Brazil
Making Justice Count
Measuring and Improving Judicial Performance in Brazil

December 30, 2004

Poverty Reduction and Economic Management Unit
Latin America and the Caribbean Region

Document of the World Bank
CURRENCY EQUIVALENTS

Currency Unit = Brazilian Real (BRL)

US$1.0 = BRL $2.85 (October 4, 2004)

GOVERNMENT FISCAL YEAR

January 1 to December 31

WEIGHTS MEASURES

Metric System

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<tr>
<td>Vice President</td>
<td>David de Ferranti</td>
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<td>Country Director</td>
<td>Vinod Thomas</td>
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<td>Sector Director</td>
<td>Ernesto Muy</td>
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<td>Sector Leader</td>
<td>Joachim von Amberg</td>
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<td>Sector Manager</td>
<td>Ronald Myers</td>
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<td>Task Manager</td>
<td>Linn Hamnergren</td>
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ACKNOWLEDGMENTS

This report represents the work of a research team comprised of Linn Hammergren (World Bank Task Manager), Carlos Gregorio (Principal Investigator and Analyst) and a group of researchers from the Fundação Getulio Vargas-São Paulo’s Law School, headed by Luciana Gross Cunha and including Alexandre dos Santos Cunha, Mariano Pedron Macário, Flávia Scabin, and Marcelo Issa. The FGV-SP contributed in the collection of data, did some additional analysis, and provided legal interpretations and related inputs. Ms Hammergren and Mr. Gregorio designed the investigation, drafted the final report, and are solely responsible for the conclusions and recommendations included in it.

The research would not have been possible without the support and collaboration of a wide variety of institutions and individuals. We would first like to thank Vinod Thomas (Director, World Bank Brazil CMU) and Joaquim Von Amsberg (Lead Economist, Brazil CMU) for providing the funding and permission to do the research. We also acknowledge the input and advice provided by other World Bank staff: Ernesto May, Ronald Myers, Mark Thomas, Yasuhiko Matsuda, Bernice Van Bronkhurst, Luke Haggarty (peer reviewer), and Beth Anne Dabak (peer reviewer). Carlos Santiso (DFID, Peru) also receives our thanks for serving as an external reviewer.

Obviously the work would not have advanced without the cooperation of the organizations surveyed. Here the list of those meriting recognition is extremely long and we can only mention the organization and its titular head, or as indicated the other principal contact. These include: the Supremo Tribunal Federal (Minister Ellen Gracie, Justice and Minister Mauricio Correa, ex-President); the Conselho de Justiça Federal (Minister Ari Pargendler, Coordenador-Geral da Justiça Federal and Neide Sordi, Secretaria de Pesquisa e Informação Jurídica), the Ministério Público da União and Federal (Rodrigo Janot, Sub-Procurador MPU and Secretario-Geral, MPF), the Advocacia Geral da União (Alvaro Augusto Ribeiro Costa, AGU), the Tribunal de Justiça de Pará (Maria de Nazareth Brabo de Souza, Presidente); the Ministério Público de Pará (Francisco Barbosa de Oliveira, Presidente); the Procuradoria Geral do Estado de Pará (José Aloysio Cavalcante Campos, Procurador); the Tribunal Regional de Trabalho, Pará (Luiz Albano Mondonça de Lima, Presidente); the Tribunal de Justiça do Rio de Janeiro (Miguel Pachá, President); the Ministério Público do Rio de Janeiro (Antonio Vicente da Costa Junior, Procurador Geral); the Procuradoria Geral do Estado do Rio de Janeiro (Francisco Conte, Procurador Geral); the Tribunal Regional Federal, Region 2 (Valmir Martins Peçanha, Presidente); the Tribunal de Justiça do Estado de São Paulo (Cesar Lacerda and José Raul de Almeida, assessores to the President); the Procuradoria Geral do Estado de São Paulo; the Ministério Público do Estado de São Paulo; the Tribunal Regional Federal of Region 4 (Vladimiro Passos de Freitas, President); the Tribunal de Justiça do Estado do Rio Grande do Sul (Osvaldo Stefanello, President); the Ministério Público do Rio Grande do Sul (Roberto Bandira Pereira, Procurador Geral); the Tribunal Regional Federal of the 5th Region (Margarida Cantarelli, President); the Tribunal de
Justiça do Estado do Pernambuco (Jose Antonio Macedo Malta, President); the Ministério Público Federal, Procuradoria da Republica em Pernambuco (Wellington Cabral Saravia, Procurador Federal); the Ministério Público de Pernambuco (Charles Hamilton Santo do Lima, Secretaria Geral); the Tribunal Regional de Trabalho, 6th Region (Fernando Cabral de Andrade, President); the Tribunal Regional de Trabalho, Region 8 (Fernando Cabral de Andrade, Presidente), the Producadoria Geral do Estado de Ceará, (Wagner Barreira Filho, Procurador Geral); the Ministério Público de Ceará (Maria do Perpétuo Socorro França Pinto, Procurador-Geral); the Tribunal de Justiça do Estado de Ceará (João de Deus Barros Bringal, President). In each of these entities we were attended by employees too numerous to list here, but we do thank them for their assistance.

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We stress that our gratitude to all these individuals does not extend to their responsibility for what we did with their contributions. The views, interpretations, and recommendations included here are solely those of the authors.
# LIST OF ACRONYMS AND KEY TERMS

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<th>Acronym</th>
<th>Definition</th>
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<tr>
<td>AGU</td>
<td>Advogado Geral da União – highest level government attorney for the Union</td>
</tr>
<tr>
<td>AJUFES</td>
<td>Associação dos Juízes Federais – peak interest organization for federal judges</td>
</tr>
<tr>
<td>AMB</td>
<td>Associação dos Magistrados do Brasil – peak judicial organization for state and labor judges (although the latter also have their own organization).</td>
</tr>
<tr>
<td>BNDPJ</td>
<td>Banco Nacional de Dados do Poder Judiciário – national level collection of judicial statistics maintained by the STF</td>
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<tr>
<td>CARTA PRECATÓRIA</td>
<td>Request from the judge presiding in a case for assistance from a judge in another jurisdiction in carrying out a summons or related activity.</td>
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<tr>
<td>CJF</td>
<td>Conselho da Justiça Federal – Council composed of Presidents of STJ and TRFs, and additional members of the former, which sets general policy for the federal courts</td>
</tr>
<tr>
<td>CLASSE</td>
<td>Class, in Brazil a term used to describe a functional interest group</td>
</tr>
<tr>
<td>CORREGEDORIA</td>
<td>Entity charged with overseeing performance and discipline of organizational members</td>
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<tr>
<td>DESPACHO</td>
<td>In the judicial sense, any single decision taken by a judge</td>
</tr>
<tr>
<td>EXPRESSINHO</td>
<td>Conciliation service set up by TJ of Rio de Janeiro to handle cases destined for the state Juizados Especiais originating in complaints against TELEMAR (phone Company)</td>
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<tr>
<td>ICT</td>
<td>Information and Communication Technology</td>
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<tr>
<td>JUIZADO ESPECIAL</td>
<td>Small claims court</td>
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<tr>
<td>MPU</td>
<td>Ministério Público da União – peak organization for the national public ministries</td>
</tr>
<tr>
<td>MPF</td>
<td>Ministério Público Federal – national public ministry corresponding to the federal courts</td>
</tr>
<tr>
<td>OAB</td>
<td>Ordem de Advogados do Brasil – peak interest association for private bar</td>
</tr>
<tr>
<td>PEC</td>
<td>Proposta de Emenda Constitucional – proposed constitutional amendment. Here used to denote the proposal, recently approved, for various reforms to the judicial system</td>
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<tr>
<td>PENHORA</td>
<td>Stage in judicial proceeding in which assets are seized or attached to guarantee their availability for payment of an award. Also may refer to the assets themselves</td>
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<tr>
<td>PGE</td>
<td>Procurador(ia) Geral do Estado – individual (and the organization he heads) providing legal services to a state government</td>
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<tr>
<td>PGF</td>
<td>Procurador(ia) Geral Federal – individual (and entity) coordinating litigation and other legal services for national government, except for those related to labor and military jurisdictions, which have their own Procuradorias</td>
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<tr>
<td>PGR</td>
<td>Procurador Geral da República – head of MPU</td>
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<tr>
<td>PRECATÓRIO</td>
<td>Amount due by government agency in legal cases it has lost</td>
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<tr>
<td>PROCURADOR(IA)</td>
<td>Term used to refer to members of Public Ministries and government attorney organizations (and in the latter case, to the organizations themselves). Following the implementation of the constitutional reform package, members of state Public Ministries will be called promotores.</td>
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<tr>
<td>PROMOTOR(IA)</td>
<td>Title of members of state Public Ministries (and of internal sections)</td>
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<tr>
<td>RECURSO EXTRAORDINARIO</td>
<td>An appeal questioning the substance of a judgment</td>
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<td>SINEJUS</td>
<td>Sistema Nacional de Estatistica da Justiça Federal) – data base incorporating statistics from federal courts and managed by the CJF</td>
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<tr>
<td>STF</td>
<td>Supremo Tribunal Federal – constitutional court</td>
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<td>STJ</td>
<td>Superior Tribunal de Justiça – highest level court for federal court system</td>
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<tr>
<td>TABELA</td>
<td>“Table” or chart. Here refers to classification systems established for data entry in courts’ (and others’) statistical systems.</td>
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<tr>
<td>TÍTULO SENTENCIAL</td>
<td>Document resulting from a judgment and establishing right to collect a monetary award.</td>
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<tr>
<td>TJ</td>
<td>Tribunal de Justiça – state superior court</td>
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<td>TRF</td>
<td>Tribunal Regional Federal one of five second instance (appellate) courts in federal system, which also overseeing management of first instance courts</td>
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<tr>
<td>TRT</td>
<td>Tribunal Regional de Trabalho – one of 24 second instance (appellate) courts in Labor Jurisdiction, also overseeing management of first instance courts.</td>
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<tr>
<td>TSE</td>
<td>Tribunal Superior Eleitoral – highest appellate court for Electoral Jurisdiction, and last instance except for constitutional issues</td>
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<tr>
<td>TSM</td>
<td>Tribunal Superior Militar—highest appellate court for Military Jurisdiction, and last instance except for constitutional issues</td>
</tr>
<tr>
<td>TST</td>
<td>Tribunal Superior de Trabalho -- highest appellate court for Labor Jurisdiction, and last instance except for constitutional issues</td>
</tr>
<tr>
<td>SÚMULA ADMINISTRATIVA</td>
<td>Binding opinion provided by AGU or highest level official of a Procuradoria intended to direct actions of administrators</td>
</tr>
<tr>
<td>SÚMULA IMPEDITIVA</td>
<td>Binding precedent set by last instance ordinary court in any of Brazil’s various judicial systems, which prohibits appeals of decisions made in accord with its content</td>
</tr>
<tr>
<td>SÚMULA VINCULANTE</td>
<td>Binding precedent set by STF, part of recent judicial reform package. Intended to direct judicial rulings and actions of administrators</td>
</tr>
<tr>
<td>TURMA</td>
<td>“Group,” here refers to body of first instance judges who hear appeals of decisions from juizados especiais and decide on uniform interpretations for types of cases</td>
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<tr>
<td>VARA</td>
<td>First instance trial court</td>
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EXECUTIVE SUMMARY

1. Overview

This report presents the results of the second of two World Bank sponsored studies on the Brazilian judicial system. The first, completed in mid 2003, analyzed a sample of civil cases filed in São Paulo's state courts as a means of exploring judicial impacts on economic transactions. While its conclusions must be qualified because of the small universe it treated, this unique look at how a Brazilian state court handles real cases suggested that many common complaints about judicial performance have more complex origins and repercussions than is usually recognized. (See Box)

1. World Bank Research On Judicial Performance And Private Sector Impacts

Analyzed a random sample of debt collection cases (ações de execução and monitorias) and mandados de segurança filed in the central state courts of São Paulo in 1996, 1998, and 2000.

Traced cases from initiation through any appeals, to final solution, using case file data to assess the quality and broader impact of judicial performance.

Found the major problem in debt collection to be inconclusiveness (no solution), not delay, and that the principal explanation was the penhora process. Where the creditor can't identify assets to attach the case is paralyzed.

Mandados de segurança were more expeditious and less costly for the plaintiff, but a proceeding which only addresses the immediate conflict does not resolve the problem of systematic administrative abuses.

Emphasized the difference between private good (for the individual parties) and public good impacts (e.g. strengthening of juridical security). In debt collection, both can be considered relatively negative. For mandados de segurança, the private but not the public good is advanced.

In this second study we pursue some of the questions emerging from the earlier work by taking a broader, if less detailed look at sector operations - defining the sector (or system) not just as the courts, but as the multiple formal and informal institutions involved in the resolution of conflicts through the application and enforcement of the legal framework. Here our principal focus was determining how the system's key

1 World Bank (2003b)
organizations monitor their own performance – the structure, content, origins, and use of statistics collected on workloads and outputs – and with what consequences for understanding problems and designing programs to resolve them.

3 The topic is important for several reasons, each of which helped shape the more detailed research design. Brazil is currently experiencing a self-described judicial crisis, but most discussion of the associated problems (delay, congestion, costs, lack of access, corruption), their causes, and remedies is based largely on anecdotes, conventional wisdom, and expert opinion. Our earlier research cast doubts on some of the usual conclusions and especially the tendency to put most of the blame with the judges. Experience elsewhere suggests that reforms based on “what we think we know,” what Brazilians call “achismo,” can waste resources and lead to counterproductive results. Hence, a first line of investigation focused on determining whether existing statistical systems would support a more empirical approach and exploring the consequences of the present, nonempirical bias.

4 Because Brazil is a regional leader in judicial automation and thus potentially capable of marshalling empirical data on court performance, the continuing reliance on achismo is especially puzzling. Courts, public ministries, and government attorneys’ offices have begun to recognize this failure and to strive to improve their performance statistics, but a further concern, and a second impetus for this study is that whatever reasons have held them back to date may also prevent effective achievement of this goal. Here we focused on identifying technological, institutional, and political constraints on the adequate collection and use of data, hypothesizing that, at least in Brazil, technology alone is neither the explanation nor the answer.

5 Finally, because statistics do exist and might allow further exploration of the crisis, the research team also attempted its own analysis of those made available to them. Our interest here was in testing some of the operating assumptions behind the current reform proposals (including the proposed constitutional amendment, or PEC, approved in Congress on November 17, 2004), determining whether we could add additional elements, and also helping sector authorities understand the utility of this approach. This effort was also useful in revealing additional types of improvements required if management statistics are to support sector leaders in monitoring organizational performance and identifying and resolving emerging problems.

2. Findings on Statistical Systems

6 This was our point of entry for the research and the basis for the subsequent lines of investigation. Our analysis draws on several types of information: statistics and reports published on the internet, available in other published form, or provided to us directly by the entities where site visits were conducted, informant interviews; and our own in situ observations. As within the project’s temporal and financial limits, we could not hope to survey all of Brazil, our site visits were organized to cover the centers of all five federal judicial regions, and in each, the respective state, federal and labor courts, the state and federal public ministries, and the Procuradorias Gerais do Estado. Cities and
states visited were Porto Alegre (Rio Grande do Sul), Recife (Pernambuco), Rio de Janeiro, Sao Paulo, and Brasilia. To these we added Fortaleza (Ceará) and Belem (Pará), the first located in Region V and the second in Region I, to help understand the variations within these large and diverse judicial districts. In Brasilia we also interviewed representatives of the central national entities, the Supremo Tribunal Federal (STF), the Superior Tribunal de Justiça (STJ) and the Council de Justiça Federal (CJF), the Tribunal Superior de Trabalho (TST), the Abogacia-Geral da União (AGU), the Ministério Público da União (MPU), and Ministério Público Federal (MPF). The organizations included represent three institutional "families" (courts, public ministries, and government attorneys) and were selected because the data they manage collectively offer the broadest view of sector operations.

7 In our review of existing statistical systems, a few basic concepts require explanation. First, the courts and other sector institutions normally generate and capture considerable data on the cases they process and other related activities, but most of this traditionally remained at the lowest level courtroom or attorney’s office. As organizations become more interested in tracking employee performance, they also begin to use portions of these data to generate, manually or automatically, a set of productivity statistics. A third level of data collection, and second level of statistics, is that used by management to evaluate organizational performance. Ideally this features additional types of indicators and thus different extractions from the work unit database. The structuring of this management statistics system is less intuitive than the other two levels, requiring decisions as to what information is of interest and a process of coordinating and standardizing its capture and submission. Work unit data usually prioritize detail on each case; productivity statistics the number of cases or actions entered and completed; while management monitors organizational as much as individual output, changes in its composition and that of the demand it answers, and factors affecting both.

The Three Levels of Data For Tracking Performance of Judicial Institutions

Data collected, manually or automatically, on individual cases is essential to three types of performance tracking:

Case and caseload management – includes both the raw data linked to individual cases and selected variables used to help the judge or courtroom manager assure that cases are moving along in a reasonable fashion

Individual productivity statistics – aggregate data received from the work unit are used to assess the adequacy of its performance or that of the responsible judge(s), prosecutor, or lawyer

Organizational performance statistics – aggregate data received from all work units used to determine how well the organization is responding to demand, identify problematic areas, and design remedies.

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All three levels are important, but here we are interested in the first two only as they affect the quality of the third. As an example, while initial data collection and work unit (caseload) tracking systems could both be improved, current practices arguably serve the needs of officials at that level. Nonetheless, because these systems are the principal source of information for the next two levels, various aspects of their organization and format pose major obstacles for generating management statistics.

The general sense of our findings is that Brazil's existing management statistics, the third level, require considerable upgrading if they are to serve their role in helping leadership identify problems and their causes, analyze changing patterns in demand and the adequacy of the organizational response, and develop reform proposals. These systems often represent little more than the aggregation of statistics on individual productivity and do not offer a sufficiently detailed view of overall performance, even to the extent of tapping variations across types of cases, conflicts, or plaintiffs. Where they attempt to do more, inconsistent classification schemes, failures to check accuracy of entries, and gaps in information supplied reduce their reliability. There are some noteworthy exceptions, all in the judiciary, and including the relatively advanced systems in the states of Rio Grande do Sul and Rio de Janeiro, and the labor courts. However, even here, where organizational statistics and databases offer the potential for many types of analysis, little of this is done. The courts are also unique in their effort to create system or nation-wide statistical systems — the Supremo Tribunal Federal’s Banco Nacional de Dados do Poder Judiciário (BNDPJ), the Labor Jurisdiction’s own system-wide statistics, and the Conselho de Justiça Federal’s new attempt to standardize the entry and aggregation of basic data across all federal courts. However, all are limited in the variables they capture, and thus the extent of analysis they support.

The Public Ministries are catching up with the courts as regards automation of case processing, and thus of data for case management and productivity evaluation, but they lag far behind in developing management statistics. Moreover, and unlike the courts, they seem to resist movement to the third level for ideological reasons linked to the notion of institutional and individual autonomy of action. Courts process what they receive, and like it or not, will be judged on that basis. Public Ministries have considerably more scope to define demand (the complaints or problems to which they will dedicate their efforts) and how they will respond (through a legal action, a negotiation, a series of meeting with interested parties, etc). This, plus the notion that each “natural” prosecutor (with constitutionally defined functional autonomy) will make his own decisions, accountable only to the law, and the selection of organizational leaders through internal elections, militates against the organization’s defining a standard product or output and evaluating individual or collective performance in these terms. The public ministries keep and publish statistics on everything, but this informational chaos makes it virtually impossible to answer the simple question “how are we doing?”

In most states, although the final selection is made by the governor, it is limited to a list of candidates derived through internal elections.
Like the courts, the government attorneys (the Procuradoria “family”) have a more easily defined unit of output – cases litigated, won, and money saved for the executive. Their late creation and still limited funding have prevented their advance in any of the three levels. Given the enormous quantity of government litigation there is a growing interest in altering this situation, and this is one area where investments in technology (computers and software) are the main priorities. Their late start also offers the potential for automating to meet all needs at once, but this will not be automatic, and great care should be taken to ensure the systems adopted serve all three purposes adequately.

3. Explanations of System Weaknesses

Because of our primary interest in the development and adequate use of management information systems, and the greater ease of designing the first two levels, most of our further analysis and recommendations are directed to the former ends. As regards the sources of existing weaknesses, the following factors where identified:

3.1. Sources of Information

The principal source of information remains the reports generated within the individual work units (courtrooms, prosecutor’s and state lawyer’s office). Because court automation occurred so early, it used first generation database software. Although the current trend is to migrate data to more modern systems (largely Oracle-based), the concepts intrinsic to the earlier systems have not changed. They continue to emphasize the automatic production of the traditional statistical reports for use in tracking individual productivity and fail to consider “statistical analysis for decision makers” among the necessities covered.

In virtually all organizations, the central administrative unit handling the compilation of statistics is located within another office (most often informatics, planning, or the Corregedoria, responsible for evaluating staff performance and managing disciplinary processes). Typically, staff members spend much of their time transferring information from the standard reports (many of them generated electronically, but often submitted on printed forms) into electronic files to in turn produce aggregate reports. As these statistical units usually do not have copies of the databases used for case management or tracking, they cannot do further analysis, crossing variables or calculating indicators (e.g. times to disposition) requiring access to individualized case data. The concept of using the data to search for patterns does not exist, nor does the idea of incorporating judges and administrators in the process of transforming raw data into new indicators to guide policy formulation.

Aside from defending the state’s interests in existing conflicts, the state lawyers also are responsible for issuing opinions binding on administrators and organizing other actions to prevent problems from emerging. Measuring productivity and impact here is more difficult, and, in any case, can over the shorter run be considered as secondary to litigation-related activities.
3.2. Classification Systems (Tabelas)

15 The categories used for data entry and generation of management statistics continue to respond to single case management needs and thus to an interest in registering all details, not creating aggregate groupings or standardizing these across courtrooms. Consequently, they provide an extremely poor base for statistical analysis. The construction of the tabelas seems a more organic than logical process. There clearly has been no effort to identify the most common categories and to collect only the least common ones in an “others” grouping. At times, the results appear to mix the usual divisions of actions, processes, and legal area indiscriminately. In addition to being extraordinarily extensive, the tabelas include very general categories alongside very detailed ones, rather than using a decision-tree structure in which general categories could be subdivided into greater detail. This increases the risk of multiple or inconsistent entries – the same case may be entered several times, or similar cases might be entered either in the general category or in the more specific one. As the tabelas are regarded as internal to the system, they are rarely published separately and tend to be unique to each jurisdiction. Efforts to encourage greater standardization, even with the use of participatory exercises, are impeded by entrenched practices, the individual-case-management perspective, and the failure, both of lower level users and of upper management, to appreciate the importance of an ability to identify systemic trends and problems.

16 A further obstacle to classification arises in the legal outlook on how the basic unit of action should be defined. A single “case” or conflict can give rise to numerous proceedings which are sometimes registered separately. For example, a single case could generate not only the judgment on the conflict, but also additional interlocutory decisions by the first instance judge. In some instances, execution of the judgment may also be counted separately, and we know, from reading the existing tabelas, that a request to be exempted from court fees is sometimes also registered separately. While from the standpoint of evaluating individual productivity, counting all these separate events is important, the basic output measure (cases decided) should arguably not include them. To the extent it does, figures on filings and dispositions may be inflated.

3.3. Statistics and Productivity

17 Another obstacle resides in the linkage of the existing management information system to the calculation of indices of productivity for individuals. The force of this connection is apparent in the frequent placement of the system itself in the office of the Corregedoria, responsible for monitoring the performance of first instance judges, prosecutors, and state lawyers. While one indication of output, a single-minded focus on individual productivity has some negative consequences. In this regard it is significant that even the court-room collection of data provides individual judges with little or no information on the age of their caseload, on the contents of their backlog, or on the average time to disposition, all of which would be useful to him or her, and to management, in better understanding problematic performance. In short, when the courtroom information sent to central offices focuses on the usual indices of productivity (cases in, cases out) and when this is linked to a system of rewards and punishments, it
not only limits management's understanding of the quality of system performance. It also tends to encourage behaviors that themselves do not prioritize quality of output. This bias has been carried over into later generation databases, which, appropriately designed, might permit other types of analysis. When queried, those in charge of these databases, said they could do the other calculations, but clearly had seen no reason to produce additional types of performance statistics.

3.4. Uniformity of Statistical Systems.

18 We repeatedly heard references to concepts like “only in Brazil” or “it is a continental state” that reinforced the notion that differences (among states or among countries) were more qualitative than quantitative. To the extent this belief prevails, it seriously undercuts attempts to encourage standardization of data management and thus the development of meaningful performance indicators. It was also apparent that Brazilians had little access to, perhaps did not realize the existence of, other databases on judicial performance that might be used to assess their own results. Using international data to interpret their own statistics would be of help in understanding their significance; it also might encourage a more conventional organization of what is collected. Idiosyncrasies exist even in the time periods covered. Because of the twice-annual judicial vacations, there is a tendency not to use the calendar year as the basic period. Instead, statistics are reported on a monthly basis or for periods that include months from different years.

3.5. Lack of control over the production of basic data and weaknesses among the teams analyzing them

19 The informatics units, which always have some part in this process, tend to work in relative isolation. They collect and process what is requested, but seem to take no independent initiative for further analysis or quality control. In many cases this may be because their “statistical” staff is composed of individuals with no particular background in statistics and no real formation in judicial applications. There is no statistical control over the adequacy and effective use of the formats they design. For example, there are no studies of frequencies to evaluate the existing tabelas, no studies of the data fields that are commonly left empty, no effort to determine whether all potential entries are captured. It is to be hoped that efforts like that of the CJF will soon move into these neglected areas, as much of their eventual success and utility will depend on their being attended.

3.6. Lack of interest or confidence on the part of external researchers:

20 Experience elsewhere suggests that an active research community may be the first to analyze statistics collected by the courts, and that their studies can both spur court interest and encourage their improvement of data collection methodologies. An ongoing

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5 Colombia is an excellent example of this phenomenon. Several Colombian research institutes took the lead in analysis of data collected by the courts and the Ministry of Justice (until the 1990s responsible for judicial administration). The judiciary now does some of its own analysis but also hires outside...
dialogue between academics and judiciaries can be useful to both parties and encourage novel insights into judicial performance problems. Unfortunately, this has yet to develop in Brazil for reasons that are still not entirely clear. At present, the dominant governmental user of academic empirical research on the judiciary appears to be the federal Ministry of Justice. Within the judiciary, only the CJF in its sponsored research program and a few state courts (e.g. Rio de Janeiro) have entered into contracts with universities, research institutes, and independent researchers. In our interviews, judges and other sector professionals occasionally dismissed the few research efforts receiving wider attention, as dominated by other disciplinary perspectives and thus not shaped by an adequate understanding of the judiciary’s situation.

21 Although the majority of the units managing databases and statistics derived from them publish information on the internet, few Brazilian researchers, universities, and independent institutes have attempted to use it. Instead they tend to rely on samples and surveys. As compared to researchers elsewhere in Latin America, Brazilians do have several distinct advantages. First, they have a better historical series of aggregate statistics than found in most other countries, and sector institutions seem less resistant to sharing this and other data with those interested in studying it. Second, Brazilian efforts to interconnect data from different sector institutions – for example courts, public ministries, police, and procuradorias – are also unusual and open the way for other types of analysis. Third, in many states, it is relatively easy to access data on individual cases, thus permitting analysis going beyond that possible only with aggregate statistics. Of course, here the same constraints facing analysts within the institutions prevail – overly complex and rarely consistent categorization, incomplete entries and the like. Some data of particular interest to researchers (like a historical series on the number and distribution of judges) are simply not readily available. Courts presumably have this information; why it has not be published is another question.

4. **Findings from Analysis of Existing Data**

22 Despite their many shortcomings, statistics already kept by the courts in particular do allow considerably more analysis than is currently being done. To demonstrate the existing potential, explore some of the conventional understanding of the judicial crisis, and indicate where better data collection would allow pursuit of more interesting questions, we attempted our own statistical analysis of two sets of hypotheses, the first having to do with the characterization of the crisis itself, and the second attempting to disaggregate its elements, impacts, and the quality of judicial response.

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researchers for this purpose. See Fuentes (2004). Much the same appears to be occurring in Peru. See Hernández Breña for an example.

6 This comes out of the Secretaria da Reforma Judiciário, created under the present administration. According to the Ministry it currently has twelve research projects under way, ranging from Reais $65,000 to Reais $2 million.
4.1. Findings on Aggregate Trends

23 Here we directed our work at testing the conventional understanding of the judicial crisis, as characterized in the following three hypotheses:

**Hypothesis 1:** The judicial workload has increased substantially over the past decade (or longer).

**Hypothesis 2:** Judges have not been able to keep up with the growth in demand.

**Hypothesis 3:** The result has been an increasing delay in resolving cases.

24 Our initial analysis of trends in workload across jurisdictions and levels validated the belief (Hypothesis 1) that since the early 1990s, there has been a dramatic growth across the board and that this has created problems of congestion (Hypothesis 2), and most likely, of delay (Hypothesis 3). It also demonstrated a corollary trend receiving little attention: judicial productivity is generally high, in the case of some courts reaching truly phenomenal proportions. The state courts have received the bulk of the growth in caseload, and even when adding new judges, have not been able to compensate. Filings per first instance, state judge have almost doubled over the past ten years, reaching near record levels for the Latin American region. Through a combination of a lower growth rate and the addition of more judges, the federal and labor courts have maintained a more stable workload per judge, although the labor judges in particular have tended to lower their productivity at the first instance over the past few years. Growth has also affected the second and third instance courts. However, the appeals rate currently appears to be rising only in the labor system, and at least until now has been adequately managed at the second instance thanks its greater number of appeals courts and judges.

25 The small claims courts (*juizados especias*) in the federal and state systems have been accumulating an increasing share of the workload and maintaining high levels of productivity. It seems doubtful, however, that they are relieving the pressure on the federal and state courts. They appear to be attracting cases that would not be sent to the judiciary were they not present. The deciding factor influencing demand for their services is less the identity of the plaintiff than the amounts at stake and the ability to lower costs by litigating without an attorney. As regards the judicial response, the potential for conciliation, batch processing, and in the federal juizados, high levels of automation are substantially increasing productivity. There are nonetheless signs that some juizados are suffering from their own congestion –meaning long delays before the oral trial can be held.

26 Trends for the three main jurisdictions covered, state, federal and labor, are summarized in the following two graphs:
A third graph, showing dispositions per judge is also useful in understanding the response to this growth: It bears noting that even the labor and federal courts' 700-800 dispositions per judge is high by Latin American (and universal) standards and that the state courts' 1,400 dispositions is a regional record. Brazil's judiciary arguably costs more (as a percentage of public expenditures or of GDP) than its counterparts.
elsewhere in Latin America, and Europe, but its quantitative output is correspondingly impressive.

Graph III: Annual First Instance Dispositions per Judge (1999-2003)

4.2. Findings on the Composition of Supply and Demand

Aggregate figures are not the whole story. We had already found differences in growth rates among the three major jurisdictions (state, labor, and federal courts) and the different instances of each, but experience suggests within-category variations (types of cases, types of claimants, level of judicial response to each) can be still greater. While we had a few ideas as to what these might be in Brazil, we phrased our initial questions as null hypotheses -- no variation -- to allow their more open-ended exploration:

Hypothesis 4: The growth in demand has been uniform across all types of cases

Hypothesis 5: The impact of the growth has thus affected all courts within each systems equally.

Hypothesis 6: Judicial response to the growth has also been uniform across all types of cases and courts

Unfortunately, the quality of available statistics seriously limited efforts to disaggregate supply and demand, and as we proceeded to lower levels of detail or attempted to track relationships among variables, we were increasingly forced to use illustrative examples from single jurisdictions. Some trends would in fact be detectable only with access to primary databases on individual cases (the courtroom data) and even then, only in the few courts that have standardized data entry at that level. Nonetheless, we were able to advance toward rejecting our null hypotheses and identifying several likely within-system variations.
Much of the escalating growth in state and federal caseload appears to be in claims related to governmental issues – especially taxes and pensions. Of course, all federal cases must by definition include the government as a party. It is at the state level where the contribution of municipal, state, and federal agencies is most notable, representing, in the most modest terms, at least 30 percent of the caseload. Many of these cases involve relatively little work by the judge. Nonetheless, courts must dedicate resources to handling them, and judicial processing inevitably adds delays for the beneficiary while government appeals augment congestion in the higher courts. Tax cases, although theoretically simple, represent a disproportionate share of the backlog in both the federal and state courts. This suggests a problem in its own right – the government’s inability to collect taxes due – and one probably not attributable to judicial performance, but rather to the government lawyers, procedural obstacles, and the lack of cooperation from the defendants. Other areas with a significant weight in the current caseload (lacking time series data, we cannot say how much some of them contribute to the increase) are those like family courts where the duration of the cases is short and appears to generate little congestion and fewer appeals, and labor cases, also disposed rapidly even at the second instance. The rest of the caseload, ordinary civil and criminal cases, accounts for a much lower share of the overall growth, at both the state and federal level.

To the extent these tentative conclusions hold, the judicial crisis appears to have different characteristics, causes, and dimensions than commonly posited. Restricted to comparing filings and judgments we cannot say much about delay at any level (that is to say whether cases are decided within a year or five years of filing) except what can be inferred from the size of the backlog. Still, it is apparent that a high and growing appeals rate is increasing the times to final disposition. Here, the government is hardly the only culprit. The generous appeals policy and the multiple appeals that may be entered for a single case are used by other opportunistic litigants, and are a major part of employers’ strategies in the labor courts, to encourage less expensive, out-of-court settlements.

Our analysis also leads us to conclude that it is more useful to speak of multiple crises rather than a single one. The five shown below are the most clearly distinguishable. We also add a hypothesized, residual category composed of the courts’ more traditional workload.

- The influx of largely administrative cases resulting from government agencies’ (the defendants) poor service and their suspected efforts to put off payments due to private actors. A large part of the federal juizados especiais’ workload is concentrated here, but the cases also affect ordinary federal and state courts. The

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7 Although state courts do not normally hear cases involving federal agencies, they do receive pension cases when there is no federal first instance court (vara) to do so.

8 We are assuming that where types of cases comprise a higher percentage of backlog than of new filings, this indicates greater delays in their resolution. This logic lies behind our conclusion that labor and family cases are decided most rapidly.
courts have invested considerable effort and resources in responding to the surge in demand. The innovations have made them popular with individual plaintiffs, but the solution is costly and inequitable. It also has little impact on the underlying problem of administrative abuses and poor service and thus on decreasing the growth in demand.

- Tax collection cases (where the government is the plaintiff) in both federal and state courts where the problem is both the growth in demand and an accumulating backlog indicating these cases are not being resolved. The judiciary's dedication of resources to this area may be less than needed. Still, the direct responsibility apparently lies with the government lawyers (overburdened, under supervised, with insufficient incentives, or perhaps all three) and with the difficulty of finding assets to attach.

- A related problem with private debt collection which also seems linked to the attachment process. Resolving it would help both the government and the private creditor. We did not identify this problem through the current analysis, instead relying on findings from our earlier research.

- The apparent cost-inefficiency of the otherwise highly productive labor courts. Brazil's government and private defendants are investing large sums in this system, against relatively modest returns to the private plaintiffs. Aside from any negative impact on employment and the Custo Brasil, the question is whether the objectives being pursued, themselves not clear, might be reached in a more efficient, and possibly nonjudicial manner. As these courts have considerable symbolic value, change may be difficult, but even the labor lawyers have begun to question the utility of current practices.

- The increasing congestion of the state small claims courts and the pressures they put on state judicial budgets. These courts do not appear to relieve the ordinary jurisdiction of caseload, but rather to attract cases that would not have gone to the judiciary in their absence. This explains their popularity with plaintiffs. They are less popular with entrepreneurs as much of their caseload involves consumer complaints, and with lawyers, because of the potential for pro se litigation. These court represent a positive step in simplifying litigation, but a better understanding of their caseload, clientele, and the alternatives for serving them seems needed to prevent their collapse.

32 The courts' preoccupation with some of these areas of growth also appears to account for much of their increased productivity. The remaining question, which we could not explore, is the fate of the traditional caseload – the more complex civil and criminal cases which do not lend themselves to batch processing techniques. These cases produce some of the most dramatic, anecdotal examples of dilatory practices and abusive litigation. Better data management and rationalization of courtroom procedures might make them more identifiable and so less likely to be shoved to the bottom of the "deus me livre" pile, but absent procedural reforms and means to discipline opportunistic counsel, radical improvements in their treatment seems unlikely.
Despite the black holes, what we have found should give judicial leaders something with which to work. It is, however, disturbing that so few of them had focused on any of these issues. The weight of government litigation is now getting judicial attention, but largely at the appeals level. A very few judicial leaders (the Presidents of the TJs in Rio de Janeiro and Rio Grande do Sul are two examples) seem interested in tracking trends at the state level and to some extent taking measures to respond to them. For others, the major problem is undifferentiated growth, with no further attention to sources, where it has the most impact, and how judges are tailoring their response. This tendency also characterized the debates on judicial reform needs and the content of a constitutional amendment recently (November 17, 2004) approved by Congress. Lack of good data or use of what is available is part of the explanation, and solution, but there are some additional contributing factors with nontechnological origins.

5. Political Impediments to Change

As many of our interviews suggested we were not exactly inventing the wheel; a majority of our findings would support, but hardly supplant the visions of a select group of experts who have been putting more thought into the problems. We thus used information from these and other sources to analyze the political dynamics of the judicial reform debate as a means of understanding why these alternative views had not had more impact. Our argument here, novel only in its scope, is that interests vested in the existing system discourage open acknowledgment of the fundamental structural problems and so have focused reform proposals on lesser remedies. Moreover, as system members dominate the reform debate, they have been instrumental in focusing it in the following fashion:

- A tendency to blame most problems on the judiciary, but to couch solutions in terms of lesser infringements on their class rights – the introduction of a judicial council and of the súmula vinculante

- Relatively lesser attention to some major sources of growth in demand and congestion – the weight of government litigation and that arising in complaints about public utilities and banks

- A tendency to downplay the role of abusive litigation in creating delay and congestion

- A total lack of concern for other nonjudicial elements – insufficient oversight by government of its own litigation and attorneys, problems related to execution of awards

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9 We also note a report recently commissioned by the Tribunal de Justiça of Rio de Janeiro to assess the weight of cases arising from consumer complaints about public utilities and banks. See Poder Judiciário, 2004.
The addition of several minor details intended to advance more specialized interests but not apparently affecting those of system members as a whole.

35 While the judiciary is not blameless, it has become the universal scapegoat for a situation to which others contribute equally if not more. Many of these other contributors have their own complaints, but have seemingly been willing to ignore them to avoid unleashing more serious disputes and potentially risking their existing benefits. While judges believe they are overworked and many lawyers question the resulting lengthy delays, both groups benefit from the heavy demand on the courts because it guarantees them employment, and in the case of judges, their generous budgets and ample chances for promotion. Government, public utilities, and banks contribute to and benefit from the very delays they criticize — as these allow them to postpone payments to claimants and probably reduce the overall incidence of claims. Obstacles to identifying and attaching assets for payment of awards, in fact the very requirement that this be done by the plaintiff, have been defended as due process protections, but serve a variety of more specific interests (the independent property registries, lawyers for whom this creates more work, defendants of all types and so on). The entire system of labor courts, despite doubts as to its overall cost benefit ratio (amount invested by all sources versus awards actually paid), helps employers postpone and reduce payments, offers a steady stream of small rewards for plaintiffs, and of course supports the work of court officials and specialized litigators.

36 As a whole (that is to say, not just the courts) Brazil’s judicial system can be criticized for being costly to sustain, inefficient, slow, and ineffectual in resolving fundamental problems underlying the conflicts it sees. These problems range from difficulties in debt and tax collection to disincentives for improving administrative and private service delivery. The judiciary’s levels of productivity are nonetheless amazingly high, it has expanded access to new users, and provides many of them, albeit after some delay, relief for their complaints. As the financial and other costs are dispersed, and the benefits are more concentrated, however unevenly distributed, the reluctance to question it basic structure is understandable, especially given the identity of the primary beneficiaries — the government, the judges, private attorneys, and some major private economic actors. There are signs that the conspiracy of silence may be breaking down, in part because of the judiciary’s displeasure with its role as scapegoat. However, if Brazil is interested in introducing more effective remedies to the familiar litany of complaints, the usual winners will all have to make sacrifices.

6. Conclusions and Recommendations

37 This report does not pretend to make Brazil’s choices for it. That is an inherently political process in which citizens must decide which values they want realized and how they believe they should be prioritized. Thus, our fundamental conclusions, as described in more detail above, are more basic: that the problem is more complex than defined in

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10 As a knowledgeable external observer noted, judges need lots of appeals to ensure an adequate chance of being promoted to the appellate courts.
public, and that a lack of better information and better analysis of supply of and demand for services works against the identification of an adequate range of viable remedies and a better understanding of their costs and benefits.

38 Given the amounts already spent on the justice system (and again, not just the courts), we doubt increases in budgetary support are a feasible solution, although there is room for redistribution in present allocations. The three more likely alternatives for addressing the crises are: increasing judicial efficiency, reducing the inefficiency of certain extra-judicial agencies which condition the judges’ response (e.g., property registries, government lawyers, possibly the Public Ministry in its handling of criminal complaints), or some effort to restructure the demand itself. Only the first alternative lends itself to implementation by the judiciary alone. The other two will require the cooperation of other sector and extra-sector organizations, and other branches of government.

39 The first alternative is the most widely accepted, but may not be sufficient. Its greatest impact is likely to be on courts with the lowest productivity (which are often those with the lowest workloads) and on those with the highest incidence of mass cases. The second alternative clearly deserves more attention although it is likely to be resisted by the agencies affected as an intrusion into their autonomy, a violation of their classe rights, or just contrary to the pursuit of their more particularized objectives. The last is the most controversial response and the most likely to touch the core interests of beneficiaries of the status quo. Steps here range from procedural simplification and an increasing reliance on alternative forums to finding ways to force entire categories of large defendants (not the least of which is the government) to improve their service delivery and treatment of clients and so end the self-serving judicialization of their conflicts. Brazil’s judges have been very good at compensating for what others fail or refuse to do for whatever reason, but this necessarily reduces the time they can devote to what only they can handle and thus their ability to move complex cases to a reasonably speedy resolution. Our more specific recommendations fall into three categories as outlined below:

6.1 Improvement of Data Collection and Analysis:

40 Whatever else Brazilians decide to do about their judicial crisis, they will do it better with better information. The positive note is that all three types of entities surveyed are interested in improving their statistical systems. We are somewhat more confident as to the motivations and inclinations of the courts and government lawyers than of the public ministries. However, we think that with external support and encouragement, all three could be convinced to do much better. Except for the government lawyers, financing is less a problem than know-how, and even for the former, costs are not that large an issue. Installing an information system is not that expensive. Doing it well is a major challenge as is certainly demonstrated by the quality of what the courts have already adopted.

41 In this regard, the following considerations are critical across the board:
Understanding that although data collection will start at the work unit level, and thus must meet case management needs, it also should be designed to serve the two higher level purposes – measuring productivity and evaluating organizational performance.

Consequently designing initial data entry to ensure use of an adequate series of standardized categories, agreeing on how these categories will be subsequently aggregated, developing means to check for accuracy and consistency of entries, and testing these initial decisions against the final results.

Finding ways to illuminate two critical black holes: the gap between filings or complaints entered and the official recognition (or distribution) of a case, and the size, contents, and age of the backlog accumulated by virtually every agency. Contrary to the logic of productivity standards, knowing what is not decided is as important as knowing how much of the workload gets through the system.

Incorporation of staff who understand statistical analysis as applied to the justice sector, and having them work with organizational members to design entry formats and performance indicators.

So far as is possible, giving statistical staff access to the raw databases so they can perform analysis not possible with even the most sophisticated aggregate statistics. (However, this also puts a premium on still higher levels of standardization of initial entries, as they may well want to move beyond the pre-established indicators and categories).

Attempting to coordinate the process within and among organizational families in the interests of creating comparable databases and statistical systems. Possibly create a coordinating committee or department at the highest level to oversee the development of a sector-wide system (or more accurately, a series of compatible decentralized systems).

Use of experts with international experience and of international statistical systems to improve the Brazilian process and help interpret the results.

6.2. Resolution of Some Additional Immediate Obstacle to Performance

Using statistics now available and other source of information, there are some obvious structural bottlenecks that could be remedied quite independently of any final, overarching decisions on overall reform. These include:

Improvements to the process for executing judgments, especially in private debt and tax collection. The penhora or the attachment of assets appears to be an obstacle in both types of cases (although we suspect there are others, especially in tax collection). Legal change may be required to reduce the opportunity for protests on the part of the debtor (or the limitations on what can be attached), but a less controversial change involves the interconnection of property registries so that creditors do not have to go on a
virtual scavenger hunt to find where debtors have assets. There are other more controversial changes that might be considered: reduction on restrictions as to information on debtor's bank accounts, to garnishment of wages (considered as aliméntos), to the types of property that can be attached, and to the requirement that the creditor, not the debtor, identify the assets.

44 **Further investigation of the impediments to tax collection cases and adoption of measures to facilitate their processing.** Aside from the penhora, we suspect the supervision, workload, and incentives for the government lawyers play a part. A first step here is better information on what the government lawyers are doing; a second is developing better guidance for their activities; a third may be redistributing their workload or adding more lawyers in some cases. We doubt the judges have a major responsibility here although courts hearing these cases seem to have an excess of filings.

45 **Development of better information systems on government litigation and its use to create litigation strategies.** This is covered above and in the section on improving performance statistics, but is so important it merits separate attention. Brazil, like many of the countries in the region, seems to put little attention to how its own lawyers are doing. Court congestion with government litigation cannot be blamed only on poor information, but better systems would help address the problem.

46 **Finding a way to back out of governmental reliance on using the judiciary to control the fluxo de caixa.** The problem is hardly unrecognized, and it will not be resolved from one day to the next. First government at all levels needs to find a way to pay its bills, and second it needs to ensure the respective administrative agencies can take on the work they have passed off to the courts. The first problem may be the most critical one – and it is clearly related to the prior issue of getting a better handle on what the government is sending to the courts.

47 **Reviewing the situation of the state juizados especiais.** The problems of the federal juizados are largely addressed in the prior two points. Those of the state entities are different. They are currently hearing cases which have no other logical forum. However, because they face their own problems of congestion, delay, and insufficient resources, either judicial budgets will have to be increased or redirected to cover their needs, or some alternative means of resolving some of their caseload must be found. Consumer complaints, a major item in many jurisdictions, have been resolved administratively in other countries. This may be feasible in Brazil. Alternatively, more use might be made of conciliatory services. Here as with government cases, it is evident that a small group of large defendants are abusing the system to their own benefit. A final recommendation, also introduced by others, is to take some of the lessons about procedural simplification from these courts and apply them to ordinary justice.

48 **Code reform.** Brazil’s procedural law is widely recognized, even in Brazil, as too complex and too permissive of dilatory practices. It needs reform. The due process rights incorporated in the codes do not so much guarantee protections as provide excessive opportunities for those attempting to avoid justice, and of course much more work for attorneys. Codes are not the only answer. The other part of the equation is educating
judges to see their role as that of resolving conflicts, not just applying the rules. Successful code reform is as much a question of modifying organizational culture and incentives as it is of redrafting laws, and it thus requires a prior consensus on the purposes to be served.

