

Ready, Set and go back: the role of Judiciary in Brazil's bingo ban

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Presentation Plan

- I. Introduction: context and gambling law history in Brazil
- II. Part I. Could bingo be run (period 2003-2007)?
 1. YES, on the grounds of:
 - a. Case 1 (2003, TJRS). Unreasonableness (unacceptable juridical uncertainty)
 - b. Case 2 (2003, TJRS). Legality
 - c. Case 3 (2004, TJSP). Fairness
 2. Depends... The price of uncertainty: institutional, juridical and political turmoil
 3. NO. Banning randomness. Brazilian Supreme Court (2007)
- III. Part II. Judicial analysis: period 2007 – present: mistrust, prejudice and harmfulness of Bingo – three decisions in Brazil's Highest Courts
 1. STF (2009): Bingo exploitation is not a constitutional right
 2. STJ (2015): Unenforceability of bingo debt and the pathological player
 3. STJ (2015): Bingo as an illicit activity per se. Compensating society for its harmfulness
- IV. Final remarks

I. Context – History of Brazilian Gambling Law and the distinguished case of Bingo

Criminal Misdemeanor Act (Lei de Contravenções Penais de 1941

according to the Decree-Law nº 3.688/41 and to the Decree-Law nº 4.215/46)



Criminal Misdemeanour Act 1941

Art. 50. Games of choice. Prohibition
Art. 51. Exception: licensed lotteries

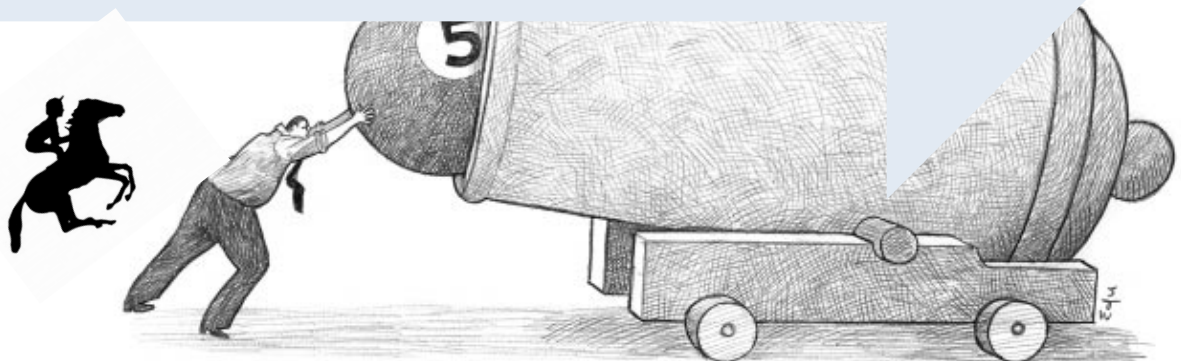
Decree n. 50.954/1961:
Federal lotteryLoteria
Federal: explored, exclusively, by the Union (art. 1)

Decree-Law n 204/64:
Exclusive competence of CEF to run the lotteries, delegation prohibited

