

# Courts and the Rule of Law in Democratic Brazil

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# Legal certainty in Brazil

- ❑ The principle of legal certainty is a fundamental right which is part of a group of unchangeable statements (known as “stone articles”) in the Brazilian Constitution, as follows:

“ the law shall not harm the vested right, the perfect juridical act and the res judicata.” (Article 5, XXXVI, Constitution of 1988)

# Legal certainty in Brazil

❑ **The Legal certainty is obtained from three levels:**

1. Quality in legislation making
2. Stable jurisprudence
3. Low level litigation

Brazil's legal system → provides an independent forum in which challenges and appeals to both public and private acts are adjudicated in accordance with the law.

# Improvements of the Constitution of 1988

- ① focus on human dignity as major principle (Article 1, III)
- ② expansion of the list of the fundamental rights (Article 5)
- ③ principles of legality, impersonality, morality, publicity and efficiency (Article 37)
- ④ administrative probity as a legal value to be protected (Article 37, § 4)
- ⑤ strengthening of the Judiciary Power, Prosecutors and Public Defenders, the establishment of the Office of the Attorney General of the Union and its legal team (Art. 99 and arts. 101 through 135)
- ⑥ highlight on economic activities, social welfare and environment (Articles 170 through 225)
- ⑦ mandatory material provision of the public policy (Articles 6, 7 through 11 and art. 193)

# State enhancements after the Constitution of 1988

- ① Social Security reform (Constitutional Amendment 41/2003)
- ② Administration reform (Constitutional Amendment 19/1998)
- ③ Intensification of the private public partnership (Law 8031/1990)
- ④ Fiscal Responsibility Law (Supplementary Law 101/2000) - new limits to the expense of personnel in the three levels of government (Article 19 )
- ⑤ Adequate and efficient public services – social rights, human dignity and reducing social inequalities - Law 8213/1991
- ⑥ Improvement of budgetary process and taxation - allocation of tax revenues for the Federation and limitation of the taxing power (according to articles 157 through 169 of the Constitution)

# Measures for Improvement of the Judicial System

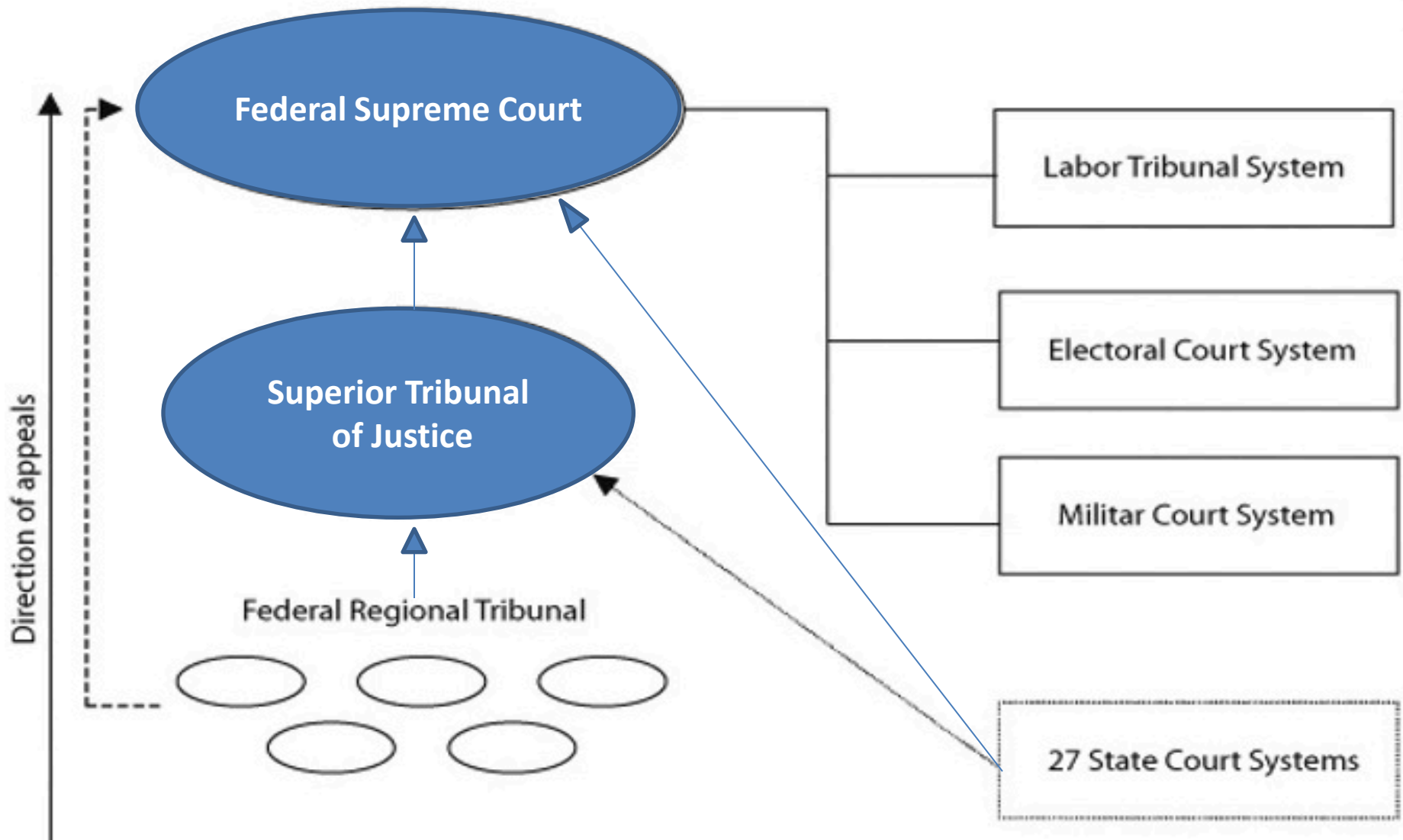
- **National Council of Justice** (Constitutional Amendment 45/2004)
- **Summula with binding effects** (Constitutional Amendment 45/2004)
- **Extraordinary appeal with general repercussion** (Constitutional Amendment 45/2004)
- **Electronic proceedings at the Judiciary** – Electoral Justice (Law 9504/1997) and increasing computerization of procedures (Law 11.419/2006)
- **Simplification of procedures** – changes in the Code of Civil Procedure by Law 11.418/2006 and establishment of repetitive appeals (similar to Group Litigation Order, UK) by Law 11672/2008