6.3 The Inevitable Political Decisions

49 Like all governance reforms, judicial reform is political, generating winners and losers with every change introduced. What a country wants its justice system to do and how much it wants to invest in its actions are decisions for which there are no hard and fast answers. Outsiders can provide analysis and suggest alternatives but they cannot or should not impose choices. Better information may allow Brazilians to do much of the analytic work themselves, but the decision to collect and analyze data and to use this to inform choices is itself political, as are the preferences that arise from the process. We think better information does not run contrary to Brazilian values but again that is for the country to decide.

50 Brazil currently spends a higher percentage of its public budget on its justice system than do most countries worldwide. In quantitative terms (cost of resolving a case), it may be getting adequate value for its money. We have suggested that qualitatively, the evaluation may be different, but this is only if one believes courts should not do administrators’ work for them or that chances for reconsideration of judgments should be limited. If one agrees with Brazil’s current choices, the costs of maintaining its justice system will remain high, and this may well be what a majority of Brazilians want.

51 We have pointed out areas where we believe the current arrangements create certain contradictions, suggesting inter alia those between what Brazilians have asked their justice system to decide and their demands for timely, less costly operations. We have suggested a preference for decreasing the demands and thereby lowering the costs and delays. However, the ultimate choice could go in other directions – increasing costs to allow fewer delays with the same workload, or accepting the workload and the costs and delays. The mathematics are objective, but the ultimate decisions on the prioritization of values are inherently subjective and are choices an outsider cannot make.
CHAPTER I: INTRODUCTION

I.1. Background

52 For nearly the past decade, Brazil has been experiencing a self-described judicial crisis and seeking to introduce legal and other remedies to address it. Definitions of the crisis vary, but generally center on the high costs of maintaining the judiciary and other sector organizations; lengthy delays in resolving cases taken to the courts and frequent failures to reach satisfactory solutions; restricted access, especially for poor citizens; the suspected impact of corruption, bias or other irregular factors in shaping system performance; conflicted relationships among sector agencies and between them and other branches of government; and a level of institutional independence within the sector that threatens to eclipse any sort of accountability to the citizens it serves. The consequences of this situation range from increases in the public budget and Custo Brasil (the cost of doing business in the country), through decreases in citizen confidence in institutions of governance, to negative impacts on social and economic equity. Scholars have registered skepticism as to the broader benefits sometimes claimed for a well-functioning justice system, but they have no doubts about the costs imposed by one that is patently dysfunctional.11

53 Although described as judicial, it should first be evident that the crisis involves much more than the courts, including a host of public and private institutions comprising the justice sector — those organizations involved in the legally based resolution of conflicts and enforcement of the legal framework. Nonetheless, the most frequent proposed remedies, encompassed in a recently approved constitutional amendment (Amendment 45 of November 17, 2004), are aimed at restraining and altering judicial operations. A second observation, and the topic of the research described here, is that many of these criticisms and remedies are based more on conventional wisdom and anecdotal evidence than on any kind of objective review of the sector’s circumstances and performance. There are reasons for that reliance on what the Brazilians call “achismo” (from the word acho, “I believe”), some deriving from the lack of information and other resources needed for doing more rigorous diagnostics and some from the interests vested in the present system. Anticipating the results of the subsequent 150 pages of analysis, the arguments forwarded here are as follows:

54 The absence of a tradition of performance monitoring (based on statistics captured by the organizations themselves) has reduced Brazilians’ ability to understand the roots of “judicial” failures and encouraged recourse to solutions that don’t seem aimed at fixing the real problems. Creating the information base needed to remedy this situation will take a little time, but the other obstacles are more ideological and attitudinal than technological or financial.

11 See Pásara (2004b)
An analysis of the, admittedly flawed, statistics already available suggests there are several rather than a single crisis area, and that each of them is amenable to a different set of remedies, many of which are non-judicial in nature. While none of these reforms will be introduced unopposed, they can be initiated now, with additional statistical support developed along the way.

Many of the problems of congestion and thus of delay and systemic costs arise in the opportunistic practices of a few very powerful actors – the government, the private bar, and to a lesser extent, banks and public utilities. If these entities could be convinced to control their opportunism, the courts could concentrate on resolving the problems of their own making.

The crisis or crises have given rise to a number of innovative measures, many of them introduced by the judiciary. These experiments, among which the introduction of small claims courts and the extensive adoption of automation stand out, have had dramatically positive results, but they would be still more efficient and effective if the exponential growth of demand could be contained.

As it seems unlikely that Brazil can afford to spend more on its justice sector, it will either have to tackle the underlying problems with hard solutions or resign itself to living with relatively high levels of inefficiency, inefficacy, and limited access.

The present report, and the source of the findings listed above, summarizes the results of research conducted in Brazil in 2003-2004. It is the second of two World Bank sponsored studies on the Brazilian judicial system. The first (see box), completed in mid 2003, analyzed a sample of civil cases filed in the São Paulo state courts as a means of exploring judicial impacts on economic transactions. Its findings, while provocative, were obviously limited in their generalizability, and as the study concluded, raised as many questions as they answered. This second effort is intended to address some of these questions by taking a broader, if less detailed look at sector operations – here defining the sector (or system) not just as the courts, but as the multiple formal and informal institutions involved in the resolution of conflicts through the application and enforcement of the legal framework. The topic this time was not how cases were handled, but rather how the system’s key organizations monitor their own performance – the structure, content, origins, and use of statistics collected on workloads and outputs – and with what consequences for understanding problems and designing programs to resolve them.

World Bank (2003b)
2. Box A: World Bank Research On Judicial Performance And Private Sector Impacts

This research, conducted in 2002 and 2003, analyzed a random sample of 1,164 cases from the São Paulo state courts. The sample, drawn from courts in São Paulo city, included debt collection proceedings (*ações de execução* and *monitórias*) filed in 1996 and mandados de segurança from 1996; 1998, and 2000. The research traced the proceedings from initiation, through any appeals, to final solution, using the data collected to assess the quality and broader impact of judicial performance. Here we made a distinction between efficacy in resolving individual problems (the private good) and strengthening the market environment (the public good) by enhancing juridical security and encouraging rule-based behavior. The distinction is important. Individual satisfaction may not coincide with systemic priorities or may occur in a fashion that lessens its wider consequences.

In summary debt collection, private good and public good impacts are mutually reinforcing, in that an inefficient proceeding has immediate personal consequences (debts are not recuperated) and longer-term systemic ones (undermining the reliability of contracts, raising the cost of credit, and discouraging future loans). The fault lies only partly with the courts. As compared to others in the region, Brazilian judges make more effort to decrease delays (or enhance efficiency) by encouraging payment or other agreements short of judgment and exercising control over dilatory maneuvers by the defendant. Nonetheless, there is room for improvement, especially in reducing the extraordinarily high appeals rate. Problems with efficacy (the eventual satisfaction of a just claim) have largely extra-judicial origins: the legal framework, creditors' poor judgment in making loans, insolvent debtors (against which a court can do little), and inadequate mechanisms for documenting credit history or providing information on attachable assets.

The *mandado de segurança* addresses a second type of juridical security, as affected by government agencies overstepping their legal mandates. Seen primarily as a means of protecting political and civil rights, it has received little attention from theorists or reformers interested in market impacts. Patterns and incidence of use have changed rapidly; a fivefold increase in filings from 1996 to 2000 was accompanied by a shift from complaints about tax collection and administrative regulations to those involving traffic fines. These patterns, combined with a decreasing tendency to grant temporary injunctions, rule in favor of the plaintiff or overturn judgments on appeal, support a common belief that the *mandando de segurança* is itself being abused and that judges are responding by screening cases more carefully.

For the individual plaintiff, the process is far more expeditious and less costly than debt collection. However, by addressing only the immediate complaint, it does not

60 For anyone not attuned to the intricacies of judicial or justice reform discussions in the rest of Latin America, this might seem an odd choice. However, in this region, where both demands for improvement in sector performance and investments in reform

3
programs have been on the rise for the past twenty years, continuing dissatisfaction with
the results have brought a new interest in objective measures, both of problems and of
advances in resolving them. This interest arises from a series of lessons of experience:

61 Despite heavy investments in automation equipment, and thus the development of
a capacity to track performance, few sector organizations (courts, prosecution, police,
state attorneys and so on) have taken advantage of this potential. They are often little
better off in terms of saying how much they do and how well they do it than they were
when the reform efforts began.

62 The most widely used quantitative measures of performance thus rest on public
opinion polls.13 Sector organizations have begun to question the validity of these polls to
evaluate performance and guide reform plans, but they in turn have little else to offer.

63 Although many of the initial complaints and thus reform targets involved
quantifiable goals – delay reduction, elimination of backlog, number of judgments
delivered, increased access to nontraditional clients – there was no baseline against
which to measure progress, and often is still little to describe even current conditions.

64 The situation affects not only external discussions of reform needs. Organizations' own abilities to improve their use of resources and detect and resolve
problems before they become the topic of broader discussions are also severely
constrained.14

65 Research efforts (like that first conducted by the Bank in Brazil15) indicate that
some of the problems initially identified may not have been quite as described and that
both the problems and their underlying causes may have been misdiagnosed. While
additional research might provide more enlightenment, systematic performance tracking
would be a more efficient way of investigating many problems and of identifying the
factors contributing to them.

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13 CEJA (2003) offers a compilation of the most prominent sources all of which suggest that public
certainty in Latin America’s justice systems has declined over the past decade. The World Bank
Institute’s work on governance (including a rule of law indicator) and its various country-specific
surveys on corruption are included in the CEJA study, but can also be accessed separately on the WBI’s
website, www.worldbank.org/wbi/governance. For published versions, see Kaufman et al (1999 and
2002).

14 For one of the few published discussions of this problem, see Binder, Vargas, and Riego (2003)

15 Similar Bank financed studies were done in Argentina, Mexico, Peru, Ecuador, and the Dominican
Republic. Those for Argentina and Mexico are reported in WB (2002b, 2003b). That for the Dominican
Republic is reported in Pastor and Vargas (2000a and b) and in Varela and Mayani (2000). Consultant
reports for Peru (González et al, 2002)and Ecuador (Simón et al, 2002) are in file in the Bank, but have
not been publicly released.
Finally, the failure to access comparative databases\(^{16}\) makes it difficult to evaluate what is available on individual systems. Countries usually now know how much they are spending on their justice systems, but have no way of telling whether this is a reasonable amount. Most can now calculate judicial caseloads, the ratio of judges per 100,000 inhabitants, or litigation rates, but again tend to view these figures in an informational vacuum. For example, the facts that Brazil’s judicial budgets (as a percentage of total public expenditures) are among the highest in the region, but that its judges also carry and decide an unusually high number of cases come as a surprise even to local experts.

As this last comment suggests, Brazil is no exception to these generalizations. In fact, it constitutes a particularly puzzling extreme case. It has been a leader in court automation (and that of other sector agencies) and the use of electronic communications. While we knew this when we began the study, the extent of computerization, the use of state of the art equipment, and the novel adaptations of information and communication technology to courtroom procedures still came as a surprise to the research team. There are of course enormous variations among regions and organizations in this “continental” nation. However, as a whole, Brazil takes a back seat to none of its Latin American neighbors in this area, and arguably has advanced beyond many industrialized countries.

There is nonetheless a paradoxical side to these developments. It became the entry point for the investigation reported here. The apparent capacity to track system performance afforded by the investments in ICT is not reflected in on-going debates about system failings or in the pursuit of remedies to address them. Current discussions of reform needs are conspicuously short on quantitative analysis – assertions about delay, the most frequent complaint, are usually backed only by a series of illustrative examples of especially egregious cases. There is no way of telling whether these are the norm or just the unfortunate outliers likely to be found even in well functioning systems. Moreover, the judiciary and other sector actors have until recently shown little interest in responding to these criticisms and when they do, their arguments tend to accept the assertion but pass the blame for the situation to factors “outside their control.” Here, Brazil does no better than many countries with a far lower level of technological endowment and a far less sophisticated policy environment. That Honduras or Guatemala do not go to the numbers for diagnosing system performance is not unexpected. However, that discussions in Argentina, Colombia, and Peru feature more reliance on empirical analysis than those in Brazil does merit attention.\(^{17}\)

\(^{16}\) While even the compilers of these databases express doubts as to their accuracy, comparative figures are increasingly available and do give some idea of the range of variations. See Contini (2000), CEJA (2003), and Bendala García (2004) for examples. There are also several new efforts underway to construct comparative statistical databases in Latin American (see CEJA, 2003) and in Europe (see CEPEJ, 2004 a and b).

\(^{17}\) Both Colombia and Argentina publish considerable data on the websites of the Consejo Superior de la Judicatura and the Ministry of Justice, respectively, as well as in printed documents. As opposed to Brazil, the presentations attempt to track trends and identify problems. They are not just number shows. In Peru, the best studies have been done by NGOs and universities. See for example, Hernández Brefia (2003). While the latter is based on data from the courts, which are of doubtful quality, it is an excellent example in terms of presentation, analysis, and discussion.
In exploring this paradox, we began with the most obvious questions: are Brazilian courts, Public Ministries, and “Procuradorias,” the three entities surveyed here, collecting any sort of performance data, what do they collect, and are they utilizing their automation systems to facilitate the process? Answers to these questions address the issue of real as opposed to potential capacity. If information is not available than the explanation as to why it is not used is obvious. To the extent it is not available or demonstrates problems of quality or quantity, there are some very simple recommendations to be made as to how the situation could be improved. For Brazil, this is theoretically easier than it would be for many countries as so much of the technological foundations have already been created. Automation is not a prerequisite for performance tracking, but it certainly eases the task.

There is a second set of questions to be addressed regardless of the answers to the first series. Why have institutions either not collected the information or failed to make greater use of what they have? To anticipate the findings presented in Chapter II, we encountered a less than clear-cut set of answers to the first questions and thus a more complex set of explanations for the second. In developing these explanations we have had to look beyond technological and technical constraints and explore the internal organization and culture of the institutions surveyed, as well as the variations within and among the three types of entities. Our conclusions here, based on a more subjective evaluation of events, also have important implications for the technically-based recommendations. The likelihood and ease of their adoption depends on far more than technology.

Finally comes the ultimate question of what effect the situation has had on sector performance and current discussions of the need for reform. Where internal performance evaluations and policy debates are not informed by empirical data, discussions of performance failures and proposals for their correction are inevitably shaped by conventional wisdom, public opinion, and anecdotal examples. Conventional wisdom is not always wrong. As a peripheral, but intended result of our line of inquiry, the research team acquired access to data which, after further analysis, support and even strengthen some lines of argument offered by Brazilian experts as to the nature of system problems and their causes. Were this information more widely disseminated and more fully analyzed, the entire discussion as to how system performance might be improved would arguably take a very different tact. In exploring why this has not happened, we have used additional insights, gathered as a result of informant interviews and review of internal and published documents, to develop some further conclusions on the politics of Brazil’s judicial reform.

Here we look beyond intra-organizational culture and operations to the question of who has stakes in the debate and how their interests affect the directions taken and the

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18 For want of a better term, and at the risk of causing confusion, we will use this term to denote state legal services - the lawyers who defend the state’s interest in judicial and extra-judicial legal matters. Unfortunately, the Public Ministries also use this title, but there doesn’t seem to be a better composite term for what might be called in English, but also misleadingly, Solicitor General’s Offices. Annex I provides a brief explanation of the organization and functions of these entities.
arguments used to support them. This takes us some distance away from the entry point of statistical information systems, but the reach is not that great. Organizational prejudice and inertia can explain some of the Brazilian paradox, but another part lies in what the stakeholders choose to discuss. Brazilians engaged in the debate, we discovered, know much more about their justice system problems than they choose to emphasize -- arguing in an empirical vacuum is as much a strategy as it is a consequence of lacking good information. And if the information available is not of better quality, this is partly because some players believe it would not enhance their positions.

73 As this description suggests, the present research design is less classical and more qualitative than the first study – we have traded methodological rigor for the opportunity to explore a broader range of questions in a greater number of sector institutions. Our point of entry, statistical systems, provided a central focus, but did not set the limits of our inquiries. Once having established what statistical systems exist in each institution, additional questions as to design and use, and more open-ended discussions of problems and pending reform proposals revealed a good deal more about organizational operations, behaviors, and the implications for efforts to improve the overall results. We were given access to some statistics managed by individual institutions, and in Chapter III offer some partial analysis as a means of supporting some of our otherwise highly subjective conclusions. It bears mentioning here that however developed or underdeveloped their databases, Brazilian judicial institutions tend to be far less chary than those in many other Latin American countries of sharing them with outsiders. If they do not use this same data in their interactions with the broader public, the explanation is not, as it sometimes is elsewhere, a conscious policy of institutional secrecy and nontransparency.

74 It also bears mentioning that the situation described here, at least so far as development and use of statistics, is changing. While we are critical of current practices, most of the organizations surveyed were already working to improve them. This made our own work easier, and is also suggestive of areas where the Bank or other donors might make some immediately useful contributions. There are statistics being collected, and we have used some of them in the general discussion as well as in the chapter focusing on data analysis. Courts in particular now publish statistics on caseloads in printed form and on their websites, but even a cursory reading raises doubts as to their accuracy or completeness. The Supremo Tribunal Federal (STF), Brazil’s Constitutional Court, publishes a system-wide database on caseflow (the Banco Nacional de Dados do Poder Judiciário, BNDPJ) available on its internet site.19 However, as participation is voluntary, coverage tends to be spotty. The two other entities surveyed here, Public Ministries and Procuradorias have lagged behind, although, as discussed in Chapter II, many state public ministries are now catching up with the courts. The quality of what is collected, and even of the systems under design, could still be improved, but that is also contingent on organizations adopting a new perspective on their utility and on certain more political impediments being overcome. The black box analogy which President Lula applied to the courts, can be as appropriately applied to the entire set of interests

http://www.stf.gov.br/bndpj/stf/
(including those of the executive) supporting the way the judicial system now operates. That the box remains unlighted, that current discussions of reform focus on what appear to be peripheral issues, and that courts fail to use even the data they now have to illuminate the rest is the bigger issue, but one whose resolution will apparently require a willingness on the part of all actors to table themes they might prefer to ignore. Before entering into a discussion of our own study, we will thus review this second paradox—the gap between what is wrong and what is openly criticized.

### 1.2. Discussions on Judicial Reform in Brazil — What is the Problem?

Viewed against the standard recipes for improving performance, Brazil’s justice system would appear to be in good condition. Budgets for the core institutions (courts, Public Ministries, and “Procuradorias”) range from reasonable to generous, there have been substantial investments in infrastructure, equipment, and additional staff, independence from political intervention has been reduced significantly, salaries are adequate, and productivity is reasonable to very high. In looking only at the courts, two factors stand out dramatically: First, Brazil’s courts arguably receive a very generous percentage (up to 4.3 percent for the federal system, up to 7 percent for the states\(^{20}\)) of the total public sector budget (excluding social security and debt payments), augmenting this at the state level with monies from special funds. While judiciaries throughout Latin America tend to absorb a larger proportion of public budgets than in other regions, Brazil is at the far end of the spectrum, with most countries falling in the 2-3 percent range. The following table, comparing Latin American figures with those of selected European countries, warrants several cautions. First, the figures come from a variety of sources, some of them of doubtful accuracy. Second, there are important variations in what is included in the “judicial budget,” the numerator. Figures for Latin America are fairly straightforward, but in the case of the European figures, all drawn from the same source, the contents are far broader than in Latin America, including the penitentiary service, legal defense (in Latin America, included only in Costa Rica and Paraguay), and judicial programs for “youth protection.” Prison expenditures would not appear to make much of a difference, but the amounts spent on youth protection in France and on Legal Services in the United Kingdom appear to have major impacts on their “justice budgets,” conceivably increasing the percentage by one-third. Third, there are questions as to how the public sector budget (the denominator) should be calculated. For all European statistics, expenditures on social security are excluded. Without these exclusions,

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\(^{20}\) Figures for the states were taken from interviews. Our judicial informants told us the national courts now receive 3.5 percent of the budget, calculated without debt payment included. However, more recent arguments about the amount, spurred by a Ministry of Justice report (Brazil, Ministério da Justiça, 2004) on the budgets have produced far lower figures. Matthew Taylor, a doctoral candidate doing a dissertation on Brazil’s courts has calculated the figure at 4.3 percent. He also added as a note that Brazil’s expenditures on its national courts are close to what the U.S. spends on its federal court system. Private communication with the author. In both cases, judicial reviewers have suggested the high figures may also include the precatórios (awards to be paid by the government as a result of judgments against it) managed by the courts.
percentages drop radically. Social security (and debt payments) appears to be excluded from the Latin American statistics, with the possible exception of Chile. Unfortunately, Latin America has been far less systematic in making these calculations.

Table I-1: Judicial Budget as Percent of Total Budget

<table>
<thead>
<tr>
<th>Country</th>
<th>Judiciary's percentage of total public budget</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chile</td>
<td>0.93&lt;sup&gt;22&lt;/sup&gt;</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>5.16 (includes Public Ministry, Public Defense, and the Investigative Police)&lt;sup&gt;23&lt;/sup&gt;</td>
</tr>
<tr>
<td>El Salvador</td>
<td>4.51 (6 percent constitutional earmark; both figures include judicial council)&lt;sup&gt;24&lt;/sup&gt;</td>
</tr>
<tr>
<td>Honduras</td>
<td>2 (earmark of 3 percent)</td>
</tr>
<tr>
<td>Paraguay</td>
<td>3.0 (constitutional earmark), actual range from 1.8 to 4.3</td>
</tr>
<tr>
<td>Argentina</td>
<td>3.15&lt;sup&gt;25&lt;/sup&gt;</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>2.55&lt;sup&gt;26&lt;/sup&gt;</td>
</tr>
<tr>
<td>France</td>
<td>2.55&lt;sup&gt;27&lt;/sup&gt;</td>
</tr>
<tr>
<td>Germany</td>
<td>7.51&lt;sup&gt;28&lt;/sup&gt;</td>
</tr>
<tr>
<td>Spain</td>
<td>2.28&lt;sup&gt;29&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

If Brazil's courts enjoy relatively high budgets, they just as arguably process a record number of cases per judge. Although the national average (so far as it can be determined) is lower, and very unevenly distributed, individual judges routinely dispose

21 Including social security as part of the budget, Blank et al (2004, p. 93) gives the percentages as 0.4, 0.3, 0.7 percent respectively for England, France, and Germany. The more generous definition of the justice sector, including prisons and legal defense used by Douat (2001, p. 20) yields 2.15 percent, 1.10 percent, and 2.18 percent for the same three countries when social security is included.

22 CEJA, p. 367, for 2002.
24 CEJA, p. 367, for 2002.
27 Loc cit.
28 Loc cit
29 Loc cit.
of thousands of cases annually, by delivering a judgment, overseeing a negotiated agreement, or closing the case at party request or for lack of action. Some numbers are truly phenomenal – the 11 judges of the constitutional court (Supremo Tribunal Federal, STF) have in the last few years decided close to 100,000 cases annually – judges in the federal small claims courts may make 7,000 or 8,000 rulings each year, and there are many instances of a single judge sentencing hundreds of cases in a single day. The following chart, based on figures for 2000-2002 does not reflect the recent surge in small claims court cases in Brazil, which would raise total filings and filings per judge still further. It also, owing to the poor quality of Brazilian statistics, probably understates even the 2002 figures – however the same is true of the other Latin American countries as well. As explained in the footnotes, figures for European judges refer to dispositions, not filings.

Table I-2: Comparative Statistics on Judicial Workloads

<table>
<thead>
<tr>
<th>Country</th>
<th>Filings (dispositions) per 100,000 inhabitants</th>
<th>Judges per 100,000 inhabitants</th>
<th>Filings (dispositions) per Judge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Honduras31</td>
<td>1,200</td>
<td>8.8</td>
<td>136</td>
</tr>
<tr>
<td>Venezuela32</td>
<td>2,375</td>
<td>6.3</td>
<td>377</td>
</tr>
<tr>
<td>El Salvador33</td>
<td>2,454</td>
<td>1.8</td>
<td>208</td>
</tr>
<tr>
<td>México, Federal District only34</td>
<td>2,600</td>
<td>4.0</td>
<td>650</td>
</tr>
<tr>
<td>Brazil35 (federal, labor, and state only—military, electoral and juizados especiais not included)</td>
<td>7,171</td>
<td>5.3</td>
<td>1,357</td>
</tr>
</tbody>
</table>

30 Dates for figures vary as indicated. Workloads are calculated by dividing the number of first instance filings by the number of judges. This may slightly understate the first instance workload, as the number of judges also includes those in higher instances. However, the bias can be assumed to be consistent, and is necessary because some information on the total number of judges does not offer breakdowns by instance.

31 World Bank figures corresponding to 2002

32 World Bank figures corresponding to 2002

33 World Bank figures corresponding to 2001.

34 World Bank 2002; litigation rates elsewhere in Mexico are usually lower – for example, the State of Mexico, the Federal District’s neighbor, showed figures of about 1,600 per 100,000 inhabitants.

35 For 2002, from Supremo Tribunal Federal data bank; http://www.stf.gov.br/bndp/stf/ As figures on juizados especiais are incomplete, as is the information on judges assigned to them, neither are included.
<table>
<thead>
<tr>
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<th>Judges per 100,000 inhabitants</th>
<th>Filings (dispositions) per Judge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>9,459</td>
<td>10.9</td>
<td>875</td>
</tr>
<tr>
<td>Colombia</td>
<td>3,298</td>
<td>7.7</td>
<td>430</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>21,000</td>
<td>15.9</td>
<td>1,320</td>
</tr>
<tr>
<td>England and Wales (dispositions)</td>
<td>(9,800)&lt;sup&gt;39&lt;/sup&gt;</td>
<td>11&lt;sup&gt;40&lt;/sup&gt;</td>
<td>(891)</td>
</tr>
<tr>
<td>France (dispositions)</td>
<td>(6,200)&lt;sup&gt;41&lt;/sup&gt;</td>
<td>13&lt;sup&gt;42&lt;/sup&gt;</td>
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<td>(700)</td>
</tr>
<tr>
<td>Germany (dispositions)</td>
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<td>23&lt;sup&gt;46&lt;/sup&gt;</td>
<td>(678)</td>
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<tr>
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<td>2,821</td>
<td>1.29</td>
<td>2,187</td>
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</table>

<sup>36</sup> Argentina, Ministerio de Justicia y Derechos Humanos (2002), p. 16

<sup>37</sup> Fuentes (2004, pp. 150-152. Figures are for 2001 and cover only ordinary courts, not the administrative or constitutional systems.

<sup>38</sup> Mora Mora (2001)

<sup>39</sup> Blank et al, p. 93. Figures are for 2001. Resolutions per judge are calculated simply by dividing the number of judgments per 100,000 inhabitants by the number of judges per 100,000 inhabitants. Although this is one of the more up-to-date compilations of European statistics, it does not include total filings, and it mixes administrative, criminal, and civil judgments. In a further breakdown (p. 93) of judgments by jurisdiction, Germany shows the greatest differences – 192 judgments in criminal courts, 1,116 in civil, and 150 in administrative.

<sup>40</sup> Blank et al, p. 93.

<sup>41</sup> Blank et al, p. 93.

<sup>42</sup> Blank et al, p. 93.

<sup>43</sup> Blank et al, p. 93.

<sup>44</sup> Blank et al, p. 93.

<sup>45</sup> Blank et al, p. 93.

<sup>46</sup> Blank et al, p. 93.

<sup>47</sup> Marcus (1999), p. 112, for early 1990s. Judges may get more filings if they are also receiving criminal cases (general jurisdiction).

<sup>48</sup> Loc cit.
Brazil’ average filings are already high for the region, but the caseloads handled by some courts (especially the *juizados especiais federais* and the STJ and STF) are far outside international norms – and are unique in a region whose judges may complain about an annual caseload of a few hundred filings. These numbers (what one informant called the “*dados surrealistas da Justiça brasileira*”) have a complicated explanation behind them (treated in later chapters), but a good deal of the secret for such high levels of productivity lies in the creative application of automation, and innovative techniques for dealing with thousands of similar complaints. While the judiciary stands out (in part because of the possibility of comparing available statistics against those from other countries), carrying capacity of other organizations also appears to be high. This is especially true of the Procuradorias and the Public Ministry, although as discussed in the bulk of this report, their statistical systems are less developed and thus less capable of tracking workloads.

Despite these advances, the justice system as a whole and the courts in particular are the targets of substantial criticism. The major complaint as regards processing of cases is delay, and the courts take the brunt of it, although they are hardly the sole contributors to this phenomenon. In criminal justice, a high level of impunity for those suspected of serious crimes is also a concern, and again, while this is treated as a judicial problem, it arguably originates elsewhere. Restricted access is a third concern – especially for those of limited resources. Finally, there is the issue of corruption, within the system itself. Although most informed observers believe the bulk of this lies elsewhere, recent investigations leading to charges against individual judges have again put the courts at the center of the debate. We do not deal with any of these issues directly, because the first three are difficult to measure in any but the most sophisticated statistical systems while the fourth, corruption, must be tapped by other means. Instead, to the extent we are able to use Brazilian data to tap into performance, we focus on workloads, clearance rates (number of cases disposed over number of cases entered), and appeals rates, all of which contribute directly to delay (*morosidade*) and can be assumed to have an effect, if far less directly, on the other complaints as well.

One problem that should be recognized from the start is that even judicial statistics systems capable of measuring delay rarely do so. The usual reason given is resistance from judges to having this kind of record kept or made public.

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49 Generalizations on citizen complaints are taken from a variety of polls conducted only in Brazil and throughout the region. CEJA (2003) offers the best collection of comparative data.

50 Brazilian critics in fact often connect impunity with congestion and delay because of the opportunity for defendants to prolong hearing of their cases indefinitely. However, the largest contributors are probably police investigation, relations between the police and prosecutors, and the prosecutors’ own skills in arguing a case. Restricted access is presumed to be a result because of the crowding out effect. The relationship between corruption and delay is more controversial. Again Brazilians have argued for some connection – in the opportunity for defendants to persuade judges or judicial staff to accept dilatory practices or simply put papers at the bottom of the stack. Some authors (Buscaglia and Dakolias, 1999) have argued for a direct relationship, but there are many slow judicial systems with fairly honest judges, and some rapid ones riddled by corruption. Costa Rica may be an example of the former, Panama of the latter.
With judges making so many rulings and with a litigation rate that is reasonable in universal terms, the question is whether the popular criticism has any basis in reality. We believe that it does. In interviews done as background for this and the prior research, we were bombarded with examples of cases that had lingered in the judiciary for years or even decades without ever coming to resolution. Our initial research in São Paulo supported the belief. Debt collection cases could be resolved in a relatively short time, if the defendant did not choose to fight them in court. In this sense, Brazil offers an advantage over the four other countries surveyed by the World Bank. However, for those cases going through the entire trial process, average times to judgment were the longest and all judgments were appealed. This last comment provides an important part of the explanation for this third paradox. Rulings by individual judges were often reached within a reasonable time. The problem is that cases are not resolved by individual rulings. Not only were all first instance judgments in our sample appealed; appeals were often entered by both of the parties (or all, if there were more than a single defendant and plaintiff or an interested third party). Moreover, appeals were often multiple – and interlocutory as well as against the final decision. Even after the ultimate ruling is made, possibly by the STF or STJ, the enforcement of judgment may give rise to still another legal conflict, also with its own convoluted appeals process. As the present research began, this explanation had to be regarded as only a hypothesis – the São Paulo sample was too small and too limited in scope to make it more than illustrative.

Impunity and limited access also appear to be real, not imagined problems, but as in the case of delay have more complicated explanations. As further explored in later chapters, they include problems of coordination across sector organizations, procedural rules, and delays themselves. These are in short real problems, but the popular tendency of blaming them on judicial malfeasance or incompetence is far too simple, and moreover is likely to produce inadequate solutions. The courts have taken the brunt of the criticism because they are most visible and because the system itself is so complex that few outsiders understand its real operations.

The findings of the São Paulo study in this sense supported both the existence of the reputed problems and explanations that were forwarded in private conversations with knowledgeable observers. However, while judges are increasingly willing to discuss these factors, they can offer little in the way of hard data to support these views. The earlier study also suggested some additional contributing factors – the high rate of litigation involving government agencies as plaintiffs or defendants, the tendency of government lawyers to appeal every negative ruling, and court congestion based on the recent entry of hundreds of thousands of small cases of a largely administrative nature.

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51 In Brazil, as opposed to in Argentina, Ecuador, Mexico and Peru, once a judge has admitted a simple debt collection case, assets may be attached and payments made. Cases only proceed to judgment if the defendant protests. In the four other countries once a case has been filed, it must go to judgment, unless the defendant pays spontaneously. This means even cases where the defendant does not show up in court (is in rebeldia), the judge must make a final ruling.

52 Respectively, the Constitutional Court and the highest appeals court for federal, non-constitutional cases.
(e.g. monetary corrections to pensions, salaries, and other benefits, or to bank accounts frozen under the Collor administration). Again, while this is becoming common knowledge among the experts, the three types of agencies surveyed here (all of which are affected by these additional elements) have not been able to offer their own hard evidence as to the incidence and impact of these practices. As a consequence, reform proposals tend to focus elsewhere.

I.3. Current Reform Discussions

With the 1988 Constitution, Brazil’s justice sector underwent significant changes. Even prior to that date, certain weaknesses characteristic of other of the Latin American region’s judiciaries had long been resolved – the professional quality of judges, members of the Public Ministry and other legal officials had been assured through a system of appointment largely by competitive examinations, sector budgets and salaries were high by regional standards, and while under the military dictatorship, courts and other institutions were limited as to their political powers, more direct interference in their internal operations had not been excessive. This was less true of entities like the police, although even here, Brazil’s police forces occupy at least a relatively high position on the regional scale in terms of professionalization, equipment, and salaries.

Changes entering effect with the 1988 Constitution created a new organization for the government lawyers (Advogado Geral da União, Procuradorias Federais, and Procuradorias Gerais do Estado), strengthened the independence of the Public Ministry, and altered some details in the judiciary’s organization. The Constitution also significantly expanded the first, second and third generation rights guaranteed to Brazilians and gave the Public Ministry greater powers in ensuring their realization.

The problem of access to the judiciary, a longtime complaint, was addressed through the Constitution and various infra-constitutional laws creating a series of small claims courts (juizados especiais) at the state and eventually federal level. These courts, initially appearing in a few states in the 1980s, may be the most popular sector innovation. Using simplified procedures, allowing pro-se (self) representation, and emphasizing rapid decisions with single oral hearings they have provided a means for the poor and others with financially minor complaints to have their problems resolved without the formality, costs, and delays of the ordinary courts. Other actions to increase access include the role of the Public Ministry in defending collective and diffuse rights, some efforts to increase the opportunities for negotiated agreements especially for cases involving masses of individual plaintiffs, and the use of community conciliators to keep small cases out of court.

53 The initial promoters of these courts explicitly followed the US example. See Watanabe (1984).

54 This is one area that has attracted considerable local research. See Batista Calvacanti (1999), Bermudes (1999), Pinheiro Carneiro (2000), Rodycz (2001), and Sadek (2000a, 2000b, 2001a).
3. Box B. Judicial Initiatives to Expand Access And Improve Services to Users

Within their spheres of influence, Brazil’s national and state courts are introducing experimental practices to improve service delivery and to speed up their handling of the cases they get. These innovations have had a positive impact and merit consideration by other countries facing problems of costly, slow, or inaccessible judicial services. Among the most important are the juizados especiais (small claims courts) at both the state (where they began) and federal levels. Their creation has allowed the poor and other potential users with less financially significant complaints a means of seeking redress in a more direct and less costly fashion. At the state level, there have also been experiments with itinerant juizados especiais (on buses or even boats), with community conciliation programs, with the introduction of special offices attached to the juizados especiais to negotiate consumer complaints with public or private enterprises, and (for federal courts as well) with computer terminals in courts where users (as well as lawyers) can check the status of their cases. Online filings and digital signatures, innovations still under debate in other countries, are already old-hat in Brazil, which is now experimenting with virtual hearings and completely automated proceedings. Labor, federal, and state courts have also experimented, in conjunction with procuradorias, in the negotiation of mass claims, and in the São Paulo federal social security small claims courts, the INSS (social security) both assists in calculating amounts due and reaches agreements as to what it will not appeal. Courts have also introduced practices to help judges who are falling behind in their workloads. These usually involve voluntary or paid work by their peers to take care of the temporary excess, and the use of diagnostic studies to identify problems leading to accumulating backlogs. Courts have been slow to advertise these innovative techniques, or to exchange information with each other. This situation is changing and both the STF and the STJ have sponsored national meetings where state and federal judges can describe their experiences and so encourage the broader adoption of their most successful innovations.

Despite all these positive changes, the justice system has been the subject of increasing complaints. For the past thirteen years, a package of constitutional amendments (Proposta de Emenda Constitucional, PEC) aimed at addressing them has been under discussion in the Congress.\(^{55}\) It was finally approved on November 17, 2004. The Lula administration had reactivated the discussion, first through a series of bitter exchanges between the National President and the President of the STF, second through the creation of a secretariat within the Ministry of Justice to deal with judicial reform, and finally through legal actions including the promotion of the PEC in a modified form to finally adopt the measures under study for over a decade.\(^{56}\) The discussion was also fed by a series of special investigations leading to charges against both federal and state

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\(^{55}\) See Sadek, (1995b and 2001c) for the history.

\(^{56}\) For a critical review of a fairly recent version, see Sady (2004).
judges for selling judgments and other acts of corruption, and in April 2004, the revelation of incidents involving the federal prosecutor responsible for the case involving alleged bribe-taking by an advisor to Lula’s Chief of Staff, Minister José Dirceu. These recent events in particular strengthened support for the proposal to create a Judicial Council to monitor the performance of all judges and members of all public ministries. The other major element in the PEC is the introduction of the súmula vinculante (eventually opposed by its Executive sponsors), or the powers of the STF and possibly the STJ\(^57\) to impose binding precedent on all lower judges through their interpretations respectively of constitutional articles and ordinary law.

86 Knowledgeable observers are divided as to the likely impact of the reform package as finally approved. While the Council faced strong opposition from a majority of judges, its real effects may be more symbolic than operational. It may be, as one observer explained to us, more important as a reminder to the judges that they are not above any sort of accountability, and that corporate self-policing, effective only for first instance judges (but not for the higher levels) is not sufficient.\(^58\) The súmula’s impact is more controversial. The government began to reverse its support in early 2004 apparently fearing it would give too much power to the STF, which would now be the ultimate determinant of what any law means.\(^59\) The súmula’s effect on reducing congestion may be less than hoped. Unless its binding effects are interpreted as extending to the administration (and here there is an ample gap between legal and real impact\(^60\)), it will not prevent cases from being brought to court, but only standardizes the responses and limits the right to appeal. As regards the influx of hundreds of thousands of similar, largely administrative cases, the courts had already adopted mechanisms to standardize responses and have been working out arrangements with government agencies to limit appeals. The súmula vinculante may thus only accord more formal recognition to practices already in place.

\(^{57}\) The STF or Supremo Tribunal Federal is the Constitutional Court; the Superior Tribunal da Justiça or STJ is the highest appeals court for questions of infra-constitutional federal law. See Annex I for further discussion.

\(^{58}\) The internal disciplinary organs, the Corregedorias, traditionally monitored the performance only of first instance judges, as part of the system for determining promotions. They now often keep information on caseloads of higher level judges, and also may be charged with investigating suspected malfeasance, but as regards the latter in particular, professional courtesy, or corporate self-interest appears to have curbed their action. Commonly, a judge, and especially a second instance magistrate, suspected of irregular behavior will be persuaded to take early retirement, at full salary, placed somewhere he will do less damage, or simply refused promotion (as occurred with the most famous of the federal judges uncovered by Operação Anaconda). Increasing public awareness of this practice has led to the belief that the judges cannot be trusted to police their own. For a discussion of regional experience with councils, see Hammergren (2002).

\(^{59}\) This led to a proposed modification, a súmula impeditiva, which would only halt appeals of issues on which any higher court (not just the STF) had already made a binding decision. In both formats, the sumula’s proponents appear to underestimate the ability of a good lawyer to always find an exception.

\(^{60}\) In some version of the PEC, this appears to be the intention, but experience in other countries suggests a legal order to this effect is often not obeyed by the administrators. Moreover willingness to comply cannot guarantee the ability to do so, and any real change in this direction will necessarily take time.
These two sections of the PEC proved so controversial as to deflect attention from other details. These include, for example, the addition of one more year to the time required for a judge or prosecutor to achieve tenured status, changes to the organization of state appeals courts,⁶¹ the addition of a residency requirement for members of the Public Ministry (in the areas where they preside), and the stipulation of a minimum age (25) and five years of practice before entry into the judicial career. The PEC also had a lengthy section on _precatórios_, the awards the government must pay to those winning suits against it. It was removed from the approved package for separate consideration. As the amounts are growing, and government agencies at all levels have fallen behind in paying them, the section merits more attention than it is getting. This is especially true of a short item, held over from the present Constitution. For what are called “alimentos” (salaries, pensions, and the like), expected to be paid promptly and in cash (not in “títulos sentenciais”), the government may alter payments depending on “the different financial capacities” of the public entities involved.⁶² As total awards in this category are growing explosively, this small detail may now take on considerable importance.

As will be elaborated further in subsequent chapters, for all its length the PEC fails to get at the crux of the congestion problem and thus its impact on delay, impunity and access remains in doubt. It appears in the end largely a political measure, either intended to place the government on the side of the angels in attacking judicial “problems,” or in a still more negative interpretation, to reduce the space for judicial independence and thus for decisions counter to the government’s interests. As many of these interests in fact hinge on continued delay (to postpone payments to those with legitimate claims on government funds), there is further reason to doubt the impact of the constitutional reforms in remedying this problem in and of itself, and as it affects other concerns like costs, access, or impunity.

I.4. The Role of Information Strategies

We save further discussion of the reforms for the later chapters. However, before proceeding, a few further points on the role of information and its place in judicial reform strategies merit attention. This also comes in the way of a discussion of the literature, which academic readers may have been awaiting. The reason for its delayed appearance is that the literature is very brief, as explained here.

The justice system operates, universally, largely on the basis of information, but what it normally uses is limited to data on individual cases. Until the advent of modern technology (and the introduction of electronic case files and organization-wide databases), these raw data remained in each courtroom. Traditionally, courts and other

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⁶¹ These would eliminate an extra level of appeals courts in the three states where they still exist. See Annex I for details.

⁶² In the version supplied by Sady (p. 141) this appears as Article 100, inciso 6. _Títulos sentenciais_ are documents issued by the court to be used by winning plaintiffs in collecting their awards at some future point in time. They are currently subject to sale to third parties who may use them to pay taxes due. The PEC would give constitutional recognition to the practice.
sector organizations might require judges, prosecutors, and others to send periodic reports on what they were processing, but the results were meager and notoriously inaccurate. Automation, which on the jurisdictional (as opposed to administrative) side usually began at the service unit (courtroom or prosecutor’s office) level, also provided an opportunity, often not taken, to collect performance data more systematically by pulling them directly from electronic files and eliminating the need for manual calculation and submission. However, in a situation where no one gave much thought to overall system performance (but rather to how their own case was faring), even when the information made it to the center, it was commonly used only to flesh out annual reports to the Congress or to the public.

More recently, and Brazil is a regional leader here, this information has also been applied as a means of evaluating individual performance – usually in terms either of the number of actions taken, or the ability to keep up with the workload. We will expand on this point in the next and later chapters. To anticipate later arguments, this use, while advancing over complete lack of attention, represents only one dimension, and a fairly rudimentary one, of performance monitoring. It assumes that the whole is simply the sum of its parts, and often doesn’t discriminate much as to the value of the parts themselves. For example where “despachos” (essentially a response to a request for a judicial action – whether a judgment of a case, or an answer to a litigant’s interlocutory pleading – called “autos” or “asuntos” in Spanish) are counted, the value of the items varies widely and judges can give the impression of much activity by simply moving lots of paper without actually resolving that many cases. Thus, the variety of information collected posed some problems even in assessing individual performance. Its utility in determining value added by the organization was minimal, but this has traditionally not been a sector concern. It is thus not surprising that this potential use was ignored. In fact, given the importance accorded to concepts like the right to justice, judicial independence, and so on, the very idea of assigning differential importance to different types of cases or actions is still strongly resisted. Throughout the Latin American region, sector organizations have at most been willing to count what they do, and how rapidly they do it. The next step – evaluating actions in terms of impact on resolving societal problems – continues to raise objections.

Things might have been left here had those sponsoring reform programs, and the donor community in particular, not been pressed to develop indicators of their own progress. For at least the past decade, several donors have been engaged in trying to develop measures of judicial performance, usually finding that their partners’ poor statistics keeping stymied much progress. Similar efforts it should be noted have been

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63 However, there have also been delays here. In some cases we found that despite the potential for their automatic generation, paper reports were still prepared manually, submitted as hard copies, and then reentered, manually, into central databases.

64 For an early attempt to develop indicators, see USAID (1998). The lengthy list of indicators developed was still considered, on the basis of field testing, to be too context specific and thus was eventually presented as an illustrative collection of what might be measured. The Bank’s own efforts to develop indicators, conducted within the Legal and Judicial Practice Group, has apparently been
on-going in Western Europe, Australia, Canada, and the U.S, often as academic exercises, but also sponsored by judiciaries themselves, in part as a response to criticisms directed against them, and in part because of their interest in improving their performance. Donors have largely abandoned their search for the one or two indicators that might summarize judicial quality (they have so far not focused on other organizations) and thus validate their programs. Apart from the problems of the quality of statistics kept within the sector, they have generally realized that sector functions are too complex, and sectors too organizationally varied, to lend themselves to this approach. For example, a high conviction rate for criminal cases might be indicative of abusive prosecution, good prosecution, overly cautious prosecution, or, as happens in some Latin American countries, of prosecutors sending to court only those cases they couldn’t negotiate, extra-legally and pre-judicially. Caseloads per judge, a favorite “indicator” and one used here as well, must be evaluated in the context of the types of cases judges usually see. Comparing workloads composed largely of debt collection and other routine, simple proceedings with those featuring more complex disputes can be extremely misleading. Even measures like judge to population ratios or amounts spent on the sector are hard to compare and demonstrably not closely linked to citizen satisfaction. Efforts to use variables like delays in processing certain kinds of cases, are notoriously inaccurate (often based on estimates provided by lawyers or judges) and also don’t take into account differences in how these conflicts are usually processed.

The substitution of composite indicators, often based on opinion polls, has been no more satisfactory. As used by the Bank and others, they in effect are the quintessential black box – and clearly are influenced by other factors (economic downturns, crime waves, periodic scandals, or when applied comparatively, by different national views as to what is acceptable) than simple performance. That the Bank’s Rule of Law Indicator crashed to the floor in Argentina following the 2001 economic collapse can hardly be blamed on a change in institutional quality – it is instead a demonstration of abandoned. In any case, the statistics collected have not been updated since their initial publication, two years ago.

