* note 10, at 284.

(a) The *Avocatória*—The Original Removal Device

In a constitutional amendment promulgated in 1977, the military government created a procedural institution called the *avocatória*. This was a removal procedure that allowed the STF, at the request of the Procurator General, to suspend any measures taken by the lower courts and to transfer to its original jurisdiction any case pending before another court whenever there was “an immediate danger of serious injury to order, health, security or public finance.”⁷³ The *avocatória*, which suffered the taint of authoritarianism, was rejected in the 1988 Constitution.⁷⁴ In 1991, the Collor de Melo Government tried unsuccessfully to resuscitate the *avocatória*. Lack of a removal mechanism has been a serious problem in privatization auctions because those opposed frequently manage to find some lower court judge who will issue a preliminary injunction blocking the auction. For example, in 1997, the auction to privatize the state mining company, Companhia Vale do Rio Doce, had to be suspended on four successive days because 135 lawsuits were filed throughout the country, resulting in thirty-five preliminary injunctions barring the sale. One belated injunction was issued after the auction had been held. All were eventually quashed by higher courts, but only after causing Brazil considerable international embarrassment for permitting a judicial circus.⁷⁵

Ultimately, the declaratory action of constitutionality was adopted as a less controversial and more sophisticated instrument for carrying out a similar purpose. The basic purpose of the declaratory action of constitutionality “is to avoid delay and contradictions with respect to constitutional questions of highest importance, which if not resolved rapidly, might lead to true legal chaos, prejudicing the national economy and the very development of the Country.”⁷⁶ Unlike the *avocatória*, the declaratory action avoids direct interference with lower court decisions and ostensibly is driven by constitutional rather than by political concerns. As an original action in the STF, whose decision is binding *erga omnes*, the declaratory action avoids any need for the STF to remand a case to the lower courts, as had happened

73. Constitutional Amendment No. 7 of April 13, 1977.

74. DALMO DE ABREU DALLARI, O PODER DOS JUIZES 65-66 (1996); Arnaldo Wald, *Alguns Aspectos da Ação Declaratória de Constitucionalidade*, 76 REV. PROCESSO 7, 8-9 (Oct.-Dez. 1994).

75. Edwin Taylor, *The Gavel Finally Descends—First Block of CVRD Privatized for \$3 Billion*, 5 LAT. AM. L. & BUS. REP. 15 (May 31, 1997); William Van Volsen, *Brazil CVRD Sale's Legal Battle May Drag on for Years*, DOW JONES NEWS SERVICE, May 7, 1997.

76. Arnaldo Wald, *supra* note 74, at 19.

with the *avocatória*.⁷⁷ Article 17 of the proposed constitutional amendment to reform the Judiciary,⁷⁸ which is currently being voted on in Congress, would have revived the *avocatória*. This measure was rejected by the full Chamber of Deputies on January 25, 2000.

(b) The *Neo-Avocatória* - Disobedience of a Fundamental Precept

In December 1999, in enacting legislation regulating Article 102, § 1 of the Constitution, Congress restored and broadened the *avocatória* under a different name: “allegation of disobedience of a fundamental precept.”⁷⁹ Anyone with standing to bring a direct action of unconstitutionality also has standing to propose an allegation of disobedience of a fundamental precept directly before the STF. This procedural device may be invoked, however, only if there is no other effective remedy to cure the harm.⁸⁰ By vote of an absolute majority the STF has the power to issue a provisional remedy suspending proceedings in any case before the lower courts or suspending the effects of any judicial decision unless it is *res judicata*.⁸¹ At least two-thirds of the members of the STF must be present to decide the merits, which can result in a declaration of the unconstitutionality of any law or normative act. The STF’s determination of constitutionality in this type of procedure is binding upon all governmental organs.⁸² This new institution is likely to become an important means to further centralizing the power of judicial review in the STF. The Federal Council of the Brazilian Bar Association has recently filed a direct action of unconstitutionality, alleging that the disobedience of a fundamental precept violates due process, the right to a law-trained judge, the principles of a democratic state of law and legality, and the separation of powers.⁸³

77. CLÈVE, *supra* note 10, at 294.

78. Proposta de Emenda à Constituição No. 96-C de 1992, at <http://www.interlegis.gov.br/interlgs/leis/muni.htm>.

79. Law No. 9.882 of December 3, 1999, D.O.U. of 06.12.1999.

80. *Id.* art. 4, § 1.

81. In cases of extreme urgency, the reporter alone can issue the provisional remedy, referring the matter to the full STF. *Id.* art. 5, § 1.