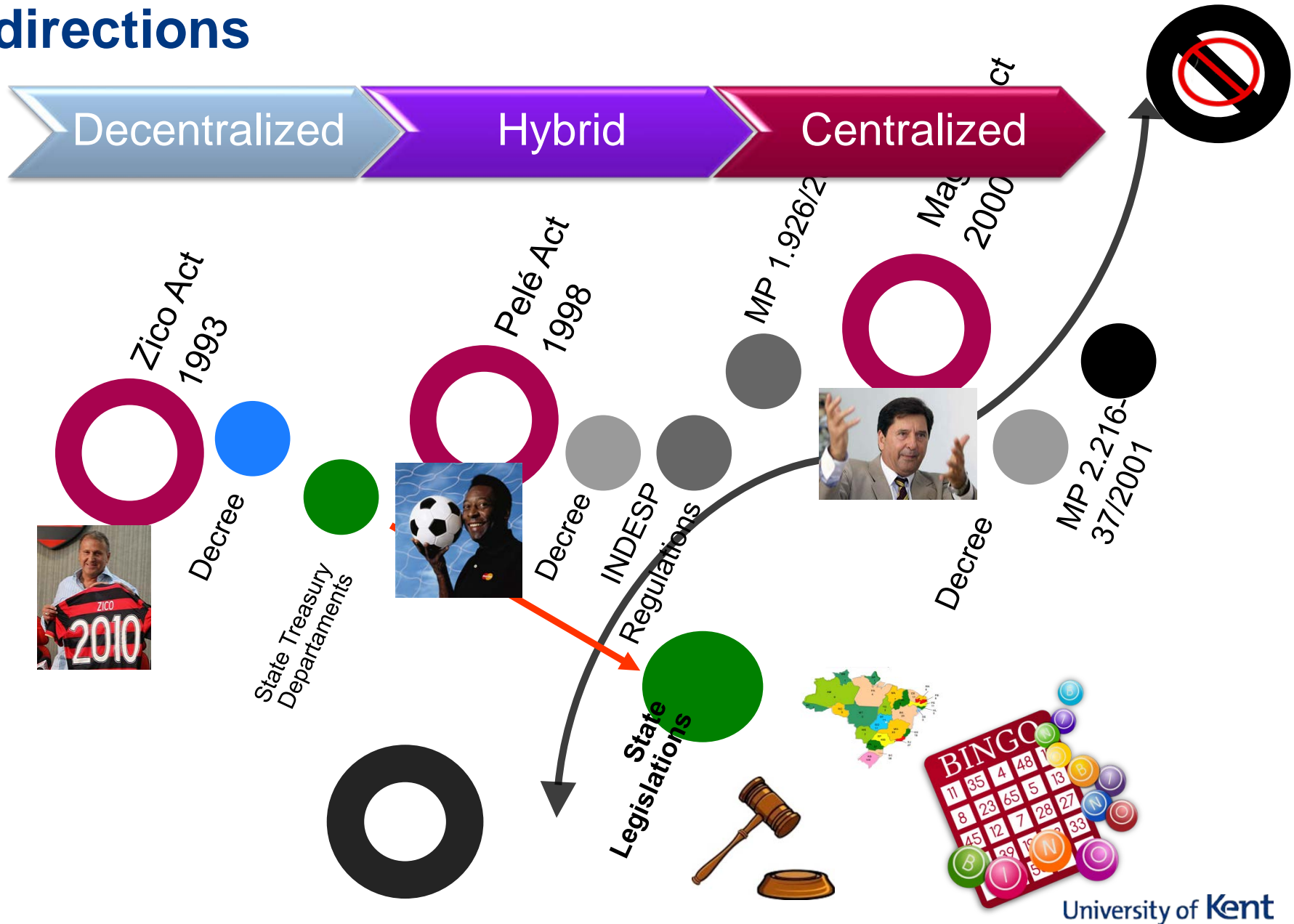
Zico Act (Lei n.8.672/93)
regulated by the Decree n. 988/93

Pele Act (Lei n. 9.615/98)
regulated by the Decree n. 2.574/98

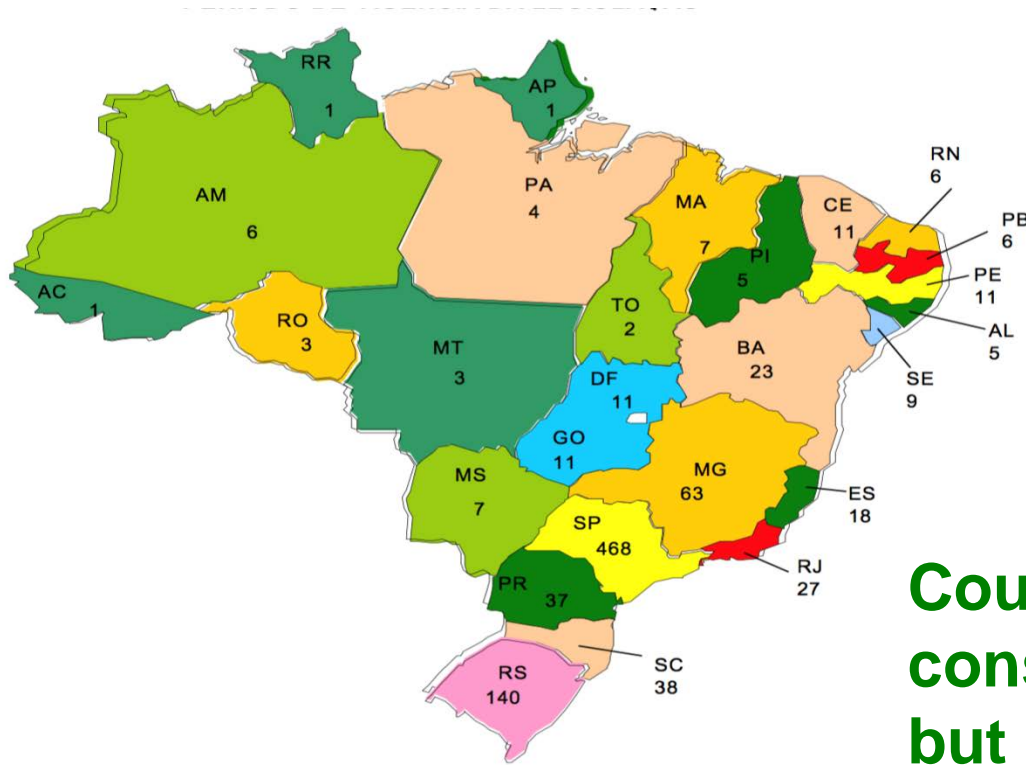
Maguito Act (Lei n. 9.981/00)
regulated by the Decree n. 3.659/00



Timeline of Bingo Regulations: opposite directions



Formal bingo businesses in Brazil, 2000-01



Case law research:
463 judicial decisions
in total.