See for example Contini (2001) as one heroic effort to establish comparative data on Western Europe. A new European effort is documented in CEPEJ (2004 a and b). The Spanish Judicial Council (see Bendala, 2004) has also been active in collecting comparative data and in developing performance measures for its own judiciary. Santos Pastor (1993), a Spanish academic who has advised Bank projects, had an instrumental role via an earlier published work on judicial efficiency in Spain.

The Lex Mundi project (Djankov et al, 2002), partially financed by the World Bank, is an example of the use of estimates. Data on delays and numbers of procedural steps were obtained by asking one lawyer in each country to provide the figures – presumably based on his experience as no country collects this kind of statistic systematically. The authors do explain the methodology in an annex to their work, but other researchers use and cite their data apparently without realizing the obvious problems of reliability. Another oversight is the failure to consider that some countries have successfully dejudicialized many of the conflicts covered (e.g. debt collection) so that what gets to court are only the hard cases, which of course take longer. The more general use of expert estimates on delays and the like has been criticized by authors (Kritzer, 1983, 2000) with more direct experience with court processes for the simple reason that even lawyers and judges tend to remember selectively.

the contagion effect. When things go wrong in a major way, all the institutions get blamed. This recognition, combined with the generally low, and often falling scores, is the source of the objections raised by the judiciaries so rated. Academics have raised similar objections to what those not actually involved in developing the composites increasingly view as at best a heuristic device,68 and a very dangerous tool for comparative analysis.

94 The result has been a renewed interest, usually promoted by the donors but also embraced by some judiciaries, in improving record keeping within the sector, recognizing that despite the millions spent on automation, this obvious application has usually not gone far. This development for once has first occurred at the policy level – giving rise to a series of programs and elements within existing projects.69 While courts still request automation equipment for internet access, to reduce their workload, or just to be modern, proposals increasingly feature a performance monitoring capacity. There is little literature to cite, in part because the academic chroniclers may still not realize the need. They don’t do quantitative work, generate their own data, or use publicly available statistics in the belief they are of reasonable quality. Anyone with inside knowledge as to how the sector gets its numbers would doubtless consider the latter a really risky assumption.

95 As this last comment hints, there are statistics and statistics. Accuracy is not the only limitation. While in countries like Brazil, well financed organizations are beginning to publish lengthy annual reports filled with numbers, charts and graphics, they often tell the interested reader very little about efficiency, efficacy, or broader impact and frequently include some highly visible methodological or simply arithmetic errors. Some of this may be intentional; we were amazed by how many annual reports mentioned aggregate caseload but never said how many judges were handling it, or listed a dizzying number of types of activities with no indication of how they related to the major organizational outputs (cases tried, cases prosecuted, outcomes). At best this type of figure may help leaders determine how much individual officials are doing, but they would be hard pressed to tell how well the organization is doing using this information. This thus suggests a final and very practical application of the current report – to ensure that this round of investments in improving statistical systems is actually related to the bigger problem of resolving systemic problems. It is important that organizations measure their performance but it is also important that they measure useful things. Brazil is on the ground floor here, but so is everyone else, and unlike many, it has the funds to invest in developing something better.

96 There is a second reason for our focus on statistics, which far transcends an interest in improving performance monitoring. It has been a way to gain insights as to

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68 See Toharia (2003) for a discussion of use of opinion polls, alone or in composites.

69 Many World Bank projects, within and outside the region, now feature a management statistics component. Various national and regionally based NGOs and universities have also begun such projects. See CEJA (2002) for one discussion; Hernández Breña (2003) is an example of what a consortium of NGOs is attempting in Peru.
what is important to organizations and how they define their own roles and contributions to societal objectives. We have no literature to cite here, because as applied to the sector, no one has thought to use this tool in this fashion. The working hypothesis is more the product of common sense, and general organizational theory – organizations measure what they believe is important either for their own purposes or for their external constituencies. What they measure in turn sends cues to their members as to what will count for their own success in the organizational setting. Organizational theorists have worked with this rule of thumb for decades, but since organizational theorists don’t normally work in the justice sector, the concept has not been applied there. The problem of course occurs when what the organization measures, and prioritizes has little relationship to the product expected by users. This is most likely to happen when, for one reason or another, user satisfaction does not translate into decisions about resource levels or other critical inputs, a common complaint about many government entities, and not only the courts.

Our interest here was not, however, in criticizing these arrangements, but rather in understanding what organizations believed they were producing. These answers, as inferred from what they measured, were surprisingly removed from what might be more important to citizens. Courts are coming closer to a match, although they still focus on what the individual judge produces, not on broader impacts like conflict reduction, reinforcing rule-oriented behavior, or something so simple as encouraging the payment of debts. However, while citizens often blame courts for situations related to these broader outputs, they themselves tend to accept measures like cases resolved and average time to resolution as adequate indicators of performance. Public Ministries seemed most divorced, in fact often discounting the importance of any kind of composite measure. They do investigations, litigate cases, and perform other citizen services and that is that. For the Procuradoria (state lawyers) family we are willing to exercise the benefit of doubt. They seem inclined to want to measure what might be important to the Executive (saving it money by winning the right cases) but simply lack the capacity to do so. We elaborate more on these arguments in the next chapters as well as noting the kinds of changes that might be introduced to ensure that the product and the measurement process are more in sync.

Certainly for members of the World Bank, with its overwhelming emphasis on the size and number of loans and rate of disbursement, this should not be a novel idea.

The only place within the sector where the rule has been applied is in the area of policing. The New York City (Giuliani) reforms were in fact based on making police responsible for the levels of crime in their district, rather than evaluating them on the usual numbers of arrests and so on. Studies of police operations have also produced many famous nearly anecdotal lessons – for example, the argument that police forces that count the number of parking tickets issued will encourage police to issue more tickets while disregarding other duties. Many contemporary critiques of management by results emerge from this same type of observation – results are commonly defined within organizations, and often within lower level units. They are often manipulated to be achievable, and too often have little significance for outside clients. (Moynihan, 2003).
I.5. Organization of the Report

The organization of the remainder of the report combines our analysis of statistical systems and statistics with additional information on the judicial reform debate and advances. Chapter II provides a general overview of the state of management statistics in the three entities surveyed, at both the national and state levels. Chapter III uses statistics made available to the research team to explore some aspects of problems identified by Brazilian observers and to contrast them with the arguments voiced in the reform narrative. Chapter IV, the conclusion, reviews the political context, analyzes the demand for reform, and offers more general suggestions as to how better statistical systems might improve the reform proposals as well as specific recommendations both as their improvement and other areas where broader changes should be considered.
CHAPTER II: STATISTICAL INFORMATION SYSTEMS AND THEIR USE IN MEASURING JUDICIAL PERFORMANCE

This chapter presents the findings of our principal inquiry as they relate to Brazil's judicial information paradox: the seeming contradictions between technological capacity for tracking performance and its failure to affect the content of judicial reform debates. It focuses specifically on the first series of questions raised in Chapter I: are the targeted organizations collecting any data on performance, what do they collect, and are they using their automation equipment to do so? It also begins to address the two additional sets of questions on the reasons for suboptimal collection or use of relevant data, and its impact on reform proposals. In Chapters III and IV we pursue these two topics further, demonstrating what can be done even with existing statistics and exploring some additional, non-technological explanations for this and other reform paradoxes.

The informational base for the analysis offered here comes from several sources: statistics and reports published on the internet, available in other published form, or provided to us directly by the entities where the site visits were conducted, informant interviews; and our own in situ observations. As within the project's temporal and financial limits, we could not hope to survey all of Brazil, our site visits were organized to cover the centers of all five federal judicial regions, and in each, the respective state, federal and labor courts, the state and federal public ministries, and the Procuradorias Gerais do Estado. Cities and states visited were Porto Alegre (Rio Grande do Sul), Recife (Pernambuco), Rio de Janeiro, Sao Paulo, and Brasilia. To these we added Fortaleza (Ceará) and Belem (Pará), the first located in Region V and the second in Region I, to help understand the variations within these large and diverse judicial districts. In Brasilia we also interviewed representatives of the central national entities, the Supremo Tribunal Federal (STF), the Superior Tribunal da Justiça (STJ) and its Council, the Tribunal Superior do Trabalho (TST), the Advocacia-Geral da União (AGU), and the Ministério Público da União (MPU), and Ministério Público Federal (MPF).

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72 This Chapter was initially drafted by Carlos Gregorio, consultant to the project. It was translated and edited by the Bank team leader. Additional information was provided by a team from the Fundação Getulio Vargas—São Paulo, headed by Luciana Gross.


74 See Annex I for an explanation of the structure and functions of each of these organizations.
While interviews began with the heads of each agency and included members of the departments responsible for collecting and using statistics, they were also more broadly focused. This was partly a result of our concern for seeing how the information systems worked in practice, but also was motivated by an interest in other aspects of organizational operations. It also was a result of our interviewees' occasional mystification as to our theme – in some cases, a significant finding in its own right, the concept of performance monitoring was so foreign that organizational leaders were at a loss as to whom we wished to interview.

The development of this chapter is as follows: a first section reviewing the status of existing management information systems, divided by types of entities surveyed and focusing on their general characteristics and the variations among them; a second section, assessing suitability of the systems as a means of monitoring performance, and a third, and final section, discussing recommendations for future action.

II.1. Some Preliminary Notes

As the data collection and analysis was done by a specialist in judicial information systems, much of it, and especially the initial descriptive section, may seem highly inscrutable to anyone not versed in this subject. The meaning should become clearer on a reading of the subsequent sections, but to avoid early reader rebellion, some of that later discussion is anticipated here, accompanied by some more general notes as to what we were looking at and for.

As suggested in Chapter I, the organizations of the justice sector use large quantities of information, but it is generally information relevant to individual cases, and thus has traditionally been kept in the files of the judges, prosecutors and others handling them. Just as traditionally, where organizational leaders took an interest in this information, it was usually only to find out what was happening to the case in question. In fact, such inquisitiveness on the part of upper leadership was often viewed in the judicial context as interference (which it often was), and thus strongly discouraged. In this sense, the individual judge, or panel of judges, understood much as did other liberal professionals (teachers, doctors, accountants and so on) that their work was between them and the immediate users of their services, and only became legitimately relevant to the higher ups, when procedural norms required it be referred to them on appeal, or when he or she violated some rule of comportment.

Things have changed in recent times for all these professionals. They are now perceived as working in a system where their collective product is of as much interest as their individual ones. Especially where they are, or always have been, located in a larger organization (school, university, hospital or judiciary) those responsible for the organization as a whole thus become responsible for the performance of the parts and their collective contribution to a broader output (literacy rates, incidences of diseases, resolution of social conflicts). Here, while they may not require the same kind of information used by each organizational member in his or her day-to-day work,
managers do need information on how that work is being done, with what results, and with what larger consequences. The problem, certainly not faced only by the courts, is what information leaders should receive and how they should use it.

106 The answers to that question are hardly obvious and have changed over time. An initial tendency in all organizational environments has been a sort of body count—a rather simple-minded and often undifferentiated inventory of everything each member did. However, as organizations themselves have been pressed to justify their work, there has been a decided shift to measures more directly related to the organization’s presumed product, and especially to that product as defined by outside clients and not only by the organization’s members. Thus, teachers now are graded on their students’ results in standardized examinations; police are evaluated in terms of crime rates in the districts they control. As these examples suggest, the answers to the questions—what do we produce and how do we measure it?—can provoke enormous controversies. There is an additional problem, where the product is complex, of determining how the individual’s contribution affects it. The head of a police district can be held accountable for the crime rate within it, but how does he or she evaluate the contributions of the police and administrators working for him? And more importantly, how does he or she signal to them, by changing what is measured, how their own efforts should be redirected?

107 Judiciaries and other justice sector institutions are among the last such organizations to begin to address these questions. Concepts like judicial independence, in Brazil associated with additional sector actors, and not just the judges, complicate the task. Brazil’s justice sector has been gradually moving toward an acceptance of individual evaluation, but it has yet to successfully link this to the evaluation of organizational performance. To do this, organizations are going to have to get a far better handle on what they produce. Is it the sheer quantity of documents processed, regardless of their differing importance? Is it cases closed, in absolute numbers or compared to cases pending? Cases closed by judgment, again absolutely or as a percentage of workload? Cases won? Monies saved for the public treasury? Or is it something still further removed from an event or body count—for example, the impact on discouraging conflicts, reducing certain kinds of rights violations or crimes, or simply user satisfaction?

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75 This term is used advisedly for the judiciary where highest level judges often serve a dual role—the last instance for decisions on legal issues, but also those ultimately responsible for running the court system. Most would not like to be considered “managers,” a term they might use only for their administrative staff. However, these judges do retain the right to make managerial and policy decisions, often refusing to delegate even minor details to their administrators.

76 The United States has taken a lead here, but interest is also emerging in Europe. The newly established European Commission for the Efficiency of Justice (CEPEJ, 2004) is developing its own recommended model for evaluating court performance. Documents prepared by the U.S. National Center for State Courts (NCSC, 2003, Steelman, 2004) are being used by the CEPEJ for this purpose. One shortcoming of the CEPEJ scheme is that it focuses on composite indicators without much attention to what data courts will need to collect in order to calculate them. As discussed below, some of the more ambitious suggestions being discussed in Brazil also overlook this crucial preparatory step.
4. Box C: Why Performance Tracking and Management Statistics Are Important For The Justice Sector

Courts and other justice sector institutions are not only late-comers to the practice of performance tracking. They also have resisted its adoption because of its perceived incompatibility with their mandate – the administration of justice – and its potential conflicts with judicial independence. However, in the modern era, where demand for their services so often exceeds supply, it has become important for them to understand how they are doing, identify problems as they emerge, and assess the impact of attempted solutions. There are many ways of doing this, but a good system of management statistics is one of the most cost-effective. The dangers of not working from this kind of empirical base are multiple:

Problems may be misidentified or misdiagnosed – in many Latin American countries, the purported overload on individual judges turns out to be vastly overstated, and to the extent it exists, affects only a portion of the courts. Likewise, complaints about delays in reaching judgments often are exaggerated; when delays do occur, they may affect only certain types of cases, or be linked to procedural phases, most often appeals and enforcement.

Consequently, remedies may be misdirected. If the problem is delay in enforcement of judgments, speeding up the time to judgment will do little good. If it is overly permissive procedural rules, computerizing trial court management is unlikely to have much impact.

Moreover, it becomes impossible to evaluate the success of remedies. The minimal impact of changes to the summary debt collection proceedings effected in Mexico in 1996 went unnoticed until researchers compared the before and after times to judgment. Colombia, now implementing its third new Criminal Procedures Code since 1991, might consider first analyzing how cases have been handled rather than simply assuming that still another law will resolve all the persisting complaints.

Effective use of existing resources or of increased funding is difficult absent good performance tracking. Additionally, where patterns of demand change, sector organizations will not be able to respond rapidly and when they do respond, may overreact, adding permanent remedies for what on closer analysis, is clearly a temporary fluctuation in demand.

For courts, the cases in and out (entradas e saídas) measure has been the basic one for years. It does give an indication of how judges and court systems are keeping up with their workload, but is increasingly criticized as insufficiently reflective of quality, and possibly still more misguided in terms of the basic product. In most countries, measuring the productivity of prosecutors and state lawyers has an equally simplistic answer: the number of cases litigated and the results. Similar objections can be made to this measure, but in Brazil, conditions have not yet progressed that far. In the case of prosecutors this has to do with a reluctance to define their product in measurable terms. For state lawyers, it is the result of technological and political weaknesses.
This discussion has removed us somewhat beyond our initial focus. Our more basic questions were whether management has any information at all, whether it is relevant to their role in improving performance, and whether they can and do use it for this purpose. In answering them, we focused our attention on two issues critical to the design of an effective management information system: content and quality control. The issue of content refers to what information will be included and how it will be organized. Whether those compiling the management system use a centralized, web based collection of all data or rely on automated or manual provision of only a part of it from decentralized units, they must be selective.

Everything is not equally relevant to management’s oversight task, and thus what it receives will include less than the universe of data. The challenge is to translate the endless details incorporated in the raw data, into broader categories. In this, some data will inevitably be lost (left at the initial collection point or in the courtroom files). More sophisticated, web-based systems can avoid this problem, but they still face the task of generating the reports management wants. Thus, whatever the level of technology, selective filtering is crucial. Judicial planners and leaders don’t want the content of every judgment rendered; they might want to know trends in pro-defendant or pro-plaintiff awards. They don’t need to know the specific details of every conflict adjudicated; they might want to know how many involve debt collection, other contract disputes, divorce, and so on. Deciding on what information is relevant and how it will be organized is critical if they are not to be overwhelmed by the results.

In making those decisions, management’s view of its own role and its notions as to the definition and source of performance problems are critical. These are also likely to change over time, meaning that system design ideally incorporates considerable flexibility. A system designed to track individual productivity, as remains the dominant tendency in Brazil, may not lend itself to the identification of other types of problems -- for example, structural bottlenecks, exogenous shifts in demand, opportunistic or abusive litigation, inefficient distribution of resources. To the extent these problems exist, a reform strategy based only on encouraging judges to produce more will have limited impacts. This suggests that whatever data reach the central offices should also allow those managing it to do additional analysis outside the standardized categories or to require that those handling decentralized databases do the analysis for them.

Design is important, but the reliability of the entries is also vital. If those entering the data initially do not follow the same rules in assigning classifications (some classifying an item as one thing, others as another), the result is chaos. There is thus a need to reach agreement not only on what will be counted, but how categories will be assigned. The risk can be diminished by filtering directly from a web-based system, but even here, differences in the initial entry can cause problems. And in the end, human judgment always determines what is entered and how. As the usual process involves accumulating data from systems established within individual work units (courtrooms, promotorias or whatever state lawyers keep as records) establishing a valid and reliable management information systems requires changing and unifying entrenched habits from the ground floor up.
The preceding discussion sets the stage for the following overview of the systems now in place. The overview treats the judiciary, public ministries, and state lawyers separately because their situations are markedly different. In all cases, both national and state organizations are covered, but we have explicitly separated them only for the courts. As there was simply more to review for the judiciary, additional details are given in Annex II. We have included a review of the technology and software as both set limits as to how management information systems will be developed. The rest of each subsection assesses the content and organization of the information collected, the uses to which it is put, and recommendations for improvement. The final sections offer some more general discussion of the last two topics.

II.2. Description of Existing Systems

Brazil’s justice sector demonstrates several contradictions in the collection and management of information on performance. On the one hand, within the last two decades, the country has made vast strides in automating its judiciaries, and if to a lesser extent, the other organizations of the sector. This tendency includes the adoption of advanced informatics systems – for the era – to register the filing and processing of individual cases. Most Brazilian courts, and virtually all national ones, currently have these automated “case management systems” in place, and have diligently upgraded the hardware supporting them. On the other hand, they have generally been less diligent in upgrading the accompanying software, and still less in using the information available as a system management tool.

One obvious impediment to advances in these neglected areas has been the federal structure of the country and its sector organizations. Court systems with a more hierarchical organization (the federal and labor courts) have been able to develop standardized criteria for entering information and insist on their adoption system-wide. They have also tended to encourage the adoption of uniform software or at least to insist that what is adopted be capable of interfacing with each other. The state courts, given their independence both from the federal system and from each other, have been left to their own devices. While some have made recognizable advances, each state judiciary has had to do this on its own, without the benefit of knowledge of others’ experience. More recently, late starters have begun to review both case management systems and databases developed by others, but there is no real program for information exchange, and no way of knowing whether a system borrowed from another state is really the best choice. These same impediments affect the Public Ministry and Procuradoria families, but here a later start and less effective central control, even within presumably hierarchical organizations, have posed additional obstacles, as further elaborated below.

II.2.1 National Judiciary

As a prelude to the discussion of the various judicial systems, the following table is offered. It gives some idea of the varying situations in the different jurisdictions,
especially as regards size and workload handled. The national judiciary includes the federal, labor, military, and labor courts, although the latter two are not covered in the study (or table). The STF, which is discussed and can be considered a "national" court, is not included in the table as it is primarily a constitutional court, with limited original jurisdiction (i.e. "first instance" cases).

Table II-1: Comparative Statistics from Brazil’s National and State Court Systems (excluding juizados especiais)

<table>
<thead>
<tr>
<th>Court system</th>
<th>1st instance judges</th>
<th>1st instance filings</th>
<th>Average filings per judge</th>
<th>Population 2002</th>
<th>1st Instance Judges per 100,000 inhabitants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal courts</td>
<td>766</td>
<td>1,097,964</td>
<td>1433</td>
<td>169,799,170</td>
<td>0.5</td>
</tr>
<tr>
<td>Labor courts</td>
<td>2,070</td>
<td>1,742,571</td>
<td>842</td>
<td>169,799,170</td>
<td>1.2</td>
</tr>
<tr>
<td>State courts - all</td>
<td>6,190</td>
<td>9,489,657</td>
<td>1533</td>
<td>169,799,170</td>
<td>3.6</td>
</tr>
<tr>
<td>São Paulo</td>
<td>1,599</td>
<td>3,720,381</td>
<td>2327</td>
<td>37,032,403</td>
<td>4.3</td>
</tr>
<tr>
<td>Rio de Janeiro</td>
<td>567</td>
<td>910,913</td>
<td>1607</td>
<td>14,391,282</td>
<td>3.9</td>
</tr>
<tr>
<td>Pará</td>
<td>160</td>
<td>107,580</td>
<td>672</td>
<td>6,192,307</td>
<td>2.6</td>
</tr>
<tr>
<td>Ceará</td>
<td>355</td>
<td>213,107</td>
<td>600</td>
<td>7,430,661</td>
<td>4.8</td>
</tr>
<tr>
<td>Pernambuco</td>
<td>340</td>
<td>135,166</td>
<td>398</td>
<td>7,918,344</td>
<td>4.3</td>
</tr>
<tr>
<td>Rio Grande do Sul</td>
<td>531</td>
<td>1,088,087</td>
<td>2049</td>
<td>10,187,798</td>
<td>5.2</td>
</tr>
<tr>
<td>Brasília</td>
<td>136</td>
<td>184,143</td>
<td>1369</td>
<td>2,051,146</td>
<td>6.8</td>
</tr>
</tbody>
</table>

77 Unless otherwise noted, data come from BNDPJ for 2000.

78 Juizados especiais have been excluded because of the lack of complete data on their operations. As in many cases, the same first instance judges also work part-time in the juizados especiais, their real caseload would be adjusted upward with the addition of these statistics. However, given the far simpler nature, and in many federal juizados, automated processing of these cases, even were statistics available it would probably be better to deal with them separately.

79 2002, from court records.
117 **Supremo Tribunal Federal (STF).** The STF’s automation hardware is state-of-the-art and it is making progress in developing its own database. Basic performance statistics, beginning in 1994, are published on the internet, consisting of cases entered, distributed, adjudicated, and decisions published. As the STF currently receives over 100,000 filings annually this is no small feat. Internally, there is a separate system for managing filings received and for tracking cases once they are distributed (i.e. sent to the Justices themselves). This creates some problems for locating cases, as the former system is less well organized. Although there are delays in distribution, they are estimated in months not years, as in the case of some state courts (e.g. São Paulo).

118 Within the system used to track its own workload, entries are classified and subclassified by procedural type, by material or branch of law, and by the party responsible (president, panel of judges, single judge, pleno) for the decision. Internal reports record the work done by each member of the court. Aside from this, additional analysis has been limited. Only recently, as part of his debate with the National President, former Chief Justice Mauricio Correa requested that staff analyze the appeal caseload by the identity of the public entity involved. A well developed case management system, with all data on every case entered electronically, allowed this to be done. Thus, although the extraction of statistics to track overall performance remains limited, the fact that the court has automated all case management means that both this and the further analysis of data to identify problems and their causes depend only on the court’s imagination and on assigning or adding staff to carry out the work. Meriting mention are also the STF’s sponsorship of a national database on the entire judicial system (see Box) and its recent efforts to improve and expand its coverage.
5. **Box D: Supreme Tribunal Federal and the Banco Nacional de Dados do Poder Judiciário (BNDPJ)**

In addition to the data on its own caseload, the STF has created and runs a database with aggregate statistics drawn from the entire judicial system -- that is, all levels of all national and state courts. Participation is voluntary, and although no judicial entity has refused inclusion, some occasionally miss a year. A further problem is that the STF has no way of checking the validity of entries or ensuring consistency in what various courts submit. It is likely for example that there is confusion as to whether *juizados especiais* should be included in first instance filings, or that many states simply don’t have that data to send. As the BNDPJ categories are both common and very broad (cases pending, entered, decided, divided at most for the federal courts into criminal and civil) there is probably not much room for confusion there. However, if courts do not keep their own statistics accurately, then what gets to the BNDPJ will suffer. Nonetheless, this is currently the most complete set of nation-wide data, and as demonstrated in the next chapter, provides the basis for some initial trend analysis.

Among its ample support staff, the STF does not have a group specialized in statistics. It only recently created a Comité Gestor de Estatística as the consultative and deliberative group for the BNDPJ. With the backing of the STF president and other Justices, the committee has announced some ambitious plans for expanding the database, but remains limited by its voluntary nature, flaws in the statistical systems of the participating courts, inconsistencies in their management of data, and the occasionally delays or simple failure to send reports. If the STF is to realize its aims it will first have to work with the other courts to help them improve and standardize their own statistical systems. It will also have to develop methodologies for calculating and recording some of the new indicators it proposes – for example average times to resolution of cases. Only a few court systems could provide those data on the basis of the statistics they currently keep. As with the CJF’s efforts to create a similar system for the federal courts, decisions cannot be made unilaterally. They will have to be consulted with all the courts covered, to determine first, what they are capable of doing now, and second, how they can develop capabilities they do not have. The STF will have to expand its technical staff working on this project, ensuring they understand all the issues to be considered apart from their wish to include new indicators. As both the federal and labor courts are well on their way to such a system, the STF can build on their effort, but that leaves it the far more difficult challenge of working with the state courts, over whom, as one justice said, it has only moral authority.

119  **Labor Courts.** The labor courts have the best internal organization for producing system-wide statistics on basic performance indicators. Given their more complex organization (24 different regional tribunals) this is hardly an automatic consequence. Under the direction of the Tribunal Superior de Trabalho (TST) and working through the Tribunais Regionais de Trabalho (TRTs), the labor courts have also been surprisingly effective at reaching agreement on common software, programs, and reporting standards. For example, they have unified the forms used by the first and second instance labor courts in supplying periodic reports to the TST; and have developed a guide for entering data, with definitions, rules for calculating results, and clear standards for determining
which proceedings should be included in each category. In each TRT there is an administrative office responsible for receiving the reports from the first instance courts, validating them, and forwarding them to the statistical unit in the TST. Moreover, many first and second instance courts have computer applications which automatically generate the reports from their own databases.

120 This structure and the effort to systematize the central database, although begun fairly recently, have allowed the Labor Courts to reconstruct a historical information series going back to the origins of the jurisdiction in 1941. The information currently collected is the result of a process of successive improvements to the system design. Each improvement has allowed the inclusion of still more data, now going far beyond aggregate inputs and outputs to cover pending cases, forms of closure, enforcement of judgments (and amounts of awards), average duration of proceedings, number of interlocutory and final appeals, and enforcement and amount of pension claims (For more details, see Annex 11).

121 Once analyzed the information is disseminated in various forms, most notably on the TST and some TRT websites. The Corregedoria Geral da Justiça de Trabalho has also issued regulations as to how the statistical bulletins of each TRT should be organized. The published reports do not capture all the details available in the database, and one problem noted in both system design and analysis is the absence of categories differentiating types of cases. The argument given by the TST and the TRTs is that most labor demands include everything – i.e. the plaintiff sues for unjustified dismissal, salary due, unpaid vacation and so on. While this may be true, there are a minority of important exceptions, for example cases covering discrimination, work related accidents, or slave labor. Moreover, even for the mass of cases with multiple claims, other distinctions can be made for example, nature of the employment relationship or area of economic activity. Identifying and analyzing these differences would be helpful in better understanding the workload and its temporal and regional variations. Thus, while the standardization of the results and the ample access to information are impressive, from a performance monitoring point of view, the design of the labor courts' statistical system could still be improved.

122 Federal Justice. The level of automation of the federal court system is relatively advanced, especially as regards case management and productivity applications. The process for the most part has been directed by the five Tribunais Regionais Federais (TRFs), and is not aimed at producing management statistics. However some TRF statistical offices (most notably that in Brasilia) have done additional analysis of their own databases. Their software applications offer a pre-established menu of internal calculations although they don't afford much opportunity for more exploratory work. In any event, it is not clear that the further analysis gets beyond the doors of the statistical personnel. We had no indication that the results generated on, for example, average delays had been requested by or submitted to the TRF members themselves.

123 Cross-regional inconsistencies in data management have impeded the compilation of system-wide performance statistics or analysis. A project directed by the Technical Secretariat of the Conselho de Justiça Federal (CJF) is currently working to standardize
classification systems (*tabelas*) and so create an improved, centrally managed database (SINEJUS, Sistema Nacional de Estatísticas da Justiça Federal). The process has been highly participatory, working through a commission composed of representatives of all the TRFs. The exercise began with the standardization of the categories to be used by the regional tribunals and first instance courts (*varas*) in entering data. The format used is a cascade or decision tree, beginning with large general categories (*classes, assuntos, and fases*) and proceeding through additional levels of subcategorization. This type of organization is inherently suited to more sophisticated analysis.

124 The project also contemplates the addition of more sophisticated performance indicators – for example, average times to distribution, first instance judgment, or for appeals – and the inclusion of data not normally submitted (or even collected) by the courts – court fees collected, human resource base, physical installations and equipment, and user satisfaction. As the CJF also sponsors studies relating to performance problems, it may eventually use the statistical database to support this work. However, efforts to date have gone into creating SINEJUS and to ensuring it is understood and applied accurately throughout the federal judiciary. The longer list of proposed indicators suggests an interest in themes more directly related to performance problems, but their creation and effective use for this purpose are a ways off.

125 The CJF staff working on SINEJUS is very small, and the undertaking is expensive and time-consuming. While the CJF has the funds to support it, unless the presumed judicial beneficiaries and especially their leaders can be more actively involved or at least have the benefits demonstrated to them, there is a legitimate concern that the effort might be halted in favor of some other use for the financing. As the full set of projected indicators could keep a far larger staff busy for the next ten years, some more strategic approach to demonstrating their immediate utility might also be wise.

126 The use of the data so far collected has been largely limited to publication in hard copy or on the CJF website. Entries on the website now include a historical series on cases entered at the first instance, adjudicated, sent to the TRF, and pending from 1997 to 2003,81 and the Atlas da Justiça Federal82 which incorporates the Juizados Especiais Federais. The *Tribunais Regionais Federais* publish their own statistics in their annual reports and on internet, with considerable regional variation as to what is included and how it is presented.

### II.2.2. State Courts

127 The state court systems present far more diversity in their levels of automation, collection of management statistics, and the use to which they are put. Even in the courts

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82 [www.cjf.gov.br/atlas/atlas.htm](http://www.cjf.gov.br/atlas/atlas.htm)
with the most advanced practices in these areas, there are still no staff members specialized in the collection and processing of statistical data. The functions tend to be performed by the Corregedorias and the informatics offices. Arrangements for coordination between the two entities and responsibility for initial data handling vary. Data from lower level courts may first be sent to the Corregedoria which then passes it on to the informatics office, or the process may be reversed. Occasionally the two receive and use their information independently.

128 Although a few state tribunals are beginning to use their central databases to identify and attack other problems, the major application is for evaluating first instance judges or supporting requests for the creation of judgeships and courts. Data are published in annual reports, with some rudimentary analysis, and on the internet. To spur judicial productivity, many state tribunals have taken to publishing or distributing lists showing how each judge has done over the period covered. Generally, state tribunals in the South of the country and in Rio de Janeiro are the most advanced in all three areas—automation, collection of statistics, and their use to identify problems. Those in the North lag behind, in part because of funding restrictions, but also it appears, because of a different understanding of what their management functions involve. São Paulo is a case in itself. Both automation and statistical systems lag far behind, but for a state whose judicial workload is several times that of the entire federal judiciary, the challenges of progressing in both areas are enormous. To the extent it has automated, it has, like many state judiciaries, adopted different and unconnected systems for first and second instance courts, and even has separate statistical offices for each level (as well as another set for the separate Tribunais de Alçada83). All states using multiple systems are currently working to unify them with the intent of eventually linking all judicial offices into a single network. Where this is most advanced (Rio de Janeiro), the “system” generates performance statistics automatically and judges no longer have to produce and submit periodic reports.

129 Financing of these changes has been facilitated by the state courts’ access to special funds, comprising filing fees and returns from agreements worked out with banks managing their escrow accounts. Some courts (Rio de Janeiro is the best example) have done very well by this system; others have negotiated less successfully with the banks, have done a poorer job collecting fees, and also complain about limits set by their legislatures on what they can charge.

130 Several of the states surveyed (see Box) have taken additional steps to improve their services, including but not limited to more sophisticated uses of their informatics equipment and improvement of their statistical databases. While many state judiciaries get no further than the usual entrada-saída distinction and organize their entry level data into hundreds of inconsistent categories, some have introduced improved classification schemes (tabela)s allowing development of more informative aggregate indicators and

83 These are specialized appellate courts, which in São Paulo, Minas Gerais and Paraná are organizationally independent of the rest of the state judiciary. This separate status presumably will end when the PEC goes into effect.
facilitating further, less structured analysis. We did note one recurring problem, even in
more advanced states – a tendency for aggregate performance data to include a number of
events that do not in themselves constitute cases, for example cartas precatórias (15
percent of all second instance “filings” in Brasilia) which are in effect requests from a
judge in one jurisdiction to another for actions related to a case being handled by the first
(e.g., notification of a witness). Other examples of possible “double counting” include
separate recording of requests for waivers of court fees or actions related to enforcement
of judgments. While it is important to register these events, their inclusion as part of the
ordinary “filings” category can substantially inflate the basic caseload statistics. The
preferred practice would be to count case filings separately and create another tabulation
for these related or unrelated events (“despachos”). At the very least, Brazilians should
adopt standard methods for their treatment, thus facilitating within country (and within
jurisdiction) comparisons. However, if they want to compare judicial workloads with
those in other countries, they would be advised to omit the despachos from the basic
count.84

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84 It should be noted, however, that this practice is not related only to Brazil. It has been reported in both
Venezuela and Paraguay, and we suspect may be common in other countries.

In our review of Brazil’s state courts, several stood out for their advances in performance tracking. Not surprisingly, they were also among the leaders in automation, although we would caution that just having automated early and extensively is no guarantee of good statistical management. Rather we suggest that early automation and good management statistics are both results of an underlying concern with improving court performance. The argument is supported by the fact that all these courts have also led in other innovations – for example the use of task forces (multirões) to help overloaded judges catch up on their workload, introduction of court annexed conciliation services to deal with consumer complaints (Rio de Janeiro’s Expressinho), proposals to connect the state property registries and to improve oversight of the cartórios (Rio Grande do Sul), or experiments with strategic planning based on projected workloads (Brasilia).

Rio de Janeiro is one of the leaders in automation and the production and use of management statistics. All courts are computerized and all but 2 percent are connected by a network. The Superior Court (Tribunal de Justiça, TJ) maintains a system-wide database covering ten years, and while the emphasis remains on productivity, use for other types of analysis is increasing. The TJ reports that efforts to track case processing times have reduced delays and that it has cut times for the distribution of its own cases from 114 days to twenty-four hours. The Tribunal is using its data to analyze the handling of precatórios, identify the most frequent complaints and parties, and determine the areas where judicially promoted agreements and settlements are most effective. It also tracks collection of court fees and as a result has increased revenues from this source. It recently published a study based on its statistics, which provides dramatic evidence of how poor service delivery by a few banks and public utilities augments court congestion with repetitive consumer complaints cases.

Rio Grande do Sul is another leader and is now in its second or third generation of improvements in the areas. It is currently migrating all case management data into a single Web-based system and its improving its classification schemes by studying those used by other states. It also is linking its own database to those of other local entities; that with the Public Ministry has been completed for appeals cases. Judicial statistics are used for planning, and the TJ president carries with him a 10-page summary of basic performance data. Analysis done by the court indicates that delays are largely due to appeals, that 50 percent of all parties are exempted from court fees, and that government-related litigation is a major source of demand, with urban property taxes figuring as the most common conflict.
II.2.3. Public Ministries

131 Brazil’s public ministries combine the role of public prosecution with an ability to investigate and prosecute cases involving alleged violations of constitutional rights. In this latter role they resemble super-empowered Ombudsmen. Their complex organization roughly parallels that of the judiciary (although here we cover only the federal, labor and state entities), and is explained in greater detail in Annex I. They are independent entities, and while their chief prosecutors are named by the respective executives, they otherwise operate autonomously. Lower level prosecutors (procuradores or promotores) hold career tenure once having passed a probationary period, and despite the public ministries’ hierarchical organization, also enjoy considerable autonomy (similar to that of judges) in carrying out their functions.

132 Regardless of their level of automation, which varies considerably but never approaches that of the more advanced courts, the federal, labor, and state Public Ministries have little in the way of management statistics. The explanation has two origins. First, automation has tended to lag as these entities lack the additional sources of financing, or just higher budgets of the various judiciaries. However, most are at least partially automated with the federal Public Ministry and those in more developed states tending to take the lead. One of the most advanced is, not surprising, Rio Grande do Sul’s state public ministry. Data entered by procuradores and promotores to manage and track their own workload are nearly 100 percent web-based. The system is linked to the Tribunal de Justiça and the Civilian Police. Santa Catarina, a state not visited, also appears to be among the most developed in these areas.

133 Aside from exceptions like this, equipment is often outdated and software even more so. In the Ministério Público Federal, for example, three different case management systems are currently in place – one for the central ministry, one for the second-instance, regional procuradorias, and one for the first-instance state offices. A recent decision by the Procurador-Geral da República will make the third system, CAETES, universal.

134 The second explanation is the organization’s lack of clarity as to the nature of its products and thus what it is tracking. This is apparent in the data submitted to and captured by the central offices at the federal and state levels, which include an exhaustive list of everything procuradores and promotores do – ranging from letters written, and meetings held to investigations, hearings, and appeals. Such data are useful to the Corregedorias (as in the judiciary, responsible for discipline and control of performance) in measuring individual productivity, but are of questionable utility to the organization in determining how it is doing overall. Individual state public ministries publish much of this information on the internet and in printed form, but apparently make little more use of it in planning their activities. Our meetings with the agency heads, Procuradores-Gerais de Justiça, in several states indicated their own lack of interest in other types of performance monitoring. In some instances, they appeared to see this as contrary to their own roles and their organizations’ operating norms – possibly as a violation of the functional independence of each promoter/procurador or simply pointless in the face of that situation.
135 It may be for just such a reason that there has been some resistance to automation among members of the state public ministries in particular and some of their leadership. It is reported that the introduction of an automated case management system, which would also generate management statistics, has gone slowly in São Paulo because promotores don’t want this kind of oversight. Collection and analysis of data on caseloads would also interfere with the highly political process through which new positions are created and geographically located. A group within the São Paulo MPE had been attempting, to create another management statistics system which would include data on crimes reported and incidence of violence. As they have noted, there is a distinct tendency for new promotorias to be created in more pleasant locations as opposed to those with more objective need. The same group has also linked the creation of new promotorias to the periodic internal elections whereby lists are prepared for the governor’s selection of the new Procurador Geral.85

136 While this particular group does not appear to remain active, São Paulo’s newly appointed Procurador has shown an interest in developing similar sets of impact indicators in environmental and other areas. Here the emphasis appears to be on tracking external conditions (crime levels, state of the environment, etc) rather than the actions of the promotores and procuradores themselves. Presumably the data would be used to identify problems and to measure the organization’s efficacy in resolving them. Of course as any resolution involves the coordinated actions of several organizations there is an obvious question as to how credit will be attributed. This approach nonetheless may be gaining in popularity; the Procurador Geral de Justiça in Pará also mentioned his desire to create this type of system, again with little apparent attention to tracking internal actions.

137 Despite these various obstacles, there are several public ministries with databases sufficiently developed to allow greater analysis. Even here leadership often seems unaware of or unattuned to this potential. For example, the Ministério Público Federal (MPF) still relies on manual reports prepared by its regional and state offices despite the fact that many of them could submit the information electronically. Thus, the informatics office has a staff member responsible for receiving the written filings and entering them into the system. Pernambuco’s state Public Ministry is currently attempting to develop an automated case management system which for once appears based on a prior interest in tracking performance. This is part of its pluri-annual plan, but despite being one of the few Public Ministries with funds for investment, financing is still a problem. Statistics collected by Pernambuco’s new Procurador Geral de Justiça, many from outside sources, are suggestive of how further analysis might help understand some of the organization’s problems – for example as regards the substantial declines in numbers of criminal cases processed as they work their way through the criminal chain – the two police forces, the public ministry, and the courts – on their way to trial and sentencing.

85 This information is based on interviews, but it has also been published. See Mello de Camargo F (2003).
With the exception of Pará, São Paulo, Pernambuco, and the new Secretario Geral of the MPF, none of the organizational leaders we spoke with seemed interested in developing better management statistics, and only the latter two defined this as a question of tracking internal actions. Most wanted computer equipment, but largely as a means of helping the promotores and procuradores do their own work, and internet linkages, but only so the latter could communicate with each other and submit their progress reports more easily. The Federal Secretaria Geral’s concern was largely linked to his role in managing the budget – the use of which has apparently been fairly disorganized in the past. It also may be spurred by the Congress’ recent creation of 5,000 more positions for the organization, as there appears to be no plan for placing them and little to go on to develop one. Budgets are a concern to all Brazil’s Public Ministries, as they apparently have little left over once staff is paid, and in their belief, also lack sufficient personnel. However, the notion that their own statistics might help them make the case for more funding for both appears nearly nonexistent. That may well match political realities, but in addition, an organization that cannot explain how much it has done, will be hard pressed to argue that it needs more to do more of it.

II.2.4 Procuradorias and the Advogacia-Geral da União (AGU)

These entities share the function of representing the government in litigation to which it is a party, either as defendant or plaintiff. They also provide the executive with other legal advice and commonly offer opinions on proposed legislation. Although members of the career staff (procuradores) seem to aspire to a level of institutional and individual independence comparable to that of judges and the Public Ministry’s professionals, these organizations are clearly part of the executive and expected to serve its interests. Again, further details on their organization are provided in Annex I.

In terms of both automation and statistical systems, members of the “procuradoria family” lag further behind. In addition to their recent creation, the fundamental problem is less lack of vision, than financial and organizational constraints. As is not uncommon for all Latin America, Brazil’s executive branches of government have paid surprisingly little attention to their own lawyers, fully overlooking their role in increasing revenue and decreasing expenditures through what and how well they litigate. It is doubtful that many of the executives have a clear idea of what their lawyers are “costing” them in both regards. This is true even of a State that seems to use litigation as a means of controlling its cash flow – the strategy depends on forcing plaintiffs to take their cases to court, apparently counting on subsequent delays, but not paying any further attention to the outcomes.

Things are changing, if slowly, especially on the financial side. Several state governments seem ahead of the federal executive in this regard. They have begun to provide monies for computer equipment, sometimes for the first time, sometimes to

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86 All of these entities are the product of changes introduced in the 1988 Constitution. Many did not achieve physical existence until the early 1990s. State lawyers of course existed prior to this; it is the central entity, responsible to a greater or lesser degree for overseeing their actions, that is the novelty.
upgrade or expand relatively inadequate systems. In both Rio de Janeiro and Ceará, PGEs had received funding to purchase new equipment for both purposes. Ceará’s governor has also promoted the addition of more procuradores. All these agencies complain of short staffing, although their limited information on what their employees do and how well they do it, makes it impossible to say whether they are right.

142 The organizational impediments are also beginning to be addressed. They largely stem from the central agency’s (PGE or AGU) limited real control over a still very decentralized corps of government lawyers, attached to offices in the central ministries, autarkies, and foundations. In some cases, (Ceará) the executive has promoted laws to consolidate central control. This is a help, but the AGU’s own experience suggests that a legal mandate in and of itself is not sufficient. Control over the direct employees of the central agency can also be a problem. In Rio de Janeiro, the Procurador Geral has been working to expand an automated system for tracking litigation handled by each of his employees. The latter however, often neglect to fill in data fields, meaning that much potentially useful information is not included. The PGE intends to resolve this problem by making more fields obligatory – which will of course mean some system of checking for accuracy and training for those making data entries. This is also a reported problem for other attempts to introduce automated systems, including for the AGU. The other state PGEs we reviewed tended to rely on periodic manual submission of lists of cases managed by the lawyers directly under their oversight. Many did not even have standardized forms, and allowed those submitting the reports to use their own discretion as to what they featured or counted.

143 All organizational leaders interviewed expressed interest in developing automated information systems, in part to help them oversee their staff’s work, in part to facilitate the staff’s own performance. They are also showing an interest in automating systems to control *precatórios* (the amounts owed by government agencies as a result of final judgments against them). This would help the government manage its payments, permit the detection of errors, and support the development of better strategies for using out-of-court settlements. Pará’s Procurador-Geral do Estado, who is also the president of the national council of PGEs, has been a leader here, although some of his innovations have been questioned by others.87 As regards management statistics systems, those in charge (usually informatics staff) sometimes get sidetracked by other issues. For example, in Rio de Janeiro, considerable effort is going into developing a library of stock pleadings for use by the procuradores; this would clearly save them time in drafting briefs, but perhaps should be regarded as a secondary priority. The more fundamental problem is that informatics experts have no special criteria for determining what information management needs, and management in turn, is often unclear on this itself. In our review of data collection systems, there appeared to be important items omitted (name of the state agency involved for example), and overuse of text entries as opposed to closed categories. Given the investment likely to go into this development, it would be useful to

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87 This particularly relates to opening up decided cases to recalculate the *precatórios*. Despite the apparent permissibility of this measure under existing law, the PGE has also been promoting what is called relativização da coisa julgada, which does not go down very well with legal purists. See Couce de Menezes (2003) for a discussion.
put more heads to work on it. It would also be useful for those developing the systems in different states to have more contact with each other.

144 The experience of the AGU is a good illustration of some of the problems. Although it is the peak organization for all federal legal services, it literally has no idea of the quantity or content of what is being litigated, much less of the legal opinions and extra judicial negotiations done by lawyers representing individual agencies. The AGU is creating a centralized database on these actions, but as regards litigation, much of its information comes from the courts. According to those in charge of the database, 80 percent of the actions are complaints from civil servants, in itself a probable sign that the data are not only incomplete, but probably nonrepresentative of the full universe of cases. The AGU’s vision is excellent – the use of the data to formulate a preventive strategy, which would shape its legal opinions, resolve problems related to certain common conflicts, and allow a cost-benefit analysis to decide whether to litigate, desist, or negotiate. This vision was echoed by several of the PGEs with whom we spoke, suggesting that procuradoria leadership may have the clearest view of their organization’s functions and product of any of the institutions with which we worked.