82. *Id.* art. 10, § 3.

83. ADIn No. 2.231-8. See Oswaldo Othon de Pontes Saraiva Filho, *Arguição de Descumprimento de Preceito Fundamental*, REV. JUR. VIRTUAL No. 16 (Sept. 2000) at http://www.planalto.gov.br/ccivil_03/revista/Rev_21/Revista_21.htm].

(c) Differences between the Declaratory Action of Constitutionality and the Direct Action of Unconstitutionality

There are two important differences between the declaratory action of constitutionality and the direct action of unconstitutionality. First, standing to bring a declaratory action of constitutionality is much more restricted than for a direct action of unconstitutionality, which may be brought by ten different categories of proponents. In contrast, a declaratory action of constitutionality may be brought by only three types of federal officials: (1) the President of the Republic, (2) the Executive Committee of either the Federal Chamber of Deputies or Senate, or (3) the Procurator General of the Republic. Second, a declaratory action may be brought only with respect to federal legislation. The constitutionality of state or county legislation cannot be determined through this procedural device.

The first declaratory action of constitutionality involved the question of the constitutionality of Constitutional Amendment No. 3 in adopting the declaratory action. In a prior direct action of unconstitutionality, the Association of Brazilian Magistrates had contended that the declaratory action was unconstitutional because it suppressed the creativity of the judicial function and violated fundamental guarantees, such as the right of judicial access, due process, full defense, and the adversary system. The Association also alleged that the declaratory action violated the principle of separation of powers, making the STF a consultative organ of the Legislature. Although that action was dismissed for lack of standing, the full STF dealt seriously with all these contentions in a lengthy opinion filed in another case in which the President of the Republic and the Executive Committees of the Congress sought a declaration of the constitutionality of a social security tax. By a divided vote, the full STF sustained the constitutionality of the declaratory action of constitutionality.⁸⁴

The declaratory action of constitutionality has been little used. In the seven years since its creation, only eight declaratory actions of constitutionality have been brought before the STF.⁸⁵ Nevertheless, the declaratory action served as an important mechanism in the Brazilian Government's recent efforts to avert a fiscal crisis threatened by lower courts conceding expensive salary increases to civil servants

84. *Presidente da República v. Mesa do Senado Federal*, ADC No. 1, Relator: Moreira Alves, 157 R.T.J. 371 (STF 1993).

85. Of these eight actions, two were granted, three denied, and three are still pending. STF-Banco de Dados do Poder Judiciário, at <http://www.stf.gov.br/bndpj/STFADC.htm>.

through a recently created procedural institution called the *tutela jurisdiccional anticipada*, which resembles the common law preliminary injunction.⁸⁶ In ADC No. 4, Minister Celso de Mello, then President of the STF, explained that the provisional remedy accorded by the STF in this case was binding on all courts. Therefore, until the STF decided the constitutionality of Law No. 9.494 of 1997, no judge or tribunal in the country was able to grant anticipatory salary increases based upon the alleged unconstitutionality of Law No. 9.494.⁸⁷ Recent legislation regulating the declaratory action of constitutionality requires an absolute majority of the STF to issue a provisional measure. If it issues a provisional measure, the STF must decide the merits within 180 days; otherwise, the provisional measure loses its efficacy.⁸⁸ Normally, the STF's decision on the merits in either type of action has retroactive effects. Nevertheless, in cases in which the STF, by a two-thirds vote, deems that considerations of legal security or exceptional public interest so require, the STF can make its decision prospective only, either from the date of the definitive judgment or from any other date set by the Tribunal.⁸⁹

3. The Action of Unconstitutionality for Omission

The 1988 Constitution confers original jurisdiction on the STF to issue a declaration of unconstitutionality for omission whenever it determines the "lack of measures to make a constitutional rule effective."⁹⁰ The STF is charged with notifying the appropriate branch of government to adopt the necessary measures. If the offender is an administrative agency, the STF may direct that the needed measures be adopted within thirty days. If the offender is the legislature, the STF can only issue a warning about noncompliance with a constitutional duty; it cannot force the legislature to enact the needed legisla-

86. This institution was created by Law No. 8.952 of December 13, 1994, D.O.U. 14.12.1994, which amended articles 273 and 461 of the Code of Civil Procedure. If the evidence appears sufficiently strong to convince the judge that the allegations of liability in the complaint are true and there is either a likelihood of irreparable harm, or the defendant appears to be abusing the right of defense, the judge may provisionally grant all or some of the relief requested in the complaint in the pre-trial phase.

