

# FACTSHEET

## Brazil – Criminal Justice System



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**The aim of this fact sheet is to provide a basic insight into the Brazilian legal system. If you need further explanation on certain points of the legislation or of the system itself, please seek advice from a lawyer. Prisoners Abroad would like to thank Matrix Chambers for their help in preparing this factsheet.**

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### 1 Legal system

The constitution of Brazil was approved in 1988 after a long period of post-dictatorship recovery. The constitution establishes the accused as the bearer of rights and not the object of persecution. It also enshrines principles of equality, legality, due process, natural law, presumption of innocence, the right to a defence and a public trial, privacy of the home and communications, and habeas corpus.

Suspects have the right to a range of information from the moment of arrest. These include the right to be told

- the name of the police officer or authority making the arrest
- the place of arrest and where they are being held
- their legal rights
- that they may communicate with the person of their choice, and may appoint the lawyer of their choice.

The police are obliged to immediately inform a judge of an *in flagrante* (caught red-handed) arrest. The constitution does not specify a time limit for this, but in practice 24 hours is accepted as the maximum. At the end of this time the *in flagrante* arrest is relaxed, and the suspect is released. However, a criminal action can still be instigated, even after the release of the suspect. Should the whereabouts of the suspect not be known the police must apply to the judge for a warrant for search and capture (i.e. arrest).

Under the constitution letters, telegrams and telephone conversations are private, as are residences. If the police wish to inspect an item of correspondence, listen in to a telephone line or enter and search private premises they must apply to the judge for a warrant to do so. A warrant will be granted when the grounds for it are in accordance with the law and it can be shown that it will aid a criminal investigation. The only exception is when a serious crime has been committed, a disaster has occurred or it is necessary to provide emergency relief (and then only during the day). In such cases the police may enter premises without the permission of the resident.

Judges also have the power to impose “precautionary measures” (including imprisonment) on suspects. Precautionary imprisonment may be ordered when temporary detention is required (similar to *guard-a-vue* in the French system) or when the crime merits preventative imprisonment. The Code of Criminal Procedure (CCP) of 1942 establishes three circumstances in which preventative imprisonment is warranted. These are

- to uphold public order
- to allow a criminal investigation to proceed without inhibition
- to guarantee the future application of criminal law.

There is controversy around the first, given the constitutional guarantee of presumption of innocence until guilt is proven. There is also much debate around the fact that certain crimes are not eligible for either bail or amnesty. These include: torture, drug trafficking, terrorism, and “heinous crimes”. Preventative imprisonment is, in practice, considered mandatory in such cases.

The constitution does not set time limits for preventative imprisonment, although ‘judicial precedent’ establishes a maximum period of 81 days. (This may be doubled in the case of a “heinous crime”). It must also be noted that in the big cities there are many instances of people waiting for their cases to be judged while being held in preventative imprisonment in police cells. This is illegal, since this effectively makes police stations little prisons, and is therefore not in line with the investigative functions of the police. On a positive note, the time limits for preventative imprisonment are strictly observed.

In marked contrast to the inquisitorial nature of the Code of Criminal Procedure (CCP) dating from 1942, the Constitution of the Republic (1988) embodies accusatorial principles of justice. This means that the Brazilian justice system is somewhat contradictory.

The constitution lays down a clear separation of roles between the prosecuting counsel, the judge and defending counsel, and establishes the accused as the bearer of rights and not the object of persecution. In line with the accusatorial nature of the constitution and the separation of roles, chiefly between judges and prosecutors, responsibility for criminal prosecution rests with the Public Ministry (*Ministerio Publico*). The Ministry has no power to intervene directly on issues of liberty of the suspect or accused, and any requests from the Ministry in this regard must go through the legal channels. Decisions may be appealed and are subject to habeas corpus.

By contrast, judges are the official defenders of a citizen's fundamental rights, and any violation of these rights must have legal authorisation (e.g. search and capture, telephone tapping, precautionary imprisonment, etc).

Responsibility for criminal prosecution rests with the Public Ministry (*Ministerio Publico*). This is in line with the accusatorial nature of the constitution and the idea of separation of roles, chiefly between judges and prosecutors. Since Brazil is a Federal Republic the Public Ministry is organised along federal and state lines and crimes are defined by the constitution as within federal or state jurisdiction. The head of the Ministry is the Prosecutor General, who is appointed for two years by the President of the Republic. Candidates for Prosecutor General must be over 35 years of age and have been approved by an absolute majority by members of the Federal Senate.