145 The AGU’s own case tracking system (SICAU) currently has 129,917 case entries, most supplied by the Tribunais Superiores (107,185) with the rest from the STF (29,275) and 3 of the regions. Clearly this is the mere tip of the iceberg. The internal classification system is based on that of the CJF, but as the entries also come from other Superior Tribunals and from the STF, it includes additional categories. Unfortunately, the additions seem somewhat haphazard and begin with a level of detail (e.g. “adição de açúcar na erva mate,” “fornecimento de prótese,” “concurso público - professor assistente”) that seems unnecessary. While SICAU uses a series of tabelas to organize the entries, they are for the most part too extensive, overly descriptive, and heterogeneous, and thus do not lend themselves to statistical analysis. As the lawyers responsible for the cases are supposed to provide additional information, the system includes a red flag to indicate where they have failed to do so. A quick review of the entries suggests this failure occurs 50 percent of the time. Moreover, when they do provide data they often are incomplete. The important category of value of the claim (with five variations to help track the relationship between the initial demand and the actual award) is one of those most often left blank. In short, the SICAU, while a first step toward fulfilling the AGU’s vision suffers from its own design problems and from a very low level of cooperation from those supposed to provide its contents.

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88 This is true of the PGEs that have attempted similar classification systems. For example in Pará, the tabelas appear to be open and thus permit the creation of new subcategories by those entering the data. In Rio de Janeiro, the procuradores did not complete all the entries, too many of which were also open text rather than closed categories. Several systems include an optional category called “historia” but the content is usually minimal and appears to be intelligible only to the person entering the data.
II.3. Discussion of the Structure and Uses of Existing Management Statistics Systems

146 This section uses the material discussed above to evaluate the quality of current management statistics and the impediments to their improvement. It looks first at the origins and content of the systems, and then at a series of additional factors explaining their still rudimentary development.

II.3.1. Sources of Information

147 The principal source of information for the majority of these systems remains the reports generated within the individual work units (courtrooms, promotorias, state lawyer’s office). Some court systems have adopted statistical applications in conjunction with their management statistics. We found that several of the system administrators believed these pre-established packages were the only means of doing additional analysis.

148 In Brazil, the primary databases (those generated at the lowest level) have characteristics not found elsewhere in Latin American. Because automation occurred so early, it used first generation database software (e.g. COBOL or MUMPS). This functioned adequately for considerable time. The limited importance given to statistical information meant that it was handled by adding programs to capture what little was needed. Today, the situation makes it difficult to work directly with the databases outside the pre-established routines. Although the current trend is to migrate data to more modern systems (largely Oracle-based), the underlying concepts have not changed and continue to emphasize the automatic production of the traditional statistical reports for use in tracking individual productivity or internet or hard-copy publication.

149 As in countries that started later, or are only just beginning, the principal weakness of these data management methodologies is the failure to consider “statistical analysis for decision makers” among the necessities covered in the design of organizational information systems. One example of the problem is the inability of the majority of Tribunais de Justiça to respond to the BNDPJ request that they calculate the average times to disposition for all cases, and for the types of cases of most interest. To do this, in most instances, the TJs would have to ask the lowest level courts to calculate times case by case, and either produce their own median or send the case-by-case results to the TJ for its own development of the aggregate measures.

150 In virtually all instances, the central administrative unit handling the compilation of statistics is located within another office (most often informatics, planning, or the Corregedoria). Typically, the unit’s staff spends much of their time transferring information from the standard reports (many of them generated electronically, but often submitted on printed forms) into electronic files to in turn produce aggregate reports. As these statistical units do not have copies of the databases used for case management or tracking, they cannot do further analysis, crossing variables or calculating indicators (e.g. times to disposition) requiring access to individualized case data.
This thus constitutes still another paradox, considering the extent to which case management is automated. The best explanations are that the emphasis from the start has been on using automation to facilitate case processing and that the systems adopted for this purpose were developed and have operated until fairly recently with first-generation database software. These programs do not allow more exploratory data analysis (data mining) to identify trends, anomalies and the like. Because of the single-minded focus on helping the individual judge manage the information on each of his cases, the potential for comparing case variables, at the courtroom, Tribunal, or highest level, was routinely ignored. Aggregate statistics are only produced as part of a routine process for reporting levels of activity to higher courts. The concept of using the data to search for patterns does not exist, nor does the idea of incorporating judges and administrators in the process of transforming raw data into new indicators to guide policy formulation. There are, nonetheless, signs of a change in a few regional and state courts and especially those that have migrated their databases to web format.

II.3.2. Classification Systems (Tabelas)

The categories used for data entry and generation of management statistics continue to respond to case management needs and thus to an interest in registering all details, not creating aggregate groupings or even to standardization across courtrooms. Consequently, they provide an extremely poor base for statistical analysis. Detail is fine, so long as it is uniformly and consistently entered and there is also agreement on how it will be aggregated. Typically, however, the lists of permissible entries (tabelas) for the usual categories -- classes, assuntos, ações, fases, and forms of termination -- are extremely long, often with hundreds of items, few of course representing even 1 percent of the total. As they are drawn from categories developed for manual entry, they also have many text fields. As there are no explanations of how items should be categorized, it is apparent that in many cases, a data enterer, puzzled by the existing possibilities may simply invent a new classification.

The construction of the tabelas seems a more organic than logical process. There clearly has been no effort to identify the most common categories and to collect only the least common ones in an “others” category. At times, the results appear to mix the usual divisions of actions, processes, and so on. In addition to being extensive, the tabelas include very general categories alongside very detailed ones, rather than using a more logical decision-tree structure in which general categories could be subdivided into greater detail. This also increases the risk of multiple or inconsistent entries – the same case may be entered several times, or similar cases might be entered either in the general category or in the more specific one. As the tabelas are regarded as internal to the system, they are rarely published separately. Finally, the tabelas tend to be unique to each jurisdiction. With few exceptions, there has been no effort to unify them.

The STF now has a specialized team to classify cases. While its own tabelas have thousands of entries, the team attempts to assign each case three classifications, primary, secondary, and tertiary. The Conselho de Justiça Federal (CJF) via its technical secretariat is attempting a more ambitious standardization of the tabelas used by all federal courts. While the results for classes and assuntos have been adopted by the
TRFs, the exercise for fases (procedural stages) is delayed because of a failure to reach agreement on its contents. Apparently, some of the TRFs want to maintain their existing classification which they find useful in determining the physical location of the case file. Despite the agreement on the two other tabelas, we were told that their adoption in the regions had been only partial. Several states are also trying to rationalize their classification system.

155 In all these efforts, we have identified several common problems. The double counting of "cases" has already been mentioned, and it is not unique to state courts. In addition few classification systems yet provide adequate information on the means of closure of cases. Knowing whether closure is by judgment or some other means (e.g. agreement, request of the plaintiff, expiration of deadlines) is extremely important in analyzing the efficiency of the judicial system. It becomes even more useful if it can be crossed with types of cases, types of proceedings, identity of parties, time to disposition, or in civil cases, amounts at stake, thus allowing analysts to determine where bottlenecks or other problems occur, which cases are more easily resolved, and where conciliation may be most effective. This is important for judges, but also should help shape the litigation strategies of public ministries and state lawyers.

156 In summary, the most important "tabelas" – referring to type of action (classe) and form of termination – have been developed as descriptive rather than analytic categories. This is a logical consequence of their primary use in conjunction with automated case management systems, to help judges record data relevant to their handling of individual cases. This is apparent from the excessive number of allowable entries (in several systems, easily 300 or more), in the failure to use a decision-tree structure, and in the worst instances, in the potential for the data-enterer to invent new categories thereby further destroying the system's consistency. Efforts to encourage greater standardization, even with the use of participatory exercises, have been hampered by entrenched practices, the individual-case-management perspective, and the failure, both of lower level users and of upper management to appreciate the importance of an ability to identify systemic trends and problems.

II.3.4. Statistics and Productivity

157 Another obstacle resides in the linkage of the existing management information system to the calculation of indices of productivity for individual judges. The force of this connection is apparent in the frequent placement of the system itself in the office of the Corregedoria, responsible for monitoring the performance of first instance judges, prosecutors, and even state lawyers. It should be noted that Brazil is one of the few of the countries in the region to have advanced even this far in measuring overall performance (and that as discussed elsewhere, this is most developed in its courts). However, while one indication of output, individual productivity is not the only one, and a single-minded focus on the usual measures also has some negative consequences.

158 If the statistics so produced have disciplinary implications and are used primarily to measure productivity, their quality could be affected – not necessarily by efforts to manipulate them, but because of the overwhelming tendency to interpret them from the
standpoint of an assembly line, and not in terms of the quality of justice delivered. This viewpoint is apparent in the poor quality of the data collected in regard to how cases are terminated. Here, the main emphasis is on termination (saídas) with the form of termination (by judgment, agreement, or prescription) often not even considered. The clean-desk syndrome (cases in cases out) might be appropriate for a more bureaucratic enterprise, but for an organization supposed to resolve conflicts, it is a very inadequate measure of success.

Still, this appears to be what is prioritized when lists of judicial actions are published. It is also significant that even the court-room collection of data provides individual judges with little or no information on the age of their caseload, on the contents of their backlog, or on the average time to disposition, all of which would be useful to him or her, and to management, in better understanding problematic performance. In short, when the courtroom information sent to central offices focuses on the usual indices of productivity (cases in, cases out) and when this is linked to a system of rewards and punishments, it not only limits management’s understanding of the quality of system performance. It also tends to encourage behaviors that themselves do not prioritize quality of output. This bias has been carried over into later generation databases, which, appropriately designed, might permit other types of analysis. When queried, those in charge of these databases, said they could do the other calculations, but clearly had seen no reason to produce additional types of performance statistics.

II.3.5. Uniformity of Statistical Systems

We repeatedly heard references to concepts like “only in Brazil” or “it is a continental state” that reinforced the notion that differences (among states or among countries) were more qualitative than quantitative. To the extent this belief prevails, it seriously undercuts attempts to encourage standardization of data management and thus of the development of statistical performance indicators. As noted, despite the efforts of the CJF to promote adoption of uniform categories, many of the TRFs still use the reporting forms and contents they always have. The fact that this will make it difficult to compare results, even in Brazil, does not seem to be a concern.

It was also apparent that Brazilians had little access to, perhaps did not realize the existence of, other databases on judicial performance that might be used to assess their own results. Using international data to interpret their own statistics would be of help in understanding their significance; it also might encourage a more conventional organization of what is collected. Idiosyncrasies exist even in the time periods covered. Because of the twice-annual judicial vacations, there is a tendency not to use the calendar year as the basic period. Instead, statistics are reported on a monthly basis or for periods that include months from different years. For example, Amazonas published its last set of the statistics for the period July 5, 2002 to December 3, 2003.
II.3.6. Lack of Control over the Production of Basic Data and Weaknesses among the Teams Analyzing Them

162 The informatics units, which always have some part in this process, tend to work in relative isolation. They collect and process what is requested, but seem to take no independent initiative for further analysis or quality control. In many cases this may be because their “statistical” staff is composed of individuals with no particular background in statistics and no real formation in judicial applications. There is no statistical control over the adequacy and effective use of the formats they design. For example, there are no studies of frequencies to evaluate the existing tabelas, no studies of the data fields that are commonly left empty, and no effort to determine whether all potential entries are captured. It is to be hoped that efforts like that of the CJF will soon move into these neglected areas, as much of their eventual success and utility will depend on their being attended.

II.3.7. Lack of Interest or Confidence on the Part of External Researchers

163 Experience elsewhere suggests that an active research community may be the first to analyze statistics collected by the courts, and that their studies can both spur court interest and encourage their improvement of data collection methodologies. An ongoing dialogue between academics and judiciaries can be useful to both parties and encourage novel insights into judicial performance problems. Unfortunately, this has yet to develop in Brazil for reasons that are still not entirely clear. At present, the dominant state user of academic empirical research on the judiciary appears to be the federal Ministry of Justice. On the judicial side, only the CJF in its sponsored research program and a few state courts (e.g. Rio de Janeiro) have entered into contracts with universities, research institutes, and independent researchers. In our interviews, judges and other judicial operators occasionally dismissed the few research efforts receiving wider attention, as dominated by other disciplinary perspectives and thus not shaped by an adequate understanding of the judiciary’s situation.

164 Although the majority of the judicial units managing databases and statistics derived from them publish information on the internet, few Brazilian researchers, universities, and independent institutes have attempted to use it. To be fair, the situation is changing rapidly, and what was not available even a couple of years ago, may have

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89 Colombia is an excellent example of this phenomenon. Several Colombian research institutes took the lead in analysis of data collected by the courts and the Ministry of Justice (until the 1990s responsible for judicial administration). The judiciary now does some of its own analysis but also hires outside researchers for this purpose. See Fuentes (2004). Much the same appears to be occurring in Peru. See Hernández Breña (2003) for an example.

90 This comes out of the Secretaria da Reforma Judiciário, created under the present administration. According to the Ministry it currently has twelve research projects under way, ranging from Reais $65,000 to Reais $2 million.

91 The usual targets of these comments were the works of IDESP, its former director (Maria Tereza Sadek), and Armando Castelar, who originally published through the institute. Sadek may finally be vindicated by the STF’s award of the “colar do mérito do Judiciário” in June, 2005.
suddenly appeared, without the researchers’ noticing it. For example, the recently disbanded IDESP, the São Paulo based institute which arguably has published the most empirical work on the court systems, reported filings for appellate, but not first instance federal courts in its 2001 publication. BNDPJ now has a fairly complete collection of the latter data as well. However, conversations with IDESP’s staff suggest they may not have been aware of the improvements until very recently.93

Apart from such exceptions, there appears to be little interest on the part of academic or sector institutions in doing statistical analysis of judicial performance. Both IDESP and researchers once associated with it, as well as other such institutes, have tended to rely more heavily on samples and surveys. Opinion surveys have provided important insights into what judicial operators think about sector problems and reform proposals, but they are, as has been stressed, a risky proposition for depicting the real situation giving rise to these perceptions. Much the same can be said about efforts to track performance problems by asking system users to evaluate delay, quality of judgments, or levels of corruption and to relate them to factors like economic growth rates or credit availability.94 As noted above, user perceptions, like those of sector members, are not the most reliable means of measuring these empirical phenomena and must be taken with the proverbial grain of salt. Samples of real cases are of course a rich source of more detailed information, much of which existing databases and statistics simply cannot provide. The World Bank, having used this method as a first cut on understanding Brazil’s judicial performance, can hardly afford to be excessively critical. However, as this and similar studies done in other countries freely admit, samples also have inherent limitations. Much of the Brazilian work on juizados especiais has been forced to use samples or surveys because of the limited data available on these entities. Again, that limitation is now disappearing, and one hopes Brazilian researchers will take advantage of the change.

As compared to researchers elsewhere in Latin America, Brazilians do have several distinct advantages. First, they have a better historical series of aggregate statistics than found in most other countries, and sector institutions seem less resistant to sharing this and other data with those interested in studying it. Second, Brazilian efforts to interconnect data from different sector institutions – for example courts, public ministries, police, and procuradorias – are also unusual and open the way for other types of analysis. Third, in many states, it is relatively easy to access data on individual cases, thus permitting analysis going beyond that possible only with aggregate statistics. Of course, here the same constraints facing analysts within the institutions prevail – overly complex and rarely consistent categorization, incomplete entries and the like. Case file

92 See Bastos (1997, 2002), Bonelli (2003) all works by Sadek for an idea of what the institute and researchers associated with it have done.

93 Sadek’s most recent article (2004) does now incorporate the full set of data from the BNDPJ.

94 For example, Castelar (1998 a, b; 2000; 2004).

95 In Chapter I. See Kritzer (1983, 2000) and Toharia (2003) for discussions of the limitations of this approach.
analysis is also time-consuming and may require skills interested researchers have yet to develop.

Also, despite the general availability in internet form, not all sector organizations make the task that easy for external users. Access is sometimes limited to lawyers or institutional members, or reports are simply difficult to locate. In some cases, safeguards have been added to prevent downloads of reports and other data. Finally, some data of particular interest to researchers (like a historical series on the number and distribution of judges) are simply not readily available. BNDPJ statistics on this item only go back to 1999, despite having caseloads for the last decade. Courts presumably have this information; why it has not be published is another question, but doubtless stems from the predominant emphasis on the individual cases and the productivity of the individual judge.

II.4. Comments and Recommendations

The general sense of our findings is that Brazil's early advances in court automation, and its later, but escalating, progress in automating other sector agencies have been driven by interests other than those of monitoring organizational performance. There is a growing awareness, at least among the courts and the procuradoria-family, of the need to fill this gap, but insufficient orientation and broader discussion, as to how this might be done. Progress is also inhibited, in the courts, by the traditional design and uses of data collection systems, which even when migrated to more sophisticated databases, tend to discourage attention to the different needs of performance monitoring. There is also a danger that this traditional outlook could be adopted by the other agencies as the path of least resistance. This would be unfortunate as it would negate the automatic advantages of starting afresh and thus being able to do things differently.

2.4.1. General Recommendations

Before proceeding to a discussion of more specific recommendations for individual types of organizations a few general comments can be made as regards handling of basic data, staffing, and construction of categories for its further classification.

Information Systems. Whether entered directly into a single web-based system or still managed as separate databases at the courtroom level, we assume that initial data collection will be linked to the processing of individual cases and thus that it will respond to the needs of the individual judges, prosecutors or lawyers for adequate detail on the cases they control. This in itself is not problematic, in fact is the best way of assuring a rich collection of information on the details of each case. The present problem is that, given the limited interest in further analysis of this data (and the limited statistics extracted from it), much initial entry tends to be in text form, thus making it unsuitable for this second purpose. One initial recommendation is thus that the data-entry systems be designed or redesigned to increase the quantity of closed (and thus codifiable) categories thereby facilitating their use in trends analysis and the development of a series
of performance indicators. As the trends analysis itself may generate the need for new kinds of indicators, the goal is to provide basic data that will allow this to be done.

171 A second urgent need is the introduction of programs of quality control and to ensure data are entered in the first place. In all the databases we reviewed, there were many empty fields which those responsible for making the entries had simply ignored. This was true both of text fields and those with closed categories. It would also be worthwhile to explore the reasons for this failure – possibly they originate in confusion as to what is wanted, possibly in a reluctance to provide certain information, possibly in a belief that it is unnecessary or redundant. As the overwhelming tendency is to add, not subtract data fields, a periodic purging of the formats is a useful policy. This may also be a way of eliminating fields that produce excessive erroneous entries.

172 As an additional note, it should be mentioned that many of those interviewed foresaw data entry as an enormously time consuming task which might even require additional or outsourced staff to perform it. Moreover, although entry is currently often done by organizational professionals, especially in the Public Ministries and Procuradorias, there seemed to be some feeling that this was inappropriate. There is evidently a sort of cultural bias at work here, but it is one running counter to what normally happens with increased automation. Professionals in modern organizations now do much of their own data entry, and for this reason, requirements should be simple, nonredundant, and directly related to their principal work. For better or worse, the days of armies of support staff to do all the boring stuff have ended, but this also means that “clerical” work must be rationalized so as not to take up the time it once did. This is a difficult, but not impossible challenge, especially if it is kept in mind as new systems are being designed.

173 The increasing tendency to adopt single web-based systems offers additional advantages for statistical analysis. Those responsible for this function will now have direct, real time access to the entire database and, assuming agreement on how entries will be made and later consolidated, can do much of the aggregation automatically. This augments the need for accurate entry at the lowest levels, however, and thus the necessity for programs to check quality and consistency.

174 Development of Classification Systems (Tabelas). Absent an immediate transformation to web-based systems, and practically, speaking, even after it is effected, a system for classifying data will still be necessary. This will facilitate the development of indicators of supply and demand for the services of each entity and the development of policies to bridge the gap between the two. If these classification systems (tabelas) are integrated into the initial entry of data, they will also facilitate each judicial unit’s analysis of its own workload and its comparison with similar units. This also means that the tabelas should be compatible across states and jurisdictions, not only for purposes of comparison but also to track problems affecting or affected by more than one entity. If the tabelas are not adequately developed, they may generate their own mistaken applications thereby complicating the task of analysis.
For all entities, the tabelas should capture at a minimum the following characteristics:

- Cases entering the system divided by nature of conflict, law or right invoked, identity of parties, value of claim (where applicable), and the type of action requested.
- Key events (interlocutory pleadings, judgments, appeals, enforcement, etc.) and their timing
- The form of disposition (agreement, judgment, dismissal, etc.) and its content (who wins or loses, what was the value of any award?)

The tabelas need not follow a strictly judicial logic, but they should be compatible with the organization of each entity's work. To avoid loss of information and to allow for future changes of interest, it is preferable that the initial entries distinguish more differences and aggregate less. This must, however, be weighed against the disadvantages of excessive detail. The solution for this dilemma is the use of a tree-construction, going from a high level of details to a lesser number of aggregate categories. This type of construction allows later changes in the aggregated groupings depending on new needs. Other general rules for the construction of classification schemes are as follows:

- They should include and distinguish all the most relevant aspects of the facts, the law, and the procedures, but always from the perspective of judicial management and policy.
- The categories should, however, be minimalist – analytic and not descriptive.
- They should be user friendly – so that the ordinary user can select a category without excessive analysis. The structure of the tables should help the user find the adequate category.
- Residual and global categories should be minimized – no single category should capture over 50 percent of the universe.
- The data entry systems should be structured to force the classification of information on initial characteristics of each case (and, if desired, but separately, each related processo) and the form of its conclusion.
- Categories for the means of conclusion of a case (or investigation) should capture adequately the various forms of "no decision" or dismissal.
- The creation of new categories by the data enterer should not be permitted. However, where users find the existing categories inadequate there should be a means for registering and investigating this problem.
177 **Staffing.** For the courts and the other agencies, internal organization, staffing, and assignment of data management functions are also complicating factors. Those directly in charge, typically informatics staff or Corregedorias, either are not trained in the concepts of performance monitoring or performance statistics, or, the case of the Corregedoria, have a very narrow cut on the issues – monitoring of individual productivity. Statisticians, and especially statisticians with an understanding of judicial functions, are conspicuous by their absence. The interactions of those handling statistical systems with higher management (the chief judges, Procuradores-Gerais, etc.) are typically extremely limited, meaning that the former are often left on their own to second-guess the latter’s needs. Clearly if sector organizations are to advance in performance monitoring they will need to alter their staffing patterns to correct these deficiencies.

178 Over time, things may work themselves out, but the quickest way to circumvent these various obstacles would be to provide, to interested sector leaders and their staff, some experienced technical assistance in the design, use, and importance of performance monitoring systems. With the possible exception of the Public Ministries (see below), there does not seem to be significant resistance to the concepts, just a lack of understanding as to how to implement them. Of course, expert advice is likely to ruffle many institutional feathers, to the extent it means breaking traditional habits and revealing problems many would prefer to ignore. However, these obstacles confront any effort to improve institutional performance, and should hardly be taken as a justification for doing nothing.

179 **Initial Analysis.** Another way of encouraging advances is to use what statistics are currently collected to do further analysis of the existing situation. Even given all the flaws of the existing databases, organizations could make better use of them to explore changing trends in demand for their services and the adequacy of their responses. The reasons behind their failure to do so are multiple – a lack of understanding of the systems themselves, a failure to grasp their potential, a focus on resolving problems of detail rather than of structure, and finally, as discussed in Chapter IV, a certain vested interest in not pursuing some areas of investigation. As a demonstration of the current potential and to enter into some of these purposefully dark areas, we have taken the statistics available through the BNDPJ and other sources to so our own analysis, as discussed in the next Chapter.

180 **Collective Efforts.** To speed things along, and to ensure compatibility of results, it is clearly desirable that similar institutions address this challenge collectively. Our research team was amazed by the lack of information members of the same organizational family had about each others efforts. In fact, we occasionally concluded that if our research produced no other results, it would at least help inform organizations in the same city as to what their counterparts were up to, or link those in different states working on similar problems. One specific recommendation is that especially at the state

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96 This is changing, however, and the STF has taken the lead in encouraging initial analysis by all the nation’s court systems. A recent event in Brasilia (May 12 and 13, 2005) presented the early results.
level, organizational families should find ways to encourage meetings among their statistical staff.

181 Sometimes the problem is distance; a PGE in Ceará might not have easy access to information on what one in Rio de Janeiro was doing – a problem clearly addressed by sponsoring national meetings. However, with the exception of very hierarchical entities (the federal and labor courts), information sharing and collaborative efforts were rare – and even here could be improved. Over time, cooperation across different organizational families will also be needed. This has begun, especially at the state level, but often is driven more by dire necessity (e.g. the AGU’s dependence on the courts to provide information on state litigation, or the use of one organization’s internet facilities by another) than by a recognition that they are all engaged in producing the same public service. Progress is not aided by a tendency to focus on isolated results – as seen in the common response to public criticism that “I am doing my part, and it is the other actors who are responsible for the failures.”

2.4.2 Agency-Specific Recommendations

183 As regards more specific recommendations, although the general needs are similar for all three types of organizations, we are grouping the remaining discussion by organizational family. This is because, given varying levels of automation and progress with performance statistics, the next steps tend to be different. There are also differences within organizational categories, but it strikes us that they can be treated simultaneously. Cooperation and linkage of information systems across organizational types is another goal, but over the short run, development of similar approaches within the types seems most practical.

184 AGU and PGEs. As noted, these are the entities with the lowest levels of automation but the clearest vision of how it might be used to improve performance. While assigning a high priority to automating case management, organizational leadership is also conscious of its need for good information on what staff lawyers are doing, not only to encourage productivity but also to improve overall organizational performance. The important challenge will be to keep sight of all three objectives as automated systems are installed and so ensure they do not repeat the judiciary’s experience – much automation, few management statistics.

185 We were unable to find a system so well designed as to merit duplication by others. However, our search was not that broad, and a first step might be to inventory what else is out there. In essence the need is for a data management and statistical system not unlike that used by large private law firms in other countries, possibly in Brazil, and by some state lawyer organizations in Latin America and elsewhere. The basic concept is, fortunately, far more straightforward than that for courts or public ministries, and while the procuradorias also have problems of eliciting internal cooperation, they do not, yet, face the legal obstacles offered by the internally more independent judges and procuradores.
The AGU/PGE family could clearly use technical assistance, and in many cases, funding, to realize their goal. Eventually legal change may also be in order to draw in legal services connected to autarkic agencies. Whether the head of each system only coordinates or also directs their actions is a moot point; the initial need for information can finesse it over the short run. As most of these organizations are starting from zero, the project lends itself to a collaborative approach. This could begin at the state level, through the organization of PGEs, or be headed by the federal entities, reaching out to the states.

In addition to creating data management and statistics systems addressing the three objectives listed above, their effective utilization for the third objective — overall performance monitoring and the development of litigation strategies — will require a capacity to do types of analysis beyond the strictly legal. If, as many Brazilian experts hold, the crush of state litigation is the real “judicial” problem and also a major direct and indirect contributor to the Custo Brazil, then helping the state lawyers get a handle on their caseload is only the first step in the process. Subsequent steps, aimed at reducing and rationalizing the state-related caseload, will require analysis of the economic consequences, development of a plan to shift from the cashflow management strategy to one where administrative agencies handle their responsibilities directly, and even improvement of their ability to do so (not only in the economic, but also in the strictly administrative sense). The AGU/PGE family is a key actor here, but the economic and political implications obviously involve far more stakeholders.

Public Ministries. Public ministries are now moving ahead in automation of their case processing and the introduction of networks and internet to facilitate internal communication. The lesser interest in tracking performance, except as it relates to evaluations of individuals’ level of activity, is a concern. This originates in organizational culture and its constitutionally supported definition of the promoter/procurador as a functionally independent actor. It also is linked to the organization’s focus on defending rights wherever they are violated. A similar view and a similar resistance to performance monitoring characterize many human rights NGOs. As they, like Brazil’s Public Ministry, take a highly idealistic approach to their work, the notion of measuring its impact often strikes them as overly materialistic.

Nonetheless, the Public Ministry provides a state-financed, public service and by this token, should expect to account for what it is doing, how well, and with what investment of resources per benefit delivered. Obviously, there are endless alternatives for how it assigns its resources and focuses its efforts, and however it is doing this now, the potential for better returns merits exploration. To carry this out, the first step will be a definition of its product, the units to be used in measuring it, and the categories for classifying this and other relevant data. The basic immediate product should not be that difficult: it is the resolution of some problem, via the judicial or extra-judicial route. Downstream impacts (resolution of broader social problems) are of course important as well, but attempting to measure them in the absence of statistics on immediate output is putting the procedural cart before the horse.
Currently, the basic product is the item most difficult to track, even in the public ministries with the most sophisticated information systems. We made an effort to do this, but have been stymied by the lack of composite categories that might indicate, for example, what kinds of criminal cases are fully investigated and taken to trial, and with what results; what proportion of civil investigations produce negotiated agreements or legal actions, and for what kinds of cases, or how many beneficiaries are linked to each action to defend collective rights. We believe the obstacles here are more conceptual, ideological, and organizational than technical. However, until they are resolved, development of an effective management information system will be virtually impossible. Interestingly, various public ministries are now trying to adopt systems to monitor socio-economic conditions relating to the rights they are supposed to defend; however, the interest in monitoring their specific contribution to defending those rights, beyond a simple list of actions, seems virtually unattended.

The Judiciary. One of the greatest obstacles affecting the judiciary is its highly decentralized organization and the relative lack of information among the parts as to what each is doing. A positive signal at the national level is the interest of the STF in linking its efforts with that of the CJF. The goal, presumably, would be to unite the two parallel efforts (BNDPJ and SINEJUS) to create system-wide statistical databases on judicial performance. If the two can advance this project, they could have a major role in improving judicial data management and performance measurement across the board. To do so, they will have to involve the state courts more actively in the exercise, both to understand better where they are in the process and to take advantage of some of the progress various of them have made. The overall goal, affecting even the sponsors, would require attention to the general recommendations made above and the following more specific objectives.

- Encouraging all participating courts, to redesign their statistics systems, meaning both their systems for capturing data and their tabelas (classification schemes). The goal should be to produce uniform tabelas across all court systems, allowing for differences only in less essential, lower level, additional details.

- Improving the quality of all data captured by every entity, and introducing mechanisms for quality control and for training data enterers in basic procedures.

- Standardizing statistical reports, determining a set of minimum contents for what is published on the internet and in annual reports.

- Encouraging the creation of small statistics units in every TJ, TRF, TRT, in the national superior courts, and in the STF.

- Encouraging dialogues among the court presidents, corregedores, directors of planning and informatics, and the statistical units so that they reach a common understanding on the information required and how they will obtain it.

To emphasize the importance of the undertaking, the STF, STJ, and CJF should begin immediately with an analysis of the data they already manage, linking it to the on-
going dialogue on judicial performance failures. If the judiciary can use this analysis to begin to demonstrate the extra-judicial origins of some of their problems, document the progress they have made in mobilizing to respond to growing demand, and illustrate where additional changes in legal or customary practices would produce further improvement, then even the doubters may begin to appreciate the potential returns on a more concerted attention to performance statistics.

193 While we applaud the courts’ interest in developing more sophisticated indicators of performance (times to disposition, appeals rates for different types of cases) and attaching these to other types of statistics (many duplicating the Public Ministry’s concern with tapping contextual conditions and others referring to factors like infrastructure and equipment endowments), we believe the first step is to improve the basics. If systems are designed well, many of the desired indicators can be generated automatically; to require them now would place the courts in an impossible situation. As for the additional statistics, whether internally or externally generated, they would require additional mechanisms for capturing data. In the case of the contextual factors (e.g. crime rates), as many organizations seem interested in having them, it would make more sense to make one entity responsible for their capture and subsequent dissemination rather than having everyone do their own collection. The internal ones (office space, equipment) seem more appropriately assigned to other internal administrative bodies – that charged with property inventory for example. If the courts normally do not have such a unit, they clearly need one, not only to collect statistics but also to oversee handling of physical assets. Charging the statistical units with generating this database is just adding one more task to their already full program.
CHAPTER III: WHAT THE DATA TELL US ABOUT SECTOR PERFORMANCE\footnote{This chapter is based on the statistical analysis done by Carlos Gregorio. Sources of data are noted with each table or graph.}

194 One of the additional findings of our study is that, despite the sector’s weaknesses both in data collection and the conversion of data into management information statistics, what is available, or more accurately, what was made available to the research team, could be used for much more analysis. In fact, working largely with statistics pulled off the internet, supplemented by what was provided by a few tribunals, we were able to explore some of the common hypotheses about the courts’ workload, its origins, and their response to it. Given the procuradorias’ limited advances in this area, and their general failure to publish what little data they have, this was not possible in their case. Although the Public Ministries do collect and publish performance statistics, their chaotic classification systems defeated our efforts to draw some meaningful information for analysis. Also, as most of our work focuses on historical trends, their more recent entrance into automation of their databases does not lend itself to this treatment.

195 Given our doubts about the reliability of the data the following analysis should be regarded with some caution. Most of the statistical series lacked adequate explanations as to what was being measured, and further questioning of those responsible did not always yield satisfactory answers. This relates to a second problem involving the extent to which those providing the initial data were themselves measuring the same things in the same ways. As noted in Chapter II, standardization and quality control are direly needed. There were also occasional dramatic changes in historical series, again defying explanation, but possibly less a result of shifts in workload than in the categories used to measure it. For example, data provided to our research team by the statistical offices for São Paulo’s state courts showed a tenfold increase in pending cases in 2003.\footnote{However, data provided to the BNDPJ does not record this increase, indicating, inter alia, some of the problems of inconsistent record keeping.} Court officials explained this as a result of the elimination of a special backlog reduction program. That might be, but we suspect how things were counted had more to do with the change.

196 The following discussion is organized by theme, or hypothesis, and further subdivided by jurisdictions as one of our interests was determining where trends were strongest as a means of investigating their causes and the adequacy of the response. As a note on format, we have left most of the entries in the tables and charts in Portuguese. This is because of uncertainty as to what those managing the data have actually included in each category. It would be tempting to translate “em tramitação,” “em andamento,” or “acervo,” terms apparently referring to pending cases or backlog, with one of those English words. However, here and in the case of several other terms, we have proceeded with caution and left them as they appear in the original statistical reports. At the very
least this demonstrates the lack of consistency among jurisdictions as regards naming and possibly content of categories used for data entry.

**III.1. The Judicial Performance Syndrome: The Three Key Descriptive Hypotheses**

- **Hypothesis 1:** The judicial workload has increased substantially over the past decade (or longer).

- **Hypothesis 2:** Judges have not been able to keep up with the growth in demand.

- **Hypothesis 3:** The result has been an increasing delay in resolving cases.

We have grouped these together as they collectively constitute conventional understanding of the courts' performance problems, and we found treating them in the same analysis inherently more practical. We found the first hypothesis true across the board, but identified differences in the size of the increase, between the national and state courts, and among the states themselves. We also found differences among first, second, and last instance courts within each system. The second and third statements, relating to the courts' inability to keep up with the workload and the resulting delay, can be considered validated at the most general level. However, the impacts vary among and within jurisdictions. We explore part of the variation here and part in another section below.

**III.1.1. The Supremo Tribunal Federal**

Significantly, the STF, the court with the final word on constitutional issues arising within Brazil's entire judicial system, has experienced a dramatic increase in workload over the past decade and a half. After a slight drop in 1990, filings (distributions\(^{99}\)) increased nearly sixfold. Judgments appear to have kept pace, even exceeding cases distributed in 1999.

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\(^{99}\) Pending changes introduced by the recent constitutional reform, many courts count cases “distributed” to judges rather than actual filings. This is explained by a practice in many jurisdictions (and one now ended by constitutional fiat) of holding back filings, sometimes for a year or more, before sending them to the judges. This was intended to give judges a reasonable workload and not flood their offices with cases they would in any case not attend to immediately.
199 Although the BNDPJ did not provide data on cases awaiting distribution (or pending cases), we used its records to make these calculations. As of July 11, 2004, there were 132,797 cases awaiting distribution, roughly the equivalent of one year’s entries.\textsuperscript{100} Thus, although the curve suggests that the rate of judgments has been keeping up with the growth in demand, the STF appears to be lagging approximately a year behind in its catch-up actions.

200 As for the content of the caseload, in 1997, 97.3 percent were composed of agravos de instrumento (AG) and recursos extraordinarios (RE), with, a tendency for the former to assume relatively more importance over time. Agravos de instrumento are essentially protests of procedural error, not substance. They may be interlocutory or lie against the final judgment. Recursos extraordinarios are appeals focusing on the content of the judgment. In fact, any single case may give rise to both types of appeals, and a common complaint is that this is a usual pattern, sometimes with both being filed simultaneously.\textsuperscript{101} Of the remaining slightly less than three percent of the caseload, the next most important category is habeas corpus. While all appeals are viewed as abused by those seeking to create more delay, the agravo is the delay creating tactic par excellence. It has been suggested on numerous occasions that it be sharply restricted or simply combined with the recursos extraordinarios to avoid the generation of two or more appeals for the same case.

\textsuperscript{100} \url{www.stf.gov.br/bndpj/stf/MovProcessos.asp} estimado como diferencia del total de recibidos y distribuidos desde 1940.

\textsuperscript{101} When this occurs, the justices should resolve the agravo first. However, we were told this does not always happen. Although the STF tends to rule against most agravos, when it does not, a prior decision on substance is thus wasted.
Despite the suggested reforms, or simply feeding the interest in their adoption, the STF’s caseload is now nearly 60 percent agravos de instrumento. The Union, the states, and the municipalities are said to be responsible for 83 percent of the STF’s caseload, as either plaintiffs or defendants.\(^\text{102}\) As the STF is the last instance for all jurisdictions (and not only for the federal courts), it is apparent that a disproportionate amount of its workload (and of the growth in the latter) is a direct result of government litigation. If the STF is overloaded (and it would be hard to hold otherwise), then the government is the most important contributor to that situation.

**III.1.2. The Federal Courts**

Data used here are taken from the website of the Conselho de Justiça Federal, which includes case movement at the first instance and in the regional appellate courts (TRFs). Major categories are aggregate figures for cases distributed (distribuídos), adjudicated (julgados), sent to the TRFs (remitidos), and pending (em tramitação). Individual TRFs also include some data on their own websites, but only those of Region 4 (Porto Alegre) are very extensive. Although occasional gaps in data entries, probable differences in what is counted, some inconsistencies in classifications, and the other problems mentioned in the previous chapter also affect our analysis, they are less critical in identifying overall trends.

**Trends in First Instance Filings.** We look at some selected data from small claims and appeals courts in the next sections. First instance (trial) filings are more

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\(^\text{102}\) From a statement by the ex President of the STF, Mauricio Corrêa, in a public speech, February 18, 2004 (see [www.sintese.com/n-18022004-13.asp](http://www.sintese.com/n-18022004-13.asp))
thoroughly analyzed as they give the best, and most accurate, indication of trends in workload and court response.

**Graph III-3. Case Movement for First Instance Federal Courts, 1967-2002.**

[Graph showing case movement with years on the x-axis and case numbers on the y-axis.]

204 Graph 3 shows an exponential growth in pending cases (en tramitação) after 1991, with more modest growth in cases distributed, adjudicated, and referred to the appellate courts (for which statistics only cover the period from 1997 onward). As the increase in pending cases cannot be explained solely by the gap between those distributed and adjudicated, we suspect something else is at work here. The most likely explanation is that courts have changed their method of calculating backlog – and are now capturing pending cases not counted before. A second possibility draws on a common observation that courts delay distribution of cases (their assignment to individual judges) as a means of controlling their workflow. Here the difference is thus not the usual “backlog” measured by other courts. In Brazil, pending cases may include both those distributed and not yet adjudicated (the usual understanding of backlog) and those held waiting for distribution, a practice we have only seen here. Interestingly, the problem is usually associated only with second instance courts – with some famous examples like that of São Paulo’s Tribunal da Justiça, believed to take several years to make distribution. However, the data suggest it may also occur in first instance federal courts. As the graph also demonstrates, the problem appears to begin with a sudden jump in filings (and distributions) in 1991 after which the congestion phenomenon takes off. This overall pattern is consistent with Brazilians’ own observations, and is usually attributed

103 We know, based on interviews, that courts often do not have a good handle on pending cases, even after distribution. For example, the new Chief Judge for TR5 (Pernambuco) noted that when she entered office she requested an inventory of all cases pending in her court, and found that the actual number was over four times greater than the amount estimated by court officials (180,000 as opposed to 40,000 cases). As one observer characterized the situation, the courts may be finally “telling the truth,” that is admitting to a backlog they had not recorded before.
to the impact of the rights-rich 1988 Constitution, the democratic opening, and the effect of both on citizens' inclination to submit conflicts to the courts.

A breakdown by judicial region suggests the trends in the four variables are similar in all of them. Two notable differences occur in Region 4, where since 2001, there has been a notable increase in productivity (dispositions) accompanied by a slight increase in distributed cases in 2002 (see Graph 4) and in Region 1 where there is a much greater growth in cases referred to the TRF in 2001 (see Graph 8). Unfortunately the high level of aggregation and the failure to capture categories by type of action or nature of conflict do not allow us to use the CJF data to explore explanations based on the changing nature of demand. It is possible demand has simply risen across the board, but the more usual experience is for rates to vary substantially by types of proceedings and conflicts. It should be remembered that the federal courts only handle labor cases involving "national" employees, and that the others go to the separate labor jurisdiction or state courts (for state and municipal workers). Thus, the growth cannot be attributed to a sudden rise in private-sector or state and municipal government disputes related to dismissals or back wages. Criminal cases make up a much smaller proportion of the federal workload, so whatever is causing the growth must be related to civil and administrative issues of a largely non-labor nature. In a later section, we use data from individual court districts to explore this phenomenon on a partial basis.

Graph III- 4. First-Instance Cases Adjudicated by Region

Although one hypothesized explanation is that the growth in filings, and in cases em tramitação, arises in the recent creation of federal juizados especiais, a comparison with data on these small claims courts from a few regions, suggests their caseload is not included. This is particularly true for Regions 3 and 5 where the figures we have for juizado especial filings would have greatly expanded the number of pending cases. These courts, as discussed below, face additional problems with distribution, less because of its use to control workflow than because of the enormous task of entering the initial
information. However, we can only surmise their exclusion for the other regions, as the CJF statistics are not clear on this point, and even if they were, those managing the data have, as noted, no way of checking to make sure their instructions are followed.

207 Separating out only cases distributed and adjudicated for all regions, another interesting finding is the federal courts' fluctuating clearance rate over the period covered. Whether measured conventionally (dispositions over filings) or Brazilian style (cases disposed over cases distributed, not cases entered), the federal first instance courts appear to be resolving a lower percentage of their workload in recent years. This is also evident in Graphs III-32 and III-33 below, which demonstrate that despite a lower average caseload per judge in the past five years, federal judges' level of productivity (average cases resolved) has dropped. This is exactly the sort of statistics leadership should be reviewing to determine the reasons for the decline and the ways it might be reversed, and is easily generated even with a very rudimentary information system. Of course, determining the causes would require the ability to disaggregate data still further, as well as additional information on party identity and litigation strategies. However, the first step is identifying the trend and this, as demonstrated, is already possible.

Graph III-5. First-Instance Cases Distributed and Adjudicated, Federal Courts, All Regions

208 Trends in Filings for Federal Small Claims Courts. Although small claims courts have existed in many states since the mid 1980s, they are new creations at the federal level. While intended to receive a variety of minor civil and criminal cases, most of their work has been in the areas of pension claims. Prior to their creation, because many of these claims were relatively small, it was often not worthwhile for the claimants' to take them to court. As these are relatively simple claims, many having to do with the readjustment of amounts in accord with indices for various economic plans, they lend
themselves to batch processing. The new courts are thus highly automated, and churn out unbelievable numbers of decisions. Most of this we know from interviews, as national statistics are still incomplete. There is little information available on the CJF website on the juizados especiais federais. Data only exist for 2003, and do not cover the entire year.\textsuperscript{104} We did, however, get access to information from the federal small claims court handling pension disputes in the city of São Paulo. This court is fully automated and has monthly records covering 2002 and 2003.

Graph III- 6: Monthly Distribution and Adjudication of Cases, Juizado Especial Federal Previdenciário de São Paulo

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{graph.png}
\end{figure}

Two trends stand out. The São Paulo juizado has faced a rapidly growing workload, but it has also managed to raise its productivity even above the levels of cases distributed. The bottleneck, not reflected in the figures, is the large number of cases awaiting distribution. The President of the Juizado Especial Previdenciário told us that of the 881,901 cases filed by 2003, there were 743,917 (84.3 percent) still awaiting distribution as of early 2004. While processing of cases is largely automated, and there is extensive use of sentêncas padronizadas with judges signing off on hundreds of similar cases at once, the remaining obstacle is inputting the initial paper work. The juizado has the capacity to decide far more cases than it presently does. The President noted that although they are now producing over 20,000 decisions a month, automation would allow them to decide 100,000 easily. Hence, here, distribution, rather than a way of managing the workload, is an obstacle in its own right.

Although amounts, by law, are small, the monthly decisions now represent a bill of R$240 million for the state, averaging R$12,000 each. Because of the small size of the awards and their classification as “alimentos,” the state (INSS) is expected to pay them within months. Even here, there are delays, and after 26 months of functioning, the

\textsuperscript{104} http://www.cjf.gov.br/atlas/proc_tram_dis_jul_rem.htm
Juizado’s 29,674 definitive judgments (after any appeal, estimated to occur for 25 percent of the judgments) had produced 11,798 payments. Although filing has been simplified, and a lawyer is not required,\textsuperscript{105} the President also estimated that only about half of the potential claimants come to court.

\textsuperscript{105} 288,043 of the claims used lawyers; 485,302 used a facilitated kit for self-filing.
7. INSS Cases And Their Judicial Treatment

As shown in the accompanying statistical analysis, pension cases, and especially those from the INSS, account for a large and increasing part of the judicial workload. Only at the appeals level, the TRF3 indicated they represented 49.1 percent of all its distributions between 1989 and 2003, and 50 percent in the latter year. Filings have grown dramatically with the introduction of the juizados especiais federais which made possible the litigation of vast numbers of cases too small to merit treatment in the ordinary courts. (That is to say, the cases could have been submitted to the courts, but the plaintiff's return would have been outweighed by the costs.) The question addressed here is why these conflicts are so numerous and why they have required judicial resolution.

The explanation begins in the seven economic plans adopted by the Federal Government between 1986 and 1994. As regards pension benefits, the application of the standard adjustment mechanisms was frequently unclear and often required lengthy, subsequent discussions among the Legislative, Executive, and Judicial Branches. In the meantime, the recalculation scheme adopted by the INSS, perceived favoring its own interests, provoked a first round of law suits which gradually worked their way up to the Supreme Tribunal Federal (STF). For example, after the Plano Real introduced a transitory currency, the Unidade Real de Valor (URV) the INSS failed to apply it to its calculation of pensions in February, 1994, meaning that from then, until 1997 when it changed its practice, pension benefits were below the (eventually) legal amount. This was not the first or last such discrepancy, and the resolution, when finally provided by the Supremo Tribunal Federal, has not always found the INSS at fault. In 2003, the STF validated the INSS's application of the Índice Geral de Preços in readjusting pension values for the months of June 1997, 1999, 2000, and 2001. However, because the same resolution recognized the Índice Nacional de Preços ao Consumidor as preferable, it encouraged a flood of additional demands which would eventually reach its doors as well.