87. Order issued in Petitions Nos. 1402, 1404, 1408, 1410 and 1016 brought by the Federal Government in 1998 against *tutelas anticipadas* conceded by regional federal tribunals to federal civil servants in São Paulo and unions of employees of the federal judiciary in Mato Grosso do Sul and Rio Grande do Sul. While the STF's preliminary injunction did not have retroactive effect, it did suspend all relief not yet actually executed.

88. Law No. 9.868 of November 10, 1999, art. 21, D.O.U. of 11.11.1999.

89. *Id.* art. 27.

90. CONSTITUIÇÃO FEDERAL art. 103, § 2. This provision was modeled upon Article 283 of the Portuguese Constitution.

tion. Not surprisingly, the action of unconstitutionality for omission has not worked well. STF notification has rarely caused Congress to legislate. Separation of powers principles prevent the courts from supplying the missing legislation, and respect for a co-equal branch of government prevents them from trying to impose a sanction against the legislature for failure to legislate.

IV. SEPARATION OF POWERS AND THE PROVISIONAL MEASURE

Under the 1988 Constitution, most legislation has stemmed from the Executive. Article 62 of the Constitution grants the President the power to issue provisional measures (*medidas provisórias*) that have the force of law for thirty days in cases of relevancy and urgency.⁹¹ According to the Constitution, these measures are void *ab initio* unless ratified by Congress within thirty days. Congress, however, usually does not act in a timely fashion. This is normally due to inertia; additionally, thirty days is far too short a time to review complex legislation. Sometimes, however, the inaction results from maneuvering by the government to prevent a vote if there is substantial opposition to the measure.⁹² Because Congress so frequently fails to act within thirty days, Brazilian presidents have adopted the practice of continually reissuing unratified provisional measures, a practice that has been deemed constitutional by the STF.⁹³

The Judiciary has not been an effective control upon the Executive's misuse of the provisional measure.⁹⁴ The only constitutional limitation on the President's power to issue a provisional measure is

91. The STF has held that the issue of whether a particular provisional measure is actually "urgent and relevant" is a nonjusticiable political question. ADIn 1.397-DF, Diário de Justiça of June 27, 1997, reproduced in Carlos Mário da Silva Velloso, *O Supremo Tribunal Federal e o Controle de Constitucionalidade: Resenha de Decisões*, in ESTUDOS EM HOMENAGEM AO PROF. CAIO TÁCITO 135, 160 (Carlos Alberto Menezes Direito ed., 1997) [hereafter cited as ESTUDOS CAIO TÁCITO].

92. Manoel Gonçalves Ferreira Filho, *As Medidas Provisórias no Sistema Constitucional Brasileiro, Particularmente em Matéria de Direito Econômico*, in ESTUDOS CAIO TÁCITO 455, 463.

93. ADIn 295-DF of June 22, 1990; ADIn 1.454-DF of June 19, 1996; ADIn 1.516-RO of March 6, 1997; ADIn 1.397-F of April 28, 1997, cited in C. Velloso, *supra* note 91, at 159-160.

For the political implications of the practice, see Scott Mainwaring, *Multipartism, Robust Federalism, and Presidentialism in Brazil*, in PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA 55, 62-64 (Scott Mainwaring & Matthew S. Shugart eds., 1997).

94. Between September 1988 and February 16, 2001, Brazilian presidents have issued a total of 584 original provisional measures, of which 451 have been converted into law and 28 have been revoked. Only twenty-two have been rejected by the Congress. Provisional measures have been reissued 5121 times. As of February 16, 2001, there were fifty-two provisional measures in force, two of which had been reissued seventy times. These figures are taken from a table compiled by the Presidency of the Republic that appears at <http://www.planalto.gov.br>.

that the subject dealt with must be relevant and urgent. The STF has decided that the issues of relevancy and urgency are solely for the President's determination and not a legal issue for the courts. The only check that the STF has placed on the President is to refuse to allow the President to reissue a provisional measure that has actually been rejected by Congress.⁹⁵ When he sought to insulate from effective judicial review the constitutionally dubious measure of freezing everyone's bank account for eighteen months, President Collor simply issued a provisional measure depriving the courts of the power to issue preliminary injunctions against the economic measures contained in the Collor Plan. When Congress failed to ratify this provisional measure, Collor simply republished it four more times until Congress finally enacted it into law.⁹⁶ The STF refused to declare such a limitation on the remedial powers of the courts unconstitutional, preferring to let Congress bear responsibility for interfering with the government's economic recovery program.⁹⁷