**Could bingos be
considered legal, but
not regulated?**

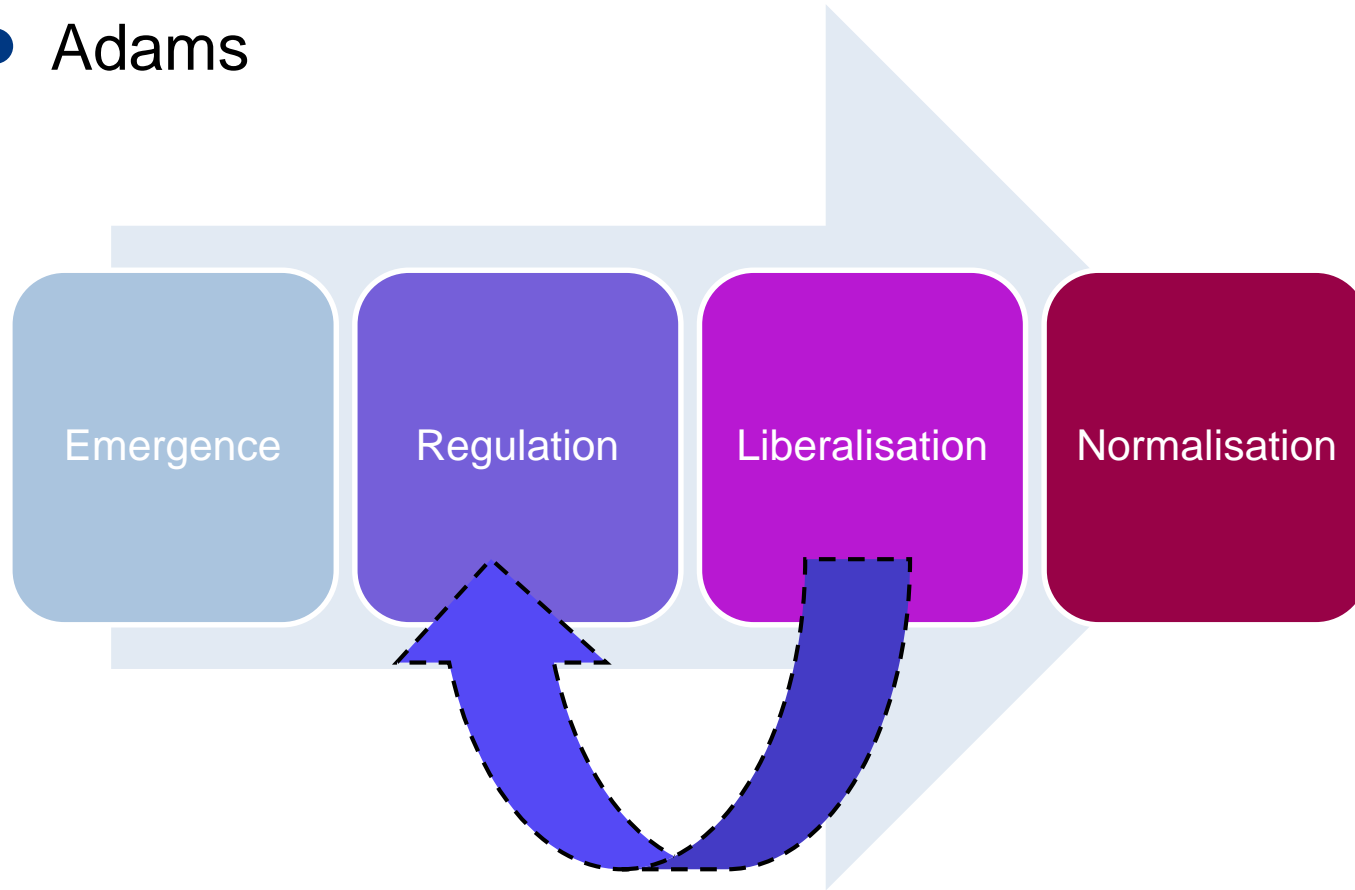
**Could bingos be
considered regulated,
but not legal?**

**Could bingos be legal
in one state but not in
another?**

**Can courts be used as
a regulatory unit
issuing licenses?**

Gambling regulation cycle

- Adams



PART I. COULD BINGO BE RUN? PERIOD 2002-2007

*“The laws in a regulatory framework are only good as the ability to enforce them.”
(Adams, p. 32, 2007)*