The STF decisions did not resolve the situation of the mass of individual claimants who still had to get their money from the INSS. INSS staff often found reasons to refuse the retroactive payments. Administrative appeals mechanisms, like the juntas de recursos and a Conselho de Recursos da Previdência Social (CRPS) are slow and markedly pro-INSS. Administrative relief is further impeded by many clients’ inability to provide the necessary documentation (a problem for those in rural areas or working informally). Thus, anyone wishing to collect the back claims, as well as those denied pensions or full benefits for other reasons, was forced into the courts.

A host of other factors add their own complications: the greater mobilization of civil society (including both professional and umbrella associations like the Confederação Brasileira de Aposentados e Pensionistas, COBAP, created in 1988) dating from the 1970s and its impact on pension policy and the judicialization of protests; judges and lawyers’ lack of preparation in pension law; a constitutional provision sending pension cases to the still less prepared state courts in comarcas without a federal vara; the increasing tendency for both plaintiff and defendant to appeal decisions, thereby delaying a final resolution and adding to the congestion of appellate courts; and problems in the pension system itself, its increasing drag on government finances, and the occasional diversion of funds to other uses. It is frequently suggested that the INSS and other state agencies have an institutional policy of delaying or refusing demands as a means of controlling their own cash flow.

If such a policy exists, its benefits have been eroded by the juizados especiais and their adoption of procedures to accelerate the treatment of the mass of usually quite similar cases, often without the need for a lawyer’s intervention. There is still a strong tendency for the INSS lawyers to create delays by resisting negotiated agreements and appealing any decision against the institute.
Trends for Regional Appellate Courts. As shown in Graph 3 and separately in Graph 7 below, growth rates for federal appellate courts have a slightly different pattern, rising to a peak in 2001 and then dropping off.

Graph III-7 — Second Instance Filings and Dispositions

As shown in Graph 8, the peak in the three variables tracked above in the period 1998-2000 is heavily influenced by a sudden surge in appeals in Region I (Brasilia) for which we have no real explanation. In a later section on sources of demand we begin to explore this phenomenon, but only in the region for which we have disaggregated data.

Graph III-8. Cases Sent to the Regional Appellate Courts (TRFs) by Region
For the years on which we have figures, the appeals rate (ratio of appeals to first instance decisions) doubles between 1999 and 2001 and then falls to its earlier level. Again, the reasons for the pattern merit further exploration, some of which we begin in a later section. We have used two methods to indicate the rate, one (ratio 1) based on our own calculation of cases distributed at the second instance over judgments at the first instance, and the second, based on the the CFJ figures on cases remitted to the second instance courts over first instance judgments. The latter figures (ratio 2) are available only from 1997 onwards, and while they show the overall pattern, the ratio is lower. The difference in the ratios does not have a good explanation – conceivably the TJs are distributing more of their backlog (and thus including in their distributions more cases from prior years). Alternatively, “casos remetidos” may only include a subuniverse of all appeals. Whatever the reason, the ratio of appeals to judgments reached exceptionally high levels – between 1.0 and 0.8 -- in the late 1990s and early 2000s, and even in recent years, at between 0.5 and 0.3 can be regarded as higher than desirable. Of course these ratios only approximate the appeals rate, as we do not know whether a smaller number of cases are generating multiple appeals or whether the rate is fairly uniform across all of them.

Graph III-9: Ratio of Second Instance Filings to First Instance Judgments

![Graph III-9: Ratio of Second Instance Filings to First Instance Judgments](image-url)
Trends for the Superior Tribunal de Justiça. The caseload for the STJ shows comparable historical trends to that of the STF so far as cases distributed and disposed.

**Graph III-10: Distributions and Dispositions for STJ, 1989-2003**

However, the trends for the two major types of appeals, agravos and extraordinarios are reversed, with the latter growing in importance (to 51.2 percent) over time.
Presumably this reversal is a good sign, although here further comparison of STJ and STF caseloads might reveal that the difference is simply in more agravos going directly to the latter. This also makes a case for comparative evaluations across jurisdictions. While we will also argue that the “judicial crisis” is not one but several crises, individual parts may well extend across court systems and can only be resolved by a coordinated approach. This has not been the Brazilian tradition, or for that matter the tradition in most justice systems, but it is increasingly necessary in an era of rising demand across the board and a tendency for litigation to go where it is easiest to enter. In short, where institutions focus only on their problems, one likely reaction is the transfer of the problems to somewhere else in the system.
111.3. Labor Courts

216 Labor courts don’t keep statistics on distribution, but they have a reputation for not using this to control their workload. Instead, the evolution of the statistics on cases received and decided, from 1941 to 2001 suggests a steady, but escalating growth and an ability to decide virtually 100 percent of what is presented. (Of course the cases-in-cases out measure does not tell us whether cases decided come from the current year, the prior year, or several years back).

Graph III-12: First Instance Cases Received and Adjudicated/Mediated, All Labor Courts

217 The same pattern is evident for the 24 Regional Tribunals and the Tribunal Superior de Trabalho. However, the latter has tended to fall behind from the mid '90s on, meaning further delays in reaching final judgments.
218 Nonetheless, the growth is not simply organic, and there is clear evidence of an increase in the level of litigation. One sign is the significant growth in the number of appeals, absolutely and in relation to the number of first-instance judgments. A second is the greater number of cases filed relative to the economically active population.
Another related trend is the drop in the percentage of cases decided by conciliation between 1980 and 2000. While the percentage fluctuates, there is a notable decline between 1985 and the following years.
Reports issued separately by several of the TRTs, as with the federal system, often provide statistics not available on the TST website. They are indicative of other issues facing the labor courts, of differences in how they handle them, and of some additional insights into the nature of their demand. The following analysis is based on data received from the Eighth Region (Pará). Figures on the sources of precatórios being handled during 2002, give an idea of which public entities are most often successfully sued in the labor courts. This chart refers to the number of awards, not the amounts.

**Table III-1: RT8 - Precatórios Levied, 2002**

<table>
<thead>
<tr>
<th>Entity</th>
<th>Number entered in 2002</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Banco Central</td>
<td>1</td>
<td>—</td>
</tr>
<tr>
<td>State of Pará</td>
<td>489</td>
<td>13.2 %</td>
</tr>
<tr>
<td>Other states</td>
<td>61</td>
<td>1.6 %</td>
</tr>
<tr>
<td>Foundations</td>
<td>341</td>
<td>9.2 %</td>
</tr>
<tr>
<td>Institutes (IBAMA, INSS, IPASEP, ITERPA, etc.)</td>
<td>183</td>
<td>4.9 %</td>
</tr>
<tr>
<td></td>
<td>1804</td>
<td>48.7 %</td>
</tr>
<tr>
<td>Municipality</td>
<td>568</td>
<td>15.3 %</td>
</tr>
<tr>
<td>Federal Government</td>
<td>173</td>
<td>4.6 %</td>
</tr>
<tr>
<td>Universities, Schools</td>
<td>84</td>
<td>2.2 %</td>
</tr>
<tr>
<td>Others</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
As precatórios affect only state entities, the following classification, by economic activity gives a second cut at the kinds of claims entered. As it indicates, most labor cases come from the private sector, not from public entities. Thus, the division noted above (federal courts hearing cases involving national workers; state courts hearing those for municipal and state employees) is not quite as clear-cut as first presented. However, public sector cases are still the minority and affect employees with a less permanent relationship with the respective government entity.

Graph III-18: RT8 —Origin of Actions by Activity, 2002

When the figures from Graph 18 are compared with data from the IBGE (on employment, by sector and by activity, by state, for 1997) there are some interesting similarities and variations. Industrial employment for example is 12.5 percent and gives rise to roughly the same proportion (13.1) of labor complaints. However, whereas services account for 28.5 percent of employment, they only generate 16.5 percent of the cases. Public administration accounts for 37.4 percent of employment and 3.5 percent of the cases filed – as explained, because most cases affecting them are heard by federal and state courts.
As compared to the federal courts, the labor jurisdiction has undergone a similarly dramatic rise in caseload (fivefold in fifty years), but has been able to keep abreast of demand more effectively. Several reasons account for its better performance: the wider, if diminishing use of conciliation, the greater number of judges and first and second instance courts, and the smaller amounts at stake, which make these courts look more like the juizados es\'eciales. In fact, the frequent suggestion that the labor jurisdiction be folded back into the federal courts often includes this last argument. As for the increasing demand, one reason, or part of the phenomenon, is the growing judicialization of labor conflicts and the greater litigiousness of the parties. Unfortunately, even the more disaggregated statistics of regions like Par\'\' do not allow a more detailed view and thus analysis of the sources of the growth, and thus a means of suggesting how it might be controlled. As the labor courts until recently received 49 percent of the national judicial budget, and there are current proposals to create more judgeships, it appears that the system itself is not widely questioned, despite the likelihood that the amounts invested (by the state and by the parties) far exceed the value of the awards.\textsuperscript{106} Clearly having 24 as opposed to five regional tribunals avoids delays at this level. However, this also could encourage appeals and the decidedly higher appeals rate. Nonetheless, most observers tend to believe those appealing (most often employers) do this because of anticipated delays and the opportunity to force settlements with the plaintiff.\textsuperscript{107} The high rate of appeals to the TST would tend to support this observation, as there definitely are delays here. Unfortunately, this is the type of issue even far better statistics would not allow us to explore.

III.1.4. State Courts

Number of First Instance Filings: for state courts, the aggregate statistics collected by BNDPJ do not usually track distributions or pending cases. Entries are generally limited to annual filings and judgments. As with federal justice, the overall trend is a rise in both, with judgments lagging behind overall demand. What we don't know of is whether there is a still larger gap composed of backlog from past years and undistributed cases or whether “entradas” always represent distributions (either because this is what how they are defined or because distribution is nearly automatic at the first instance).

\textsuperscript{106} We did speak with some labor lawyers who suggested it might be more economical for the state to simply pay the awards to the plaintiffs rather than investing in the court system.

\textsuperscript{107} Castelar (2000)
A few state courts do provide statistics on pending cases as well as filings and dispositions. Because the accumulation is proportionately not as large as in the federal courts, this suggests that the entrada-distribution gap does not exist and that court clearance rate has maintained a fairly uniform relationship to total filings, even to the extent (Minas Gerais) of judgments dropping when filings drop.
In the two cases above, the leap in filings and the real gap between cases disposed and pending appears to have occurred later than in the federal courts. As Rio de Janeiro’s time series only covers the past few years, it is hard to say when this occurred, but judging by the already hefty backlog, it apparently happened earlier than in Minas and Rio Grande do Sul.

Source: BNDPJ — the values for pending cases are estimated from 1999 onward.
For São Paulo we also only have figures from 1999 onward. As in Rio, the greatest growth (and the accumulation of backlog) appears to have occurred earlier, and the curve is thus flatter. As is evident from the chart, national trends are heavily influenced by those in São Paulo which accounts for roughly one-third of the first instance caseload in all states.

**Graph III-23: São Paulo, First Instance**

The expansion of backlog at the state (and federal) level has obvious implications for delays in resolving new cases, but to make this link we need to know more about its composition – or the age of cases currently being decided – information not available in the national databases and we suspect, simply not kept by the courts. To the extent backlog represents active cases, then many current dispositions may be cases filed years earlier. However, if backlog is largely composed of cases that have stalled along the way, the impact on delay would be far less. In this second scenario, courts might be resolving a majority of new filings within a reasonable time while accumulating a large number that are in effect going nowhere. As discussed in a later section, there are indications that the second explanation may be closer to the truth, and moreover, that the accumulated backlog represents a relatively narrow slice of the universe of types of filings. The evidence here is based on information from a few states, but it is consistent with findings from Bank-sponsored studies in other countries indicating that much backlog derives from party, not judge-caused inactivity, or from certain procedural obstacles – most notably the difficulties of identifying goods to attach in debt collection.
cases. Such cases may remain on the books for years, but are unlikely to ever reach disposition. While they remain inactive, they also do not interfere with courts’ handling of new filings.

228 Because of the different sizes of the states it is also useful to look at filings in terms of ratio to population as in Graph 24 below. The increase, over a six year period, from slightly over 4,000 to 6,000 cases per 100,000 inhabitants is dramatic, taking Brazil from a low medium to high medium range as compared to regional and international figures. When contrasted with the nation’s overall litigation rates, it also demonstrates that most of the growth and the bulk of the cases are in the states, as is also apparent (see Graph III-32, below) in the individual caseloads handled by state as opposed to national judges. As is apparent, São Paulo not only accounts for the major share of first instance filings because of its size. It also has a decidedly higher civil litigation rate.

Graph III-24: Civil Cases per 100,000 Inhabitants, State Courts

229 Second Instance State Courts (Tribunais de Justiça): Once again, the aggregate statistics only show filings and judgments, and given what we know about a few courts, we suspect “entries” are cases distributed, not filings. São Paulo alone is said to have a backlog of undistributed cases that have accumulated for several years. Given this interpretation, the pattern is a similar one, a constant, but escalating growth in workload with the judicial response (disposition) more or less keeping up but the gap widening considerably over the past six years.

109 In addition to the Bank studies (World Bank, 2002b and 2003a; CEBEPEJ, 2003; Simón 2002; González 2002), see Henderson et al (2004) for a discussion of problems in enforcement of debt collection cases, a major source of procedural paralysis.
The growth appears attributable both to the increase in first instance filings and in appeals rate. While the latter is almost indistinguishable in the graph below, a comparison of the two shows that while first instance judgments (and filings) have increased three-fold over the 12-year period, appeals have increased six-fold, meaning that the appeals rate has doubled. Nonetheless, the appeals rate at the state level is far lower than at the federal, and federal courts generally have a higher caseload for second instance (appeals) judges than do state courts.
Graph III-26: First Instance Judgments against Second-Instance Filings, all States

231 **Juizados Especiais.** The BNDPJ’s published statistics on the state Juizados Especiais are incomplete. These courts are often not automated at the state level, and there are strong indications that many states simply do not have systems installed for tracking their workload. The number of juizados for each state is often inconsistent or not supplied, and the categories used for data entry are not standardized (and usually not consistent with those used for the other courts – for example, sometimes cases are categorized as adjudicated, and others as resolved, the latter probably including alternative forms of solution). The following graphs are offered as illustrative of the situation in a few states that seem to collect statistics more reliably, but as they also demonstrate, in a fashion that makes cross-state comparison very difficult.
Graph III-27: Juizados Especiais — Percentage of Filings “Resolved” São Paulo\textsuperscript{110}

Some states provide more complete statistics as shown below.

Graph III-28: Number of Judgments from Juizados Especiais (Most Important States with Most Complete Statistics)

\textsuperscript{110} Here again we have an interpretational problem – whether “resolved” means closed with judgment, conciliated, dismissed for inactivity, or something else. This is the classification used by São Paulo, although it differs from that of other states.
As the last chart in this section indicates, while the juizados especiais have maintained a fairly high level of filings and judgments over the past five years, they still do not represent the majority of state filings. It also appears, based on the growth in ordinary cases, and the nature of the juizado workload, that they are probably attracting new users rather than removing cases from the ordinary state courts. This is not an unimportant service, but it will do little to reduce court congestion at the state level.

Graph III-29: Judgments from Juizados Especiais (Estimated).  

III.2. Summary of Findings on the Three Key Hypotheses (Caseload and Response)  

This initial analysis of trends in workload across jurisdictions and levels makes it clear that since the early 1990s, there has been a dramatic growth across the board and that this has created problems of congestion, and most likely, of delay. Of course these initial conclusions, which support the opinions offered by judicial experts and other analysts, could be tempered by a number of additional considerations, some of them discussed here, others covered in the next section, and still others identified as topics for further research. Among them are the following:

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The broken line represents statistics taken from the BNDPJ. The estimated value (solid line) includes statistics published by the TJ-SP which are not captured in the BNDPJ.
• We know, on the basis of findings from other court systems, and those produced in our initial work in São Paulo, that not all cases filed will be pursued by the claimants, and thus that many of those apparently left unresolved (pending or em tramitacão) may simply be awaiting definitive closure for lack of action. Depending on case closure policies and how courts keep their records (e.g. whether closures for this reason are actually recorded), a large number of pending cases may thus not represent demands the judges are actually expected to resolve. Our lack of good information on pending cases, on party strategies, and on record keeping, makes it hard to assess this situation in Brazil, but we suspect that the real backlog, especially at the first instance, may be considerably less than it appears.

• We also know, based on the same sources, that there is an enormous difference in the work required of judges, depending on the nature of the proceedings and conflicts. Debt and tax collection (ações de execução and execuções fiscais) are good examples of cases which are normally processed fairly rapidly, and in Brazil, as elsewhere in Latin America, they often make up a large portion of the judicial workload. Countries, like Spain, that have tried to rationalize and equalize the distribution process, often take the inherent complexity of different types of cases into account when assigning them to judges. The creation of specialized jurisdictions (for example for execuções fiscais or for bankruptcy) may serve a similar purpose. The first tend to attract a majority of these simple proceedings, while the second single out cases requiring more investment of judicial efforts. To the extent the available data allow us to explore these issues, we do so in the next section.

112 The most famous example is the well-known fact that only 2 to 10 percent of filings in U.S courts actually go to trial. So far as can be determined, not an easy task, up to 60 percent of the rest settle (are negotiated by the parties out of court) and the rest are eventually closed for lack of action by the parties or at the parties' request. (However, see Barr for a more conservative estimate of the level of settlement.) U.S. judges actively work to keep the number of trials within this range. In civil law countries, the figures are less dramatic, but a recent study in France (Doriat-Duban, 2001) suggests that about 25 percent of civil filings are settled out of court. In civil cases, the French have recently introduced a process whereby a juge de mise en état (rather like an instructional judge) meets with the parties early on to determine what issues will be included in the proceedings, encourage settlement, and otherwise simplify the case for the trial judge or judges.

113 We were told that in Brazil, as in many other countries, plaintiffs often file a case with no intention of pursuing it immediately. They are simply reserving their right to future action. The fifty percent of the ações de execução tracked in our São Paulo study that never progressed beyond filing may in part reflect this practice. (World Bank, 2003b).

114 Where a party has taken the extra trouble of filing an appeal, possibly paying an additional fee, we assume inactivity is less likely. However, if the appellant intends this as a dilatory maneuver or simply to discourage the other party, then appellate backlog may also include its share of cases, for all intents and purposes, dead in the water.

115 It is frequently observed that these cases become less important in more modern societies, and in some instances have been explicitly dejudicialized. This is one of the reasons behind the caution, expressed in Chapter I, against comparing caseloads without considering their composition.
Finally we know that the Brazilian judiciary has taken its own steps to speed the processing of certain routine cases, originating for the most part in unintentionally or intentionally poor service by administrative agencies. These include the requests for readjustments of pensions, like those handled nearly automatically in the São Paulo federal juizado especial. It is solutions like these that allow Brazilian judges to issue record numbers of decisions and respond to the truly explosive growth of demand in this area.

On a separate theme, we also know that delay is not only a consequence of how rapidly individual judges make decisions. When judgments are routinely appealed, as appears to be the case for the government when it loses even minor disputes, final resolution is complicated by the need to transfer these cases to higher courts, and the congestion that creates there. Only the Labor Courts have successfully addressed this problem, at least at the second instance, through their far higher number of regional tribunals. However, this solution has also required their absorbing nearly half of the national judicial budget. Applied to other jurisdictions it would require a similar growth in funding. The alternative solution, to limit appeals, is under discussion, but faces enormous resistance from judges, lawyers, and the clients who use the current system to their own advantage.

None of these qualifications undercuts the initial observations that the demand on Brazilian courts has grown explosively over the past decade, and that congestion and delay are problems. It does, however, suggest that the situation may be less critical than sheer numbers imply and that some of the contributing factors complicating the judiciary’s response lie outside its control.

In the following tables and graphs we summarize the situation described in detail in the earlier sections, to give a better idea of the overall growth patterns, the judiciary’s response, and how both affect the different types and levels of courts. In the next section, we try to disaggregate the patterns somewhat further, thus attempting to provide more insights into how they have affected the judiciary and which actors have most contributed to the overall phenomenon.

As the graph below demonstrates, while the growth in demand and workload began at roughly the same time for all, it has been most explosive in the state courts. Unfortunately the time series data for them covers the shortest period, and is less reliable in the early years, but their increasing levels of absolute and relative demand over the rest of the ‘90s are accurately reflected from thereon in.
Response patterns (numbers of cases adjudicated or otherwise disposed) parallel the growth rates, although the gap (and production of pending caseload or backlog) is most dramatic at the state level. This is nonetheless, the level at which judges have most increased their productivity, just not enough to catch up with rising demand.
The overall trends demonstrate still another Brazilian judicial paradox—they show an extraordinary judicial response to the new demands on the courts, and especially at the state level, but a continuing inability to keep up with demand. As noted above, a part of the explanation for the level of response lies in the adoption of mechanisms (automation, sentenças padronizadas, other types of “batch processing,” use of task forces to reduce backlogs in especially overloaded courts) intended to increase efficiency. The response is all the more admirable when one takes into account the lack of a comparable increase in the numbers of judges. Numbers of judges and court units have risen even over the six year period, but as demonstrated below, only the labor and federal courts seem to have benefited in terms of lower individual workloads. Unfortunately, we lack good time series data, but at least for the period 1999-2003, what we have illustrates the impact on the individual judge. Of course, these figures are aggregates, and as shown in Chapter II, there is an enormous difference among states in particular as to individual caseload. Thus the number of cases per judge shown below reflects the average, not extreme case scenario.

**Graph III-32: Annual First Instance Filings per Judge (1999-2003)**

In the above table as in the one below, estimates of real workload (and of potential overload) would also depend on a better understanding of the nature of the cases heard. Similarly, as regards dispositions, it would be important to know what “disposition” (saídas o ajuizados) means and whether it has the same meaning across jurisdictions.
At the very least, the comparisons do indicate that congestion is least within the labor courts and in fact tends to be declining, that at the federal level the situation has been stable, and that at the state level, filings and judgments per judge have nearly doubled over the five-year period. Despite their lower (compared to the state courts) and more stable workload, the federal courts have nonetheless accumulated a large backlog over the period (see Graph III-3 above) and have reduced, rather than increased their productivity. Before deciding the federal judges should just work harder, it would be desirable to understand better what they are deciding and whether its composition has changed over the past decade. While federal judges’ productivity now approximates that of the labor judges, there are also apparent differences in the nature of the cases seen, and the labor courts’ greater opportunities for short-circuiting the trial process through the use of abbreviated proceedings, and collective and negotiated agreements. In any case, and without further information on the caseload itself, it bears mentioning that even the federal and labor judges’ 700-800 judgments per year approaches the peak numbers recorded in Latin America, and that the incoming cases per judge are the highest seen in the region. That Brazilian judges can manage this output rate, in a system with some of the most generous opportunities for interlocutory (prior to judgment) appeals, is also worth noting.

This last comment raises the question as to how much more productivity can be increased absent more basic changes to the structure of the legal system. The most dramatic increases in productivity have been for mass filings of “administrative cases” as in the automated small claims courts hearing pension disputes. As noted above, insiders believe they can churn out many times the number of judgments once they resolve the obstacles to inputting basic documents. This is a tremendous accomplishment in and of itself, but one would hardly want to promote the mechanisms for the more complex cases traditionally heard by the courts. In fact there is a second question as to whether Brazil’s
courts should even been hearing these pension cases – they have leaped into the breach, but to compensate for administrative incompetence. Perhaps the automation investments should go to the administrative agencies so they can do their work better, and thus free up the courts to focus on the issues they are designed to treat. We will return to this question in later chapters, and now address, as best we can, the related issues of the composition of demand, how it has changed over time, and what this implies for real as opposed to nominal judicial workload.

### III.3. An Exploration of the Sources of Growth in Demand, Its Impact, and the Differences in Judicial Response

- **Hypothesis 4**: The growth in demand has been uniform across all types of cases
- **Hypothesis 5**: The impact of the growth has thus affected all courts in all systems equally.
- **Hypothesis 6**: Judicial response to the growth has also been uniform across all types of cases and courts

242 These are really the null hypotheses as we began with a belief that they would not be true. However, lacking any particular sense as to where growth would be most pronounced and how judges would handle it, we simply attempted an open ended exploration of potential differences. There are several reasons for wanting this kind of analysis, and for recommending that courts organize their own databases to allow it:

- First, as discussed above, aggregate statistics are only an indication of real workload. Different types of cases make different requirements on judges’ time and have different implication for levels of congestion, delay and so on. Given the existence of specialized jurisdictions, where growth is most pronounced for certain types of cases, it will affect some types of courts more than others. While this latter phenomenon can be tracked by looking at which courts accumulate more of the caseload, it also is helpful to know which of the cases they see are accounting for most of the growth.

- Second, different types of cases provide benefits to different publics. It is thus important to know at least what kinds of cases are entering, and preferably which parties are involved. This helps the courts know whom they are serving, with what kinds of results, and with what imputed impact on broader societal goals.

- Third, once judiciaries better understand their own caseload they can take steps to handle it better – ranging from the redistribution or creation of more court units in the areas most affected, to working to combat the exogenous factors (abusive litigants, overly complex codes) contributing to higher levels of growth and congestion. For this, it will also be important to know the differentiated responses to different types of cases – for example, which cases are being resolved, and
which ones are not. As indicated below, this is one of the most perplexing issues, and while we attempt to explore it, the existing data do not allow us to get very far in this endeavor.

243 We believe courts already collect some of the information needed for this kind of analysis. However, based on what they include in their annual reports and websites, and on discussions with court leaders, we don’t think it is being used adequately. Also, as discussed in Chapter II, the form in which data are initially entered in the courtroom may make it difficult to pull out the varying trends. Given these impediments, our own analysis is only illustrative in most areas, although it is suggestive of several potential conclusions or hypotheses meriting further research: that much of the growth lies in a few areas, that much of it comes from relatively simple cases, and that these cases nonetheless have a high appeals rate, thus exacerbating delay and putting more pressure on the appellate courts. The increasing importance of cases involving government entities, as both plaintiffs and defendants, is also apparent. Not all the growth in workload can be attributed to them, but they certainly have an active or passive role in a good part of it.

III.3.1. Federal Courts

244 Unfortunately the major aggregate databases (BNDPJ and that managed by the CJF) do not yet break down cases by major area. (The system being developed by the CJF will soon change that situation). Hence, exploring nation-wide trends in the composition of demand is not possible. We were able to get some less aggregated figures from the TRFs allowing us to track a few general patterns in the appellate caseload across time. Here we use statistics from Region 3 (São Paulo) provided by the statistics office for the Tribunal Regional. This allowed us to break down appeals by major categories, and thus reveal the varying weight of different case types. As shown in Graph 34, this begins to provide an idea of the composition of demand and its changes over time. A second graph, also divided by subject matter, shows differences in the types of cases referred by the TRF to the STF and STJ.
Graph III-34: Cases Distributed within the Tribunal Regional Federal, Third Region

Graph III-35: Cases Sent from the Tribunal Regional Federal, Third Region, to the STF and STJ

245 One further interesting development, also from São Paulo refers to the composition of pending (as opposed to entered) cases again at the appellate level. As shown below, here tax cases (execuções fiscais) take up the majority of the backlog, in contrast to their lower weight among cases filed in the appellate court.
Table III-2: São Paulo TRF3, Pending Cases by Type (classe) as of December 12, 2003 (percentages of total)

<table>
<thead>
<tr>
<th>Type</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Habeas data</td>
<td>0.0</td>
</tr>
<tr>
<td>processos cíveis</td>
<td>1.6</td>
</tr>
<tr>
<td>ações sumaríssimas</td>
<td>0.9</td>
</tr>
<tr>
<td>feitos não contenciosos</td>
<td>1.3</td>
</tr>
<tr>
<td>ações diversas</td>
<td>6.1</td>
</tr>
<tr>
<td>execuções diversas</td>
<td>0.6</td>
</tr>
<tr>
<td>execuções fiscais</td>
<td>58.7</td>
</tr>
<tr>
<td>ações ordinárias</td>
<td>24.6</td>
</tr>
<tr>
<td>reclamações trabalhistas</td>
<td>0.0</td>
</tr>
<tr>
<td>processos criminais</td>
<td>2.7</td>
</tr>
</tbody>
</table>

In general, the following trends can be identified in Region III, many of which we suspect (but for lack of data cannot conclude) prevail throughout the federal courts.

- Appeals from the federal first to second instance are now over half (59.9 percent) for pension cases. There is a rapid growth from 1991 on, and after 1993, these cases replaced those for taxes (now 22.5 percent) as the most common federal appeal. It should be noted that this does not mean pension and tax cases have higher appeals rates; the greater number of appeals most probably reflects their being the most common cases in the first instance. It should also be noted that because pension cases heard by the federal juizados especiais have restrictions on the appeals that can be entered, they should not push up the rate further, and may actually decrease it (if some cases formerly heard by the first instance civil courts are now redirected to the small claims jurisdiction).

- The same general pattern also holds for last instance appeals to the STJ and STF. The third most common category at the second instance, precatórios, nearly disappears, however, in the highest courts.

- As we don’t know the amount of delay between first, second, and third instance decisions, or the incidence of multiple appeals for different types of cases, it is difficult to track actual appeals rates. However, it is interesting that peaks in certain types of cases are reached earlier in the higher court than in the lower one. This may coincide with some landmark decision in the former, discouraging these
types of cases from being appealed. They also may be explained by certain government policies as regards use of appeals. It has been observed for example that the Cardoso administration and its AGU Gilmar Mendes took steps to limit repeat appeals of many routine cases from 2000 on, temporarily cutting the number forwarded to the STF by half.\textsuperscript{116}

- Finally, the different incidence of types of cases in the pending as opposed to appeals categories is suggestive of delays in handling tax cases in particular. As they have not represented the bulk of new second instance appeals since the early ‘90s, it appears that they have been accumulating over some time and are still processed less rapidly. This, it should be noted, coincides with our earlier speculation that backlog may overrepresent certain types of cases, and thus that its linkage to delay may be similarly restricted. As discussed below, tax cases also appear to be problematic at the state level.

247 Because all cases seen by the federal courts inevitably involve a government actor, the key questions here refer to which one – clearly INSS and the tax agency. As federal workloads show a lower growth rate than state ones, the weight of government agencies in the latter is another critical question, and among those addressed below.

\textbf{III.3.2. Caseload Structure at the State Level}

248 \textit{Civil Versus Criminal Cases.} The aspect of the question addressed here has two parts: how important are criminal versus criminal cases in general, and in explaining the growth of the state caseload? In the aggregate as shown below, civil cases have remained more important, although the ratio of civil to criminal cases varies over the period, between 4.1 percent and roughly 3.3.

\\textsuperscript{116} We are indebted to Matthew Taylor for calling this to our attention. See “Governo Federal é Maior Cliente Do STF,” \textit{Folha De São Paulo}, February 15, 2004.
Because large states (e.g. São Paulo with 56 percent of the total caseload) tend to shape the averages, it is useful to track variations among the states, as shown below.

Graph III-37: Ratio of Civil to Criminal First Instance Filings, States with High Values (Alagoas, Goiás, Piauí, São Paulo), with lowest values, (DF, Minas Gerais, Rio Grande do Sul, Santa Catarina), and the Average (middle line) for the Remainder.

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117 Figures for 2003 had not been completely published in the BNDPJ as of the date of this work.

118 In tracking the average values (for the rest of the states), Amazonas, Bahia, Ceará, Pernambuco, Rio Grande do Norte y Roraima were excluded for lack of statistics or inconsistencies in those provided. Included are Acre, Amapá, Espírito Santo, Maranhão, Mato Grosso do Sul, Mato Grosso, Pará, Paraíba, Paraná, Rio de Janeiro, Rondônia, Sergipe, and Tocantins.
Again, we simply note, that these trends should be recognized and explored by judicial leaders. One further difference we noted (but have not shown here) refers to substantial changes in the ratios for certain states over the past six years, in some cases dropping or rising by as much as a factor of two. It would be important to explore the reasons for this change and to ensure distribution of resources matches shifting needs. (Is it for example a reflection of changes in the crime rate or a consequence of police and prosecutorial performance? Has this created greater or lesser congestion and delays in criminal courts or are they adjusting readily?) For a country so concerned with crime and impunity these are important questions, and whatever the courts’ real responsibility, they need to address them seriously. We have seen little indication that anyone is paying attention to these tendencies, either within or across states although the capacity to do so clearly already exists. However, absent a statistical office charged with doing this kind of analysis, it is unlikely the potential will be used.

Composition of Civil Caseload. Because civil cases remain the vast majority of first instance filings, and thus a major source of the expanding caseload, we were interested in knowing more about their composition and origin. Unfortunately, it is again difficult to break down the categories used in the major aggregate databases (CJF and BNDPJ). Using data from individual states is complicated by the absence of cross-state standardized categories for entering data and the fact that many states seem to lack any official system for doing so at the courtroom level. Thus while we cannot do national comparisons, we can review trends within some states. Here we use two indicative cases: São Paulo’s statistics on active cases (pending plus new entries) and Rio Grande do Sul’s data on distributions to the appellate court (TJ).

Graph III-38: São Paulo, Active Cases, First Instance (Percentage of Total)
As noted above, the table below is not for first instance filings, but rather for the appeals court. Unfortunately, to the extent state courts disaggregate filings by types of cases, they usually do this at the second, not first instance. São Paulo, above, is an exception.
Table III-3: Rio Grande do Sul – Civil Cases Distributed to TJ by Type of Action, 2002

<table>
<thead>
<tr>
<th>NATURE</th>
<th>QUANTITY</th>
<th>PERCENTAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direito privado não-especificado</td>
<td>36.271</td>
<td>20,26</td>
</tr>
<tr>
<td>Negócios jurídicos bancários</td>
<td>32.604</td>
<td>18,21</td>
</tr>
<tr>
<td>Previdência pública</td>
<td>17.156</td>
<td>9,58</td>
</tr>
<tr>
<td>Direito tributário e fiscal</td>
<td>10.386</td>
<td>5,80</td>
</tr>
<tr>
<td>Servidor público</td>
<td>10.067</td>
<td>5,62</td>
</tr>
<tr>
<td>Direito público não-especificado</td>
<td>9.363</td>
<td>5,23</td>
</tr>
<tr>
<td>Responsabilidade civil</td>
<td>8.551</td>
<td>4,78</td>
</tr>
<tr>
<td>Alienação fiduciária</td>
<td>7.453</td>
<td>4,16</td>
</tr>
<tr>
<td>Família</td>
<td>5.722</td>
<td>3,20</td>
</tr>
<tr>
<td>Arrendamento mercantil</td>
<td>5.382</td>
<td>3,01</td>
</tr>
<tr>
<td>Locação</td>
<td>3.656</td>
<td>2,04</td>
</tr>
<tr>
<td>Responsabilidade civil em acidente de trânsito</td>
<td>2.606</td>
<td>1,46</td>
</tr>
<tr>
<td>Seguros</td>
<td>2.418</td>
<td>1,35</td>
</tr>
<tr>
<td>Licitação e contrato administrativo</td>
<td>2.335</td>
<td>1,30</td>
</tr>
<tr>
<td>Promessa de compra e venda</td>
<td>2.242</td>
<td>1,25</td>
</tr>
<tr>
<td>Previdência privada</td>
<td>2.114</td>
<td>1,18</td>
</tr>
</tbody>
</table>

Where is the State Workload Going and How is It Handled? Given the problems with the aggregate caseload data, even on a state-by-state basis, another way of addressing case composition and introducing still a second set of questions is to look at where the cases are going. Brazilian courts tend to be organized by specializations, especially in the more populated urban areas. Intuitively, this suggests that when the heaviest growth occurs in specific legal areas, certain types of courts will experience higher rates of workload growth. As the distribution by specialization is anything but uniform, congestion can be combatted by having more courts dedicated to the most active areas. The following table shows the distribution of specialized first instance courts in the capitals of six states. The numbers of court units in the interior are given for comparison, but as few of these are specialized, only the aggregate is shown.
While these patterns might make sense if organized to reflect the varying levels of demand, there are indications that, if this ever was the case, it no longer matches reality. As shown below, this appears to hold at least for the three court systems from which we have data. The data from Pernambuco are especially dramatic – 92 percent of the distributions in 2003 went to two varas covering municipal tax and fee collections. Although these are inherently simple cases, the disproportionality is still impressive.

Table III-5: Recife, PE, Filings Distributed to First Instance Courts (Varas), December, 2003

<table>
<thead>
<tr>
<th></th>
<th># varas</th>
<th># Cases</th>
<th>%</th>
<th>Most Common</th>
</tr>
</thead>
<tbody>
<tr>
<td>varas cíveis</td>
<td>23</td>
<td>687</td>
<td>2.1</td>
<td>outros ordinários</td>
</tr>
<tr>
<td>varas de fazenda publica</td>
<td>8</td>
<td>261</td>
<td>0.8</td>
<td>outros ordinários</td>
</tr>
<tr>
<td>varas de executivo fiscal estadual</td>
<td>2</td>
<td>236</td>
<td>0.7</td>
<td>executivo fiscal estadual</td>
</tr>
</tbody>
</table>

119 These numbers are approximations as very few of them are found on the state courts’ websites, and most have been taken from published statistical reports or from lists of court phone numbers. Moreover, they do not always coincide with the data available in the BNDPJ.
<table>
<thead>
<tr>
<th>Area</th>
<th># varas</th>
<th># Cases</th>
<th>% active</th>
<th>% new</th>
<th>% judgments</th>
</tr>
</thead>
<tbody>
<tr>
<td>cível</td>
<td>30</td>
<td>27.3</td>
<td>24.5</td>
<td>14.5</td>
<td></td>
</tr>
<tr>
<td>falência e concordata</td>
<td>3</td>
<td>1.0</td>
<td>0.3</td>
<td>0.4</td>
<td></td>
</tr>
<tr>
<td>família</td>
<td>18</td>
<td>9.4</td>
<td>20.8</td>
<td>18.5</td>
<td></td>
</tr>
<tr>
<td>sucessões</td>
<td>5</td>
<td>3.6</td>
<td>3.6</td>
<td>2.6</td>
<td></td>
</tr>
<tr>
<td>fazenda publica</td>
<td>7</td>
<td>14.5</td>
<td>14.5</td>
<td>4.1</td>
<td></td>
</tr>
<tr>
<td>execuções fiscais</td>
<td>5</td>
<td>15.5</td>
<td>3.2</td>
<td>2.5</td>
<td></td>
</tr>
<tr>
<td>registro publico</td>
<td>2</td>
<td>0.9</td>
<td>1.7</td>
<td>1.4</td>
<td></td>
</tr>
<tr>
<td>infância e juventude</td>
<td>5</td>
<td>2.2</td>
<td>3.7</td>
<td>4.0</td>
<td></td>
</tr>
</tbody>
</table>

253 Workload appears more evenly distributed in Ceará, with tax cases representing a far lower proportion of the new filings, although a relatively larger share of the backlog.

Table III-6: Fortaleza, CE, Percentage of Active Cases, New Filings, and Judgments, First Instance (Varas), (November, 2003)\(^{120}\)

\(^{120}\) The juizados especiais are excluded.
Table III-7: Fortaleza, CE, Cases per Judge per Month

<table>
<thead>
<tr>
<th>VARA</th>
<th>#Varas</th>
<th>Filings per judge</th>
<th>Judgments per Judge</th>
</tr>
</thead>
<tbody>
<tr>
<td>fazenda publica</td>
<td>7</td>
<td>208.6</td>
<td>49.0</td>
</tr>
<tr>
<td>execuções criminais</td>
<td>1</td>
<td>148.0</td>
<td>132.0</td>
</tr>
<tr>
<td>juizado especial</td>
<td>20</td>
<td>119.0</td>
<td>167.1</td>
</tr>
<tr>
<td>família</td>
<td>18</td>
<td>116.4</td>
<td>85.5</td>
</tr>
<tr>
<td>registro publico</td>
<td>2</td>
<td>88.0</td>
<td>59.0</td>
</tr>
<tr>
<td>cível</td>
<td>30</td>
<td>82.1</td>
<td>40.3</td>
</tr>
<tr>
<td>infância e juventude</td>
<td>5</td>
<td>75.2</td>
<td>66.4</td>
</tr>
<tr>
<td>Sucessões</td>
<td>5</td>
<td>72.0</td>
<td>43.6</td>
</tr>
<tr>
<td>execuções fiscais</td>
<td>5</td>
<td>64.0</td>
<td>41.2</td>
</tr>
<tr>
<td>execuções de penas alternativas</td>
<td>1</td>
<td>24.0</td>
<td>7.0</td>
</tr>
<tr>
<td>justiça militar</td>
<td>1</td>
<td>17.0</td>
<td>33.0</td>
</tr>
<tr>
<td>transito</td>
<td>2</td>
<td>12.5</td>
<td>2.5</td>
</tr>
<tr>
<td>falência e concordata</td>
<td>3</td>
<td>10.7</td>
<td>10.7</td>
</tr>
</tbody>
</table>

However, when average filings and judgments are considered, it is apparent that neither the workload nor the judicial response is evenly distributed.
A third example from Amazonas also suggests differences in productivity among the different types of courts. Again those dealing with fiscal matters have the largest backlogs and some of the lowest productivity.

Table III-8: Amazonas — Monthly Productivity of Trial Courts, Averages (April 2003 — March 2004)

<table>
<thead>
<tr>
<th>Varas</th>
<th># of Varas</th>
<th>Disposed Cases</th>
<th>Active Cases (February 2004)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>On merit</td>
<td>Agreements</td>
</tr>
<tr>
<td>fazenda pública estadual</td>
<td>11.5</td>
<td>11.0</td>
<td>24.0</td>
</tr>
<tr>
<td>fazenda pública municipal</td>
<td>12.0</td>
<td>3.0</td>
<td>46.0</td>
</tr>
<tr>
<td>dívida ativa estadual</td>
<td>16.0</td>
<td>95.0</td>
<td>1.0</td>
</tr>
<tr>
<td>Cíveis</td>
<td>11.4</td>
<td>2.9</td>
<td>8.0</td>
</tr>
<tr>
<td>do interior</td>
<td>67</td>
<td>17.4</td>
<td>7.6</td>
</tr>
<tr>
<td>infância juventude</td>
<td>37.0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Família</td>
<td>2</td>
<td>72.0</td>
<td>96.5</td>
</tr>
</tbody>
</table>

While hardly conclusive and far from uniform, the evidence from the three states is suggestive of several characteristics of the growing demand on state courts and the judicial response to it:

- Growth tends to be skewed to certain narrower areas — most notably tax collection—and thus has its greater effects on a lesser number of courts
- While tax collection cases are theoretically simple, there are apparent delays in their resolution (possibly a failure to resolve them at all), thus accounting for a
still larger share of the accumulating backlog. In São Paulo we found similar patterns. Execuções fiscais were 29.6 percent of cases distributed during 2002 and 51.3 percent of the active cases. Meanwhile they accounted for only 14.23 percent of all judgments and 35.77 percent of closures without judgment.121

- Despite the high representation of tax cases in new filings and active workload, the number of courts assigned this speciality tend to be few (never more than 13 percent of the total units).

- Certain courts, those dealing with family and related issues in particular, and the juizados especiais, show a relatively greater ability to keep up with their caseload, as measured by a higher number of judgments and lesser backlog accumulation.

257 Hence, to the extent we can generalize from these limited cases, it appears that growth in demand on state courts has been anything but uniform across the various types of cases, and that the ability to respond to it has been likewise inconsistent. While tax collection cases appear to be the most problematic in all regards, we need far more information to understand what is happening to them. The problem may not be judicial overload (although for some states it would be hard to see this otherwise) but rather procedural obstacles that prevent cases from being resolved. It also could originate in an excessive workload for the state lawyers assigned to litigate these cases, or some flaws in their incentive system. The high proportion of such cases closed without judgment in Amazonas and São Paulo is consistent with all these explanations, indicating the need for more detailed examination of the phenomenon to determine its causes as well as more information on the reasons for closure (prescription, withdrawal of the claim, payment?). Cases may also be awaiting appeals and thus creating a large backlog for this reason. Here the data from Rio Grande do Sul (Table 4) suggests otherwise with tax cases constituting only 5.8 percent of the civil cases distributed to the TJ. However, that is only one state, and thus hardly evidence of a trend.

258 As this exercise indicates, even identifying macro-trends is made difficult by differences in state court organization, record keeping, and how statistics are presented. Getting to the explanations behind these trends would require still more detail, and of course, greater standardization of record keeping. A common understanding of what is being measured and why would help individual states track changes in performance, identify problems, and also facilitate comparison with other state systems—helpful not only for researchers, but for each state itself. While it is possible that what is published for external readers does not represent the state courts’ own use of their statistics, we suspect that further use is not that great. The product they present for external inspection is neither highly intelligible nor highly impressive—one wonders what Amazonas thinks readers will make of the 115,000 active municipal tax cases against the 61 monthly dispositions, or how Ceará evaluates and expects to be evaluated the 25 percent clearance rate in its varas for fazenda pública. Based on what information we have, we cannot offer further analysis or explanations, but we can point to disturbing trends and to the need for

121 Data from Relatório Anual de Gestão, 2002.
the courts to recognize and deal with them. As many of these trends do involve government litigation, they should also be captured by and of concern to the state executive and the PGE. The problems doubtless affect and are affected by all of them, and thus beyond their recognition will require a joint effort at solution.

III.3.3. Structure of Caseload in the State Juizados Especiais

259 As the juizados especiais were intended to reduce some of the pressure on the ordinary trial courts, we are also interested in understanding the composition of their caseload and how well they handle it. As a first cut, we look at overall filings and judgments as derived from the (partially complete) data provided by the BNDPJ.

Graph III-39: Cases Disposed in the Juizados Especiais, All States

260 Although the data are partial (with many states not providing this information to the BNDPJ), it is apparent that while judgments were rising until 2003 (and possibly afterwards – the drop may be delays in providing data), the total number of judgments falls far short of the total state caseload. Hence even were these all cases that would have gone to the ordinary courts, the impact on congestion would still be modest. As there is reason to believe many are “new” cases, the real impact is probably far less. We will only look in detail at civil cases as this is the area where any impact on decongesting the ordinary courts would be most important.

261 Civil Cases seen by Juizados Especiais: Here again we are forced to use data provided by the few states offering them in more disaggregated form. Comparison is difficult, not only because states handle their statistics differently. There are also apparent differences in the nature of demand, partly because of the local context, but also because of how the state judiciaries have organized the small claims services. For example, in Rio de Janeiro, consumer complaints are a major source of demand. Of a total of 202,164 cases filed in the nearly 50 Juizados Especiais Cíveis (130,006 of them
coming from the capital city), 62,141 (31 percent) represented complaints involving 10 companies and 40,944 (20 percent) involved only the local phone company – Telemar.122

**Table III-9: Rio de Janeiro, Corporate Defendants in Juizados Especiais**

<table>
<thead>
<tr>
<th>Name of Company</th>
<th>Number of Actions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Telemar</td>
<td>40944</td>
</tr>
<tr>
<td>CERJ</td>
<td>9946</td>
</tr>
<tr>
<td>Light</td>
<td>3893</td>
</tr>
<tr>
<td>Credicard</td>
<td>2035</td>
</tr>
<tr>
<td>Fininvest</td>
<td>1230</td>
</tr>
<tr>
<td>CeA</td>
<td>788</td>
</tr>
<tr>
<td>Cartão Unibanco</td>
<td>771</td>
</tr>
<tr>
<td>Banco do Brasil</td>
<td>668</td>
</tr>
<tr>
<td>Ponto Frio</td>
<td>645</td>
</tr>
</tbody>
</table>

122 Mondaini offers a critical analysis of the juizados especiais civis (small claims courts handling civil cases), noting, as have others, that they currently risk falling into the delay characteristic of the ordinary state courts (Justiça Comum). He links this to the heavy (80 percent) use for consumer protection claims and the abusive practices of the companies involved, which, in their defense claim that "... o próprio Juizado acabou por assumir uma relação paternalista com o consumidor, tornando-se por isso um meio fácil de ganhar dinheiro devido à sua gritante parcialidade". On the basis of interviews in 13 juizados especiais in the City of Rio de Janeiro he contests the companies’ view noting that “a imagem de um consumidor mal-intencionado que procura diretamente o Juizado, sem tentar um acordo prévio, visando um beneficio financeiro extra, não resiste aos dados empíricos apresentados a seguir”:

He provides data on the educational background of the users, noting that this indicates clients are not primarily the most marginalized, but even in poorer areas tend to be better educated, and presumably more aware of their rights.