The only matters that the President may not deal with by provisional measures are regulation of constitutional amendments adopted since 1995.⁹⁸ A further constitutional question has been raised by the Executive's practice of adding a clause validating all acts performed in reliance on prior provisional measures. In addition to generating heated debate as to its constitutionality, this measure presents the judiciary with a serious dilemma. On the one hand, the practice is obviously a misuse of a constitutional measure designed to permit temporary, emergency legislation. On the other hand, if the courts were to invalidate the practice, Brazil would be thrown into a state of legal paralysis, and the courts would have to devise some way to extract eggs from an omelette.

95. Procurador-Geral da República v. Presidente da República, ADIn No. 293, Relator: Celso de Mello, 146 R.T.J. 707 (STF en banc 1990). See IVO DANTAS, ASPECTOS JURÍDICOS DAS MEDIDAS PROVISÓRIAS 93-94 (2d ed. 1991).

96. The prohibition against preliminary injunctions challenging Collor's economic reforms was first issued as Provisional Measure (PM) No. 173 on March 18, 1990, D.O.U. of 19.03.1990, which expired because it was not examined by Congress within thirty days from its publication. It was republished as PM No. 182 on April 23, 1990, D.O.U. of 24.04.1990; PM No. 186 on May 23, 1990, D.O.U. of 25.05.1990; PM No. 192 on June 22, 1990, D.O.U. 25.06.1990; and PM No. 198 on July 26, 1990, D.O.U. of 27.07.1990. Finally, Congress approved PM No. 198, converting it into Law No. 8.076 of August 23, 1990, D.O.U. of 24.08.1990.

97. The vote was 7 to 2. Decision of April 5, 1990, reported in *Gazeta Mercantil*, Apr. 6, 1990, at 31. See Francisco Barros Dias, *Inconstitucionalidade das Normas Impeditivas de Liminares*, 59 REV. PROCESSO 125, 132-133 (Jy.-Sept. 1990).

98. Article 246, added to the Constitution by Amendment Nos. 6 and 7 of August 15, 1995, prohibits the use of the provisional measure to regulate any constitutional amendment adopted since 1995. CONSTITUIÇÃO FEDERAL art. 246.

Currently, the President and Congressional leaders are trying to negotiate a compromise constitutional amendment to solve the dilemma posed by misuse of the provisional measure. According to recent newspaper accounts, the President is willing to give up his power to reissue provisional measures during the same legislative session, provided that he can continue to legislate with respect to tax and financial matters, and that Article 246 of the Constitution is repealed so that he can regulate constitutional amendments. The thirty day period Congress presently has to reject or adopt provisional measures would be extended to sixty days, renewable for another sixty days. Existing reissued provisional measures would be resubmitted to Congress for ratification.⁹⁹ This proposed amendment has already been approved twice by the Senate and once by the Chamber of Deputies.¹⁰⁰

V. NEEDED REFORMS

The Brazilian courts are currently overwhelmed by huge caseloads. At all levels of the system, with the exception of the military tribunals, judges are simply unable to cope with the sheer volume of cases. In the first eight years following promulgation of the 1988 Constitution, the number of cases filed in Brazilian courts increased by more than a factor of ten, from about 350,000 cases in 1988 to more than 3.7 million in 1996.¹⁰¹

The volume of cases is particularly acute for Brazil's highest courts, the STF and the Superior Tribunal of Justice (STJ). In 1998, the STJ received 92,107, and decided 101,467 cases, an average of 3622.5 cases per judge, and still had a backlog of 47,202 cases. In 1999, the STJ received 118,977, and decided 128,042 cases. The avalanche of cases is even more crushing for the STF, which has only one-third as many judges as the STJ. In 2000, the STF received a record 105,307, and decided 86,138 cases, an average of 7830 cases per judge. One need only compare this statistic with the 17,432 cases decided by the STF in 1989 to fully appreciate the magnitude of the change engendered by such an expansive Constitution and the turmoil caused by successive governmental economic plans.¹⁰² In contrast, for the

99. Gerson Camarotti, "Planalto fecha acordo sobre limite para edição de medidas provisórias," Estado de São Paulo, (Feb. 22, 2000) at <http://www.estado.com.br/jornal/2000/02/22/news041.html>.

100. Rosa Costa, "ACM retoma pressão por regras para MPs," Estado de São Paulo (Mar. 28, 2000) at <http://www.estado.com.br/editorias/2000/03/28/pol160.html>.