- Background of the first 3 cases (TJRS and TJSP):
 - brought by commercial operators;
 - after bingo licenses issued by the CAIXA expired and the bingo market was closed under Maguito Act;
 - because there was no longer a regulatory agency available to deal with renewal of bingo licences in the states of SP and RS, the applicants asked the court (TJRS and TJSP) to renew their licences;
 - the courts ruled and interpreted with different intensity the reasonableness of using the Judiciary as a primary regulatory unit, on the grounds of:



PART I. COULD BINGO BE RUN? PERIOD 2002-2007

1. YES. On the grounds of:

Case 1 (RS, AI 70005784434, April, 2003)

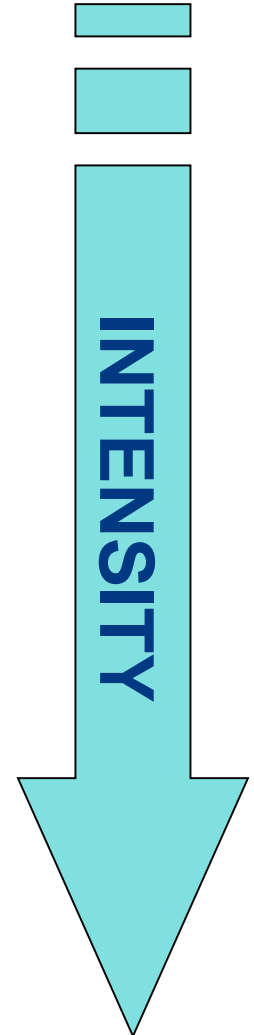
Unacceptable juridical uncertainty → reasonableness

Case 2. Legality (RS, MS 7005921507, May, 2003)

Legalization is NOT dependent on regulation → legality

Case 3. Fairness (SP, MS 473032000, June, 2004)

It is NOT a crime → **unfair** to deny licenses



PART I. COULD BINGO BE RUN? PERIOD 2002-2007

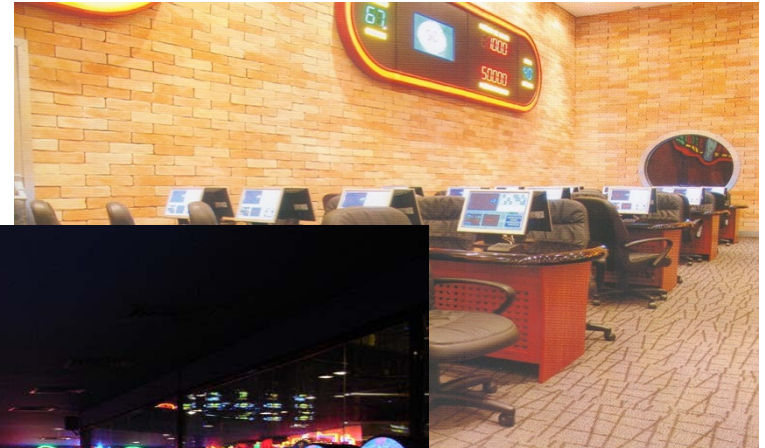
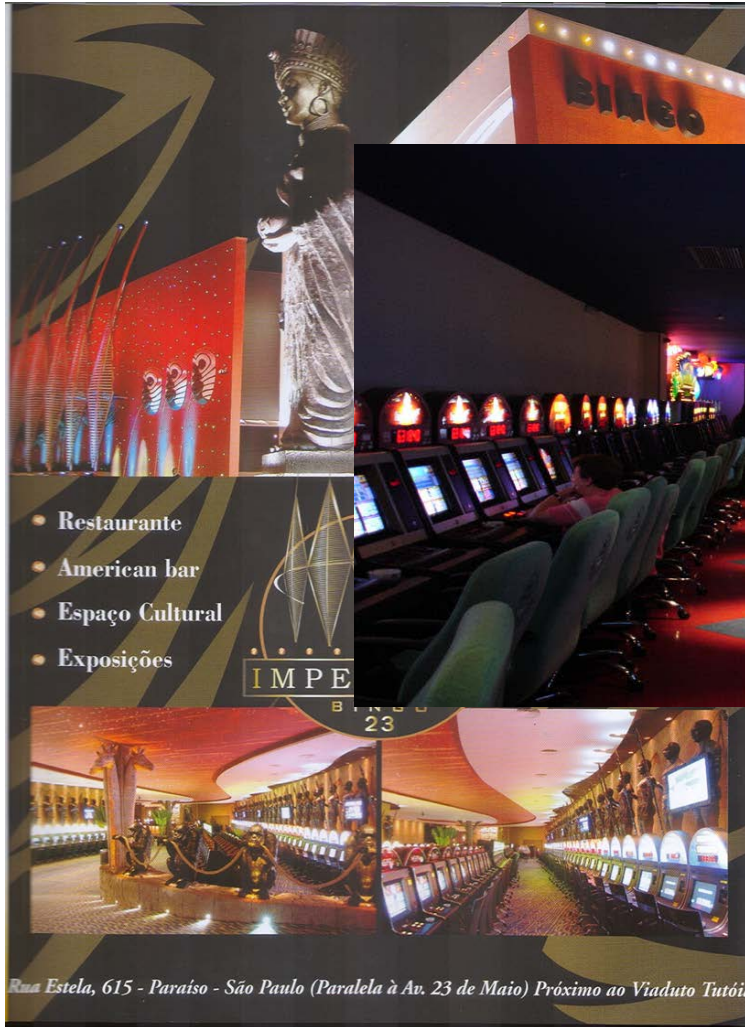
2. Maybe... The price of uncertainty: institutional, juridical and political turmoil: Parliamentary Commission of Inquiry (CPI dos Bingos – Senate: **Executive Power**) and Hurricane Operation (Federal Police + Federal Prosecution Service: **Judiciary Power**)



