THE FIGHT AGAINST CORRUPTION IN BRAZIL, RECENT EVENTS AND THEIR CONSEQUENCES

Marcelo FIGUEIREDO*

SUMARIO: I. *Introducción*. II. *Good Governance —Good Administration— A Constitutional Right of Citizenship*. III. *The Main Instruments to Fight Corruption in Brazil*. IV. *Corruption in Brazilian Laws and Customs*. V. *The "mensalão"*. VI. *The "Lava Jato"*. VII. *Conclusion*. VIII. *Recent Events involving the Lava-Jato Operation*.

I. INTRODUCCIÓN

Corruption is as old as man. Law has always sought ways to combat it. However, the issue was never a central concern of classical *Constitutional Law*. On the other hand, we almost always find the figure of corruption as a crime, infraction or crime, both in criminal law and in sanctioning administrative law. Lately, with the profound changes in human societies brought about by the Scientific-Technological Revolution, and within it, by the Communications Revolution, which fostered the formation of regional, supranational, and international blocks, attempts have been made to implement standards common to corruption, globally and wherever it is committed: in the public or private sphere.

As it is known, the keyword introduced by *globalization* in the mutating State is *efficiency*. Both in its external and internal action, the primacy of warlike efficiency, which was so important in the era of great powers, is no

* Marcelo Figueiredo is a lawyer and legal consultant in São Paulo, Brazil. He is Associate Professor of Constitutional Law in undergraduate and graduate courses at PUC-SP, where he was also director of the Law Course (2005-2009-2009-2013 administrations). He is president of the Brazilian Association of Democratic Constitutionalists (ABCD), the Brazilian section of the Ibero-American Institute of Constitutional Law based in Mexico, and Vice President of the International Association of Constitutional Law (IACL-AIDC). He is also a Visiting Professor at various Universities in Latin America and Europe.

longer enough, but that of a new and peculiar political efficiency to act in multilateral relations.

No longer just simple economic efficiency, understood as increased production, with reduced inputs and increased profits, but also socioeconomic efficiency, which consists of producing better quality goods and services, but quickly and in greater quantity, to supply increasingly demanding societies; no longer just the efficiency that depends solely on the action of isolated states, but rather that which is achieved through an *institutionalized* concert of solidarity states.

Thus, the post-positivist rehabilitation of principles, by redefining the supremacy of fundamental rights, and the widely disseminated demonstration effect of the most successful political jus experiences, have revealed a new operational concept of public administration, which starts from a precise and adequate vocation of the functions assigned to each provider entity, so that they satisfy, in the best possible way and with the lowest costs, the traditional and emerging demands of societies of all latitudes, without minding so much who will be in charge, in the end, of said benefits: if it will be a public, private, local, regional, national, multi or metanational entity.[1]

Thus, alongside the perennial concern with *administrative morality*, is added the perception that corruption increases the cost of products and services made available to society, *diverting* them towards groups of people with selfish and non-republican interests.

Corruption hinders development, harms economic growth, sacrificing the poorest disproportionately and undermines the effectiveness of investments and financial aid, therefore, strategies to combat corruption need to be integrated into a development model formulated to help countries to eradicate poverty.

There is no doubt that the greatest impact of corruption is on the poorest citizens, who are unable to absorb its costs. By diverting public resources, corruption compromises services such as health, education, transportation, and surveillance – exactly the most important for the less favored classes.

Corruption exists in both democratic and non-democratic countries, as well as in countries with extensive freedom of the press and in countries with almost no freedom of opinion.

Its universalization or international character lies in the fact that it is possible both to agree with a diagnosis of the situation of a given nation that

[1] Moreira Neto, Diogo de Figueiredo (coord.), "Uma avaliação das tendências contemporâneas do direito administrativo", *Obra em homenagem a Eduardo García de Enterría. Anais do Seminário de Direito Administrativo Brasil-Espanha*, Rio de Janeiro, Renuevar, 2003, p. 550.

considers parameters that can be shared with other countries, and to institute control practices, whose effectiveness can be measured using the same references. used to establish the diagnosis.