101. *Tribunais de Primeira Instância*, 1 REVISTA CONSULEX 18 (No. 3, Mar. 1997).

102. These statistics are taken from Banco Nacional de Dados do Poder Judiciário at <http://www.stf.gov.br/bndpj/stf.htm>.

1999-2000 term, the U.S. Supreme Court had only 2413 cases on its docket and decided only 115 of them. Seventy-nine of these cases were disposed of by signed opinions, two were decided *per curiam*, thirty-four were decided summarily, and one was set for reargument.¹⁰³ The rest were either denied review, withdrawn or not acted upon.

A. *Certiorari*

Unlike the U.S. Supreme Court or the Argentine Supreme Court,¹⁰⁴ the STF has no device like certiorari to enable it to pick and choose cases it deems worthy of its review. Moreover, its grant of mandatory original jurisdiction is overly broad. Consequently, Brazil's highest court hears a great many trivial cases. For example, every request for recognition of a foreign judgment (including uncontested divorces) or issuance of a letter rogatory requires prior approval by the STF.¹⁰⁵ As Justice Sydney Sanches lamented, "The Supreme Federal Tribunal is becoming a small claims court."¹⁰⁶

Procedural differences between the Brazilian STF and the U.S. Supreme Court explain why the STF can decide a much higher volume of cases. In the STF, each case is assigned to one justice who acts as the reporter (*relator*) and is responsible for studying the file, reporting the issues, and delivering a prepared vote. In a few types of cases,¹⁰⁷ a second justice, called the reviewer (*revisor*), is assigned to assist and to check on the reporter. While the other justices can stop the proceedings by requesting the opportunity to review the file on their own, normally they do not, choosing instead to concur with the reporter's vote. Additionally, the STF normally sits in panels of five, only occasionally sitting as a full court.

103. U.S. LAW WEEK, July 20, 1999, at 3069.

104. In its case law, the Argentine Supreme Court developed the concept of discretionary review similar to the U.S. Supreme Court's certiorari. In 1990, Argentina legislatively adopted the writ of certiorari, formally granting the Supreme Court discretionary power to refuse to review an extraordinary appeal in any case for lack of sufficient federal harm or when the questions raised are insubstantial or lack transcendence. Law 23.774 of April 5, 1990, art. 2. See generally, Adolfo Gabino Ziulu, *El "Writ of Certiorari" y el Incremento de las Facultades Discrecionales de la Corte Suprema*, 1991-C REVISTA LA LEY 775.

105. CONSTITUIÇÃO FEDERAL art. 102 (h) permits delegation of this function to the President of the STF, which has been done in the STF's Internal Regulations. Decisions of the President in these matters may be appealed to the full tribunal.

106. Quoted in Eduardo Oinegue, *Exaustos Meritísimos*, VEJA, Mar. 26, 1997, at 109 (original in Portuguese).

107. Reviewers are designated in cases involving rescissory actions, criminal revisions (the penal counterpart to the civil rescissory action), extraordinary criminal appeals, original criminal actions, and declarations of suspension of rights. STF, Internal Rules, Art. 23.

B. *Need for Binding Precedents and Governmental Respect for Judicial Pronouncements*

Another reason that it can decide so many cases so rapidly is that the great bulk of the issues presented to the STF have been decided by it previously. In some countries, a single decision of the nation's highest court either declaring a statute unconstitutional or interpreting a statute is sufficient to preclude the government from trying to enforce it or from seeking a different interpretation. The Brazilian practice is quite different. According to testimony of the former President of the STF, Sepúlveda Pertence, the Tribunal decided the question of the constitutionality of a compulsory loan, enacted by the Sarney regime, more than 10,000 times. According to Justice Pertence, research reveals that ninety percent of the appeals raise issues that the STF has already decided.¹⁰⁸

Judicial decisions in Brazil, with the exception of decisions by the STF in direct actions of unconstitutionality and declaratory actions of constitutionality,¹⁰⁹ do not have the force of binding precedents. Despite development of the institution of the *súmula*,¹¹⁰ Brazilian courts are continually subjected to repetition of rejected legal contentions and conflicting interpretations of the same legal provisions. But this factor alone does not explain why the STF, as well as Brazil's lower courts, have to decide the same issue hundreds or thousands of times. Other civil law countries operate without the doctrine of *stare decisis* without experiencing this problem to the extraordinary degree it exists in Brazil. The past President of the STF recently identified bad faith governmental refusal to pay what it owes as the principal cause of the congested judicial dockets.¹¹¹ The only reason for litigating the same issue that has been decided adversely numerous times is to forestall the inevitable day when the defendant will have to pay what it owes.