There were judges who allowed Bingo Halls to operate normally....And there was speculation that these injunctions would cost R\$1 million [US\$ 282,5k], 2 millions [US\$ 564,83k], 5 millions [US\$ 1,412,070]. ...[T]he ones who got these decisions felt like they had won the lottery. When these suspicious about “judicial decisions’ for sale” were strengthened by Operation Hurricane, the Supreme Court had to act in order to bring judicial uniformity.”(Male, politician, Rio Grande do Sul)



Bingo Halls

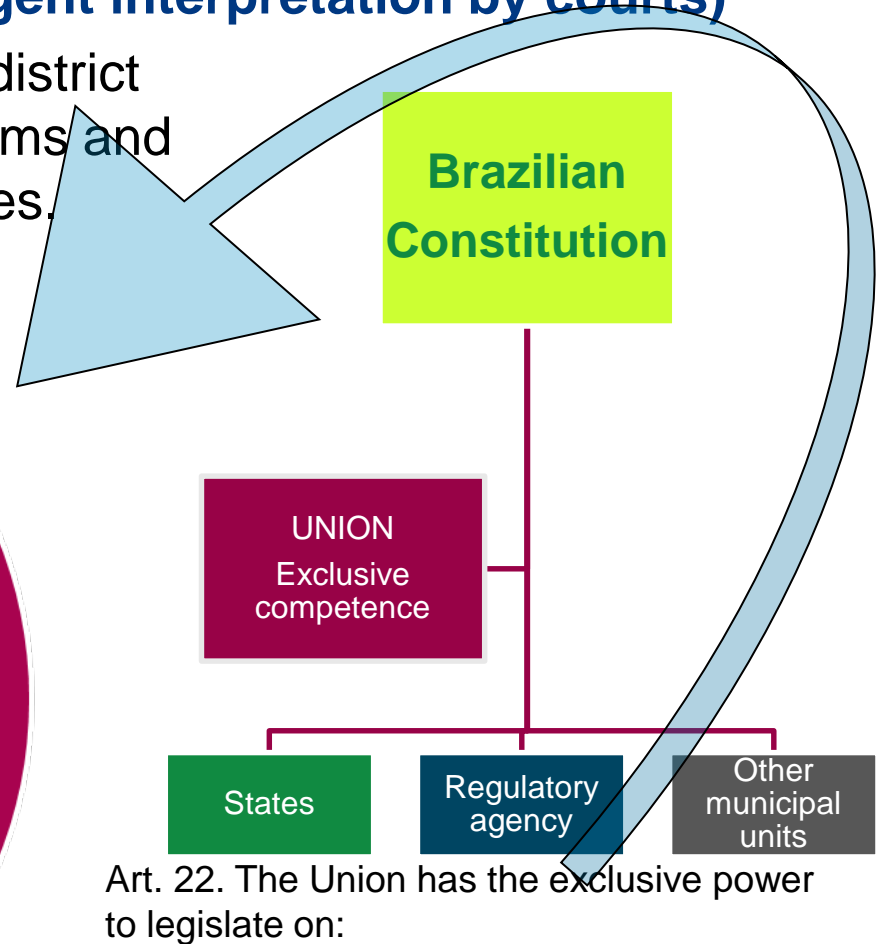
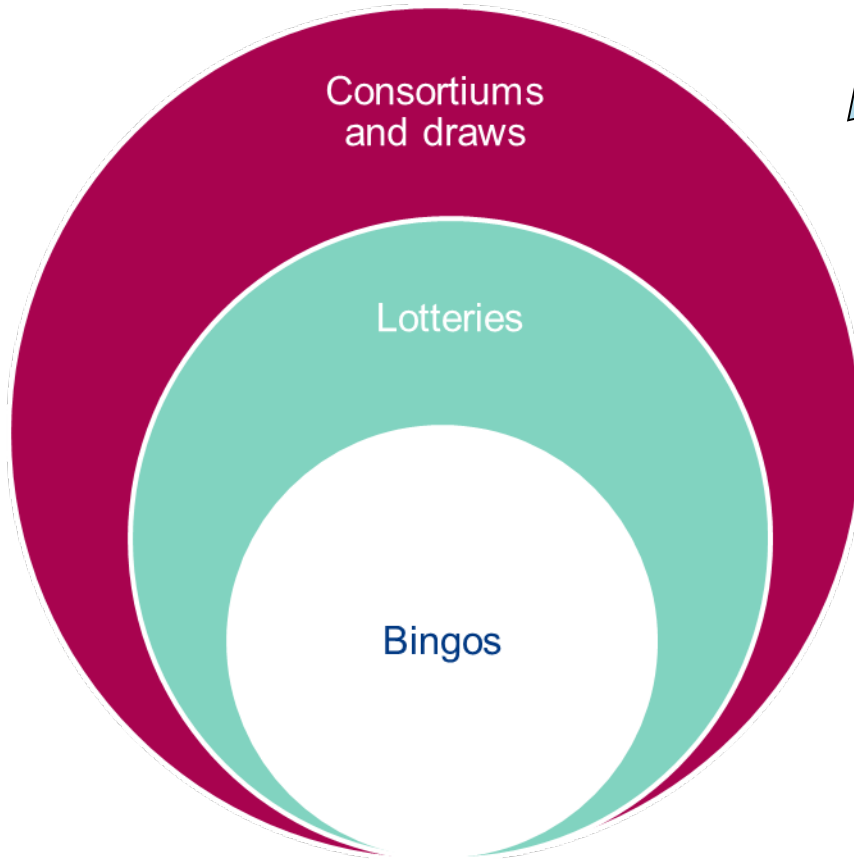