**Rio de Janeiro — level of education of plaintiffs in JECs**

<table>
<thead>
<tr>
<th>Level Completed</th>
<th>Richer areas</th>
<th>Poorer areas</th>
<th>total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illiterate</td>
<td>0%</td>
<td>2%</td>
<td>1%</td>
</tr>
<tr>
<td>Basic Education</td>
<td>13%</td>
<td>27%</td>
<td>20%</td>
</tr>
<tr>
<td>Middle School</td>
<td>35%</td>
<td>48%</td>
<td>41%</td>
</tr>
<tr>
<td>Higher Education</td>
<td>52%</td>
<td>23%</td>
<td>38%</td>
</tr>
</tbody>
</table>

He adds that 80 percent of those interviewed reported an attempted conciliation before going to the courts, and that 82 percent of the respondents claimed their legal action was only to resolve a problem, with only 18 percent requesting a monetary award. Giving the growing demand in such cases he concludes that it will soon be necessary to introduce collective actions in the JECs as well.
262 As a consequence, the state judiciary has coordinated with Telemar to set up a special conciliation service, the Expressinho, attached to the juizados, where clients can first attempt to reach an agreement with the company. The Tribunal de Justiça also recently published a study, one of the few examples of a court using its statistics for this type of analysis, documenting the incidence, content, trajectories and outcomes of these and other consumer complaint cases involving the same frequent defendants. Among its conclusions were that banks and public utilities, much like the government, had a practice of not responding adequately to legitimate complaints (legitimate, it appears, because in the end the plaintiffs usually won), thus forcing the complainants into court, and counting on judicial delays and appeals to postpone payment and so reduce their real monetary losses. Like the government they also apparently counted on many complainants not bothering to pursue the judicial route.

263 As indicated in the data provided by Amazonas, the workload there is quite different. Even assuming that consumer complaints might take up most of the area of indenizações diversas, they would at most reach 32.7 percent of all filings. Debt collection and related contract cases (execuções extrajudiciais) here come to over half the caseload.

Table III-10: Amazonas, Juizado Especiais Cíveis, 2003 Nature of Complaints. (Percentages)

<table>
<thead>
<tr>
<th>Nature of Complaints</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>acidentes de trânsito</td>
<td>0.03</td>
</tr>
<tr>
<td>indenizações diversas</td>
<td>32.7</td>
</tr>
<tr>
<td>Despejos</td>
<td>1.4</td>
</tr>
<tr>
<td>Possessórias</td>
<td>3.7</td>
</tr>
<tr>
<td>cobrança de dívidas</td>
<td>29.7</td>
</tr>
<tr>
<td>execuções extrajudiciais</td>
<td>14.7</td>
</tr>
<tr>
<td>Outras</td>
<td>17.8</td>
</tr>
</tbody>
</table>

264 For more detailed information, samples and academic studies are the only source, unfortunately too limited in their scope to allow us to generalize. One study done in a São Paulo small claims court with a sample of 3,174 civil cases provides additional information on the use of the juizados as shown in the following tables.

---

### Table III-11: Identity of Plaintiff and Defendant, São Paulo

<table>
<thead>
<tr>
<th></th>
<th>Plaintiff Frequency</th>
<th>Plaintiff %</th>
<th>Defendant Frequency</th>
<th>Defendant %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual</td>
<td>3,150</td>
<td>99.2</td>
<td>1,330</td>
<td>41.9</td>
</tr>
<tr>
<td>Organization</td>
<td>24</td>
<td>0.8</td>
<td>1,844</td>
<td>58.1</td>
</tr>
<tr>
<td>Total</td>
<td>3,174</td>
<td>100</td>
<td>3,174</td>
<td>100</td>
</tr>
</tbody>
</table>

### Table III-12: Type of Conflict, São Paulo

<table>
<thead>
<tr>
<th>Type of Conflict</th>
<th>Frequency</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consumer Complaint</td>
<td>1,550</td>
<td>49.2</td>
</tr>
<tr>
<td>Traffic Accident</td>
<td>672</td>
<td>21.3</td>
</tr>
<tr>
<td>Landlord-tenant</td>
<td>301</td>
<td>9.6</td>
</tr>
<tr>
<td>Neighborhood</td>
<td>242</td>
<td>7.7</td>
</tr>
<tr>
<td>Other</td>
<td>385</td>
<td>12.2</td>
</tr>
<tr>
<td>Total</td>
<td>3,150</td>
<td>100</td>
</tr>
</tbody>
</table>

### Table III-13: Value of Demand (minimum salaries)

<table>
<thead>
<tr>
<th>Value Range</th>
<th>Frequency</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>To 1,99</td>
<td>393</td>
<td>12.5</td>
</tr>
<tr>
<td>2 – 3,99</td>
<td>462</td>
<td>14.7</td>
</tr>
<tr>
<td>4 – 5,99</td>
<td>402</td>
<td>12.8</td>
</tr>
<tr>
<td>6 – 7,99</td>
<td>282</td>
<td>9</td>
</tr>
<tr>
<td>8 – 9,99</td>
<td>250</td>
<td>7.9</td>
</tr>
<tr>
<td>10 – 14,99</td>
<td>384</td>
<td>12.2</td>
</tr>
<tr>
<td>15 – 19,99</td>
<td>325</td>
<td>10.3</td>
</tr>
<tr>
<td>20</td>
<td>235</td>
<td>7.5</td>
</tr>
<tr>
<td>20,01 or more</td>
<td>416</td>
<td>13.2</td>
</tr>
<tr>
<td>Total</td>
<td>3,149</td>
<td>100</td>
</tr>
</tbody>
</table>
Forms of termination of civil cases, juizados especiais estuduais. Juizados especiais are also characterized by a greater use of conciliation to resolve cases. This is supposed to accelerate the process, and provide greater user satisfaction for the types of cases they see. Rates of agreements recognized by the judge (homologado) do tend to be higher, although the incidence for the three states covered varies greatly. The first again comes from the São Paulo study and thus is based on a sample rather than court statistics.

Table III-14: São Paulo — Type of Solution

<table>
<thead>
<tr>
<th>Type of Solution</th>
<th>Frequency</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agreement</td>
<td>1,363</td>
<td>43</td>
</tr>
<tr>
<td>Judgment on merits</td>
<td>772</td>
<td>24.3</td>
</tr>
<tr>
<td>Closure without judgment</td>
<td>53</td>
<td>1.7</td>
</tr>
<tr>
<td>Claim withdrawn</td>
<td>985</td>
<td>31</td>
</tr>
<tr>
<td>Total</td>
<td>3,173</td>
<td>100</td>
</tr>
</tbody>
</table>

For comparison's sake we also look at termination of cases in two other states, Acre and Amazonas, for which there are published data.

Table III-15: Type of Juizado Especial Disposition, Acre 1998

<table>
<thead>
<tr>
<th>Type of Disposition</th>
<th>Juizado Especial Cível</th>
<th>Juizado Especial Criminal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judgment on Merit</td>
<td>1.210</td>
<td>14</td>
</tr>
<tr>
<td>Agreement</td>
<td>5.617</td>
<td>2.154</td>
</tr>
</tbody>
</table>
Table III-16: Amazonas 2003, Civil Cases in Juizados Especiais, Types of Termination

<table>
<thead>
<tr>
<th>Form</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agreement</td>
<td>46.2</td>
</tr>
<tr>
<td>With Judgment on the merits</td>
<td>24.7</td>
</tr>
<tr>
<td>Closure without judgment</td>
<td>29.0</td>
</tr>
</tbody>
</table>

Further analysis of the situation of the small claims courts is impeded by the lack of data, especially those available in the BNDJ. Here it is even difficult to determine the number of juizados or of the judges assigned to them, let alone their caseload and disposition rate. What data are available suggest growth in both areas has been moderate and that the total number of filings is still only a small portion of the states’ first instance caseload. What data we have suggest a major use has been for consumer problems, many of them of a similar nature (overcharges or poor service from the same few companies). Conciliation is relied on for many dispositions. However, there has been no systematic follow-up to determine enforcement rates in these or other cases. Surprisingly, conciliation is also heavily used for small claims courts’ treatment of criminal cases. However, their disposition rates are lower, and there have been more explicit complaints about failed enforcements. Both factors may account for the apparent declines in their use in the criminal justice area.

III.3.4. Appeals

The appeals system in Brazil is widely identified as a major contributor to delay and congestion. While the PEC attempts to address it through the use of the súmula vinculante, many observers believe that will be insufficient and that a direct attack, via code reform, will also be needed. We have already looked at some aspects of the growth in appeals within the various court systems. Here responding to the general question of where the workload is going, we focus instead on a comparison of the impact on the state, federal, and labor courts and on the STJ and STF. Unfortunately we still have to do this grosso modo. The available statistics do not let us distinguish between interlocutory and final appeals, or between procedural and substantive issues. The following two charts are thus simplified approximations. Graph 40 includes two ratios, the first featuring second instance and first instance filings in all three court systems, and the second comparing third (STF, STJ, and TST) and second instance filings (TRF, TRT, and TJ) for the same universe. While ratio 1 holds fairly stable (between 0.1 and 0.2) over the nine years covered, ratio 2 shows a clear rising tendency, nearly doubling during the period. We make no claims for great accuracy in either calculation, but believe the overall lack of change or increase is valid. Thus, one of the clear impacts of the overall growth in demand in increased pressure on the highest level courts.

126 www.netium.com.br/janaina/corregedoria/produtividade.asp (website of Corregedoria Geral da Justiça do Estado de Amazonas.)
Graph III-40: Ratio (1) First Instance Dispositions to Second Instance Filings, and (2) Second Instance Dispositions to Third Instance Filings (All Court Systems)

To get still more detail on these events, we have also broken down ratio one (second instance filings over first instance dispositions) by the three principal court systems – federal, state, and labor. Two characteristics stand out in this comparison: first, the higher appeals rate in the federal courts, and second, its tendency to decrease, but not to the level of the other two, in the past three years. The state courts have by far the lowest appeals rate and it remains fairly stable over the entire period. The labor courts on the other hand show a slight tendency to increase in the past three years.

Graph III-41: Ratio of Second Instance Filings to First Instance Dispositions
III.4. Conclusions

The collage of data presented here, while hardly allowing definitive conclusions, is suggestive of various aspects of what Brazilians call their judicial crisis, some of them anticipated, others not. To the extent the crisis is defined by a rapidly expanding caseload, and by the judiciary’s ability to keep up with only a part of the new growth, our data indicate that is an appropriate characterization. However, as the judiciary’s response capability has overall been high, and much of the growth originates in factors outside its direct control, the remedies currently pursued seem relatively misdirected. Nonetheless, growth and response capabilities are hardly uniform across or within the various court systems, leading us to posit a series of crises rather than a single one, each with its own distinctive profile, causes, wider impacts, and probable solutions. The distinction is not made only for analytic reasons. We think, as we will elaborate below and in the final chapter, that speaking of one crisis may encourage a focus on the areas of largest growth, so diverting attention from other, longer term problems whose incidence, but not necessarily impact, is less dramatic. Before turning to this issue, we first summarize the general trends and emerging hypotheses covered above.

The state courts have received the bulk of the growth in caseload, and even when adding new judges, have not been able to compensate. Thus the filings per judge have almost doubled over the past ten years, reaching near record levels for the Latin American region. Through a combination of a lower growth rate and the addition of more judges, the federal and labor courts have maintained a more stable workload per judge, although the federal courts in particular have tended to lower their productivity at the first instance, thus accumulating a backlog nonetheless. Growth has also affected the second and third instance courts, although the appeals rate only appears to be rising in the labor system, and at least until now has been adequately managed at the second instance thanks its greater proportion of appeals courts and judges. The small claims courts (juizados especiais) in the federal and state systems have been accumulating a greater share of the workload and maintaining high levels of productivity, although it seems doubtful that they are relieving the pressure on the federal and state courts. They appear to be attracting cases that would not be sent to the judiciary were they not present. The deciding factor influencing demand for their services is less the identity of the plaintiff than the amounts at stake and the ability to lower costs by litigating without an attorney. As regards the judicial response, the potential for conciliation, batch processing, and in the federal juizados, high levels of automation has meant greater productivity. There are nonetheless signs that some juizados are suffering from their own congestion—meaning long delays before the oral trial can be held.

Aggregate figures are not the whole story. Much of the growth appears to be in claims related to governmental issues—especially taxes and pensions. Of course, all federal cases must by definition include the government as a party. It is at the state level where the contribution of municipal, state, and federal agencies is most notable,

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127 Although state courts do not normally hear cases involving federal agencies, they do receive pension cases when there is no federal vara to do so.
representing, in the most modest terms, at least 30 percent of the caseload. Moreover, the majority of these cases (we estimate between 50 and 75 percent\textsuperscript{128}) involve relatively little work by the judge. Nonetheless, courts must dedicate resources to handling them, and judicial processing inevitably adds delays for the beneficiary while government appeals augment congestion in the higher courts. Tax cases, although theoretically simple, appear to augment the backlog in both the federal and state courts, and produce more than their share of dismissals without judgment. This suggests a problem in its own right – the government’s inability to collect on taxes due – and one probably not attributable to judicial performance, but rather to the government lawyers, procedural obstacles, and the lack of cooperation from the defendants. Other areas with a significant weight in the current caseload (lacking time series data, we cannot say how much some of them contribute to the increase) are those like family courts where the duration of the cases is short and appears to generate little congestion and fewer appeals, and labor cases, also disposed rapidly even at the second instance appeal level. The rest of the caseload, ordinary civil and criminal cases, account for a much lower share of the overall growth, at both the state and federal level.

272 To the extent these tentative conclusions hold, the judicial crisis appears to have different characteristics, causes, and dimensions than commonly posited. Caseload is growing, and has reached levels exceeded at most by one other Latin American country,\textsuperscript{129} and at the state level, by none. Judicial productivity is also high, and at the state level again sets Latin American records. However, the growth, and we suspect the backlog of unresolved cases, tend to concentrate in a lesser number of areas, many of them requiring relatively less judicial input and largely government related. Restricted to comparing filings and judgments we cannot say much about delay at any level (that is to say whether cases are decided within a year or five years of filing). Still, it is apparent that a high, and growing appeals rate is increasing the times to final disposition. Here again, the government has a major role, given its policy of appealing a large proportion of judgments against it. It is hardly the only culprit. The generous appeals policy and the multiple appeals that may be entered for a single case are used by other opportunistic litigants, and are a major part of employers’ strategies in the labor courts, to encourage less expensive, out-of-court settlements. Finally, judicial budgets are already high by universal standards, but so long as the sources of growth remain unattacked, the only way to prevent more congestion and greater delays will be to increase funding further. Additional funds can go into more automation or more judges, probably to both, given the average caseloads currently held.

273 The only other solution is to restrict demand – and especially that related to appeals and government litigation – and in cases like those of tax collection, to determine what is blocking their progress and seek ways to overcome it. It is likely that the

\textsuperscript{128} This is a rough estimate based on what we learned about the treatment and relative incidences tax and pensions cases, those for which the actual work required of the judge is usually not that great.

\textsuperscript{129} This is Costa Rica, which until recently had a slightly higher caseload per judge than Brazil. However, judicial sources indicate that over half of Costa Rica’s caseload corresponds to routine traffic cases, which the judges (and many defendants) now believe they should not receive automatically.
apparent failure to resolve tax cases is a source of demand in its own right, creating a
disincentive to pay taxes and thus a greater need to take them to court. It also may
contribute to a tendency, found in our earlier study, for municipal governments in
particular to attempt to levy taxes illegally, in their desperation to increase revenue. Such
efforts produce increased demand in another area, the filing of mandados de segurança
(protesting violations of constitutional rights) by taxpayers who recognize the abuse. The
earlier study found the mandados to be quickly decided at the first instance, but
inevitably appealed by the losing party (often the government) "all the way to the
Supreme Court." Thus whatever the source of the tax-collection paralysis, it merits
resolution because of its impact on government finances, on litigation costs for private
parties, and on various kinds of court congestion. As debt collection among private
parties faces similar delays and inconclusiveness, there may be a broader problem here
which could be remedied to the benefit of private creditors as well.

274 What a polity decides will be justiciable (suitable for judicial decision) is
ultimately a question of values, but in this choice two factors must be kept in mind: 1)
the potentially justiciable conflicts will inevitably exceed the judiciary's capacity to
handle them and 2) the judiciary can also mitigate the level of conflicts by making clear
decisions as to how laws will be interpreted and applied, and by, when appropriate,
sanctioning those who violate them. Both statements may conflict with certain ideals of
Brazil's legal and judicial community as regards the right to access and the need for
individualized treatment, but for a majority of conflicts, citizens, if not always the losing
party, may be more appreciative of predictable rules than of creative judicial
interpretations. As one Brazilian judge has written,130 it is important to distinguish
between mass (justiça de massas) and artisan cases. The former require a quick,
standardized response (as in simple debt collection); the latter call for more study on the
part of the judge. When judges start treating mass cases like artisan ones, they are only
likely to decrease predictability and weaken the rule of law. In their treatment of the
routine tax, pension, labor, and maybe even debt collection cases, Brazilian judges do not
appear to have fallen into this confusion. However, they have let the parties act as though
they had, allowing unnecessary appeals and other dilatory tactics, and they have taken on
work they might best refuse, by insisting it be done by those directly responsible for it.
Even when these routine administrative cases are decided rapidly, they use judicial
resources that might be better devoted to more complex conflicts, and to speeding their
resolution. We don't have the information to say how Brazil's courts are doing on their
traditional workload – more complex criminal, civil, and administrative cases – but we
suspect the effort going into the mass cases has deflected attention from these others.

275 It is at this point that we will elaborate on the multiple crisis argument, starting
with the lack of attention to the traditional workload. We cannot say whether these cases
are in crisis, as the data do not allow us to single them out. We do think that whatever
problems they have always encountered are not being addressed, and that more complex
civil and criminal disputes are those most likely to fall into the multiple appeals,
procedural labyrinth trap. If anecdotes can be counted as evidence, this is where a good

130 Beneti (2000).
Deal of the evidence lies, especially that coming from entrepreneurs and from citizens outraged about impunity. Because judges have been more willing to standardize responses on the mass routine filings, these complex cases are arguably those requiring greater attention not only to the speed, but also to the predictability and quality of decisions. While recommended actions like procedural reforms, including those limiting appeals, will benefit all cases, and not just the more complex ones, because the latter do not lend themselves to some of the more radical approaches suggested below, such reforms should be designed with them in mind. There is not much other hope for their more efficient and effective handling. Of course improved court administration and better statistics should also improve their processing, if for no other reason than that of reducing their tendency to be overlooked.

276 A second crisis involves the mass cases originating in poor service by government agencies and the consequent need to take complaints to court. Here the choice between raising court budgets or limiting demand is a stark one, and our recommendation is for the latter. To effect this, the government agencies will have to find a way of decreasing their reliance on the forced judicialization of administrative conflicts as a means of controlling their cash flow and will also need to get a better handle on the quantity and value of what they are litigating. This means more investments in information equipment for the Procuradoria family, and steps to ensure more centralized oversight of its members. This solution will have to be incremental and will also require putting more of the onus on the administrative agencies most at fault, possibly by changing legislation to locate responsibility for poor performance. To repeat an argument made earlier, judicial control of administrative abuses is most effectively directed at forcing the administrators to perform better, rather than correcting their errors individually.

277 A third related crisis involves tax collection cases where we suspect the origins lie both in poor performance by the Procuradorias and certain obstacles (shared with private debt collection cases) to enforcing judgments -- i.e. identifying assets for seizure and taking control of them. As noted this crisis feeds off itself. Fewer cases won means more incentives not to pay, and thus more filings entered. It also encourages a second level of demand when tax agencies abuse their powers to increase revenues and so give rise to a series of constitutional protests, also clogging the courts all the way to the top. Here the demand can only be reduced through a better understanding of the problems and actions to attack them at the source. Courts may have less of a role in this process, but given the immediate impact on their workload, they should encourage others to take the necessary steps and can certainly do some of their own analysis.

278 A fourth crisis involves the labor courts. As they seem to be keeping up with their workload, crisis may not be the best characterization, but it is evident that the various ways of calculating the system's cost-benefit ratio rarely give positive results. Even labor lawyers, who live off the proceedings, have suggested that the public and private investment going into the system is hardly justified by the pay-offs for the litigants. Other critics have argued that the system has negative impacts on levels of employment and possibly on the Custo Brasil. The labor lawyers' argument needs little validation; the additional criticisms probably merit further investigation. However, the
more fundamental question here is what purpose the system is intended to serve and whether it could be met in some other fashion, or possibly, at all.

279 To the extent labor claimants usually walk away with something (even if a much reduced reward based on a judgment or out-of-court agreement), the system was described by one of our consultants as a sort of additional unemployment insurance or minor vehicle for income redistribution. If that is its principal purpose, then the Brazilians can certainly devise a more cost-effective means of attaining it, even, as our labor lawyer informants suggested, simply having the government pay the claim up front (and financing it by raising taxes on employers). If the impact is the strengthening of certain labor laws, then the question is whether this is happening. The enormous amount of cynicism about the labor courts, on the part of employers and third party observers, suggests the effect may not be that great, and that again there may be better ways of reaching it. From this standpoint, it might also be interesting to compare the labor courts' handling of these cases, with what happens to government labor disputes sent to federal and state courts. Of course there is an enormous ideological baggage associated with the labor jurisdiction which might make any change impossible, but knowing what is really happening, how much it costs, and with what downstream effects would be a start.

280 A fifth and final crisis relates to the state juizados especiais and the warnings that they are facing their own problems of congestion and delay. There has been more academic research done on their performance which provides a start for testing that hypothesis along with several others. Unlike the federal juizados, the demands on these courts cannot for the most part be diverted to any existing alternative forum, whether in the administration or the ordinary judiciary. However, once the composition of their caseload is disaggregated, statistically and analytically, and the intended impact of each part is identified, a search for alternatives may yield results. For example, the goal of limiting abusive treatment of consumers could be handled through an administrative agency and stiffer laws. An expansion of conciliation services might better address neighborhood disputes, and services to help individuals organize their finances could help enforcement of judgments or of negotiated agreements. All of this does not have to be done by the judiciary; in fact a current tendency to think in terms of adding social services to the juizados may simply duplicate what agencies devoted to these areas can do better. (In much the same vein, a tendency for Public Ministries to sponsor conciliation services seems like unnecessary mission creep.)

281 These are only five cuts at disaggregating the judicial crisis. Better information on what is happening to court caseload, as well as that of other sector institutions, would doubtless turn up others. Consequently, we cannot end this chapter without a further

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131 In addition to Gross Cunha, CEBEPEJ, the NGO which participated in our first study, is completing a study of São Paulo's juizados focusing on many of these questions. It also has a contract with the Federal Ministry of Justice to expand the work beyond São Paulo. Other related work includes Batista Calvalcanti (1999); Pinheiro Carneiro (2000); Rodycz (2001); Sadek et al (2000, 2001a); Sadek (2004); Sadek and Cavalcanti (2002); and Watanabe (1986). Finally, the TJRJ's study (Poder Judiciário, 2004) on consumer complaints cases in small claims and first instance courts merits mention for its statistical analysis of the contribution of these cases to court congestion.

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word on the need to improve the sector’s own statistical systems. As our tentative conclusions demonstrate the state of sector statistics is currently so deplorable as to nearly defeat efforts to use them to identify problems or to carry the findings over into public debate. If the more radical solutions suggested here are to prosper, or even if the more conventional ones are to have any impact, it will be important to document existing problems and advances in resolving them. Moreover, although individual agencies and court systems can do this on their own, the most desirable approach is a coordinated effort, one allowing comparisons across jurisdictions and an ability to track cases that pass among them. This means, as stressed in the previous chapter, agreement on common categories for classifying data, an ability to capture far more detail than is currently the case, and mechanisms to instruct data enterers in their use, and to check their performance in applying them. It also means the creation of groups within each court system, public ministry, and procuradoria capable of overseeing the process and doing the necessary analysis. Finally, it means that sector management must see this as part of its responsibilities, as important, if not more so than the usual emphasis on protecting their own class rights. Current statistics leave much to be desired, but as we have demonstrated, much more could already be done with them. That it is not being done suggests that a part of the problem lies in management’s own very narrow definition of its role.

282 This section anticipates some of the issues that will be discussed further in the final chapter. It also anticipates a discussion, also provided in that chapter of the political dynamics of the judicial reform debate and the interests lying behind them. Little of what we have suggested or will suggest later is really new. The question, explored in the next chapter is why so much of it will be first published in a World Bank study, when so many Brazilian experts are already familiar with the arguments, in fact were the principal source of many of our insights.
CHAPTER IV: LOOKING BACK AND LOOKING AHEAD

283 This study began as an effort to evaluate the Brazilian justice sector's capture and use of basic statistics to track performance, identify problems, and develop programs to resolve them. This kind of data-based performance monitoring is increasingly seen as a critical management tool and an essential guide to programming reforms. While it appears possible in Brazil because of the country's advances in automation, it is conspicuous for its absence in on-going debates on judicial weaknesses and reform needs. This was one of the several paradoxes of Brazil's sector development underlying our research design and its various related lines of investigation.

284 Given limited time and resources, we focused on a large, but still restricted group of sector organizations - the federal and state courts, public ministries, and government lawyers within the Federal District and six state capitals. We also looked at the labor jurisdiction and the constitutional court, the Supremo Tribunal Federal. This has given us a good, if not entirely representative overview of the situation and allowed us to reach some conclusions on the technical, technological, and organizational impediments to the collection of performance data and their use in monitoring organizational operations. As an offshoot of the work, we analyzed some of the available data to track trends in the growth and treatment of caseload and so explore a series of hypotheses about the nature of Brazil's "judicial crisis." Our findings here suggest still another paradox -- the apparent discrepancy between what the "facts" tell us about judicial problems and their origins and where the usual reform proposals tend to focus. The explanations for this gap are clearly more than an issue of technological failures, and at least in part arise in traditional attitudes about the role and value of management statistics as applied to judicial operations.

285 In this final chapter, we look at the implications of our findings for building more effective programs to combat Brazil's judicial crisis. We do this in three parts. A first section summarizes what we have discovered about the judicial crisis and the ability of individual sector organizations to document its extent and causes, focusing on restrictions imposed by existing monitoring practices and institutional management's view of its role. A second section reexamines current reform debates, centering on the recently approved constitutional amendment (No. 45 of 2004, based on PEC 29 of 2000\textsuperscript{132}) and the identity, interests, and strategies of those participating in its formulation. Here we look beyond the technical and technological inputs to reform planning to consider the political

\textsuperscript{132} In its thirteen years of circulation through the Congress, the PEC (Proposta de Emenda Constitucional) has had several numbers; this is the most recent. As some items in the PEC had been held back for separate consideration (destaques), the final contents of the reform remain uncertain as of late December. However, despite some doubts as to how this might affect approval of the whole, it seems unlikely that the government will backslide on what had become its own cause célèbre.
dynamics of the process. While skeptical as to the amendment’s impact on resolving any of the series of problems defining the judicial crisis, we find indications that the same participants might be mobilized to enact more fundamental changes and discuss how this could be done. The final section offers a set of recommendations for the content of any such program, building on our statistical and political analyses.

IV. 1. Brazil’s Judicial Performance Statistics and What They Can Tell Us about the Judicial Crisis

IV.1.1. State of Statistical Systems in the Three Sector Entities Surveyed

The most general finding was that statistics collected by the three organizational families were inadequate for performance monitoring beyond the most rudimentary level. Data reaching organizational leaders are excessively aggregated, categorized in a fashion that precludes tracking important trends, frequently incomplete, and lack checks for accuracy and consistency. The reasons for these shortcomings are multiple and vary by organization, but across the board the principal explanations lie in the primary emphasis on using automation to facilitate management of individual cases and secondarily, to allow quantitative evaluation of the output of individual staff members. Both objectives are important, and one would not want to discourage their pursuit. However, a third level of monitoring, that tapping organizational as opposed to individual output and exploring its adequacy in handling changing levels and patterns of demand is increasingly critical, especially as that demand begins to exceed organizational response capabilities. Brazilian sector organizations, and their management in particular, are only beginning to recognize that need, the place that statistical systems can play in meeting it, and the fact that once demand-supply gaps are identified leadership also has a role in finding ways to bridge them.

Here the courts have taken a lead, based on their earlier and extensive automation of internal operations. However, their statistical tools still leave much to be desired especially in their inability to capture details beyond sheer across-the-board growth. Even the exact dimensions of the growth remain in question, given problems of underreporting and possible double or triple counting of cases. Moreover, courts still lack the capacity to do statistical analysis and many leaders do not recognize its importance, limiting their interest to demonstrating they have too much work and so promoting the creation of more judgeships or court units. Courts have used their funds for other types of automation, especially in their handling of mass administrative filings and other repetitive cases (e.g. agravos de instrumento), but only recently have begun to

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133 Multiple counting results from the recording, as separate entries, of various interlocutory actions associated with a single case. Although we don’t think this seriously affects our conclusions on growth patterns, especially because of the simultaneous underreporting, it has become clear in the course of our research, that some of the surrealistic data may be the product of this practice. We doubt the effect is intentional. It is simply a result of how Brazil’s courts have traditionally kept their accounts. However, unless standardized, it complicates comparisons across jurisdictions within Brazil, and if retained, even in an improved form, it makes comparisons with other countries impossible.
explore the sources of growth in these areas, as a first tentative step toward controlling demand itself.

288 Brazil’s public ministries, although increasingly automated, have been still less systematic in exploring patterns of demand for and supply of their services. They collect and publish many statistics, but in a form that makes it difficult if not impossible to determine where most efforts are going and with what results. The obstacles are not so much technological as structural and even ideological. Because of their organizational and individual autonomy, prosecutors (procuradores and promotores) exercise considerable control over how their services respond to and even what is defined as demand, but have a lesser sense of external accountability for how they make these choices. Because they define their product in terms of resolving external problems, they have shown an interest in collecting data on the incidence of crime or environmental degradation, but seem to resist tracking or evaluating the efficiency of their own actions in addressing these issues. Resistance to external evaluation and accountability is hardly unique to the public ministries, but is less feasible for the courts. The demand for judicial services is more easily defined and measured, and any supply-demand gap is immediately evident even in the least sophisticated measures of entradas e saídas.

289 Finally the government lawyers (AGU, PGF and PGEs) as the most recently established and least automated agencies, are those with the most minimal statistical systems. Unlike the public ministries, their leaders seem to have a clear idea of what they should be measuring, at both the individual and institutional levels, and an interest in tracking not only quantitative but also qualitative output (whether they win or lose and with what financial consequences for their respective executives). Among the federal and state procuradorias surveyed we found none with the ability to begin answering these questions. The concern here is that as they introduce automation, they do so in full pursuit of the three linked objectives: facilitating individual case management, tracking individual productivity, and assessing overall institutional performance as a means of rationalizing state litigation.

290 In states with higher levels of automation, and in the federal and labor courts we did find some interesting and positive developments. In the first these included programs to link data collection and statistical systems across organizational families, and in the second, efforts, well advanced in the labor courts, to standardize data collection categories throughout the system. However, the labor courts could improve the details captured in their standardized systems while the federal courts need to find a way to accelerate the process.

291 Courts as a whole are beginning to pay more attention to their management statistics and to introduce some analysis into discussions of their problems in responding to higher levels and different types of demand. The experience is still impeded by the

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134 In the interest of accuracy, it should be noted that the public ministries and government attorney’s offices were both products of the 1988 Constitution’s division of the functions of the preexisting Procuradorias. However, the new public ministries were organized much more quickly, in part because their members had promoted the change.
lack of personnel or units with analytic skills, limited familiarity with other national or international databases, and the prevailing tendency to see this as a means of bolstering existing arguments about problems and their causes, rather than a more open-ended approach to understanding the situation on the ground. As we found, courts could do much more with the statistics they already have, but still fail to recognize this potential.

IV.1.2. What Data Analysis Tells Us about the Judicial Crisis

292 As only the courts keep statistics allowing trends analysis, we restricted our work to the judiciary. The two most important conclusions here are the following:

293 The demand for judicial services has risen dramatically especially since 1991, as has judicial productivity, just not enough to compensate for the larger workload. Nationally, average caseloads and number of cases decided reach Latin American and universal highs. There are of course considerable variations by region and jurisdiction and surrealistic numbers at both ends of the spectrum – courts which resolve seemingly impossible numbers of cases, and those whose output looks more like some of the worst Latin American performers.

294 While existing data systems are inadequate to the task of tracking the sources of demand and differences in impact on and response of the different parts of the system, they do provide more information than is currently used. Apart from overall growth, we found trends courts ought to be tracking and exploring, but apparently are not

295 The state first-instance courts have experienced the highest rates of growth, and have shown the greatest increases in productivity. Currently, their production per judge averages twice that of the first instance labor and federal courts, but even the latter average a very respectable 700 to 800 annual dispositions. Second-instance appeals courts in all systems have also experienced growth, although considerably less explosively, and in the case of the federal courts, which have the highest appeals rates, dropping off in the past five years. Last instance appeals, to the STJ, TST, and STF have risen more dramatically, and despite increased productivity, have produced further backlogs and delays here.

296 If growth in demand and productivity has not been organic, it has also not been uniform across types of cases and courts. Owing to shortcomings in the nation-wide databases, and even in decentralized collections, our analysis constitutes more of an illustrative “collage” than a rigorous test of our working hypotheses. It does suggest an additional reason for improving data collection, in indicating that the incidence and probable causes of delay and associated problems vary sufficiently to require different solutions in specific areas. It is here where we introduced the notion of multiple judicial crises, based on differences in the sources and rates of growth and in the adequacy of the judicial response. In all of these crises, the judges themselves seem less directly responsible, with the exception of any crisis related to the seemingly neglected backlog of more complex, “normal” cases. Judges can be faulted for allowing abusive litigants too much free rein, but the legal framework and organizational incentive systems do pose
constraints on more proactive judging. Among the crises distinguishable in data analysis are the following:

297 The influx of masses of administrative cases resulting from government agencies' (the defendants) poor service and their suspected efforts to put off payments due to private actors. The federal and some state courts have invested considerable effort and resources in responding to growth here. Their response is laudable, but it represents a questionable use of judicial skills, and the trend will require still more resources if it is allowed to continue. The courts' innovations have made them popular with individual plaintiffs. However, the solution is costly, inequitable, and hardly addresses the underlying problem of administrative abuses and poor service.

298 The situation of tax collection cases (where the government is the plaintiff) in both federal and state courts. While recently taking a back seat to pension and related conflicts, tax cases still contribute to court congestion and represent an even higher proportion of unresolved backlog (cases classified as em suspenso or sobrestado, terms which themselves appear to be used inconsistently). Informants also suggested that even cases categorized as terminated, via a judgment or agreement, often did not produce full payment. Given the sheer quantity of the entries, the judiciary's dedication of resources to this area may be less than needed. Still, the direct responsibility for the various forms of ineffectual treatment apparently lies with the government lawyers (overburdened, under supervised, with insufficient incentives, or perhaps all three) and with the difficulty of finding assets to attach.

299 A related problem with private debt collection which also seems linked to the attachment process. A common Brazilian saying sums up the situation — ganhei mas não levei ("I won, but I didn't collect"). Resolving the problem would help both the government and the private creditor. We did not identify this issue through the current analysis, instead relying on findings from our earlier research.

300 The apparent cost-inefficiency of the otherwise highly productive labor courts. Brazil's government and private defendants are investing large sums in this system, against relatively minimal returns to the private plaintiffs. Aside from any negative impact on employment and the Custo Brasil, the question is whether the objectives being pursued, themselves not clear, might be reached in a more efficient, and possibly nonjudicial manner. As these courts have considerable symbolic value, change may be difficult, but even the labor lawyers have begun to question the utility of current practices, stressing the need for still greater procedural simplification and more reliance on negotiated settlements.

301 The increasing congestion of the state small claims courts and the pressures they put on state judicial budgets. These courts do not appear to relieve the ordinary jurisdiction of caseload, but rather to attract cases that would not have gone to the judiciary in their absence. This explains much of their popularity with plaintiffs. They are less popular with entrepreneurs as in many states, a large part of their caseload involves consumer complaints, and with lawyers, because of the potential for pro se representation. These courts represent a positive step in simplifying litigation, but a
better understanding of their caseload, clientele, and the alternatives for serving them seems needed to avoid their collapse.

302. There were many areas we could not explore for lack of sufficiently disaggregated statistics. These include a better understanding of the size and composition of court backlogs -- the great residual category which may, under further analysis, reveal additional problems (i.e. any systematic pattern of what doesn’t get resolved for reasons beyond the lack of action by the parties); more detailed information from the otherwise good labor court database as to the composition of the recent growth and the conflicts in which it originates;135 a better understanding of the reasons for the traditionally higher federal appeals rate and for the organic, occasionally explosive growth in appeals in all areas; and more detailed information on the sources of growth and patterns of response especially at the first instance level in the federal and state courts.

303. Despite the black holes, what we have found should give judicial leaders something with which to work. The disturbing finding is that so few of them had focused on any of these issues. The weight of government litigation is now getting judicial attention, but largely at the appeals level.136 A very few court presidents (the Presidents of the TJs in Rio de Janeiro and Rio Grande do Sul are two examples) seem interested in tracking trends at the state level and to some extent taking measures to respond to them. For others, the major problem is undifferentiated growth, with no further attention to sources, where it has the most impact, and how judges are tailoring their response.

304. As Brazil’s courts seem, by whatever measure, to have a relatively high budgetary allocation, the potential to improve their response through the injection of more resources seems extremely limited. The three most likely alternatives for addressing the crises are: increasing internal efficiency, reducing the inefficiency of certain extra-judicial organizations which condition the adequacy of the judicial response (e.g. property registries, government lawyers, possibly the Public Ministry in its handling of criminal complaints), or some effort to structure the demand itself. Only the first of these alternatives lends itself to implementation by the judiciary alone. The other two will require the cooperation of other sector and extra-sector organizations, and other branches of government.

305. The first alternative is the most widely accepted, but will not be sufficient alone. Computerization, improved courtroom organization, and the rationalization of workflow (the standard recipe) can root out some vices, but are of little help when the underlying problems are complex proceedings, litigant abuses, excessive appeals, or an ineffectual enforcement mechanism. They also have no impact on a critical source of delay, the time the judge him or herself must spend on reviewing the case. Moreover the least

135 We note that while we believe an argument can be made for the role of the courts, and the lawyers specializing in these cases, in encouraging the growth in demand, others viewing the same statistics interpret the growth as evidence of increasingly abusive labor practices, although admitting that the jurisdiction does not appear to be resolving this problem. (See Moreira, 2002).

136 For one recent exception, focusing on first instance cases, see Poder Judiciário (2004).
productive courts, and thus the logical targets for these measures, are often those with the lowest workloads. Increasing their output would have a lesser impact on overall productivity.

306 The second alternative clearly deserves more attention as a potential source of fairly immediate improvements in targeted areas. However, it is likely to be resisted by the agencies affected as an intrusion into their autonomy, a violation of their classe rights, or just contrary to the pursuit of their more particularized objectives. Its effective implementation will also require a level of cross-institutional planning and coordination not typical of a sector where reform is usually envisioned as a question of improving the performance of individual organizations with little attention to its interactive consequences.

307 The last is the most controversial response, as it is the most likely to touch the core interests of beneficiaries of the status quo. Steps here range from procedural simplification and an increasing reliance on alternative forums to finding ways to force entire categories of large defendants (not the least of which is the government) to improve their service delivery and treatment of clients and so end the self-serving judicialization of their conflicts. As one of our Bank colleagues (herself a judge) has said, courts get their work in part out of what no one else wants to do. This is true, but at some point the judicial willingness to take on the work of others can become counterproductive. Brazil’s judges have been very good at compensating for what others fail or refuse to do for whatever reason, but this mechanism of last resort is not necessarily the most appropriate or most cost-effective. Moreover, when courts become overburdened with work others should do, they have less time for what only they can handle. It indeed appears that to the extent the usual complaints are supported by the facts, the courts are being blamed for just this type of failing – their inability to move complex cases to a reasonably speedy resolution.

IV.1.3. Implications for the Judicial Reform Debate

308 We have anticipated some of this section with the last series of comments. The most obvious implication arises from the limited understanding of the causes, composition, and internal and external impact of the growing caseload, or of the advances in responding to it, because of the sector organizations’ inability to monitor and further analyze any of these factors. Brazil’s courts are clearly deciding more cases, but neither they, nor we, can say with how much delay or where the delay is most extreme and most critical. We, and they, also don’t know much about the kinds of cases that are augmenting the growing backlog, and especially those pushed into the “deus me livre” pile. And if judges are resolving many individual cases more rapidly than supposed, we have only the most general notions as to how the high appeals rate affects their final disposition.

137 Our FGV colleagues report this as a term used by the state courts in São Paulo to denote those cases that simply accumulate in judicial offices because of their complexity.
The situation for the two other organizational families – public ministries and government attorneys – is far worse in as much as the statistics they keep, or in the case of the government lawyers, don’t have, do not allow analysis either of the demand for their work or their success in responding to it, let alone the quality of output, obstacles to better performance, or indeed even of how better performance might be defined. Although discussions of the judicial crisis and proposals for its resolution tend to ignore these institutions, we suspect both are affected by and contribute to the usual litany of popular complaints. Certainly, the public ministries’ role in problems associated with impunity and that of the government lawyers as regards court congestion are fairly evident. We also suspect that institutional demands for more human and financial resources to keep up with a heavy workload merit further examination, and that existing resources could be better deployed if the organizations had a more systematic means of analyzing their current use. Finally, although not direct targets of the reform package, the workloads and operations of both families may well be impacted by its contents, and to the extent their response poses further problems, they may become the subject of future reform programs.

Without this more detailed knowledge in these and many other areas, the formulation of reform proposals remains based on the few things we do know (e.g. the growing gap between demand and response) and many things observers think they know but cannot validate. What they think they know is not necessarily wrong, but a reliance on what Brazilians term “achismo,” and cognitive scientists call the “availability heuristic” (rules of thumb based on how people remember experiences), intuition, and received principles is no substitute for factual and statistical evidence. Thus, if as our partial analysis seems to suggest, the current reform proposals are mistargeted, part of the explanation can be found in the proponents’ failure to check their assumptions against what the data reveal and to seek more information where what is available is inadequate. The remedy, as suggested above and further elaborated in the final section, is to improve existing analytic tools and encourage their more systematic use. This will require a large measure of cultural change given that statistical analysis for management decisions is hardly an accepted practice in Brazil’s judicial sector, and there are still many in the legal community who find it not only foreign, but also antithetical to their notions of how justice should be administered.

Still, the apparent shortcomings of reform proposals cannot be blamed only on analytic failures. They also arise in the reform process itself and in the many vested interests served by Brazil’s complex, costly, and relatively ineffectual justice system —

138 For an interesting discussion of this phenomenon, and the failings of “expert” heuristics, see Thayer and Cass (2003). The example is the use of statistics to improve baseball recruiting, but the authors, neither of whom has more than a fan’s interest in the topic, present it as an example of the challenges facing all kinds of organizational change. As they note “…even when the stakes are high, rational behavior does not always emerge. It takes time and effort to switch from simple intuitions to careful assessments of evidence.” They also note that “bad statistics,” that is to say statistics that are inaccurate predictors of real performance, are another problem. Those responsible for making predictions sometimes become so attached to their measures of choice that they cannot entertain the notion of alternatives. Baseball managers are as uncomfortable with data mining as are many judges.
ineffectual in the sense of not providing speedy, definitive conflict resolution and so not discouraging the repetitive presentation of similar disputes. The debates over the constitutional reform, its final content, and some of the last minute additions and vacillations provide an excellent context for exploring these arguments, and for investigating the potential for mobilizing a differently oriented reform coalition. Like many reforms, the PEC was hardly based on an objective analysis of broader problems, and thus, it should come as no surprise that the changes it introduced responded to other influences. To understand why this was so, and to explore the potential for doing things differently the next time, we now look in more detail at the outcomes and the actors who have been most important in shaping them.

IV.2. Judicial Reform as a Policy Area and How It Has Been Treated in Brazil

312 We divide this section into three parts: a more detailed look at the content of the recently approved PEC and the extent to which it addresses problems identified in our data analysis; an examination of the political dynamics of the debate over the reforms and the groups most active in shaping it; and a final discussion of the potential for introducing additional changes that might attack the problems not likely to be affected by the constitutional amendment (as well as some problems its individual elements may introduce or aggravate).

313 IV.2.1. The PEC, Its Contents, and Its Likely Impacts

314 Judicial reform is hardly a single pre-determined program. As long-time observers are coming to recognize, it is a complex policy field where the definition of problems and of potential solutions is decided less by objective conditions than by the preferences and perceptions of the participants. The conflicts thus only begin with the demand that something be done – it is the definition of that something that is the real crux of the matter. We began with the suggestion that Brazil’s recently approved judicial reform package focuses on an exceedingly limited range of sector problems and potential solutions. The emphasis on external control, while fed by recent (2003-2004) investigations into judicial corruption, appears to tackle a minor issue. Judicial corruption does exist in Brazil, although hardly at the levels found in much of the rest of Latin America. Citizens seem aware of this, and responses to public surveys indicate their greater concern with other issues: delay, access, impunity, and problems relating to such qualitative factors as the predictability, biases, or excessive formalism (failure to resolve the central dispute) of judgments. In addressing these criticisms, the measures introduced in the PEC seem of limited utility.

139 There is still a tendency, fed in part by donors, but also adopted by certain academics (Prillaman, Ungar) to assume a single set of objectives and uniform list of activities. For a contrary view, noting the different lines of action and the consequently different approaches see articles in Pásara (2004).