The proposed constitutional amendment to reform the Judiciary adds a new Article 103A to the Constitution that allows the STF, either on its own or by request, to approve *súmulas* after reiterated decisions on a legal question, which upon publication in the official

108. 1 REVISTA CONSULEX, No. 3, Mar. 1997, at 10.

109. Article 28 of Law No. 9.868 of November 10, 1999, D.O.U. of 11.11.1999, explicitly provides that declarations of unconstitutionality or constitutionality, including constitutionally mandated interpretations, are effective *erga omnes* and are binding not only upon the Judiciary, but also upon all other governmental agencies. For a discussion of the meaning of these concepts in the Brazilian context, see HELY LOPES MEIRELLES, *supra* note 21, at 339-348.

110. *See supra* note 22.

111. José Celso de Mello Filho, *O Judiciário em Questão*, CONSULTOR JURÍDICO (1997) at <http://cf3.uol.com.br:000/consultor/artigos.cfm>.

gazette, will be binding on the rest of the judiciary, as well as the direct and indirect public administration.¹¹² In addition, Article 102, § 2 is to be amended to make definite decisions on the merits in direct action of unconstitutionality and declaratory actions of constitutionality binding on both the judiciary and the direct and indirect public administration, something Article 102, § 2 already does for declaratory actions of constitutionality. The proposed amendment also adds a new section to Article 102 that limits the efficacy of provisional measures conceded in direct actions of unconstitutionality to 120 days unless confirmed by an absolute majority of the STF. If approved, which seems likely, this proposed constitutional amendment will extend the limited concept of binding precedent, but this will not solve the problem.

The President of the Republic has issued a decree that should have reduced much of the litigation spawned by recalcitrant governmental agencies.¹¹³ Article 1 of this decree requires that all organs of the federal public administration, both direct and indirect, obey all final decisions of the STF interpreting the text of the Constitution in an unequivocal and definitive manner. Once the case law of the STF has firmed up with respect to the constitutionality of a law or administrative act, the Federal Advocate General is required to publish in the Official Gazette a *súmula* to that effect.¹¹⁴ The Procurators-General of the critical federal agencies, like the Treasury and Social Security, are also directed to cease relying on laws and decrees whose unconstitutionality has been definitively determined by the STF.¹¹⁵ Eliciting bureaucratic compliance has not been easy, in part because the requirement that the STF's decision be "unequivocal and definitive" permits wide latitude in interpretation, and in part because the budgets of governmental agencies continue to be insufficient to pay mandated expenditures.¹¹⁶

112. Proposta de Emenda à Constituição No. 96-C de 1992, *supra* note 78.

113. Decree No. 2.346 of October 10, 1997, D.O.U. of 13.10.1997.

114. *Id.* art. 2.

115. *Id.* arts. 4-6.

116. The deadbeat proclivities of the agencies of the Brazilian Government have been exacerbated by two constitutional provisions creating a constitutional right to delay payment of definitive judgments against them. Article 33 of the Transitional Constitutional Provisions Act specifically permitted all judgments, with the exception of support payments, then pending against the government to be paid in eight annual installments. Constitutional Amendment No. 30, promulgated on September 13, 2000, permits judgments against any agency of the Brazilian Government pending on the date of adoption of the Amendment, with the exception of support payments, those for small amounts, and those already extended under Article 33 of the Transitional Constitutional Provisions, to be paid in ten annual installments. In addition, Provisional Measure No. 2.102-27 of January 26, 2001, D.O.U. of 27.1.2001, prohibits the courts from issuing

C. *Protection of Civil and Individual Rights*

Despite an incredibly elaborate system of constitutional protection of basic and not so basic rights, certain constitutional rights are violated constantly in Brazil. Since the restoration of democracy in the 1980s, freedom of speech, freedom of the press, and freedom of religion have been well respected. On the other hand, the country's protection of the rights to life, respect for the moral and physical integrity of prisoners, and freedom from racial or sexual discrimination has been far from exemplary.