PART I. COULD BINGO BE RUN? PERIOD 2002-2007

3. No. Banning randomness: The *Binding Precedent* nº 02

– 2007 (to decide definitively on issues considered to be relevant to public order and subject to divergent interpretation by courts)

- It is unconstitutional any state or district normative act related to consortiums and draws, including bingo and lotteries.

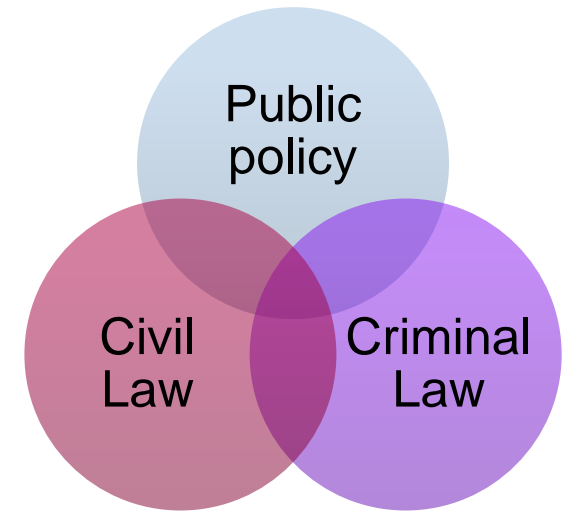


...

XX – consortium and draws systems;

Binding Precedent (Sumula Vinculante) n. 02: Reasoning. Leading case: ADI 2.847-2/DF, 2004

- Civil law, public policy and criminal are closely connected but the 1990s Bingo legislation was NOT about criminal law;
- Principle of Federation → idea of a synchronic system → Centralised power
 - Principle of Federation is congruent with the idea of a centralised model and a requirement for the *crystallization* of a gambling constitutional system
 - “It is curious to observe... That this subject (games) has been regulated, historically, by the central authority;... Prince Joao (Portugal), through a license, dated from 28/05/1808, ordered that the production and sale of card games, in Brazi ... could only be exploited to whom the Royal Portuguese House granted the privilege to, what meant that, in the distant colonial phase, there was a recognition of the Central Power competence do discipline the subject.” (Min. Carlos Ayres Britto)
- Regulation can be delegated to different spheres and units, but legalization NOT