140 For a series of surveys, comparing Brazilian results with those from the rest of Latin America, see Galindo (2003) and CEJA (2003).
Impunity (as regards both corrupt officials and ordinary criminals, especially those involved in violent, organized crime) is a growing concern for all citizens, no longer limited to those living in large urban centers. However, as knowledgeable observers are quick to point out, to the extent the sector contributes to this problem, police and prosecutors deserve more of the blame. One enormous contributing factor is the vast number of criminal cases that never get to court, because of the failure to identify suspects or collect sufficient evidence to indict them. Another series of surrealistic numbers, only beginning to be known, relate to the enormous differences between the number of crimes reported and those for which an investigation is completed, a suspect indicted, and a trial held. Changing court organization or how judges work will have no impact here. There have been reported problems with the cases that do get to court, and especially those involving well-placed defendants. However, many of these originate in the ample, legally established procedural opportunities for their lawyers to create delays, possibly until the statute of limitations runs out on their alleged crimes.

The other issues -- delay, access, and quality of judgments -- are more directly judicial and thus get attention here. Costs might also be added, not as those referring to what the judiciary spends, but rather what a judicial user must pay. However, care must be taken in interpreting complaints in this area, as they are common even in countries where legal and court fees are relatively low. Overall costs for the system might indeed be another problem, but one receiving relatively little attention. In part this is because, as we found, budgetary figures are hard to come by, but mostly it is because Brazilians have no idea how the costs of their system stack up against international averages, and still less how they might be measured against system outputs and

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141 There is an ample and growing literature on this. See for example Bastos Arantes (2002), Macaulay (2001), Mingardi (n.d.), Sadek (2003), Vieira (2002), and Zaverucha (2003). Problems include poor management of each organization, abysmal coordination among them, the preservation of the very formalistic inquérito, conducted by the instruction-judge like delegado of the civilian police, and of course, corruption in the police forces. Some observers also suggest that despite the Public Ministry's fame for pursuing corruption, there are internal (and external) controls on what its members are allowed to look into.

142 A group headed by Sergio Adorno of the Universidade de São Paulo is elaborating one such study. In interviews, Adorno indicated that investigations done by police on the basis of crimes reported to them went forward as indictments at the ratio of about 100 to 1. The newly elected Procurador-Geral de Justiça for the state of Pernambuco had collected similar figures for that state, indicating that of 17,205 crimes detected in 2003, 10,855 were still being processed, and only 1,992 had been tried, with 1,569 convictions. Earlier figures, collected by the new Procurador as part of his electoral campaign, were still less positive -- of the 2,917 homicides recorded by the health authorities in 2000, 1,517 were reported to the police, 1,392 were investigated, 138 were referred to the Public Ministry for criminal action, and 100 were sent to trial. Figures for 1998 were 3075, 1594, 1462, 45, and 43 respectively, indicating some improvement but hardly a cause for celebration. Data from interviews in Pernambuco's Public Ministry, November, 2002.

143 Costs for legal assistance and court fees vary widely in Brazil, and there are indications that the bulk of attorneys do not charge that much. In fact, the low costs of entering into judicial action (or the potential for not paying fees until an award is made) have also been credited with augmenting the demand for court services.
benefits. System operators want more funds and the public wants more benefits, but so far no one has explored the relationship between the two sides of the equation, let alone asked whether the current cost-benefit ratio might be improved.

The PEC’s external control mechanism (some sort of council) hardly seems likely to affect any of these additional issues—first because it is more directed at discipline than output, and second because it is hard to envision it doing anything the courts are not already attempting to increase production (measuring productivity, batch processing mass filings, and finding ways to help judges who get behind catch up with their workloads). Moreover, councils introduced elsewhere in Latin America have demonstrated little progress in this area. The approved amendment does contain language indicating that judges who fall behind in their resolutions (exceed the legal time limits) cannot be promoted, but how teeth would be put into that provision is a good question. For one thing, many delays are not the fault of the judges, but rather arise in the action or inaction of one or more of the parties. Judges have varying abilities to control such dilatory tactics, but face many disincentives for exercising them. As this suggests, a serious attack on delay will require still other changes, but not those likely to be introduced by the council.

The sumula vinculante, the PEC’s other most contested element, does appear aimed at two of the three usual complaints—delay and quality—but again the extent of its impact is questionable. If it works as it is supposed to, the device will not necessarily keep cases out of court, but should make judgments more predictable and eliminate many appeals, thereby reducing delay directly (case is decided in the first instance) and indirectly (less congestion at the second instance, and possibly at the first instance, if parties destined to lose, decide not to bother to litigate.) In a similar fashion, costs and even access might be positively impacted. Not having to fight an appeal lowers legal costs, and less congestion should make room for more claimants in other types of conflicts. There are, nonetheless, two caveats. First, as noted in the introductory chapter, here too the courts are attempting to make changes already—reaching agreement with the procuradorias on what will not be appealed, encouraging negotiations, but most of all finding a way to batch process similar cases. The sumula might strengthen this approach, in which case it is a positive addition, but the question is how much more impact it would have. The second caution is more fundamental, and may largely explain the

A recent “Diagnostico” released by the Ministry of Justice (Brazil, Ministério de Justiça, 2004) did raise the issue of costs and attempt to compare them with other countries. However, the comparisons were poorly done, neglecting to take into account factors like differences in the content or size of caseloads, what is included in the “judicial” budget, or how public budgets themselves were calculated. The judiciary’s responses to the report, while offering different statistics, still provide no means for interpreting their significance.

The comparison of costs to benefits is essential and requires a more sophisticated approach than that usually taken. On a per case basis, we suspect Brazil, despite its high budgets, comes out rather well—as its judges decide more cases than those in many other systems. Until one begins to look at social (and not individual) costs and benefits, Brazil would probably not appear problematic. By social or public we mean the broader impact of decisions, not the material subject matter (i.e. public or private law).

Hammergren (2002).
government’s sudden reversal on the súmula – and its efforts to introduce a modified form, the *súmula impeditiva*, which would curtail appeals of issues already decided by higher courts, but not instruct lower level judges as to how they should rule.\(^{147}\)

319 In retracting its early support for the *súmula vinculante*, the government’s initial argument was that it would give too much influence to the judges, making them a power above the others and intruding on the law-making function of the legislature. As became clear with the administration’s final efforts to prevent passage, there is a more practical reason, revolving around the potential impact on the executive’s programs and budgets.\(^{148}\) Just as with a decree enacted by the second Cardoso administration (and revoked within days of its publication), which attempted to curtail the compulsory appeal (*recurso de ofício*) for cases the government lost, the Executive apparently recognized, if belatedly, the potential economic costs of the measure.\(^{149}\) By both removing appeals and unifying jurisprudence to be followed by first instance judges, the *súmula vinculante* could eliminate a good part of the government’s financial gains from refusing to pay claimants’ demands and thus forcing them to take their cases to court. The impact would be still greater, if as implied in the approved version of the reform, the *súmula* is also broadly binding (i.e. not only for the specific case) on administrative offices. Not only would it unify judgments and prohibit appeals; it would also instruct administrators to do the right thing in the first place – pay the pension and salary adjustments, return overcharges on housing loans, and so on. The government is already facing a problem with the judiciary’s invention of novel ways to process the hundreds of thousands of cases it sends their way. The *súmula*, if actually enforced, could put an effective end to a large part of the state’s use of the judiciary to control the flow of expenditures (*controlar o fluxo de caixa*).

320 Despite the executive’s dramatic reversal, it may be overreacting. Lawyers make their livings finding exceptions to apparently hard-and-fast rules. What constitutes a similar case is always a matter of debate, and it is unlikely private or government lawyers

\(^{147}\) The *súmula impeditiva* remained in the PEC, but was left for separate treatment (em destaque). If approved, it will not conflict with the *súmula vinculante*, but rather reduce appeals on other issues, not “*sumulado*” by the STF.

\(^{148}\) Surprisingly only in their frankness, are the comments made by Minister of Justice following the November 17, 2004 approval of the PEC and the *súmula*. As reported by the *Jornal do Brasil* (Nov. 18, 2004), “O ministro da Justiça, Márcio Thomaz Bastos, operou nos bastidores contra a medida. Um dos motivos é econômico. Se reiteradas decisões favoráveis ao setor produtivo contra a União forem sumuladas pelo Supremo, o governo terá de pagar a fatura de uma tacada só, e não a conta-gotas, ou ao final de cada processo isolado, como ocorre atualmente. São várias as disputas judiciais que podem ter tal desfecho. O setor sucroalcooleiro, por exemplo, pede indenização de R$ 50 bilhões, em cerca de 200 ações judiciais, por supostos prejuízos causados devido a tabelamento de preços na década de 80. Empresas querem que o STF confirme decisão que lhes garantiu direito a créditos de IPI na compra de insumos no regime de alíquota zero. Coisa de R$ 25 bilhões ao ano, segundo estimativa da Procuradoria-Geral da Fazenda Nacional. O impacto econômico causa preocupação. Não temos condição de avaliá-lo previamente - disse o secretário da reforma do Judiciário, Sérgio Renault.”

\(^{149}\) There have been other, less ambitious efforts to limit the automatic appeal, including article 445 of the new Civil Procedures Code. For a discussion, see De Azevedo (2003). However, these offer the opportunity to not appeal, leaving the choice up to the government attorney.
will give up without a good fight. Moreover, the constitutional amendment does not establish sanctions for the administrator (or for that matter, the judge) who ignores the effects of the súmula. Presumably the judge will be influenced by possible impacts on his or her career, but for the administrator, failure to comply still has no apparent costs. In fact, it is easy to foresee another round of mass legal action, this time against administrative agencies that failed to follow the high court rulings. Short of this, the STF Ministers may well decide to proceed with caution, taking into consideration the economic implications of using their new powers and heeding whatever official or unofficial analysis is provided by the executive branch. Finally, the government, as noted in Chapter I, has maintained the article allowing it to adjust amounts owed or award them incrementally where the affected agency lacks the possibility to pay them. Should the precatórios continue to escalate, this detail may come in handy. Also the provision for the sale of títulos sentenciais (documents establishing the right to collect an amount awarded in judgment) and their use against taxes due should further reduce the precatórios as well as the backlog of execuções fiscais (tax collection cases) the government lawyers have been unable to take forward.

321 Two other characteristics of the reform package merit further mention. First, because of the furor over the the súmula and the Council, far less attention has gone to numerous items of detail, some of them added in the months just prior to passage, which also promise changes, some quite significant, in sector operations. For the most part, these additions reflect the interests and positions of far narrower groups, and range from a fairly symbolic (but hotly contested) proposal to change the titles of the members of the Public Ministries, from procuradores to promotores,150 to the more radical elimination of the two annual judicial “férias” (the sixty days when the courts operate with limited staffing and attend only emergencies) and of the long standing tradition of delaying distribution of cases to control judicial workloads. Many articles were approved through sheer lack of wider attention. Some, like the last two examples, also benefited from the inability of those they targeted, in this case the judges, to fight too many brushfires at once. While these two items aim at increasing output, they also illustrate a further problem with this type of unilateral imposition—the immediate chaos likely to result as judges scramble to adjust to the new rules and the likelihood of a compliance that is more semantic than real.151 Whatever the ultimate impact on court productivity (probably far less than might be imagined), over the short run the measures may well add to delays.

322 As provisions aimed at curtailing certain traditional privileges, either for that end alone or because of a presumed, if somewhat doubtful, impact on performance, the items

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150 In the end, adopted only for the state agencies, but not for the federal ones. Heads of state Public Ministries will now be Promotores Gerais da Justiça and state prosecutors will be promotores.

151 The São Paulo Tribunal da Justiça which has earned national notoriety for its delays in distribution immediately noted that compliance with the new rules would swamp the courts with dossiers and likely cause structural damage to the buildings. As several informants noted, the elimination of the férias judiciais does not necessarily mean that judges will space their 60 days of leave evenly over the calendar year. Most will likely take their vacations when they always have (to coincide with school vacations). The biggest losers here may be the private bar whose members may have trouble scheduling any leave as they no longer can count on predictable periods when judges will not call for action in their cases.
relating to the férias and distributions are atypical. In most cases, the PEC, like the 1988 Constitution, provided an opportunity to advance classe interests, giving various organizations within the sector still another chance to effect unilateral changes to their structure, operating rules, or the privileges and status of their members. Among those affected were the members of the labor courts, with the addition of ten more justices to the TST (also a boon for the current administration which will be able to name all new members) and its retention of its ability to set jurisprudence in the sector; the Public Ministry, whose ultimate head (Procurador Geral da República, PGR) will now have to be selected from the federal career staff; the public defenders, now accorded “functional and administrative autonomy;” and the state judiciaries as a whole which now will directly control the income from court fees as fondos propios, thus ending the occasional practice of discounting them from the judicial budget, or not transferring them in their entirety to the respective courts. Although interested parties interviewed before and after passage defended such measures for their positive impacts on organizational performance, most of these additions clearly derive from classe concerns with augmenting their resources and ability to function independently.

323 The second characteristic of the debates and their outcome is the lack of direct attention to the factors identified in our own statistical analysis as major contributors to the most critical sector problems. True, some of the PEC’s elements may be seen as targeting their impacts, but only if one reads between the lines and assumes their diplomatic introduction will translate into a more energetic implementation. Excessive appeals have been addressed, but without any reference to their predominant sources or to the powerful interests vested in maintaining this practice. The weight of government and consumer complaint litigation on trial court workloads has likewise been ignored. The issue of enforcement of judgments, and the several factors contributing to it, receive no attention despite the problems it poses even for “successful” litigants. The already high costs of the sector are not only overlooked; many of the proposed reforms (creation of an agrarian jurisdiction and more juizados especiais, expansion of the TST, autonomy of public defense) would appear to increase them. Moreover, the opportunity afforded to decrease expenditures, by reducing the size of appellate courts, if the súmula, in either of its forms, has its intended impact, has not been mentioned. While the government finally had to admit its strategy of controlando o fluxo de caixa, aside from its last minute protests and whatever may result from the sections on precatórios, there is no consideration of other steps it might take to reduce the consequent problems – for example by strengthening its own corps of state attorneys and coordinating their actions.

324 In short, if the justification for the PEC’s passage was its impact on delay, access, costs, impunity, and overall user satisfaction, it is hard to interpret the results as having achieved those expectations. Instead it became a vehicle for advancing a series of individual, institutional projects, few of them with any visible, direct relationship to these performance variables. This is not to say the reform will change nothing, and here we differ with some of its more pessimistic critics. However, the extent and nature of that

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152 Much of this pessimism seems to derive from the likelihood of enormous delays in implementing many of the new provisions, because of further legal battles, budgetary limitations, or simple inertia, or
change depend on an element largely missing from the debate – a consensus among the principal participants as to the desired alterations in system outputs and impacts, as opposed to a simple, often implicit agreement on the structural modifications they were willing to have introduced. To understand why this was so, we now turn to an examination of the main shapers of the reform.

IV.2.2 Participants in the Reform Debates and Interests at Stake

325 Discussions of Brazil’s judicial reform debate often make this seem a nearly dichotomous conflict between the Judiciary and the Executive, or the Judiciary and society. Reality is far more complicated. In Brazil, as elsewhere, judicial reform can be characterized as a policy area where the benefits of change are diffuse (spread among society as a whole) and the costs concentrated (associated with those positively affected by the current arrangement). Those who analyze the politics of policy change usually consider this configuration as one of the most difficult in which to work. Diffuse beneficiaries find it hard to organize and have few incentives to engage actively because their anticipated individual gains are small. Conversely, those on whom the costs will fall have a stronger incentive to oppose change, and because they can easily identify each other and often already are organized, find it easier to do so. This means that even if they are relatively less powerful, in numbers, position, or other resources, they can have a degree of success out of proportion with their objective situation. Of course, if they are resource rich, their chances are even greater.

326 And who are the current beneficiaries and thus those most likely to be negatively impacted by many types of reform? They are quite simply the members of the system and its predominant users, all of whom have not only learned to live with Brazil’s very complex, overburdened legal system, but have come to depend on the quantity and content of the litigation it engenders. System members include not only judges, but also prosecutors, state attorneys, public defenders, the private bar, various specialized lawyers (most notably the cartórios, responsible for various court-related functions -- running registries, notifying and negotiating with debtors before debt cases are judicialized, and in some instances, doing the work of ordinary court clerks or notaries), and the organizations that represent their interests (e.g. Ordem de Advogados do Brasil, OAB; Associação dos Magistrados do Brasil, AMB; Associação dos Juízes Federais, AJUFES) or perform other related functions (law schools). Only a few of these system members would be benefited by further increases in the level of litigation, but none has a strong institutional interest in effecting radical decreases in its quantity. Most can be considered neutral on the issue of delay, which becomes a problem for them only when adopted as a criterion for evaluating their performance. Any interest in broadening access or lowering costs would also have to be considered altruistic as the current values for both pose no direct hardship for any of these groups.\textsuperscript{153}

\textsuperscript{153} Given that one of the obstacles to access is the cost of legal services, lawyers would only benefit from expanding access if the government subsidized their fees.
Predominant users, those responsible for much of the litigation taken to court, include government agencies at all levels, banks, and public utilities, as well as a number of other private entities which litigate with some frequency and so can be considered repeat clients. While one might expect them to value speed and predictability of outcomes, this tends to be true only when they appear as plaintiffs. Against this they must balance the advantages of slow, inconsistent results for cases where they are defendants, and to date the bulk of their participation takes this form. For this group, access and costs are not problems either, and the obstacles they present to their potential opponents are clear advantages. When self-defined victims of their poor services cannot or decide not to pursue the judicial route, the groups’ potential liabilities decrease. As noted in an earlier chapter, judges in the federal pension courts estimate that perhaps half of the potential plaintiffs do not pursue their claims, a phenomenon likely to apply to consumer complaints and other mass litigation.

For the rest of the citizenry, use of the system or any of its institutions is likely to be a one-time or null event. Thus, no matter how much they buy into the usual criticisms, their interest in its reform is rarely a high priority. Moreover many of them (employees using the labor courts; retirees using the federal small claims pensions courts), while they might gain more from additional reforms, seem content with what they receive from the current second-best solutions. Having to stand in line for hours to file a claim and perhaps wait a year for a pension adjustment is still better than the status-quo ante when the adjustment was never made.

Consequently, the reform debate, while it may play to a large audience, tends to be actively shaped by a minority of institutions and individuals with the most direct stakes in the issues. None of them can be said to be 100 percent happy with the current situation, but all derive some benefits from it, and many would be prejudiced by more fundamental changes in system operations – for example a dramatic reduction in the incidence of appeals and other opportunities for dilatory practices, a reduction in overall litigation rates, or the expansion of the opportunities for pro-se representation. A point deserving mention here, and further elaborated below, is that when these concerned stakeholders are grouped into functional categories or as Brazilians call them, “classes,” their collective interests obscure certain within-classe differences. These differences derive from the varying situations of classe members (higher level or national judges versus lower level or state judges; very successful, and fully occupied attorneys versus those struggling to find clients; and so on), as well as idiosyncratic ideological or attitudinal predispositions. In a nation-wide debate, like that experienced by the PEC, common interests usually take precedence over internal differences as a simple political strategy, and thus the nuances of sub-classe or individual preferences tend to be eclipsed. Even differences among classes may be downplayed out of a concern for not raising the level of conflict any further. In the end, the current administration’s determination to get the PEC approved provided the impetus lacking during the prior thirteen years of congressional deliberations. It also appeared to put a premium on damage control on the
part of key groups of stakeholders, and thus on not introducing issues that might have further divided them or reduced their ability to shape the outcomes.\textsuperscript{154}

330 As regards its modifications to the general outlines of the system, the reform package can be considered a lowest common denominator product. Nonetheless, one surprising result is that even the most powerful actors lost ground on the items acquiring most symbolic importance (although they also made advances on the details of less interest to anyone but themselves). This suggests, as will be pursued in the next section, that there is sufficient diffuse and specific interest in improving the situation to offer a basis for more significant alterations. Because the judiciary and eventually the public ministries became the scapegoats for all sector problems, their defeat on the creation of the national councils was inevitable. However, that the private bar, its peak association (the OAB), and eventually the government lost on the issue of the súmula vinculante is more perplexing. Here the government’s initial support was too strong for the bar to contest, or for the government itself to retract once it reconsidered the implications. Passage of the PEC was acclaimed by the administration as a victory. Whether it continues to see it as such depends on its ability to minimize the budgetary impact of the súmula and maximize its other less noticed gains.

331 In the chart below, we offer a schematic interpretation of the principal stakeholders’ positions on the PEC and additional aspects of the current system they might target for change or protection. The chart notes some differences within each of the larger groups (for example, those affecting the judicial position on the súmula vinculante, or the more particular positions of individual executive agencies). These and others will be further addressed in the next section. A second point demonstrated by the chart is the relative neutrality or at least effective silence of certain groups on the PEC itself. In some cases (Ministry of Finance, autarkies, cartórios, and law schools) this is because their interests were represented by another actor (Ministry of Justice speaking for the Executive and member agencies, cartórios and law schools covered by the OAB). In others (Public Ministry and government attorneys), they may have been distracted by the potential for advancing their institutional agendas in the less noticed items of the PEC, and unwilling to get involved in conflicts they did not believe affected them, or where, as in the case of the government attorneys, whether affected or not, they are expected to support the Executive. As changes to the content and quantity of litigation implicit in the súmula, alterations in the precatorio system, and even the elimination of the judicial férias, not to mention the Public Ministry’s new council, is indeed likely to impact their operations, their disinterest also suggests a lack of strategic foresight. If that is the case, they are not alone. As mentioned, both in its major and minor details, the PEC contains elements with far larger potential consequences than anyone, even their proponents, seemed to anticipate or intend.

\textsuperscript{154} Interviews with those interested in introducing more fundamental changes (including some members of government) indicated their decision to hold off on discussions until after the PEC’s approval out of a concern that the highly charged environment would not favor their efforts. Significantly, immediately after passage, the Presidents of the Republic, STF, Senate and House signed a pact outlining proposed changes in these other areas.
A final note is necessary on the Congress, as the venue in which the major part of the debates occurred. While Brazil's Constitution (Article 60) allows the President to propose an amendment, the PEC's formal initiation was within the Câmara de Deputados and its further discussion and modification have taken place there and more recently, in the Senate. Congress has a large component of lawyer members who have been central to the PEC's evolution. Many have strong personal views on the topic which have been a principal influence on the course of events. Ties to other stakeholders are also critical in shaping individual Congress member's participation, especially as regards their promotion of the numerous special articles. Finally, belonging to a party that is within or outside the governing coalition has a significant impact on attitudes toward changes with perceived effects on judicial independence.

Although the PEC was first proposed by an opposition (PT) Deputy, it was a PMDB Deputy, Nelson Jobim (then a member of the governing coalition and now STF President), who introduced the two key components, the judicial council and the súmula vinculante. Two PSDB deputies responsible for further shaping of the proposal are noted for having taken radically different approaches on these and other issues. Readers interested in tracing the debates, and the list of strange bedfellows they have produced are referred to the few Brazilians studies on the topic.\(^\text{155}\) It bears mentioning that no observer has suggested an institutional, "congressional" stake in the topic. To the extent the debates involved the balance of powers among branches of government, the focus was that between the Executive and the Judiciary. Concerns about possible judicial inroads into the legislature's rule-making function were not raised in the discussion (except during the Executive's final arguments against the súmula, where, as noted, they had no effect).

Table IV.1: Stakeholder Positions on Judicial Reform

<table>
<thead>
<tr>
<th>Institutional Actor</th>
<th>Position on PEC, external control and súmula</th>
<th>Interests in other change</th>
<th>Status Interests</th>
<th>Quo</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judiciary</td>
<td>Against external control, divided on súmula vinculante; also against articles on férias judiciais and distributions</td>
<td>Reduce government appeals, increase budgets or at least raise ceilings on additional appointments, to take pressure off judges asked to</td>
<td>Conditions of employment stable (salaries, pensions, tenure); keep mass cases (for first instance and small claims courts)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Institutional Actor</th>
<th>Position on PEC, external control and súmula</th>
<th>Interests in other change</th>
<th>Status Quo Interests</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Ministry</td>
<td>Neutral except for opposition to the creation of its own external council. Provisions on selection of PGR from the federal career later opposed by other national ministries as an infringement on their independence</td>
<td>More budget, more control over police, more control over selection of own leaders (attained, partially, with requirement that PGR be from the career)</td>
<td>Retain internal and external independence; retain &quot;investigative powers&quot;</td>
</tr>
<tr>
<td>National Executive</td>
<td>Increase external control; súmula uncertain</td>
<td>Reduce court interference in laws and programs; increase influence in areas of special interest – e.g., labor and agrarian cases (achieved in PEC)</td>
<td>Continue practice of judicialization of administrative conflicts and individualized handling of other redundant cases; control the cash flow</td>
</tr>
<tr>
<td>a) Ministry of Justice</td>
<td>Pro external control, position on súmula shifting as a result of the executive's rethinking of the results</td>
<td>Increase role in setting sector policy; leave way open to lead future changes, especially in code reform</td>
<td>Same as above (by delegation)</td>
</tr>
<tr>
<td>b) Ministry of Finance</td>
<td>Unknown on council,</td>
<td>Possibly change precatório</td>
<td>Continue practice of</td>
</tr>
<tr>
<td>Institutional Actor</td>
<td>Position on PEC, external control and súmula</td>
<td>Interests in other change</td>
<td>Status Quo Interests</td>
</tr>
<tr>
<td>---------------------</td>
<td>---------------------------------------------</td>
<td>--------------------------</td>
<td>---------------------</td>
</tr>
<tr>
<td>c) Autarkies</td>
<td>presumably anti-súmula</td>
<td>system to allow more flexibility in amounts, payment schedule</td>
<td>judicialization of administrative conflicts, control the cash flow</td>
</tr>
<tr>
<td>Congress, parties</td>
<td>Unknown</td>
<td>Same as above, reduce courts' ability to sequester budgets</td>
<td>Retain appeal rights, keep control over own lawyers</td>
</tr>
<tr>
<td>State lawyers</td>
<td>Neutral (although AGU expected to support position of federal executive)</td>
<td>Items to favor special constituencies, cartórios, AMB, OAB, etc.</td>
<td>Opposition parties oppose greater control over judges; parties in government want more. Leftist parties also want to keep pro-poor tendency in lower level and labor judges</td>
</tr>
<tr>
<td>Private attorneys</td>
<td>Pro control, anti</td>
<td>Reduce</td>
<td>Maintain role of</td>
</tr>
<tr>
<td>Institutional Actor</td>
<td>Position on PEC, external control and súmula</td>
<td>Interests in other Status Quo</td>
<td>Status Quo Interests</td>
</tr>
<tr>
<td>---------------------</td>
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<tr>
<td>súmula</td>
<td>opportunities for pro-se representation</td>
<td>lawyer as entrée to legal system, maintain judicialization of administrative cases, keep multiple appeals</td>
<td></td>
</tr>
<tr>
<td>Cartórios</td>
<td>Unknown</td>
<td>Increase pre-judicial role (e.g. requiring banks to use their services before putting debtors on a nonpayment list)</td>
<td>Resist active judicial role (e.g. requiring banks to use their services before putting debtors on a nonpayment list)</td>
</tr>
<tr>
<td>Law schools</td>
<td>Unknown</td>
<td>Unknown</td>
<td>More litigation, greater monopoly role for lawyers in controlling it</td>
</tr>
<tr>
<td>OMB</td>
<td>Pro-control, anti-súmula</td>
<td>Eliminate pro-se representation, ensure own representation on councils for judicial and administrative cases, keep multiple appeals</td>
<td></td>
</tr>
<tr>
<td>AMB</td>
<td>Anti-control, anti-súmula: also in favor of “quarantine” on government officials moving to judicial positions</td>
<td>Raise ceiling on judicial staffing to allow more “democratization” of judiciary (as control of institution by its members, and especially those</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Retain mass cases, but provide more funds for responding to them; maintain all classe rights and privileges.</td>
<td></td>
</tr>
<tr>
<td>Institutional Actor</td>
<td>Position on PEC, external control and súmula</td>
<td>Interests in other status quo at lower levels</td>
<td>Status Quo Interests</td>
</tr>
<tr>
<td>---------------------</td>
<td>---------------------------------------------</td>
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<td>----------------------</td>
</tr>
<tr>
<td>Large, private repeat users</td>
<td>No known position</td>
<td>As plaintiffs, improvement in attachment proceedings to facilitate debt collection; possibly some interest in expanded mechanisms to otherwise facilitate payments</td>
<td>As defendants, maintenance of ample opportunity for appeals and other dilatory practices; possibly some interest in conciliation mechanisms</td>
</tr>
<tr>
<td>Sporadic or one-time users</td>
<td>Not known, but may regard any reform as positive</td>
<td>Expansion of <em>juizados especiais</em>, <em>expressinho</em>-like mechanisms, and for plaintiffs, anything that would reduce delays, facilitate execution of awards</td>
<td>Maintenance of pro-se litigation, and for defendants, of all due process guarantees and restrictions on assets that can be attached</td>
</tr>
</tbody>
</table>

### IV.2.3 Sources of Demand for Further Reforms

334 The reform package as finally approved comprises a lengthy list of discrete initiatives, each originating with one or more of the stakeholders in Brazil’s justice system. What began over a decade ago as a few targeted changes, has evolved into an eclectic collection, in which unilateral agendas predominate over any common vision and where, as a consequence, we suspect the real battles still lie ahead. As experience in Brazil and elsewhere demonstrates, having ones institutional project enacted into law is an important first step, but hardly guarantees its realization, especially when the dynamics of its insertion were more opportunistic than consensual. As regards our own
line of inquiry, the more important corollary point is the following: whatever the eventual individual and collective impact of its various parts, the document is not, nor does it appear informed by, a coordinated strategy for resolving higher order performance problems, the type commonly associated with the judicial crisis and further explored in our statistical analysis. The question is what it would take to attack the latter and to do so in a more systematic, strategic fashion. The intra and inter-sectoral political struggles implicit in the PEC will clearly complicate matters, but we leave them aside for the moment to explore the potential for more positive change.

335 As mentioned repeatedly in this report, our own analysis was guided by suggestions from Brazilian observers, most of whom can be considered members of one of the principal stakeholder groups. Nonetheless, their opinions and preferences are not registered in our table because they represent the minority views within their respective classes. This is to be expected. Whenever reforms are under discussion, it is natural that most stakeholders would rather stick with the “known devil,” only departing from the status quo when they believe there are unambiguous gains to be made – hence the numerous items of detail added to advance classe agendas. However, our informants’ minority position is not that minimal. They were the vocal and most articulate representatives of sub-classes with diverging views, but with less inclination to express them so succinctly. The question is whether their more silent colleagues might be mobilized to support some of their more radical suggestions, and whether they in turn might mobilize others whose attachment to things as usual is more a question of habit than of a well thought-out weighing of costs and benefits. We believe both aims are possible, and devote the following discussion to the reasons behind this argument and the way these goals might be enacted.

336 We will work here with major—the judiciary, the private bar, the executive agencies, and key groups of system users—rather than minor players, on the assumption that they will continue to dominate the process and that any real improvement in output must thus work through linking their classe interests to more fundamental changes in system performance. Because such changes carry an implicit and explicit threat to their current stream of benefits or simply to business as usual, a first challenge is to demonstrate how their short term sacrifices would be compensated by medium term gains, or alternatively, why sticking with the status quo will eventually harm even their present situations. A second challenge is to shift the attention from structural modifications (the means) to outputs (the ends) because the former’s impact is inevitably limited absent an agreement on the objectives being pursued. Both of these tasks would benefit from the types of analysis we have recommended here, but still a third challenge is getting the parties to accept its relevance. The debates surrounding the PEC have inspired a host of statistical displays, but very little analysis of the content and thus minimal illumination of the problems under discussion. In the end the issue is not whether Brazil spends 2 or 0.0002 percent of its budget or GNP on its courts, but rather whether the societal benefits derived merit the investment. So far the discussion has not arrived at that point, and it is unlikely to do so until the major stakeholders move beyond defending their own positions to a serious attack on systemic problems. In the following we suggest where the room for that opening lies.
Brazil’s judges, as tends to be the case universally, are a fairly conservative group, but they are certainly aware that their traditional rights and privileges are under fire, and that they are being held responsible for system failings, both of their own and others making. Thus, they are increasingly open to measures that might address the latter and so save the former. Those who resist any change at all, are increasingly still another minority group, although they can occasionally activate their less inflexible colleagues by stressing the alarming consequences of any particular innovation. To date, the strategy of the judges most concerned with better performance has been to introduce mechanisms to improve services within the system as currently defined. Rather than challenging the government’s contribution to court congestion, they have found ways to speed the processing of the mass, administrative cases. They have taken the same tact with consumer complaints originating with a few large private service providers. This is what economists call a “second best solution,” one which does not attack the underlying problem directly, but rather finds ways to mitigate its impact. Similar means have been found to deal with the massive appeals originating in these and other cases – the most innovative higher level courts have used automation, sentenças padronizadas, and related devices to handle the tens of thousands of appeals reaching their offices. As the current President of the STF explained recently in a congress on judicial reform, the reason he had time to address the group was that the 10,000 opinions he was expected to write each year, really responded to 150 complaints, entered repeatedly. While such measures keep the courts from drowning in their heavy caseload, and have earned the appreciation of those immediately benefited, their minimal impact on the judiciary’s negative public image is a continuing source of frustration to the judges. Thus, there are now judges willing to consider a more direct, first best solution – one which would resolve the mass complaints more directly and so allow the courts to focus their efforts on a smaller number of more significant conflicts, rather than remaining as dispensers of a sort of McJustiça. There are elements of the PEC (the súmula vinculante itself, and, if approved em destaque, the STF’s ability to refuse appeals without a broader significance and the súmula impeditiva) which might advance these ends, but only if, beyond the support of the law, there is a broader consensus on the need to push their application to their intended objectives.

The judges remain divided on the need for change, and the directions it should take, as discussions over the PEC made clear. Upper level magistrates in national courts tended to be more favorable toward the súmula, and less adverse to the councils than were lower level and state judges. However, the division does not polarize the judiciary, and there appears to be a large group of judges whose inherent preferences are neither so strong, nor as inflexible as those of the die-hard opponents of any change. A reform program that does not threaten their classe rights (salaries, tenure, and regular promotions), that recognizes their achievements in improving service delivery (the juizados especiais, the creative use of automation, and even the sentenças padronizadas) while at the same time proposing to move beyond them, and that addresses problems over which they have no control (the overly complex legal procedures and the dilatory

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practices they allow), especially if led by members of the judiciary itself, could well attract their support.

339 Despite a few partial victories (the state courts' control over income from fees, the enlargement of the labor jurisdiction, and the creation of the agrarian courts), the judges came out of the PEC debates as the material and symbolic losers. Leadership that can focus on a proactive program to answer complaints about performance, moving beyond the defensive posture of the PEC period, could gain both judicial and broader support. As certain judicial leaders, and especially the STF, have recognized, improving the judiciary’s ability to track and analyze its own performance is an essential component of this approach – especially given the impact of the Ministry of Justice’s mid-2004 report, to which the judges’ only response was to admit the poor quality of their own record keeping. However, for this to be successful and credible, the judges will have to acknowledge the need for better statistics and better analysis, rather than just trying to massage the figures they have to disprove the Ministry’s findings. A still more recent report contracted by the Rio de Janeiro TJ is an excellent example of what can be done and thus can be taken as a model of where the others need to be.157 Further technical assistance would also be useful. Judiciaries attempting statistical analysis often want to do more, but are unclear how to start.

340 Whether the Public Ministry’s own losses in the reform package (essentially their inheritance of their own council) will be sufficient to inspire an interest in systemic change remains uncertain. However, the fall-out from some of the sections directed at the courts (end of judicial férias, end of delayed distribution, creation of an agrarian jurisdiction, and the súmula itself) should have an impact on them as well, stretching their budgets, increasing their workloads, and possibly reducing their effectiveness in protecting citizen rights (should súmulas work against the positions they are advancing). This may add incentives to reexamine their own use of resources and to coordinate better with other actors in the sector. Although the Public Ministries’ lack of involvement in past discussions suggests they may not be candidates for reform allies, there are individual promotores who have begun to question some aspects of the current system and to look for ways to do their own Gordian knot cutting, exploring, for example, the legal potential for charging entire agencies with providing substandard attention to clients. Like the judges who have recognized the limits of their second best remedies, these prosecutors are realizing that individual and even collective action litigation do not resolve, but only mitigate systematic abuses and rights violations.

341 The "Procuradoria Family" offers a more interesting possibility. Like the Public Ministries, but to a much greater degree, these organizations stand to be affected by many of the PEC elements, should these be implemented to maximum effect. The passage of the súmula provides them with a great justification for requesting more funding for informatics equipment and case tracking systems, and for promoting more central control over the activities of state attorneys at each level of the system. If the executive budgets are now under fire, it behooves their lawyers to be better positioned to defend them.

There is also the potential for greater coordination with the courts, and with the executive (ministries and secretarias of finance) in deciding how the potentially catastrophic impacts on the national and state budgets will be handled. Even should the executive find a way to soften the sêmulas' effects (which we think likely), the days of using the judiciary to control the cash flow may be limited, and thus the role of the state attorneys in developing global litigation strategies enhanced. This also means more attention to cases where the government is the plaintiff, and especially to tax collection.

342 The executive’s role may change as well, and it could become an ally for more effective reform. The sêmula is not its only problem. Many of the less noticed items threaten higher financial costs (more judges for the labor and agrarian jurisdictions, higher budgets for the now independent Public Defenders). One suspects that for just this reason, some of these additions may go without implementation, but over the medium run the executive will confront the choice of expanding the sector budget, promoting more efficient use of resources (including curbing its own contributions to court congestion), or acknowledging the impossibility of fulfilling the many unfunded mandates. In this choice, both the Ministry of Finance and the Ministry of Justice should be key players, the former because of the budgetary implications, the latter because having backed the PEC, it now needs to make it workable. We know Justice has been exploring the potential for further changes to the procedural codes, working both with academic groups and some judges. However, code reform, while important, rarely has much impact unless accompanied by a broad consensus building campaign stressing the objectives of the change. If Justice is to succeed in its efforts, it will have to take a less confrontational stance toward the judges and bar association, so avoiding some of the negative consequences of its past go-it-alone strategy. The reform’s major contribution may not be improving performance (for all the reasons detailed here), but rather so unsettling things as usual as to require further changes. In this second stage task, the premium should be on collective analysis rather than on more unilateral innovations. Justice has proved it can be a player; now it needs to show it can perform this role to more constructive ends.

343 The private bar and the OAB, a majority of whose members may see such mechanisms as a threat to their livelihood, will also need to be involved. Here too, a minority of members, including most leadership, are less wedded to the current system for its own sake, than caught in the responsibility for defending the common denominator classe interests. The debate over the PEC provided the least propitious environment for addressing these issues. Anyone who publicly ceded ground was likely to be labeled a turn-coat, putting their own interests above those of the classe to which they belong. Further progress, and a more direct attack on the various elements of the judicial crisis will thus require two conditions: a neutral arena in which those interested in such change can discuss the alternatives calmly, outside the public limelight, but also understanding the limitations on each part, and once some sort of informed consensus has been reached, a public campaign to sell the next steps. Here the academic community, not really a major stakeholder, may come in handy, as through the Ministry of Justice’s grant program and less formal connections with other major participants, they have developed analyses of the problems that may help convey the real needs in a more neutral format.
And what of system users, and especially those whose interests are presumably most directly affected by these types of changes? The dominant players here, the government and various large firms, have long used the system's vices to their own benefit and thus would not appear to be potential allies. However, both the increasing information on their tactics, and the judges' own efforts to handle these cases more rapidly, may be altering the bottom line for all of them. Moreover, these same vices, when used against them or discouraging outside investors, are posing increasing costs. In the larger scheme of things, none of them benefits from identification with a country where it takes a decade to resolve an ordinary debt collection case, and even then the creditor is not paid. As this information is disseminated, even outside Brazil's borders, the downside of the arrangement may begin to assume more importance. Meanwhile, the large, repeat users, as well as smaller businesses, have always suffered from these same vices when they are the plaintiffs in a debt collection or administrative conflict. For the large users, what is needed is a reasonable exit from business as usual, something that will allow their gradual adjustment to different operating principles. And while information can be used against them (to demonstrate their abuses), it also may provide the means of reaching this more positive solution. An untapped source of demand in this area are the many small and medium businesses, and independent professionals, whose financial situation does not allow participation in the tactics employed by large, repeat users. While unlikely to rally on their own, they, or institutions representing their interests, might be good candidates for adding support to any initiative dealing with their particular concerns. Again, more information and analysis would be useful in determining just what these are.

In fact, in resolving the potential problems of the simulá and other less noticed elements of the PEC, there is room for more cooperative efforts among judicial actors, Justice, Finance, and the AGU, the state agencies giving rise to much of the mass litigation, and elements of the business community. There is an immediate need to find a way to reduce the government's judicial liabilities (bills that would fall due if the simulá eliminates the requirement for individuals to litigate similar demands separately). Whether this occurs through creative legal interpretations or through an open admission of the problem and additional emergency measures to delay the impact, a consensus solution would be better for all. Now that the proverbial cat is out of the bag, those who have long understood its presence can begin to discuss mechanisms to eliminate or reduce the reasons for its existence. Similar measures might be studied for addressing the mass consumer complaints, another source of congestion that should be susceptible to more effective treatment. Cooperation is needed not only to overcome resistance to change, but also because any effective solution will require the efforts of all three branches of government, the independent regulatory agencies, and many of the dominant users of the courts. Laws may need revision, regulatory and administrative agencies will have to alter their posture toward user complaints, and both public and private actors will have to introduce mechanisms to ensure these complaints can be treated more effectively without judicialization.

It would be ludicrous to suggest that all these changes could be affected rapidly. However, there are some more targeted reforms that could make a difference, and pave the wave for eventual more fundamental alterations. Some of them are discussed in the
final section on recommendations. All will require more background analysis to ensure the problems are fully understood. All may also require legal change and all will certainly require an effort to overcome some fundamental preconceptions as to how justice ought to operate. However, if the emphasis can be kept on results, on public service, and on the sharing the implied costs, that may serve as a less divisive touchstone.

IV.3. Looking Ahead: Recommended Next Steps

347 Our last comments constitute a caveat that the next steps will not be easy, especially as they begin to have real effects. Those most active in promoting the new multi-institutional pact on future reforms, are clearly aware of this fact, but even the additional allies they have attracted may not recognize that short-term win-win solutions are unlikely. For example, the current broadening interest is improving sector performance statistics seems based in part on a belief that the affected institutions will only benefit from the process. We do believe there will be substantial benefits, but the changes will not be painless.

IV.3.1. Steps to Improve Data Collection and Analysis

348 Out of respect for our principal theme, and in recognition that further progress in problem resolution is limited by poor information, we start here. The positive note is that all three types of entities surveyed are interested in improving their statistical systems. We are somewhat more confident as to the motivations and inclinations of the courts and government lawyers than of the public ministries. However, we think that with external support and encouragement, all three could be convinced to do much better. Except for the government lawyers, financing is less a problem than know-how, and even for the former, costs are not that large an issue. Installing an information system is not that expensive. Doing it well is a major challenge as is certainly demonstrated by the quality of what the courts have already adopted.

349 Here we return to the point made repeatedly earlier. An information system, whether automated or manual, should serve three purposes: facilitating handling of individual cases and workloads; monitoring individual performance; and providing a good overview of organizational output. Unless all three objectives are recognized from the start, the danger is that one or two of them will be giving short shrift. Inevitably, it has been the organizational overview that has suffered in Brazil, as is the usual case, virtually everywhere.158 Our analysis indicates that for the courts, and to some extent the public ministries, the challenge will be to adapt a system aimed at the first two objectives

158 Once exception to this rule may be a recent interest, in Latin American and elsewhere, in developing system performance indicators with no attention to basic data capture. CEJA in Chile, and possibly CEPEJ in Europe, have been promoting this in their respective regions. To the extent national organizations buy into the plan, they may end up investing an enormous amount of effort in developing the indicators without a statistical system that allows their automatic generation. One wonders for example how a statistical system like that of Brazil (and there are many in Latin America in far worse shape) will be able to provide average times to dispositions of cases, without doing separate samples or requiring manual calculations at the courtroom level.
to cover the third as well. For the government lawyers, the challenge is to design a system from scratch that covers all three objectives adequately. Ideally, in the redesign or design stage, a fourth objective should also be included: facilitating information exchange, at the first and third levels, across systems. (We assume that evaluation of individual performance is institution-specific, although this may be a lack of imagination on our part.) While this is not an immediate goal, taking it into account now, especially for systems that are currently being installed, may avoid any number of subsequent problems.

350 As data entry always begins at the lowest level (with the officials handling the individual cases), the goal is to ensure that a part of what they record fulfills the needs of the two higher levels. Ideally, this should not require additional effort, but rather be a part of what that lower-level official needs to do her own work. This suggests a process much like that in which the federal courts are now engaged, of first understanding how and what data are already entered and then negotiating common categories. The less change required of the data enterer the better, but some change will be necessary – especially in the shift from textual to codified entries and in a rationalization of the codes used. Assuming software permits it, this can be done incrementally, prioritizing those entries most necessary to the second and third levels of analysis. This also requires, as does any classification system, a prior decision as to what one most wants to know – the values at stake, the identity of the parties, or the types of evidence or names of the witnesses called?

351 We also note that the resulting system should include means to review the state of the backlog virtually every organization collects. It is not enough to know what is decided and how quickly. Management also needs to put more attention to understanding what remains unattended, both after cases are initiated, and in the courts, in the stage between filing and distribution (until and unless the reform automatically eliminates that gap). This information is also important for the other two levels, to help judges, prosecutors, and lawyers manage their own workload, and as a means of evaluating their performance.

352 Simultaneously and to ensure the decisions are wisely made, the higher courts, public ministries, and government lawyers will also have to create departments to manage and analyze the statistics. The clear danger here is that the new interest in statistical systems will be limited to their use in fighting old battles. Just having numbers is not enough. The point is their application to investigate and resolve real problems, not simply “prove” that the courts or the public ministries are doing more, and using fewer funds, than anyone suspected. To the extent this report has had an impact, even prior to its official dissemination, we think it has only come halfway. Courts, public ministries, and lawyers are now counting results, but their efforts will only be significant (count in the second sense) if they also make improvements. This may be the area in which external technical assistance is most critical, as well as greater exposure to the statistical analysis being done in other countries.

353 Here communication across jurisdictions and organizations within Brazil is also essential to ensure all are moving in the same direction. The highly decentralized
structure of Brazil’s justice system makes this latter step, indeed the entire effort, very difficult, but creating or identifying an organizational center for the effort would be highly desirable. We know the obstacles here, but better information is essentially better sector information, and relying exclusively on the efforts of individual organizations will only create problems further into the process. Committees or commissions are never a good choice, but faute de mieux that may be the logical solution. Conceivably any such committee, or better yet, organization, could include representatives from the state courts, public ministries, and PGEs, from the STF, STJ, and TST (which seem interested in working together), the AGU, and the MPU, and from the Ministry of Justice. If composed not simply of high level representatives, but also of individuals with an interest in and knowledge of analytic methodologies, this kind of cooperative setting might also be an asset in doing analysis outside the box – encouraging open-ended investigation of problems without the pressures of defending organizational positions behind it.