# Strengthening of internal controls and protection against corruption

- Law 8.429/92 - the defense of administrative probity among politics and public servants
- Law 12.527/11 - the access to information
- Law 12.813/13 – conflict of interest
- Law 12.846/13 – anticorruption
- Laws 9.613/1998 and 12.683/2013 – Board of Control of Financial Activities (COAF)
- Supplementary Law 134/2010 – “Law of Clean Record” – hypotheses of ineligibility
- Establishment of National Strategy of Combating Corruption and Money Laundering



# Levels of the Court System



**763 Varas Federais and 213 Juizados Especiais Federais Autônomos**

# Federal Supreme Court

**The Federal Supreme Court (*Supremo Tribunal Federal* – STF)** is the highest court in Brazil and is entrusted with the responsibility of safeguarding the Constitution, as well as functioning as a court of review. The Federal Supreme Court also has original jurisdiction to try and decide:

- **Direct actions of unconstitutionality** (*Ação Direta de Inconstitucionalidade*) of a federal or state law or normative act
- **Declaratory actions of constitutionality** (*Ação Declaratória de Constitucionalidade*) of a federal law or normative act, which somewhat resemble the issuance of advisory opinions — a situation not allowed in the Supreme Court of the United States

The National Council of Justice (Conselho Nacional de Justiça) was created in 2004 through Constitutional Amendment No. 45 of December 30, 2004. It is a judicial agency responsible for the administrative and financial control of the judiciary and the supervision of judges

Competency: Federal Constitution, article 103-B, §4:

- It is incumbent upon the Council to control the administrative and financial activities of the Judicial Power and to fulfill the functional duties of the judges
- Composed of fifteen members who are more than thirty-five and less than sixty-six years of age, for a term of two years, with one continuation allowed

# Superior Tribunal of Justice

The Superior Tribunal of Justice was created by the Constitution of 1988 and is responsible for standardizing the interpretation of federal law in Brazil, following constitutional principles and the guarantee and defense of the rule of law (Federal Constitution, article 105)

The STJ is the last instance in the Brazilian legal system for consideration of infra-constitutional issues not directly related to the Constitution. In 2005, as part of the judicial reform implemented through Constitutional Amendment No. 45 of December 30, 2004, the STJ also took jurisdiction in the analysis and grant of letters rogatory and in the judgment and confirmation of foreign decisions, which previously were under the jurisdiction of the Federal Supreme Court (STF)

Composition: Federal Constitution, article 104 (sole paragraph):

- Composed of a minimum of 33 Justices, chosen from among Brazilians over thirty-five and less than sixty-six years of age
- Appointed by the President of the Republic, after their nomination has been approved by an absolute majority of the Federal Senate.