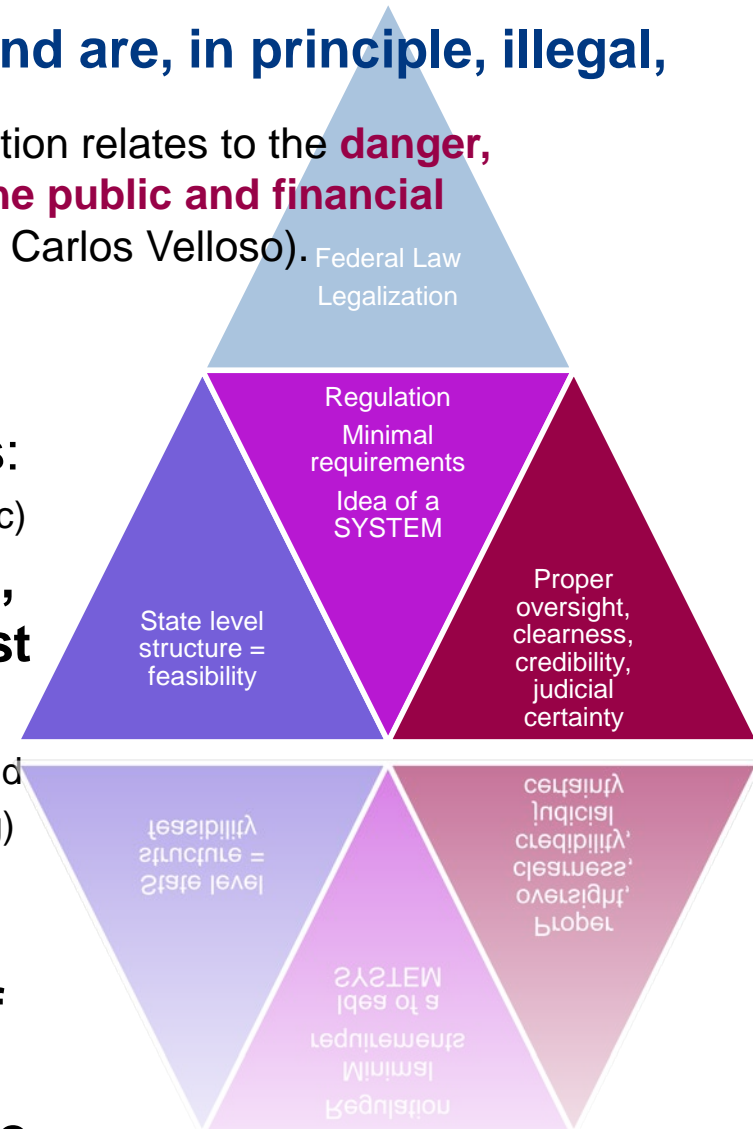


- Application of revenues raised from bingo in social/sporting ends cannot modify the illegality of bingo trade;

Bingos shall be subect to strict reguation and are, in principle, illegal,

>> since the pre-normative rationality deployed by Constitution relates to the **danger, harmfulness, economic and psychologic abuses and the public and financial order disturbances involved in gambling activities** (Min. Carlos Velloso). Federal Law Legalization

“There is thus the necessity for the **federal law** to establish **which juridical framework should be applicable to these games or lotteries:**
a) **define them**; b) state who will **operate them**; c) how should they be **operated**; d) what features, **rights, obligations**, burdens and benefits **do assist players** or competitors; e) what would be the **method of payment**; f) how **prizes** should be delivered, i.e., which conditions should be applicable to it; g) how it would be structured the **appealing process**; and h) the possibility of **private, public or hybrid run of games**. And before all, that **each one of the gaming modalities can be subject to proper licensing procedures according to member-states capabilities and infrastructure.**



Min. Carlos Velloso, Voto
Vista, ADI 2.847-2/DF

Brazilian Misdemeanour Act



- Art. 50 – To establish and to provide games of chances in public places, accessible to public, through payment of entry or without it.
- 1 year imprisonment + penalty + seizure of material(s)
- § 3º - Games of chance: (i) those games in which winning or losing depends exclusively or mainly on luck; (ii) horseracing bets, when performed outside hippodromes or any other place where these type of bets are allowed and (iii) bets on any other sports competition

Number of states that have had their laws judged unconstitutional by the Supreme Court:

1. ADI 2.847/DF
2. ADI 3.147/PI
3. ADI 2.996/SC
4. ADI.2.690/RN
5. ADI 3.183/MS
6. ADI 3.277/PB
7. ADI 3.189/AL
8. ADI 2.995/PE
9. ADI 3.060/GO
10. ADI 3.259/PA
11. ADI 2.948/MT
12. ADI 3.063/MA
13. ADI 3.004/MG
14. ADI 2.950/RJ
15. ADI 3.148/TO
16. ADI 3259/PA
17. ADI 3.896/SP



PART II. JUDICIAL ANALYSIS. PERIOD 2007-PRESENT.

MISTRUST, PREJUDICE AND HARMFULNESS OF BINGO

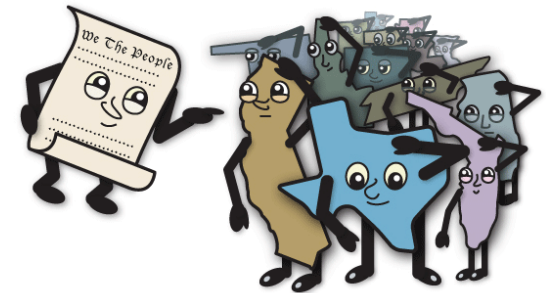
1. Mandado de Injuncao (MI) 766-AgR, Dje: 13/11/2009 – The judiciary is not a political institution, so that the lobbying for legalisation has to take place elsewhere

- Applicant asked the Supreme Court to issue an order (a mandatory injunction) to compel the Union to pass an enabling legislation for bingos.