Public criminal prosecutions are divided into two types. Firstly, those that are conditioned by the victim: assault and bodily harm are examples. In such cases the victim has a period of six months to report the crime to the authorities (i.e. to authorise the Public Ministry to start legal action). Secondly, some unconditional prosecutions, which do not depend on the victim reporting the crime. These include cases of theft, robbery and fraud.

Crimes that are prosecuted privately include those against personal honour, and must be brought within six months of the offence being committed. In such cases prosecution is left to the victim and the Ministry does not get involved.

The constitution also provides for a further category: "private criminal action subsidiary to public action". This is when the Public Ministry does not instigate proceedings within the legal time frame (normally two weeks), and the victim decides to take matters further with the Public Ministry as "co-titular" in the criminal proceedings. This provides a way (in theory) for the public to control the criminal prosecution activity of the Ministry. However, there is no provision for state support to cover legal fees.

The Constitution recognises the following:

- Equality before the law. Brazilians and resident foreigners are guaranteed the right to life, liberty, equality, safety and property. Men and women have the same rights and responsibilities.
- Natural law. No-one may be tried or sentenced except by the competent authorities.
- Legality. No one may be required to do, or to cease doing, anything without regard to the law. There is no crime without a prior law defining it, or punishment other than that laid down by law. No one is considered guilty until convicted by a court of law.
- Due process. No one may be deprived of their liberty or possessions without due legal process.
- Everyone has the right to a defence
- The inadmissibility of illicit evidence
- The public nature of legal proceedings as a general rule (except where this would affect privacy or the interests of society).
- Privacy of the home. No one may enter without the permission of the resident, except in cases of serious crime or disasters, or to provide emergency assistance or (during the day) by legal order.
- Privacy of communications. Letters, telegrams and telephone conversations are private. Warrants may be obtained for their inspection in accordance with the law and to further a criminal investigation.

To safeguard these rights, in addition to the standard mechanisms of criminal proceedings, habeas corpus and injunctions are applied.

Under law 8072-90 crimes such as torture, drug trafficking, terrorism, and “heinous crimes” (these include aggravated homicide, aggravated rape and robbery resulting in death) are not eligible for either bail or amnesty, and preventative imprisonment before trial is considered mandatory.

## **2 Remand period**

The accusatory system provides for the involvement of the Public Ministry in the preliminary investigations. Its role is to receive the findings of investigations and monitor police activity at this stage. The Brazilian system has no equivalent to the examining justice, and in the past there have been many occasions when the boundaries between the responsibilities of the judicial police, the Ministry and the judiciary have been blurred.

During the investigation of the case the accused remains in the custody of the arresting organisation, usually the Federal Police, but possibly also the Civil Police - in conjunction, as necessary, with DENARC (Drugs Investigating Agency) and the *Receita Federal* (Customs / Inland Revenue).

## **3 Bail**

People charged with crimes such as torture, drug trafficking, terrorism, and “heinous crimes”, including aggravated homicide, aggravated rape and robbery resulting in death are not eligible for bail. Whatever the crime, bail is more difficult for foreign nationals to obtain.

## **4 Legal assistance**

The constitution includes the provision of free legal aid for accused persons without the financial resources to pay for a lawyer. In such cases a public defence lawyer will be appointed. (According to the 1996 census, 98% of people convicted have had free legal aid.) However, the number of public defence lawyers available falls far short of what is required to provide a full service. For example, in Sao Paulo the State Prosecution Service currently has around 800 lawyers in its legal aid section, in addition to interns - students in their final year of a law degree. The informal solution has been to take on more interns, and they currently do most of the administrative legal aid work and some of the judicial aid work.

Minors (under 18) are assigned a guardian, who is not necessarily a legal professional, to ensure their correct treatment.

British nationals are recommended to contact the Embassy. Consular staff cannot give legal advice but can explain the legal system of Brazil and the nature of the charge(s) when it is brought. They can also provide a list of English-speaking lawyers.