In short, *globalization* has set in motion a new and expanded concept of *political efficiency*, in which the *organization of power*, whatever it may be and regardless of its size, as well as the *functions* to be performed, should be *subsidiarily* adapted to the new demands, in the extent to which, as a result of information, the old and disconcerting *tolerance for inefficiency in the public sector*, one of the causes of which is undoubtedly the phenomenon of corruption, would gradually diminish.

It is not by chance that today there are numerous International Conventions concerned with corruption in various dimensions and perspectives.

This being so, although as we have already observed, corruption is not a concern of *classical* constitutional law,[2] this reality has changed. And it has changed for several reasons. Basically, global integration is responsible for it. Gradually we see that the international legal system and the internal legal system are not separate units but integrated.

In truth, the processes of "globalization" and "universalization" of law, and particularly of international law, have given rise, on top of the traditional network of States, to an "integrated political system at various levels", which is governed by its own legal regulation.

For example, remember that international law forms, together with the internal law of the States, a "multi-level political system", constituted based on the political systems of the member States, and which in turn they can hold, internally, a multilevel structure.

There are clauses of different opening in the democratic Constitutions of the whole world, including in Latin America, that facilitate the comfortable entry of Conventions of all kinds, including those that deal with the fight against corruption as a global phenomenon.

Remember, as an example: the United Nations Convention of New York, dated October 31, 2003, and others that are projected in the systems of the different continents, the Inter-American Convention against corruption, of Caracas (03/28/1996) and the Convention on Civil Corruption of the Council of Europe, carried out in Strasbourg, on 11/4/1999, in addition to the African Union Convention to prevent and combat corruption, approved by the Heads of State and Government on June 12, 2003.

[2] Of course, we have always found norms in favor of public ethics and morality (good customs) throughout the Law, an issue with a different perspective than the current one.

Almost all the countries of Latin America or as some want, belonging to the "Hispanic-American" systems, have also adopted important provisions aimed at combating corruption and, in general, they have also implemented norms of the international or regional Conventions. There is no point in commenting on them.[3]

II. Good Governance —Good Administration— A Constitutional Right of Citizenship

We affirm that corruption has never been a central concern in classical Constitutional Law. In other words, at the time of the elaboration of the first constitutions, it was desired, above all, to control power, establish political and civil rights, deal with finances and internal and external public security.

This situation changed substantially with the contemporary Constitutions that expanded, dealing with a series of issues unimaginable in the eighteenth century.

[3] The international community celebrated, on December 17, 1997, the CDE Agreement to Combat Bribery of Foreign Public Officials in Transnational Business Transactions. The OAS, on March 29, 1996, signed the Inter-American Convention against Corruption. On December 9, 2003, in Mérida (Mexico), the UN prepared the United Nations Convention against Corruption, with the purpose of promoting and strengthening measures to prevent and combat corruption more effectively. On December 15, 2000, in force since September 29, 2003, the United Nations Convention against Transnational Organized Crime was celebrated in Palermo, establishing as the main measure the need to harmonize the criminal types in force in the different States, and in particular, the typification of the crime of participation in organized crime groups. The European Union, through Council Act 97-C 195/01m of 05/26/1997, established a Convention on the fight against corruption involving officials of the European Communities or of the Member States of the European Union. Likewise, the Group of States against Corruption of the Council of Europe (GRECO) was formed, in which control procedures of the States are arbitrated, with provision for mutual assistance and international cooperation, extradition, spontaneous information, direct communication between central authorities and information on available cooperation mechanisms. The European Judicial Network was also created on June 29, 1998, with the aim of facilitating criminal judicial cooperation between the Member States of the Union. We must also remember the relevant role played by the Utstein Anti-Corruption Resource Center globally. International transparency also deserves reference. Finally, it is timely to record that the World Bank presented a practical guide and created an internet portal, with the purpose of promoting collective action against corruption. This is the document entitled Fighting Corruption Through Collective Action-The Guide for Businesses (2008), the result of a coalition of institutions led by the World Bank, made up of NGOs, multilateral organizations such as the United Nations Global Compact, the International Center for Private Enterprise (CIPE), Transparency International and various private sector companies.

Today there is no written Constitution that does not show great concern for the administration and management of public affairs, public resources, budget matters, public policies, how they are formulated, and above all, executed.

The so-called "governance" or "governability" affects not only the central government agencies (Executive) but also all entities, public or private companies that apply, manage or contract with the State.