While the Constitution prohibits torture and makes commission of torture a non-bailable offense,¹¹⁷ torture of criminals is still a regular occurrence. In 1995, the chief of the civil police in Rio de Janeiro complained publicly that torture has long been a common practice of the Brazilian police and declared that Brazilian society regards torture as a just punishment for common criminals and as a legitimate means of obtaining information.¹¹⁸ The United States Department of State recently reported that "there are frequent credible reports that police torture and beat criminal suspects to extract information, confessions, or money."¹¹⁹ One serious consequence of the frequent resort to torture is that the police rarely obtain evidence that can be used to procure convictions in the courts. Reportedly, ninety percent of the homicide investigations in Rio de Janeiro do not produce sufficient evidence to try the suspects.¹²⁰

The right to life is constitutionally protected, but abuse of deadly force by the police is a regular occurrence. Despite governmental efforts to eliminate extermination squads, in many areas they act with impunity, executing suspected criminals, squatters, and street people,

preliminary injunctions that award compensation for tax or social security credits and prohibits execution of any judgment requiring payment of government funds until the judgment has become final and nonappealable.

117. CONSTITUIÇÃO FEDERAL art. 5 (III) and (XLII). Law No. 9.455 of April 7, 1997, D.O.U. of 08.04.1997, specifically criminalizes torture, and Decree No. 40 of February 15, 1991, D.O.U. of 18.02.1991, promulgates Brazil's adoption of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Penalties.

118. He also stated, somewhat unrealistically, that he thought that society was gradually rejecting torture as a legitimate police practice. UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1995, 345 (1996).

119. UNITED STATES DEPARTMENT OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 618 (2000) [hereinafter U.S. DEPT. OF STATE REP.].

120. Paul Chevigny, *Defining the Role of the Police in Latin America*, in *THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA* 61 (Juan E. Méndez, et al. eds., 1999). [hereinafter *THE (UN)RULE OF LAW*].

including minors.¹²¹ Not only do the perpetrators go unpunished, but also they are frequently decorated and promoted.¹²² Except for cases of intentional homicide, the military police are subject to prosecution only in special courts, where convictions are a rarity.¹²³ Since 1996, military police may be prosecuted in ordinary courts for intentional homicides, but the internal military investigation has to decide if the homicide was intentional before forwarding a case to the civil courts. Consequently, few such prosecutions are brought. When there are homicide convictions of police in the civil courts, the penalties imposed are usually much less than would have been imposed against non-police offenders.¹²⁴

Article 5 (XLIX) of the Constitution commendably provides that "prisoners are assured respect for their physical and moral integrity." In addition, Brazilian law requires that prisoners be given health care, educational, legal, social and religious assistance.¹²⁵ Despite recent governmental efforts at prison reform, the sad reality is that Brazilian prisons are woefully inadequate, badly overcrowded, and generally do not comply with United Nations Minimum Rules of Treatment. Reports of abuse and mistreatment of prisoners by guards and other inmates are common place.¹²⁶

The Constitution rhetorically proclaims that a fundamental objective of Brazil is "to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination."¹²⁷ The heading to Article 5 states: "Everyone is equal before the law, with no distinction whatsoever. . . ." Article 5 (XLII) of the Constitution boldly proclaims that "the practice of racism is a non-bailable crime not subject to the statute of limitations. . . ." Law No. 7.716 of January 5, 1989, made racism a criminal offense, and the penalty for violation was increased in 1997.¹²⁸ Yet, despite overwhelming evidence that racism is both common and pervasive, there has been little governmental effort to eradicate it and very few successful criminal prosecutions.¹²⁹

121. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN BRAZIL 27-47 (1997) [hereinafter INTER-AM. COMM. REP.].

122. Paul Chevigny, *supra* note 120, at 53-55.

123. U.S. DEPT. OF STATE REP. at 2.

124. INTER-AM. COMM. REP. at 38-43.

125. Law No. 7.210 of July 11, 1984, art. 11, D.O.U. of 13.07.1984.

126. INTER-AM. COMM. REP. at 57-67; U.S. DEPT. OF STATE REP. at 619-620.

127. CONSTITUIÇÃO FEDERAL art. 3 (IV).

128. Law No. 9.459 of May 13, 1997, D.O.U. of 14.05.1997.

129. Peter Fry, *Color and the Rule of Law in Brazil*, in THE (UN)RULE OF LAW 186, 193-94.

Gender discrimination is clearly outlawed by the Brazilian Constitution. Article 5 (I) provides: "Men and women have equal rights and duties under the terms of this Constitution." Despite concerted governmental and non-governmental efforts to protect the rights of women, there are widespread violations of women's constitutional rights when they are victims of sexual assaults and domestic violence. Existing legal procedures discourage many women from denouncing such violence, and many reported crimes against women remain uninvestigated and unprosecuted. Even when they are prosecuted, judges and juries are often reluctant to convict, especially when a husband has injured or killed a wife he suspected of infidelity.¹³⁰ Article 7 (XXX) of the Constitution prohibits any employment or pay discrimination based upon sex. Yet employment discrimination against women is fairly common, and women are generally paid far less than men. The laws prohibiting employment discrimination against women are seldom enforced.¹³¹