IV.3.2. Resolution of Some Additional Immediate Obstacles to Performance

354 If, as the latest thinking seems to go, it is not large organizational reforms, but rather targeted policy and institutional changes that count, then our simultaneous suggestion is on track. This is to use the information currently available to begin a series of reforms that seem long overdue. Better information would both justify and help direct these efforts, but we believe the justification already exists and that more information can be collected through the reform process itself. These changes in effect reform aspects of the various crisis areas and can be summarized as follows:

355 Improvements to the process for executing judgments, especially in private debt and tax collection. The penhora or the attachment of assets appears to be an obstacle in both types of cases (although we suspect there are others, especially in tax collection). Legal change may be required to eliminate the opportunity for protests on the part of the debtor, but a less controversial change involves the interconnection of property registries so that creditors do not have to go on a virtual scavenger hunt to find where debtors have assets. This change is partly underway in Rio de Janeiro and some other states, but should be accelerated nation-wide. Funding or subsidies could be provided to the affected registries to help overcome the cartórios’ resistance. There are other more controversial changes that might be considered: reduction on restrictions as to information on debtors’ bank accounts, to garnishment of wages (considered as alimentos, and thus exempt from attachment), to the types of property that can be attached, and to the requirement that the creditor, not the debtor, identify the assets. As regards the latter, it is worth mentioning that in Germany and Denmark, debtors are required to provide this information under threat of sanctions for noncompliance. We do not know whether this practice can be recommended in Brazil, but it is worth exploring.

159 "Instigating growth is a lot easier in practice than the standard Washington recipe, with its long list of institutional and governance reforms, would lead us to believe.” Dani Rodrik, Getting institutions right, CESifo DICE report, Summer 2004 as quoted in The Economist, August 7, 2004.

Further investigation of the impediments to tax collection cases and adoption of measures to facilitate their processing. Part of the problem may indeed lie in attachment proceedings, but we suspect the supervision, workload, and incentives for the government lawyers also play a part. A first step here is better information on what they are doing; a second is developing better guidance for their activities; a third may be redistributing their workload or adding more lawyers in some cases. As developed above, problems in tax collection constitute a vicious circle and also lead to other actions producing their own burdens on the courts. We doubt the judges have a major responsibility here although that issue should also be explored. Certainly many of the courts hearing these cases seem to have an excess of filings, and if the state attorneys increase their own efficiency, the current complement of judges hearing these cases may be insufficient. Of course, an alternative means of addressing the problem is to eliminate the need for judicial enforcement, as have other countries in Latin America (Peru, Mexico). This arrangement does not necessarily produce better results (Mexico) and even where it does, raises the threat of abusive application, but we suspect that the largest impediment in Brazil would be an ideological resistance to its adoption.

Development of better information systems on the incidence and implicit liabilities of government litigation. Brazil, like many of the countries in the region, seems to put little attention to how its own lawyers are doing or to what their failure to do better is likely to cost. Court congestion with government litigation cannot be blamed only on poor information, but better systems might help address the problem by allowing government attorneys to focus their efforts where they will have the greatest impact and, over the longer run, discouraging the executive and legislature from creating more eskeletos. Moreover, while we believe professionalization of government lawyers is important, we would warn against the implications of their proposed functional and administrative independence. Creating another class of state attorneys empowered to make their own decisions as to how they will invest their efforts may be consistent with Brazilian corporativism, but it does not seem the way to maximize the benefits they provide to society or government.

Finding a way to back out of governmental reliance on using the judiciary to control the fluxo de caixa. The weight of government litigation is a major contributor to the judicial crisis, both for the space it occupies and for the attention it diverts from the more natural mandate of the courts. The impact is inequitable (not all legitimate plaintiffs get to the courts), costly (if less so than paying the bills up front), and has a number of further negative consequences for the courts (e.g. diverting attention and resources from the resolution of more complex, traditional caseloads). The problem is hardly unrecognized, and it will not be resolved from one day to the next. First government at all levels needs to find a way to pay its bills, and second it needs to ensure the respective administrative agencies can take on the work they have passed off to the

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161 Generally, in Peru at the national level it has been free of problems, except when the Fujimori government politicized the tax agency, but it has been problematic at the municipal level. In the U.S., where it also prevails, critics have also charged that it can be used abusively.
courts. The first problem may be the most critical one – and it is clearly related to the prior issue of getting a better handle on what the government is sending to the courts.

359  **Reviewing the situation of the state juizados especiais.** The problems of the federal juizados are largely addressed in the prior two points. Those of the state entities are different. They are hearing cases which, as discussed above, currently have no other logical forum. However, at least in the larger states, they face their own problems of congestion, delay, and insufficient resources. Either judicial budgets will have to be increased or redirected to cover their needs, or some alternative means of resolving some of their caseload must be found. Consumer complaints, a major item in many jurisdictions, have been resolved administratively in other countries. This may be feasible in Brazil. Alternatively, more use might be made of conciliatory services, reserving judicial treatment only for certain types of case. Although more information is needed, some of it may already be available in the numerous academic studies that have focused on these courts. A final recommendation, also introduced by others, is to take some of the lessons about procedural simplification from these courts and apply them to ordinary justice.

360  **Code reform.** We introduce this here as a natural follow up on the notion of procedural simplification. Brazil’s procedural law is widely recognized, even in Brazil, as too complex and too permissive of dilatory practices. It needs to be reformed, but as one informant noted not only by (the usual) lawyers. The point should be to create processes that allow speedy and fair resolutions of conflict, not that incorporate the recognition of every legal principle ever invented. We are not so radical as to suggest lawyers should not be involved, but their professional biases and vested interests imply they cannot be the only determinants of the changes. The current set of due process rights incorporated in the codes do not so much guarantee protections as provide excessive opportunities for those attempting to avoid justice, and of course much more work for attorneys. Codes are not the only answer. The other part of the equation is educating judges to see their role as that of resolving conflicts, not just applying the rules. Successful code reform is as much a question of modifying organizational culture and incentives as it is of redrafting laws, and it thus requires a prior consensus on the purposes to be served.

**IV.3.3. The Inevitable Political Decisions as to Resource Use and the Purposes of Reform**

361  What a country wants its justice system to do and how much it wants to invest in its actions are inherently political decisions for which there are no hard and fast answers. Outsiders can provide analysis and suggest alternatives but they cannot or should not impose choices. Better information may allow Brazilians to do much of the analytic work themselves, but the decision to collect and analyze data and to use this to inform choices is itself political, as are the preferences that arise from the process. We think better information does not run contrary to Brazilian values but again that is for the

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162 The only half humorous suggestion of one of our interviewees, himself a lawyer.
country to decide. At the very least, better information should not preclude a number of alternative strategies—it just allows them to be designed and evaluated more intelligently. Here we recall Cass Sunstein’s assessment of the role of cost-benefit analyses in public policy related to product liability. The issues addressed “...involve complex questions about how to control risks that stem both from nature and from beneficial products. In resolving these questions, we cannot rely entirely on cost-benefit analysis, but we will do a lot better, morally as well as practically, with it than without it.” In much the same vein, better information on justice sector performance is an input to improve decision making on how to reform it. It does not dictate the answers. It can improve their quality.

362 Brazil currently spends proportionately more on its justice system than do most countries worldwide. In quantitative terms (cost of resolving a case), it may be getting adequate value for its money. We have suggested that qualitatively, the evaluation may be different, but this is only if one believes courts should not do administrators’ work for them or that chances for reconsideration of judgments should be limited. If one agrees with Brazil’s current choices, the costs of maintaining its justice system will remain high. This may well be what a majority of Brazilians want. Improved information systems will still be important in revealing where economies are possible, but they cannot lead to a decision that the system itself is flawed. There are values and there are facts, and it is wiser not to confuse the two categories. Based on its global experience, the role of the World Bank, and of the studies it sponsors, necessarily concentrates on improving the factual basis for decision making and providing information on alternative choices. Except in those circumstances where a country has decided more information is irrelevant or even undesirable, this does not constitute an imposition of values. What a country decides to do with this information, especially in an area as value laden as that of justice, is not our call. For those who believe the Bank is promoting its own model of how justice systems should operate, this may come as a surprise. We may point out apparent contradictions between what a country says it wants, how it operates, and with what results, but again that is only grist for the political mill.

363 We have pointed out in this report areas where we believe this type of contradiction is evident, suggesting inter alia the apparent contradiction between what Brazilians have asked their justice system to decide and their demands for timely, less costly operations. We have suggested a preference for decreasing the demands and thereby lowering the costs and delays. However, the ultimate choice could go in other directions—increasing costs to allow fewer delays with the same workload, or accepting the workload and the costs and delays. The mathematics are objective, but the ultimate decisions on the prioritization of values are inherently subjective and not ours to make.

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164 We will admit that some Bank members have their own preferences, but whether publicly disseminated or just conferred in private discussions, they are not official policy. We also note that studies published by the Bank, including the present one, do not constitute official policy either.


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ANNEX I: The Justice Sector, an Overview\textsuperscript{165}

1. The present section is provided only for those not familiar with the basic organization of Brazil’s justice sector. It is unapologetically oversimplified, and only covers the facts essential to understanding the later discussion. In Chapter IV, in the section on the discussion of the demand for reform, additional institutions, those not covered in the research, are included and more attention is given to the intra- and inter institutional politics of the reform debate.\textsuperscript{166} As an additional note, Constitutional Amendment 45, approved on November 17, 2004, will change some of the details discussed here (for example the number of justices on the TST, and of course, the additional of national councils for both the judiciary and the public ministries). Given uncertainties as to how quickly it will be implemented, we have not attempted to update these details because at the time of this writing (December, 2004), they still hold.

2. Brazil’s justice sector is court centered, but hardly dependent only on the courts for its output. Moreover, all its institutions, including the courts have a very decentralized organization. This is more than a result of the country’s federal structure. Brazil’s corporativist political tradition has served to enhance the independence of organizations which elsewhere in Latin America are rarely accorded this status. Counteracting this tendency to dispersion of control is a federal legal structure which defines, often constitutionally, organizational structure and powers. These general principles apply to the three institutions surveyed here – the courts, the public ministries, and the Procuradorias (solicitors general or government attorneys).

I. National Courts

3. At the national (what non-Brazilian readers might call “federal”\textsuperscript{167}) level, the court system is the most complex. The highest court, the Supremo Tribunal Federal (STF), is the court of last instance for all constitutional issues, wherever originating in the system. However, it has no administrative role in running the lower level court systems – its leadership, as one member expressed it, is only “moral.” Because its 11 members are selected politically (that is to say not necessarily from the career system, but among eligible, distinguished jurists, chosen by the President and Congress), its efforts to expand this leadership are sometimes resented by the other “career” judiciaries. STF Ministers once appointed serve until age 70; the two-year presidency is determined by length of

\textsuperscript{165} There are virtually no good published overviews of Brazil’s justice sector, or even of its constituent parts. Information given here comes from some published sources (Ballard, Bermudes, Rosenn 1998 and 2002, Prillaman, and Sadek, all works), from unpublished documents provided to the team (da Costa Silva, de Brito Nobre), and from interviews and legislation.

\textsuperscript{166} We do cover statistics on criminal cases, but that is the limit to our focus. Had we extended the research to problems of criminal justice, the three major police forces, public defense, and the prison system would have been added.

\textsuperscript{167} Brazilian jurists object to the term federal courts being used as an overall category, as in Brazil, the federal courts are only one part of the national court system.
time on the court which theoretically makes it possible to predict the names of presidents for several years to come.

4. Nationally organized court systems, each with their own superior court of last instance for nonconstitutional matters (including those initiating in the states), include the ordinary federal courts (headed by the 33-member Superior Tribunal de Justiça, STJ), the labor courts (headed by the 17-member Tribunal Superior de Trabalho, TST, to be increased to 27), the military courts (headed by the 15-member Superior Tribunal Militar, STM), and the electoral courts (headed by the 7-member, Tribunal Superior Eleitoral, TSE). All four systems are divided into regions, with regional appellate courts overseeing single judge trial courts (varas). Only two of these systems are surveyed here: the federal and the labor courts. The federal courts have only five regions and appellate tribunals (the TRFs). The labor courts have twenty-four regions and TRTs, one for nearly every state, and two for São Paulo. The federal courts have a council, composed of presidents of the STJ and TRFs and additional members of the former, which meets periodically to decide common policy. The Council of Federal Justice (CJF) has a technical body attached to it which manages some common programs, including a project to unify the statistical systems across the five regions. Since 2001, the federal courts have introduced a lower level of small claims courts, juizados especiais federais, to handle both criminal and civil cases. At present the bulk of their work involves social security cases, although in Regions I and II, additional small claims courts handle other civil and criminal issues.

5. Federal court original jurisdiction is generally determined not by the law applied, but by the participation of the Union, a federal entity, or a federal public company as one of the parties. For the other national courts -- labor, electoral, or military -- it is the subject matter that prevails. In the case of labor courts, cases may thus involve only private actors, or government agencies and their employees, at any level. (However, where a state or municipal agency is involved, it is a state not federal procurador that represents its interest).

6. With the removal of the labor classista judges (representatives chosen by employee and employer associations), recruitment to the first instance of both systems is by competitive examination. Salaries are set by national law, and budgetary limits for personnel expenditures, are, as for all courts and public ministries, set by the Law of Fiscal Responsibility (up to 6 percent of the 60 percent allowed for all personnel expenditures at the relative level of government, for the courts, and up to 2 percent for the public ministries). The percentages have come to be regarded as floors as well as ceilings and are closely watched by the agencies, although there seem to be some differences as to how they are calculated, especially at the state level. Members of the superior and regional tribunals are recruited 80 percent from within the judiciary on the basis of merit

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168 The electoral courts have a separate administrative structure but their members are largely judges working in the ordinary court systems, seconded during the periods of the year when they are needed, and paid an additional salary for the service.
and seniority, and 20 percent from among members of the Public Ministry and private bar.

7. While each court system manages its own budget (with effective control lying at the regional level), budgets must be approved by the legislature. The lion's share of the budget (49 percent) goes to the labor courts with the federal courts getting about 33 percent. The labor courts do have nearly three times the trial judges of the federal system, but their caseload is only about 1.7 times larger. The creation of new judgeships (or court units) also requires legislative approval. The ceilings on overall amounts spent on salaries generally mean that all court systems have more allotted spaces than they have actual judges. This is also true of the state courts and the public ministries.

2. State Courts

8. Each state, and the Federal District (covering Brasilia and other nearby cities), has its own independent court system, headed by a Superior Court (Tribunal de Justiça or TJ). The TJ oversees system administration and on the juridical side, functions largely as an appeals court for cases initiated in single judge trial courts (varas). Three states, Paraná, Minas Gerais, and São Paulo, also have a second set of appellate courts, which hear appeals not going to the TJs. These courts, Tribunais de Alçada, are organizationally independent of the TJs and have their own administrative offices and budgets. Although their judges do not hold the rank of desembargador (appellate judge), their budgetary independence has reportedly sometimes given them higher salaries. The constitutional amendment eliminates this system. Since the mid 1980s, the states have been creating their own small claims courts, juizados especiais, in both criminal and civil jurisdictions. Cases initiated in state courts may also be appealed to the STJ (for issues of infra-constitutional federal law) or the STF (for constitutional issues). Appeal rights are different in the juizados especiais, largely handled through ad hoc bodies (turmas) of first and second instance judges. Whereas court fees are not charged at the first instance in the juizados especiais, private parties wishing appeals from their rulings must pay a filing fee.

9. Judicial salaries have traditionally been set by the states, subject only to a ceiling imposed by the Constitution, but routinely violated, based on 95 percent of the salary of a member of the STF. As part of the 2003 pension reform, this ceiling was again emphasized, in the interests of eliminating a minority of salaries that exceeded that

\[169\] Again with acknowledgments to Matthew Taylor, it appears that the labor courts' share dropped in 2003 by at least 10 percent.

\[170\] Figures for 2000, taken from the BNDPJ, showed 830 cases per first instance labor judges as opposed to 1433 for first instance federal judges. At the second instance (appellate level), labor justice has three times the judges but only about 60 percent of the caseload of the federal courts.

\[171\] Judges and prosecutors also argue that a lack of qualified candidates explains the unfilled positions, but given that most organizations appear to be working at the top of the allotted percentages, we suspect that is a very secondary explanation.
The result, however, has been a nationwide drive to raise the majority of salaries that had not reached it. The overall effect appears to be a leveling of salaries across the states, but probably an increase in the total amount spent.173

10. State court allocations from the public budget are augmented by funds derived from court fees and earnings on judicial deposits held in various public or private banks.174 The amounts from both sources vary considerably by state, determined in part by state laws on court fees (regarding percentages and ceilings) and since the early 2000s, whatever arrangement courts can make with the various banks competing for their funds. Some state courts (Rio de Janeiro is the most famous example) do extremely well by this system. In Rio the fees are high, have no ceiling, and the TJ over the past five years has made an extra effort to ensure they are collected. Moreover, the TJ has apparently negotiated a very good arrangement with the banks holding the escrow accounts – so much so, that between all these sources it has had sufficient funds to loan some to the state government. Other state courts, like that of Pernambuco, suffer on all counts – their fees are limited and capped, they may not be doing as much to ensure collection, and apparently their arrangement for the escrow accounts has not been as lucrative.

11. There is a controversial side to this alternative financing. First there is the question of whether the state is entitled to any of the funds generated by the escrow accounts. The courts’ arguments are that they are just taking part of what the banks formerly kept for themselves, but the question is whether this should not go instead to the depositor. Brazil’s national bar association (Ordem de Advogados do Brasil, OAB) is in fact contesting the practice. The second part of the question has to do with the courts’ view that these are their funds (fundos propios). Perhaps they should no more be seen as such than the taxes collected belong to the collection agency. This question has not been raised in Brazil, but it probably merits attention. At any rate, over the short run, the state courts alone within the sector, and to varying degrees among them, have an extra source of funding to use for investments (not salaries). This explains the vast investments in infrastructure and equipment in various states (as well as the efforts of the Public Ministries to latch onto more funds).

3. The National and State Public Ministries

12. Brazil’s Public Ministry is a unique institution combining the prosecutorial functions exercised by its counterparts in other civil law countries with the role of a

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173 This conclusion is based on interviews with the seven state courts we surveyed, most of whom were requesting substantial increases for their members and lower level judges based on the 95 percent rule. As in two cases, this would have meant a 50 percent increase, the judges agreed to incremental raises over two to three years.

174 De Brito Nobre offers the only written account of how this works we could find. In Pará, the fund was created by Lei Complementar Estadual no. 21 of February 28, 1994, following examples already under way in other states (Santa Catarina, Rio de Janeiro, Mato-Grosso).
super-empowered ombudsman.\(^{175}\) In both functions, it is said to represent society’s interests (not those of the state), for which reason it is independent of the other branches of government. In its ombudsman-like role it actually may investigate and take actions against governmental (and private party) violations of constitutionally guaranteed rights and also is charged with ensuring government agencies’ compliance with infra-constitutional law (most notably those defining corruption).\(^{176}\) While it may represent violations against individuals, it is particularly active in defending collective and diffuse rights.

13. Unlike other Latin American and European Public Ministries, it is also unique in the judicial status it accords to its members (“natural” procuradores and promotores). In practice this means that each procurador (or promoter as lower level prosecutors are called at the state level), operates independently of much direct higher level supervision. Internal disciplinary bodies, Corregedorias, do keep track (as they do in the judiciary) of the productivity and compliance with legal rules on the part of first instance prosecutors, but generally only abject malfeasance brings sanctions or dismissal. Procuradores and promotores are bound by the principle of legality, meaning they are not supposed to exercise discretion in selecting their cases—but rather investigate and prosecute whatever comes or is brought to their attention. However, emphasis is another matter. Except for restrictions imposed by substantive specialization (e.g., a promoter or procurador specializing in environmental matters may not investigate a case involving child abuse), they have considerable discretion as regards how much attention they give to the complaints they receive or what they decide to investigate on their own volition (de oficio).

14. The Public Ministry is legally regarded as a single entity (as is the “Judicial Power”). However its functions are performed by a series of semi-independent or independent organizations with an overall structure resembling that of the judiciary. The nationally-based Ministerio Público da União (MPU) is divided into four semi-independent branches – the Ministerio Público Federal (MPF), de Trabalho (MPT),

\(^{175}\) In other Latin American countries, the Ombudsman or Defensor/Defensor of Human Rights, is an investigative body without prosecutorial powers. Once it determines an abuse has been committed it may refer the matter to the prosecutorial offices, try to negotiate a settlement between the parties, or publicize the fact in the hopes that public pressure will bring resolution. These limitations have not prevented Ombudsmen in countries like Peru or Guatemala from having an impact on public policy, but that impact would clearly increase if they could themselves prosecute cases in court, like the Brazilian public ministry.

\(^{176}\) The STF is currently reviewing a case questioning the constitutionality of the Public Ministry’s investigative role. At issue is the organization’s ability to initiate investigations of alleged crimes without requesting police involvement. Those favoring the restriction argue that promotores and procuradores have often used these powers abusively and arbitrarily. Those opposed argue that because of frequent police (and occasional judicial) involvement in white collar crimes, the prosecutors sometimes have to act independently (also leading the current Procurador-Geral to argue for the Public Ministry’s ability to access individual bank records without a judicial order). If the issue is due process violations, it is hard to say why giving investigation exclusively to the police would be an improvement.
Militar (MPM) and for the Federal District and Territories (MPDFT). The head of the MPU, the Procurador-Geral da República, also heads the Ministerio Público Federal. The MPT, MPM, and the MPDFT each have their own Procurador-Geral. The federal, labor, and military branches have a national organization, and the first two have representations in each of the state capitals, as well as in other large and medium-sized cities; the Ministerio Público Militar has local representations but they are less broadly distributed.

15. State Public Ministries have a more unified organization, like that of the state courts. Each state Public Ministry is headed by a Procurador-Geral de Justiça, chosen by the executive from among candidates selected by the members of the organization itself. State procuradores handle cases seen by the Tribunal de Justiça and promotores handle first instance cases. There is also an increasing tendency to internal specialization via the creation of Procuradorias for areas like environment, youth, or organized crime. These often have a state-wide jurisdiction although depending on local, non-specialized promotores to carry out some actions. Generally, wherever there is a court, there is a procurador or promotor to deal with cases requiring attention from the Public Ministry. Despite this fact, the budgetary ceilings for personnel expenses are only one third of those for the courts. As the Public Ministry salaries are equivalent to those of judges, the only way this can be accomplished is by having less support personnel. In some sense, this is reasonable as courts have more personnel and infrastructural needs. However, the Public Ministries have been combating the differential treatment ever since the enactment of the Law of Fiscal Responsibility. They are also for this reason, the entities most interested in access to loans from the Bank and other donors.

4. Government Lawyers ("Procuradorias"): 

16. The 1988 Constitution also set a new organization for the lawyers representing the state’s legal interests. As with the Judiciary and Ministerio Público, national and local level entities are completely separate organizationally. Since 1988, there has been an effort to unite further the various legal offices still serving different governmental agencies and public enterprises and foundations. At present, while there is usually a single office in theory coordinating all litigation for a governmental level, in fact the coordination is often very slight. Although municipalities also have legal representation, the focus here is only on the national and state level.

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177 Procuradores working with electoral cases are like the electoral judges, seconded from other positions. However there is no separate “Ministerio Público Electoral” as there is for the judiciary.

178 The MPF also has five regional offices, headed by Procuradores Regionais da República, which handle cases seen by the respective TRFs. They have no administrative control over the state offices, even the one located in the regional capital, which report directly to the center. The MPT’s regional offices coincide with those of the states, mirroring the organization of the labor courts.

179 As noted in the text, the recent constitutional reform changes the nomenclature for all members of state public ministries to “promotor.”
17. At the national level, the key organization is the Advocacia-Geral da União, constitutionally charged with providing legal advice to and representing the Union judicially and extra-judicially, directly or through linked organizations. The Constitution defines a comparable role for the Procuradorias in each state and in the Federal District. At both levels, the organizations are to be staffed by career appointees, chosen by competitive public examinations. The heads of the agencies (the Advogado-Geral da União and Procuradores Gerais do Estado) are selected by the respective Executive. At the federal level, and in many states, they need not come from the career. This is a sore point with the organizations’ members and one they attempted to alter via the PEC, introducing recruitment from within and possibly based, at the state level, on lists developed through internal elections. In this the emerging classe obviously aspires toward a system based on that of the Public Ministry.  180

18. As prior to 1988, legal representation generally was provided by lawyers attached to each public agency, the remaining problem was how to coordinate them and their work with the central legal bodies. At the national level, this was only legally addressed with Lei Complementar no 73 of February 10, 1993, which specified the relationships between the Advogacia da União, the newly recreated Procuradoria-Geral da União, the Procuradoria-Geral da Fazenda Nacional, and the Orgãos Vinculados (legal departments belonging to the autarkic agencies). This law reemphasized the AGU’s leadership of the entire system, folded all central government services, except that for Fazenda, into the Procuradoria Geral, under the AGU’s oversight, and left the departments belonging to the autarkic agencies, like that of Fazenda, operating in a semi-independent status, but still under the AGU’s leadership. The states, facing a parallel but less complex situation, have individually taken similar steps to integrate the system. In all cases, the status quo ante, of any number of independent legal offices, was not easily changed in fact. And it is only in the past couple of years that a few executives, largely at the state level, have begun to take steps to force a tighter real coordination. As part of this coordination rests on exchange of information, it is a further topic of this report.

19. Aside from the organizational complexities, the role of the state lawyers is fairly simple. They are to represent the state as plaintiff or defendant in litigation, conduct, where legally allowed and practically possible, negotiated settlements of disputes, and provide other legal advice and binding opinions (súmula administrativa). The rising weight of state litigation, its direct costs, and the financial stakes involved, have awakened interest in the development of overall litigation strategies as well as the formulation of policies to prevent situations giving rise to disputes. Here as with simple oversight, the key is again having information on what the various units and their members are actually doing.

180 And they are not the only ones. Sadek et al (2003) report that the delegados of the Polícia Civil are also seeking an internally managed selection process. This would eliminate the governors’ ability to select police chiefs.
ANNEX II: EVALUATION OF JUDICIAL STATISTICAL SYSTEMS

20. The following provides more detailed information on findings within the different branches of the national judiciary and a selection of state courts. (The STF is not included as the bulk of the details are provided in the text.) We include it here because it is likely to be of interest to members of those court systems surveyed, or to those working on improving overall judicial performance statistics. For the general reader, we acknowledge that it is not essential to understanding the main report and might in fact just add confusion.

1 National Judiciary

364 Labor Courts. The labor courts have the best internal organization for producing system-wide statistics on basic performance indicators. Given their more complex organization (24 different regional tribunals) this is hardly an automatic consequence, but the labor courts are generously financed with a lower average workload than the federal courts, and thus may be able to devote more time and resources to the objective. Among the accomplishments, under the direction of the Tribunal Superior de Trabalho (TST), are the following:

- They have unified the reporting forms to be used by the first and second instance labor courts in supplying periodic reports to the TST.
- They have developed a guide for using the forms, with definitions, rules for calculating results, and clear standards for determining which proceedings should be included in each category.
- In each TRT (regional appellate court) there is an administrative office responsible for receiving the reports from the first instance courts, validating them, and forwarding them to the statistical unit in the Tribunal Superior de Trabalho (TST).
- Many first and second instance courts have computer applications which automatically generate the reports from their own data bases.

21. This structure and the effort to systematize the central data base, although begun fairly recently, have allowed the Labor Courts to reconstruct a historical information series going back to the origins of the jurisdiction in 1941. The information currently collected is the result of a process of successive improvements to the system design.
Each improvement has allowed the inclusion of still more data. Statistics now collected cover:

- "Situação processual" -- overall caseload including, pending cases, annual new filings and judgments with details on hearings, forms of closure, and graphs showing payments of awards and other enforcements of judgment.
- "Situação processual" for different types of actions.
- "Incidentes" -- or interlocutory pleadings
- "Decisões e acordos" -- negotiated agreements including numbers of participants and monetary values.
- Average duration of proceedings; the entries here also take into consideration, pre-judicial resolution (resolução anticipada) via conciliation
- "Cartas precatórias" – judicial orders originating in other jurisdictions, for execution by the receiving judge
- Appeals
- Collection of court fees
- Amounts paid to plaintiffs, differentiated by judgment or agreement.
- Classification by nature of work involved – the former 15 categories have recently been expanded to 50.
- Classification by municipality
- Enforcement and amount of pension claims

22. Once analyzed the information is disseminated in various forms. The Tribunal Superior de Trabalho (TST) offers the following information on its website:\(^ {182}\)

- For the TST, TRTs and first instance courts: cases filed received and resolved from 1941 to 2003.
- For the TST only, number of cases filed, distributed, resolved and pending; sessions held and extraordinary appeals (recursos extraordinarios) from 1999 to 2002.

\(^ {181}\) The current formats were approved by an internal decision of the Council of TRTs, Provimento CGJT 4/2003. They are available on the website: www.tst.gov.br/Secg/prov0403_1.pdf and www.tst.gov.br/Secg/prov0403_2.pdf

\(^ {182}\) www.tst.gov.br/MenuTRTs.htm
23. Some TRTs also make available, on the websites for their Corregedorias, statistical tables reproducing roughly half of the information provided to the TST in the mandatory forms. The Corregedoria Geral da Justiça de Trabalho has also issued regulations as to how the statistical bulletins of each TRT should be organized. One problem we noted with the overall design is the failure to introduce categories to differentiate types of cases. The argument given by the TST and the TRTs is that most labor demands include everything – i.e. the plaintiff sues for unjustified dismissal, salary due, unpaid vacation and so on. While this may be true, it seems unlikely that all cases have exactly the same content. For example, there are cases that focus on other issues: discrimination, work related accidents, slave labor and so on, and it seems important to at least distinguish these. Moreover, even for the mass of cases with multiple claims, there must be other characteristics to distinguish among them – for example, nature of the employment relationship, area of economic activity. Identifying and analyzing these differences would be helpful in better understanding the workload and its temporal and regional variations. Thus, while the standardization of the results and the ample access to information are impressive, from a performance monitoring point of view, the design of the labor courts’ statistical system could still be improved.

24. Federal Justice. The management statistics of the federal courts are evolving satisfactorily thanks to the work of the Technical Secretariat of the Conselho da Justiça Federal. This work has been formally adopted by the Conselho (composed of the presidents of the STJ and five TRFs and several additional STJ members) and has been developed by its technical staff Many of the products and a description of the process are available on the Council’s website. Data collection is channeled through the five regional tribunals (TRFs), based on the systems each created. The objective of the current project is to standardize its classification so as to feed into a common set of statistics managed at the central level, and to facilitate within and across region analysis. There are also examples of TRF statistical offices (most notably that in Brasilia) using their own software to do additional analytic work with their own databases. These software applications offer a pre-established menu of internal calculations although they don’t afford much opportunity for more exploratory work. In any event, it is not clear that the further analysis gets beyond the doors of the statistical personnel who seem to engage in it out of their own interest. We had no indication that the results generated on, for example, average delays had been requested by or submitted to the TRF members themselves.

25. The product of the CJF effort is the creation of SINEJUS (Sistema Nacional de Estatísticas da Justiça Federal). The process has been highly participatory, working

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185 www.cjf.gov.br
through a commission composed of representatives of all the TRFs. The exercise began with the standardization of the categories to be used by the regional tribunals and first instance varas in recording performance statistics. The first two years have focused on three generally categories: "classes" (first divided by major legal areas and then by the type of proceeding) "assuntos" (subject matter or nature of conflict); and "fases" (the stages in any judicial proceeding). The format used is a cascade or decision tree, beginning with large general categories and proceeding through additional levels of subcategorization. For example, the tabela for assuntos, begins with 6 grand divisions (administrative, civil, tax, pensions, criminal, and consumer law), and then further divides each into three more levels, reaching a total of 849 categories. This type of organization is inherently suited to more sophisticated analysis. The categories to be used in classifying assuntos (tabela de assuntos) were approved with Resolução CJF no. 317/2003, and that for classes by Resolução CJF 328/2003. Both resolutions include a collective process for modifying or expanding the classification systems.

26. A part of the standardization of the classification of fases is being done with an eye to unifying the production of results for all three categories. Thus the formats that will be used for classifying fases will also incorporate the categories of classes and assuntos. Beyond the entry of these basic statistics, SINEJUS also contemplates the production of the following performance indicators:

- Average time between filing and distribution at the first and second instances
- Average time between distribution and judgment at the first instance
- Average time between second-instance distribution and first instance judgment
- Average time between request for an interlocutory appeal and its judgment
- Average time between:
  - first instance distribution and delivery to TRF;
  - second instance distribution and delivery to the STJ or return to the trial court
  - delivery to the STJ and return to the TRF;
  - distribution and termination (arquivamento definitivo) at the first and second instance.
- Average of backlogged cases, differentiated chronological categories
- Rate of judgment (judgments delivered in a period / [pending cases + new filings])
- Average time for opinion from the Public Ministry
- Clearance rate (judgments/new entries)

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187 [www.cjf.gov.br/Download/RES328.PDF](http://www.cjf.gov.br/Download/RES328.PDF)
- Average number of appeals per case
- Total and average number of parties to cases

365 The designers are also looking ahead to incorporating related indicators based in large part on information not included in SINEJUS

- Judicial services provided
- Collection of court fees
- Financial resources
- Human resources
- Installed capacity and the distribution of court units
- Convictions and sentences
- Equipment purchases
- User satisfaction.

27. The above lists so far constitute only projections. There has been little apparent progress in deciding how they will be implemented, although the working group has developed formats for the submission of some of the results. Each will clearly require its own process of unifying calculations and terminology to ensure the results are comparable.

28. The use of the data so far collected has been largely limited to publication in hard copy or on the CJF website. Entries there now include:

- Historical series on cases entered at the first instance, adjudicated, sent to the TRF, and pending from 1997 to 2003.\(^{188}\)

- *Atlas da Justiça Federal*\(^{189}\) — much the same as above except that the *Juizados Especiais Federais* are also included.\(^{190}\)

366 The *Tribunais Regionais Federais* public their own statistics in their annual reports and on internet.


189 www.cjf.gov.br/atlas/atlas.htm

190 www.cjf.gov.br/atlas/Quadros%20Gerais/Mov%20Proc%20nos%20JEF.html (this is the only available aggregate data on the *juizados especiais federais*).
• TRF1 — graphs on cases distributed, adjudicated, and pending, as part of the Relatorios de Actividades of the Corregidoria.¹⁹¹

• TRF2 — data on productivity by judge¹⁹² and on the juizados especiais.¹⁹³

• TRF3 — monthly reports for 2003 y 2004 on cases distributed and judgments.¹⁹⁴

• TRF4 — graphs showing cases distributed, judged, and pending,¹⁹⁵ and the monthly statistical bulletin.¹⁹⁶

• TRF5 — statistical series,¹⁹⁷ map of productivity, and monthly statistics.¹⁹⁸

2. State Courts

29. In addition to the general summary provided in the text, more detailed information on the seven state courts reviewed is made available here.

30. São Paulo. Despite or possibly because of its size and heavy workload (over one-third of the total for all state courts), São Paulo has lagged behind in the adoption of automation equipment, automated case tracking systems, and management statistics. The Tribunal de Justiça has two statistical offices (and there is another for the three independent Tribunais de Alçada). One handles data from the second instance and the other from the first instance. Staffing is minimal, no more than six people in each unit, and they devote most of their efforts to entering data manually from the reports sent by the judicial offices. They have neither the time nor preparation to do further analysis. The use of the resulting data base is almost exclusively to track productivity of individual judges. Entries are limited to the most basic — cases pending, new filings, hearings and sentences. These are also reproduced in printed form in the Relatório Anual de Gestão and on the website for the Corregedoria.

31. The Tribunal has negotiated the financing of a plan for state-wide automation with the bank (Caixa Nossa) holding its escrow accounts. It was unclear in our interviews whether the plan had been developed by the Tribunal itself or has been left up to the bank. In any case, there are apparent doubts as to its sufficiency. Software,

¹⁹¹ www.trf1.gov.br/institucional/corregedoriageral/corregedoria.htm#linkResultado
¹⁹² www.trf2.gov.br/institucional/estatistica/estatistica.php
¹⁹³ www.trf2.gov.br/juizados/estat-inicial.htm
¹⁹⁵ www.trf4.gov.br/trf4/institucional/estatistica.php (includes a graph on “outros processos registrados” without specifying what they are)
¹⁹⁷ http://200.199.20.194/vian04/corregedoria/indice_estatistico_historico.php
¹⁹⁸ http://200.199.20.194/vian04/corregedoria/corregedoria_index.php
however, will continue to be provided through a state enterprise, PRODESP, which is responsible for processing all the state's data. PRODESP now has a contract with Oracle to develop a new system for the judiciary, but judicial statistics will be the last element designed. This is unfortunate as it means that what can be measured will be determined by decisions relating to the capture of data for other purposes. This is, of course, the situation nation-wide, but the development of a new system offers the opportunity to avoid many of the usual problematic consequences.

32. **Rio de Janeiro.** This state is one of the leaders in automation and in the production and use of management statistics. All judges have computers in their offices and each also has a laptop so that he/she can work at home. All second instance courts are connected by a network, as are 98 percent of those at the first instance. Complete linkage is only impeded by problems with telephone service in some outlying areas. All data bases have been migrated to Oracle. Internet consultations have been so successful that the TJ has stopped investing in self-consultation terminals in the courthouses. While the state had a head start on others, its ability to modernize its equipment and software further has been facilitated by its productive management of court fees and other sources of its special fund.

33. Network coverage allows automatic inputting of data to the management information system. Rather than requiring judges to send reports to the TJ on their productivity, these are automatically sent to them. The court has a data base covering ten years of court statistics. The emphasis remains on judicial productivity, and also includes that of second instance judges. The Corregedoria no longer oversees the process, but instead focuses on controlling staff and the cartórios. Monitoring of judicial productivity has been transferred to an internal Judicial Council. The TJ has calculated minimal production standards, and when a judge does not meet them, the Council contacts him or her to discuss the problem. Depending on its causes, the Tribunal may mobilize one of several types of special working groups to provide assistance. These are composed of judges, working for free or with additional salary, who help the target judge reduce his backlog. Members of these task forces are expected to keep up with their own caseload and to meet production quotas in this additional work.

34. The statistics managed at the central level have been used still more creatively to address productivity problems. Average times for the resolution of cases have been calculated as a first step to reducing delays. As a consequence, the TJ reports that case processing times have dropped and that the average times for the distribution of its own cases (following filing) have fallen from 114 days to 24 hours. (Nonetheless, as demonstrated in Chapter III, the Rio de Janeiro state courts retain a large backlog.) The Tribunal's analysis of the workload of the juizados especiais suggests they have been most effective in expanding access to nontraditional clients, but have not reduced congestion in other courts. As the juizados now face their own congestion problems, the

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199 As explained in Chapter IV, these are private attorneys performing various pre-judicial functions, now under court supervision. The term is often translated as notaries, although not all functions are strictly speaking, notarial.
Tribunal has introduced a court-annexed conciliation service (the *Expressinho*) to handle cases involving the local phone company, Telemar, the source of a large proportion of consumer complaints.

35. The Tribunal has begun to use its data base to analyze a wider range of issues -- the handling of *precatórios* (awards owed by government agencies in cases they lose) and the identification of the most frequent complaints and parties, and of areas where judicially promoted agreements and settlements are most effective. It also maintains separate statistics to track collection of court fees and thus increase these generations. Improvements in all these areas are reported on the Tribunal’s website and in its annual reports.

36. *Pará*. Automation remains partial. Only 22 of the 102 comarcas are computerized, although they are those with the largest workloads. The existing plan is to complete coverage by 2007. Entry of centrally managed statistics is handled by a statistical unit within the office of informatics. The informatics office, with a staff of 35 is in turn under the *Secretaria de Planejamento, Coordena@o e Finan~as*. The statistics unit receives some data directly, but periodic reports on judicial production, generated manually or automatically, are first channeled through the Corregedoria. Aside from statistics on judicial productivity, there is a separate system to track collections of court fees.

37. The information system is based in Oracle and incorporates data from the entire state. However, data from the noncomputerized courts is entered on the basis of manual reports, compiled in each *vara*. The format used is that established by BNDPJ, essentially new filings, cases closed, and cases pending.

38. Use of the central data base appears limited to its submission to BNDPJ and to the *Corregedoria*’s evaluation of judges. Given the emphasis placed on the number of inhabitants served by each judge, it may also be used to support requests for higher staffing levels.

39. *Ceará*. The state currently has three automated case management systems. The oldest was developed by the Tribunal and is still used by judges in parts of the interior. A second was purchased and operates in a few courts in the capital. The third, called SPROC was developed by the TJ of Tocantins, and functions in Ceará’s Tribunal and in 54 of the 184 comarcas. The plan is to phase out the first two and migrate all data to this third system, which will operate in a network linking both first and second instance courts. While the Tribunal has attempted to unify the categories applied in the case management entries, many of the comarcas continue to use their own. In addition, the categories are still very extensive as their main purpose is to facilitate the handling of the individual case, beginning with the determination of which judge should receive it. As the purpose is to differentiate cases, not track general trends, greater detail is seen as an asset.

40. The Department of Informatics is responsible for the implementation of the new system. It also manages the central collection of statistics, which are submitted as paper
reports based on calculations done by the support staff of each court. The Corregedoria is the principal user. Workload tends to be distributed very unevenly, owing to the need to cover a large state with many relatively underpopulated comarcas. Forty-seven comarcas do not have their own judge, and rely on visits from the judge in a neighboring comarca. This has also created problems for the juizados especias which are staffed part time by ordinary judges. Ceará has also experimented with judicial task forces to reduce backlog in congested courts, but the main emphasis remains on finding a way to increase the number of judges. The TJ’s annual report includes very few statistics.

41. **Pernambuco.** The automated case management system now in use is JUDWIN. It was developed by a firm in Paraná and is also used there. Coverage includes the entire second instance and 77 percent of the first instance caseload. Only the second instance has internet connections. The data on individual cases is used to generate an index of judicial productivity based on the number of cases resolved. This is used internally by the Corregedoria. Only the productivity index for desembargadores (appellate judges and members of the TJ) is published in the Diario Oficial.

42. Use of the data appears otherwise limited. There is no statistics unit, and the informatics office which manages the data base has only been asked to focus on productivity. While the Planning Department works with its own data base it does not appear to tap into the data on caseloads. The Tribunal’s website offers no statistics. Printed reports focus on budgetary data, productivity of desembargadores, and caseload, by vara and by assunto. Some of Pernambuco’s lack of progress in these areas apparently originates in the smaller size of its special fund. A collection of adverse circumstances – low fees, caps on payments, and possibly less successful arrangements with the bank holding the judicial deposits – makes this one of the states where court authorities claim to have little money to invest in improvements and thus profess an interest in securing outside funding.

43. **Rio Grande do Sul.** The state court is another early leader in automation and production and use of statistics, and is now in its second or third generation of improvements in all areas. Currently all 160 comarcas are linked by internet with the Tribunal de Justiça. The Tribunal is in the process of upgrading its case management data bases, and currently have two systems in operation, both internet connected. The new system, which was introduced in the interior first (and still is not in place in the largest cities) will use a single data base in web format. The goal is a data warehouse which will include all cases from the first and second instance. This is clearly the wave of the future, and this is one of the few courts (at any level) to have advanced this far. Like Rio de Janeiro, the Tribunal benefits from its successful management of its special fund and the various sources of financing contributing to it. The fund has also been used to finance additional investments in ICT equipment and experiments now underway with automated filings and virtual hearings and proceedings.

44. Data entries follow a classification system based on materia (assunto), classe and naturaleza. Forms of closure are also classified by type of judgment or other termination. In producing the classification system, the court staff studied the experiences of other
states. They also considered other state experience in developing their new system design, and noted that Santa Catarina and Paraná were among the best surveyed.

45. The Tribunal is in the process of linking its own database to those of other local entities. There is already an interface with the Public Ministry for the second instance, thereby eliminating the need to duplicate data entry. There is a plan to create links with the Civil Police as well. Because of differences in classification systems, the two organizations are currently collaborating to develop an equivalency table. A project is also underway to link the courts with the civil registry and eventually, following their own interconnection, with the state’s 400 property registries. Progress in creating interfaces with Public Defense and the Procuradoria Geral do Estado are hindered by the organizations’ scarce resources.

46. Aside from the usual application to control productivity of individual judges, the data are used for planning. The planning unit publishes a statistical annual on internet. Although they had not done so, the staff members said they could analyze such themes as the incidence of state litigation, the appeals rates, and outcomes for these cases. The Tribunal president, who ordered prepared and carries a 10 page summary of basic data with him, was able to discuss performance problems on this basis. He noted for example that delays were largely due to multiple appeals, that the state currently has one judge for every 22 to 25,000 inhabitants, that judges manage an average of 3,000 cases (including pending and new filings), and that 50 percent of all parties are exempted from court fees for inability to pay. Government-related litigation was an important source of cases with the urban property tax figuring as the most usual conflict. It also accounted for 18 percent of appeals, with public pensions accounting for 11 percent.

47. Tribunal de Justiça do Distrito Federal e dos Territórios (Brasília). The Federal District is another leader in the early automation of case management. The Tribunal currently has two systems in operation, one for the first instance courts and the other for the second instance. The systems are not yet interconnected, but cover all courts in the city of Brasilia as well as the comarcas in the rest of the Federal District. The data are structured through the use of several coding tabelas. One interesting inclusion here was the value of the demand (valor da causa). Our rapid review of the data available on the internet suggests that this is normally provided. Nonetheless, the “tabelas de feitos” (codification of substantive issue) have not been optimized.

48. We also noted here a problem present in many other systems – a tendency to include a number of events that do not in themselves constitute cases, for example cartas precatórias (15 percent of all second instance “filings”) which are in effect requests from a judge in one jurisdiction to another for actions related to a case being handled by the first (e.g., notification of a witness). While it is important to register these events, their inclusion as part of the ordinary “filings” category can substantially inflate the basic caseload statistics. The preferred practice would be to count case filings separately and

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200 [http://www.tj.rs.gov.br/institu/contas/ranual/indice](http://www.tj.rs.gov.br/institu/contas/ranual/indice)
create another tabulation for these related or unrelated events ("despachos") At the very least, Brazilians should adopt standard methods for their treatment, thus facilitating within country (and within jurisdiction) comparisons. However, if they want to compare judicial workloads with those in other countries, they would be advised to omit the despachos from the basic count.

49. The Federal District’s automated case management system made available on the internet is one of the most sophisticated we have seen, possibly one of the most sophisticated in Brazil. It is virtually the only internet presentation accompanied by an explanation of the categories in the various tabelas. It allows consultations for both first and second instance courts. It also is one of the few such systems to provide links with full text documents so that those consulting the system have access to interlocutory decisions, "despachos" and final judgments. As noted, the internet data also include the monetary value of the demand.

50. Data collected in the management information system allow the production of some potentially useful statistics. Although the database software used (MUMPS) is old, and there have been additions in other languages, the staff has been able to do further analysis some of which has been used to guide policy decisions. For example, the advisory body for strategy (Assesoria de Assuntos Estratégicos) has done a statistical study on the evolution of demand between 2000 and 2003 in which it has also incorporated data on population, unemployment, and crime rates. This has been used to project workloads for the 2004 to 2006 period and to inform decisions on the structure and location of courtrooms. Curiously, the TJDF’s website does not itself contain statistical reports.

\[201\] Available at www.tjdf.gov.br/consultap/frameproc.htm.