## **5 The trial**

The law is administered by the Federal Supreme Court of Justice (*Supremo Tribunal Federal*, or STF) and other courts of law below it. The Supreme Court is competent to judge the President of the Republic on criminal matters (and did so, in 1992). Below this are the various Superior Courts, also competent to judge criminal cases. The Superior Courts are:

- Superior Court of Justice (STJ)
- Superior Electoral Court (TSE)
- Superior Military Court (STM)

As a federal republic, Brazil's justice system is divided into federal courts and common courts, which are linked to the member states. Federal justice is divided into three instances:

- First instance
- Regional Federal Court
- Superior Court of Justice

Common justice is also divided into three instances:

- First instance
- Court of Justice
- Superior Court of Justice

It should be noted that judges are guaranteed tenure and permanence of location.

The first hearing is supposed to take place approximately two to four weeks after arrest but this is unfortunately not always the case. At the first hearing, the accused pleads either guilty or not guilty and is questioned by the judge, the prosecution and the defence lawyers. The Courts normally provide an interpreter.

The second hearing should happen about two weeks after the first one. The Prosecution presents its case.

Again the third hearing normally happens within two weeks after the second one. The defence presents its case, but of course only if it has any witnesses and a strong case to present. If not, there is no hearing.

After the final hearing, the prosecution and defence lawyers prepare and submit their case to the judge. The judge deliberates, comes to a decision and calls the accused for verdict. This whole process is supposed to be completed within approximately 6 to 8 weeks. Normally sentences for drug trafficking (most British citizens detained in Brazil are held for drugs-related crimes) are between 4 and 8 years. Once the accused is sentenced, they are transferred to a temporary prison for a few weeks and then moved into a definitive prison.

## **6 How can appeals be made?**

The defendants have the right to appeal against their sentences to a High Court through their lawyers. However, the appeal process is very slow (not less than two years to process) and can actually lead to the appellant's release being delayed, so a lawyer's opinion of the case is recommended before the decision is taken to appeal.

## **7 Reduction of sentence (for good behaviour)**

For every three days worked, a prisoner may receive a one day reduction in sentence. However, this must be work that qualifies for parole, and such work is scarce. Good behaviour can sometimes help as well, depending on the case.

## **8 Early release (parole)**

British prisoners may be released after completion of two-thirds of their sentence if they meet certain compassionate criteria. This is not an automatic right by law, rather a concession, and each case is considered individually by the Court. When the time comes, and if appropriate, a request for conditional release can be addressed to the State Court, the VEP (Vara de Execucoes Penais). The State will only consider early release if the expulsion of the prisoner has been authorised by the Ministry of Justice. When the prisoner makes their request for conditional release, the Embassy will also write to the Ministry of Justice alerting them to the case and asking for expulsion from Brazil to be authorised. Experience has shown that an outstanding appeal - whether by or against the prisoner - can be a delaying factor in their release.

There is no release on parole for foreign prisoners as they do not usually have accommodation, employment or local support infrastructure. On release, foreign prisoners are returned to their country of origin - at Brazilian expense. However, this sometimes takes a few days.

## **9 Clemency**

People convicted of crimes such as torture, drug trafficking, terrorism, and "heinous crimes", including aggravated homicide, aggravated rape and robbery resulting in death are not eligible for amnesty.

## **10 Financial penalties**

Normally the Brazilian authorities waive financial penalties imposed on foreigners. However, any foreigner who has incurred a financial penalty and chooses to stay or return to Brazil would be expected to pay any outstanding penalty.

## **11 Transfer to the UK**

A Prisoner Transfer Agreement between UK and Brazil has been ratified. The prisoner makes the request through the prison administration. Transfer can only take place with the prisoner's consent and that of both Brazil and the UK. The act for which sentence was imposed must also constitute a criminal offence in the UK, there must have been a final judgment and at least 6 months left to serve.

## **12 Release and deportation**

Once a prisoner receives his parole release date, he will be expelled by the Ministry of Justice and the prisoner will not be allowed to stay in Brazil (although the deportation order can be appealed against if the prisoner wishes). On the release date, the prisoner will be transferred to the detention centre at Praca Maua, where he

was held on arrest, until expelled. The Federal Police will deal with the expulsion on receipt of the prisoner's expulsion papers from the Ministry of Justice. The Federal Police are also responsible for organising the return air ticket for the prisoner, should he not pay the fare themselves. It usually takes about two weeks to obtain the return ticket through the Federal Police however they have warned that it can take up to three months. If the prisoner can provide the ticket, he will benefit from an earlier release. The prisoner will then be escorted to the airport by the Federal Police until they are on a plane leaving Brazil. If the flight has a stop-over in another city in Brazil, a plain-clothed police officer from the Federal Police will accompany the prisoner until he is on a direct flight out of Brazil.

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