VI. CONCLUSION

Judicial review in Brazil is an extraordinarily complex hybrid institution that attempts to marry the civil and common law traditions. Its level of complexity and the volume of constitutional cases have increased dramatically since adoption of the 1988 Constitution. If, as seems likely, the proposed constitutional amendment on the reform of the judiciary is eventually adopted, judicial review will continue to change. Few seem satisfied with it the way it is today.

Brazil has a crying need for an expanded concept of binding precedent and adoption of a procedural device that will enable the STF to avoid having to decide the huge number of cases currently on its docket. Forcing the highest court in the country to deal with routine and unimportant cases makes little sense and prevents the STF from devoting its time and attention to the cases with national importance. The lower courts, however, have displayed substantial resistance to being required to follow decisions of a higher court. The separation of power problems posed by the Executive's use of the provisional measure to usurp a substantial amount of Congressional power to legislate has not been resolved satisfactorily in the courts. It is likely, however, that an intelligent solution may be worked out between the President and Congress that will take the form of yet another constitutional amendment.

130. U.S. DEPT. OF STATE REP. at 625; INTER-AM. COMM. REP. at 129-132.

131. U.S. DEPT. OF STATE REP. at 625.

On paper, constitutional rights are better protected in Brazil than in virtually any other country. If the proposed constitutional amendment on the Judiciary is enacted, they will become even more protected, for Article 1 elevates to constitutional rank all human rights protected by the international human rights treaties to which Brazil has adhered, provided they are approved by a two-thirds vote of each house of Congress, in two separate votes.¹³² The reality, however, is that many important constitutional rights are honored in the breach. After police in São Paulo deliberately punished fifty-one prisoners by cramming them into a tiny unventilated cell, killing eighteen of them, an editorial in *Veja*, the Brazilian Newsweek, made the point forcefully:

Today Brazil has one of the most beautiful Constitutions in its history in all that it says with respect to fundamental human rights. . . . Moreover, there is nothing to complain about in relation to our laws in this area. The problem is in the disturbing distance that separates the rights inscribed on paper from their effective exercise, and above all in the guaranty of their exercise in practical life. Such distance has been once again dramatized last week in the massacre of detainees who mutinied in the cells of a São Paulo police station—locked into an unventilated cell as punishment, fortuitously killed by asphyxiation.¹³³

Torture and maltreatment of common criminals is a fact of life in many Brazilian police stations and jails despite the formal constitutional guarantees. Racial and gender discrimination are also facts of everyday life. Making paper rights a reality is only partly the task of the courts. It is also the task of federal, state and county governments. Ultimately, it requires a change in the dominant culture with respect to the rights of those who live at the margins of the society. There are encouraging signs that change is underway, but the task is likely to be

132. One can also argue that the proposed amendment is a step backward in protecting international human rights. A number of well respected jurists and scholars contend that rights protected by international human rights conventions ratified by Brazil already have constitutional rank because of Article 5, § 2, which provides:

The rights and guarantees established in this Constitution do not exclude others arising from the regime and principles adopted by it, or from international treaties to which the Federative Republic of Brazil is a party.

See Valerio do Oliveira Mazzuoli, *Hierarquia Constitucional e Incorporação Automática dos Tratados Internacionais de Proteção dos Direitos Humanos no Ordenamento Brasileiro*, 37 REV. INFORM. LEGIS. 231 (No. 148, Oct./Dez. 2000). The proposed constitutional amendment would grant rights protected by such treaties or conventions constitutional rank only if adopted by the same extraordinary procedure for constitutional amendments. Currently, Article 84 (VIII) grants the President exclusive power to enter into treaties, subject to Congressional approval under Article 49 (I) for treaties that involve serious financial charges or commitments.

133. *Carta ao Leitor*, VEJA, Feb. 15, 1989, at 23 (original in Portuguese).

slow and arduous. The paradox of judicial review in Brazil is that despite an incredibly detailed constitution and an elaborate system of judicial enforcement that decides a staggering number of constitutional cases, many constitutional guarantees have not been implemented and still others are regularly disregarded.