Accountability has become a fundamental matter not only for the power that oversees the executive, legislative and its auxiliaries, the courts of accounts, but also for civil society, for citizens who have the power to push their representatives in the right direction.[4]

Most of the contemporary Latin American Constitutions have dealt a great deal with corruption to the extent that they have expanded, as much as possible, the role of agents and bodies in charge of supervising the application of public resources. public resources. "Prosecutor's Offices", Comptroller's Offices, Audit Courts, Ombudsmen, Ethics Commissions, Public Ministry, are eloquent examples of this.

To this extent, citizens have also been "empowered" to actively participate in the management of what, ultimately, belongs to them. As experience shows, the parliament, the government, the judiciary, and the courts of accounts improve their performance with respect to transparency and democracy, with effective collection from society.

[4] Freitas, Juarez, *Direito Fundamental à Boa Administração Pública*, 3rd. Ed., Malheiros Editores, São Paulo, p. 21 et seg defines the right to good administration as follows: "...trata-se do direito fundamental à administração pública eficiente e eficaz, proporcional cumpridora de seus deveres, com transparência, sustentabilidade, motivação proporcional, imparcialidade e respeito à moralidade, à participação social e à plena responsabilidade por suas condutas omissivas e comissivas". In English: "It is about the fundamental right to efficient and effective public administration, proportional to fulfilling its duties, with transparency, sustainability, proportional motivation, impartiality and respect for morality, social participation and full responsibility for its omissive and commissive conduct". Later, in the concept proposed by the author, the following rights are protected, among others: "o direito à administração pública transparente, o direito à administração pública sustentável, o direito à administração pública dialógica, o direito à administração pública imparcial e desenviesada, o direito à administração pública proba, o direito à administração pública respeitadora da legalidade temperada, o direito à administração pública preventiva e eficaz". In English: "the right to transparent public administration, the right to sustainable public administration, the right to dialogic public administration, the right to impartial and non-biased public administration, the right to probate public administration, the right to public administration that respects tempered legality, the right to preventive and effective public administration".

It is essential that citizens and civil society organizations, among others, are well supplied with information – in quantity and quality for citizen action, mainly for the prevention of the misuse of public property.

It is therefore necessary to form alliances between organized civil society and government institutions to maximize efforts to combat corruption manifested in all segments.

In Brazil, instruments have been created to strengthen citizen action in practically all areas subject to state action.

III. The Main Instruments to Fight Corruption in Brazil

The Brazilian Constitution is full of norms that deal with ethics and administrative probity directly or indirectly. Let's mention the main ones. Article 5, item LXXIII provides, with respect to popular action, that it will also protect administrative morality. It means that the Constitution has not considered it sufficient to proclaim the principle of legality, certain that administrative morality is inserted in it, nor has the lesson of the doctrine that the administrative act is made up of elements and one of them , of greater importance, is that of the purpose —the administrative act must always have a purpose of public interest— and that the administrative act contrary to morality is an act that does not serve the purpose of public interest.

And the Constitution went further. The principle of administrative morality constitutes, with the 1988 Constitution, an autonomous legal concept. As we have already stated:

Today we have an idea of the principle of morality as a much broader principle, to the point that morality would no longer be contained in legality, or, if you want it another way, the principle of morality is an autonomous principle, conjugated in the constitutional legal system along with many other values that prestige.[5]

From the same fact, as is known, investigation and civil, criminal and administrative responsibility can be derived depending on the independence of the instances.

There is a true arsenal of legal norms, mechanisms to combat corruption, among which we highlight:

[5] Figueiredo, Marcelo, *O controle da moralidade na Constituição*, São Paulo, Malheiros, 2003.

a) Public Ethics Commission, created in May 1999 and the Code of Conduct of the High Federal Administration, instituted in August 2000.
b) Council for Public Transparency and the Fight against Corruption (Law no. 10,683/2003);
c) Law of Administrative Improbity (Law n. 8.429/1992) commented below; Public Civil Action Law (Law no. 7,347/1985), Complementary Law no. 64/1990, Law no. 9,424/1996, Complementary Law no. 75/1993, Law no. 1,079/1950 and Decree-Law no. 201/1967.
d) Law on Regulatory Agencies (Law no. 9,986/2000);
e) Brazilian Penal Code and Law no. 10,467/2002, which adds the crime of active corruption in international commercial transactions and the crime of influence peddling in international transactions;
f) Law on Tenders and Contracts in the Public Administration (Law no. 8,666/1993);
g) Statute of the Federal Public Official (Law no. 8.112/1990);
h) Code of Ethical Conduct of Public Agents of the Presidency and Vice Presidency of the Republic (Decree No. 4,081/2002).