BUT

- In this case, the remedy could not be used to enforce the State to legislate and to regulate gambling activities because there is NO CONSTITUTIONAL right to run a bingo business.

* Mandatory Injunction Action (Mandado de Injuncao): this type of order can be used to oblige the State to fill a legislative omission that prevents full enforcement of rights or liberties



→ It is a political CHOICE – not a CONSTITUTIONAL RIGHT to allow bingo trade

2. Problem gambling and the Superior Court of Justice (STJ) – REsp 1406487/SP, DJe 13/08/2015: Unenforceability of bingo debt and the pathological player

- The debt was incurred while bingo was lawful although the case decided after the restoration of prohibition;
- **Specific** case analysis: debt unenforceable based on the BRA Consumer Code's protection of the vulnerable
 - Consumer (pathological, vulnerable) x
 - Bingo Hall (supplier, irresponsible)
- Debtor: pathological player
- The problem gambler (consumer) who does not appear to have been subject to any concerns in the past in terms of prevention through regulation was then led to be treated in the “remediation” phase.



3. Problem gambling and the Superior Court of Justice (STJ) – REsp 1509923/SP – D.J.e 22/10/2015: Bingo as an illicit activity *per se*. Compensating society for its harmfulness

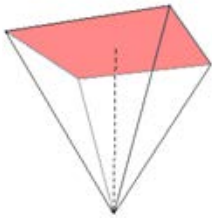
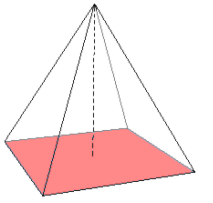
- Collective action
- Bingo = illegal → the operation *per se* is an economic activity that harms consumer and collective interests → pain, suffering or psychological damage from the illegal economic activity would be presumed.

Bingo Halls were condemned to compensate the society for collective moral damages and to pay a daily penalty (astreintes) of R\$ 20k (US\$ 5,8k) for holding bingo games and R\$ 2k per slot-machine.

Burden of proof would not rely on the authors representing the damaged society (Ministério Público) due to the application of the Brazilian Consumer Code.



Critical comparison – Superior Court decisions 2015

	REsp 1408487	REsp 1509923
Relation	Individual: Bingo Hall x Indebted consumer	Collective: n Bingo Halls x Consumer society
Analysis	Concrete: Pathological player (psychiatric evaluation)	Presumption: harmfulness of bingo exploitation (notorious fact)
Methodology	Empirical Deductive 	Abstract Inductive 
Result	Unenforceability of debt	Compensation to society, subject to further daily penalties
Striking feature	Based on CIVIL (not CRIMINAL) LAW → curb behaviour forwards, punish it backwards	

? Insufficiency and/or anachronism of Criminal (misdemeanour) provisions?

“There are establishments that the police closes today; tomorrow they are opened again, [that it is: even when] they [bingo owners] are not bribed, the police does not necessarily take away even the machines

(...)

*Now, in this (illegal bingo) where I usually go. The people who work there I’ve known them for years, I have developed a close relation with them; I know exactly what happens (...). **Last week, the local police was there.** (...) **They put a gun at your head, ask you to raise your hands. It already happened to me.** I have already passed through that – nobody told me about that, I lived it. **So, what happened: last week another policeman came up, knocked at the door and said “we want R\$ 2k per week. If you don’t pay us, we shut it down.”** So the owner is trying to negotiate to see whether they can agree in something less than that. **Because it is like that: [in fact] the owner has already been weekly paying a policeman from another zone***

(...)

[but] many times they (police) come up very smoothly and say: do not worry, it is nothing personal with you ... they ask you to fill some forms, sign it, and let you go...



IV. Final remarks



- There is not the possibility of “no games”: they are either legal or illegal;
- Judiciary: until 2007, instability instead of stability;
- Atypical use of the consumer law – when an activity is already illegal – to curb behaviours;
- Misdemeanour: prohibition of gambling – and the persistence of clandestine bingo: law is not realistic or its enforcement is not → prone to abuses and/or corruption;
- 1. Legislation: clear + 2. Executive/Legislative/Judiciary: cooperation + 3. Judiciary: legality/constitutional matters – not as an ad hoc/primary regulator
- X Judicialization of morals and of gambling is not an answer
- Inadequacy of the regulatory framework of the past
- Costs of legal uncertainty → Brazilian society
- (A)typical reliance on the Judiciary not only is avoidable through a proper regulation but it is also a requirement for a sustainable gambling/bingo regulation to be enacted in the present/future
- In relation to the past, the history has been already told, but



In relation to the future, we can draw a better one.

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Thanks!

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» *If you must play,
decide upon three things at the start:
the rules of the game,
the stakes,
and the quitting time.*
» *(added emphasis)*
Chinese Proverb

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