**The Federal Justice is composed of Federal Regional Tribunals (Tribunais Regionais Federais) and Federal Courts (Juízes Federais)**

Federal Regional Tribunals have original jurisdiction to hear:

- cases against federal judges, including military judges and labor law judges whenever they are involved in common crimes and crimes of responsibility; and the members of the Public Prosecutor's Office (*Ministério Público da União*) with the exception of the competency of the Electoral Justice
- criminal reviews and annulment actions of federal court decisions
- writs of mandamus and habeas data against an act of the Federal Regional Tribunal or federal judge;
- habeas corpus, when the constraining authority is a federal judge
- conflicts of jurisdiction between federal judges subordinated to the Federal Regional Tribunal

Federal Regional Tribunals act as courts of review in cases decided by federal judges and in cases decided by state judges exercising federal authority in the area of their jurisdiction

## **Federal Courts**

Federal courts have jurisdiction to try cases in which the Federal Government, its agencies, foundations, and federal public companies are listed as plaintiffs or defendants and in all other matters listed in article 109 of the Constitution. The trial courts of the federal justice are regulated by Law No. 5,010, of May 30, 1966

# Courts and the Rule of Law



# Courts and the Rule of Law

Brazil is a civil law jurisdiction, different from the common law system used in countries such as the United States and Commonwealth countries, Brazil's courts are less able to establish legally-binding precedent, as most decisions are applicable only to the parties concerned

Consolidated sets of legislation called “Codes”. Examples:

- National Tax Code: taxation
- Civil Code: private law, including property
- Commercial Code: commercial law )
- Consolidated Labor Law: labor law

# Courts and the Rule of Law

A wide variety of disputes and conflicts have arisen out of the twin economic and political transitions that followed the end of military rule in Brazil. In resolving these conflicts, Brazilian federal courts have repeatedly been thrust into the vortex of policy debate. Brazilian courts have taken an active, dynamic stance: they have shaped policy choices, influenced policy implementation, challenged many of the executive-driven reforms of the 1990s, and stalwartly defended the 1988 Constitution.

# Courts and the Rule of Law

Access to the courts under the 1988 Constitution was expanded by creation of small claims courts (*juizados especiais*), as well as by broadening access to some legal instruments. The Constitution allowed for widespread challenges to the constitutionality of laws via the *Ação Direta de Inconstitucionalidade* (ADIN), or Direct Action of Unconstitutionality. The ADIN mechanism had existed under the military, but was expanded by the new Constitution, allowing the constitutionality of a law to be directly contested in the highest court, the Federal Supreme Court, by a broadened set of institutional actors: the President, the Senate, the Chamber of Deputies, the state assemblies, state governors, the prosecutor general, the Federal Council of the national bar association (OAB), political parties, and national class or union confederations. In addition, new case types were created or modified to strengthen the ability of civil society groups to challenge the government directly, and the Constitution created the autonomous *Ministério Público*, a federal prosecutorial body with extensive powers and a degree of autonomy that have led some to call it the "fourth power" in country

The glut in the upper reaches of the Brazilian judiciary can be largely attributed to public sector litigation, with state companies and governments at all three levels (federal, state, and municipal) counting for 90% of litigation in the Federal Supreme Court (STF) during the period 2000-2009.

## Dealing with da problem

1. Mediation in private and public sector – PL 7169/2014
2. Arbitration – PL 7108/2014
3. Tax agreement – PL 5082/2009
4. New civil procedure law – Lei 13.105/2015

- ✓ According to article 103-A of the Constitution, the Federal Supreme Court may issue a decision with a binding legal effect on the entire judicial branch and in the direct or indirect public administration at the federal, state, and municipal levels. To be issued, it is necessary that a Constitutional matter have been repeatedly decided in the same way by two-thirds of the Court's members
  
- ✓ The new Civil Procedures Code establishes the respect for da precedente:
  - Article 489, itens V and VI
  - Article 926 and paragraph 2º and 5º
  - Article 988, item IV

# Mediation's regulatory benchmark

- ✓ Proposal recently submitted to Congress to establish in Brazil the legal culture of agreements instead of disputes, introducing the institute of mediation as an essential tool for participatory conflict resolution (Bill nº 517/2011)
- ✓ According to the draft law, the mediation can address the whole conflict or just part of it, and is divided into three types: non-judicial, judicial and public
- ✓ Regarding the law suits, the proposal foresees the possibility for the court to convene a mediation session to try to expedite the solution of the case

# Model experience of the Attorney General's Office

- ✓ **Conciliation Chambers of the Federal Administration** – resolution at administrative level of disputes among organs and entities of the Federal Administration, without the need to judicialize those conflicts
- ✓ **Conciliation Chambers of the federation:** conciliation of conflicts among the Federal Government and States or municipalities (with more than 200.000 people or state capitals)



# Attorney General's Office and legal certainty

- ❑ Legal competences of the Attorney General of The Union
  - ✓ Interpret the Constitution, laws, treaties and other legal acts, to be followed uniformly by all organs and entities of the federal administration (Article 5 of Law 11105/2005 (Article 3, X of Supplementary Law 93/1993))
  - ✓ Unify the administrative judgments, ensure correct application of laws and resolve disputes between legal entities of the federal administration (Article 3, XI of Supplementary Law 93/1993)
  
- ❑ The uniform legal interpretation of the law among the federal administration ensures legal certainty for citizens and business agents in their relations with the Brazilian State.

BRAZILIAN GOVERNMENT

**BRASIL**