Law no. 8,429/1992, an important instrument to combat administrative improbity in Brazil, which provides for the sanctions applicable to public agents for the practice of acts of administrative improbity, which finds its genesis in the Federal Constitution, article 37, §4, is, therefore, instrument of realization of the major principle, that of administrative morality.

The §4 of article 37 of the Constitution of the Republic provides:

> Article 37. The direct and indirect public administration of any of the Powers of the Union, of the States, of the Federal District and of the Municipalities will obey the principles of legality, impersonality, morality, publicity, and efficiency, and also, to the following: ...
>
> §4º Acts of administrative impropriety will cause the suspension of political rights, the loss of public function, the unavailability of assets and compensation to the treasury, in the form and gradation provided by law, without prejudice to the corresponding criminal action.

Regarding the cassation of political rights, the Constitution also provides, in its article 15, that "the cassation of political rights is prohibited, the loss or suspension of which may only occur in the cases of: ... V – administrative improbity, in the terms of article 37, §4".

Any public agent, servant or not, including political agents in general, those hired for an indefinite or temporary period, and those subject to the CLT [*Consolidation of Labor Laws*], that is, no matter what the Agent's relationship with the direct Public Administration of the three Powers and with the direct, indirect, or foundational Public Administration, which commits an act of improbity, is subject to the precepts of Law n. 8,429/1992.

Law no. 8,429/1992 defines three types of administrative acts, those that imply illicit enrichment (article 9), those that cause damage to the treasury (article 10) and those that violate the principles of the administration (article 11).

In addition, the Law contemplates the following sanctions: a) loss of goods and assets illegally increased to the patrimony; b) comprehensive compensation for the damage; c) loss of public function; d) suspension of political rights; e) civil fine; f) Prohibition of contracting or receiving tax benefits.

Law no. 12,846/2013, on the other hand, provides for the liability of legal persons in the administrative and civil spheres, for the practice of acts against the public administration, national or foreign. This Law entered into force on January 29, 2014.

Among the Brazilian institutions for combating corruption, the Federal and State Public Ministry stands out, which is responsible for prosecuting and judging acts against public property in general, the Comptroller General of the Union (CGU), created in 2001, organ of direct assistance to the President of the Republic, especially in matters related to the defense of public assets and transparency in the management of said assets, within the scope of the federal administration.

There are also the Courts of Accounts of the Union and of the States and Municipalities, in charge of supervising and judging the regularity of the accounts of the administrators and others responsible for public money. They are external control bodies of the Executive Power that act as auxiliaries to the Legislative Power in the control of public spending.

The National Congress (Parliament), made up of the Chamber of Deputies and the Federal Senate, has the main responsibility of preparing laws and proceeding with the accounting, financial, budgetary, operational, and patrimonial control of the Union and of the entities of the direct and administrative Administration. hint. Internally, we find the Parliamentary Inquisition Commissions destined to investigate facts of relevant interest for public life and for the constitutional, legal, economic, and social order of the country.

Without detriment to all the existing legal instruments and the efforts against corruption in our continent, the World Bank report *Governance* 2006: *Governance Indicators in the World*, published in June 2007, reveals that only four Latin American countries (Chile, Uruguay, Costa Rica, and El Salvador) rank in the top half of the 212 countries in the *control of corruption* category, while five countries (Ecuador, Nicaragua, Honduras, Paraguay, and Venezuela) rank in the bottom quarter.

Transparency International's 2006 *Corruption Perceptions Index report* paints an even bleaker picture: only Chile and Uruguay have received a rating above 5.0 (on a scale of 0 to 10), with 10 indicating less corruption, while seven countries in the region received less than 3.0 points.

Quite rightly clarifies Peter DeShazo:

> The high and persistent levels of corruption in the region not only undermine confidence in democracy and economic development, but also weaken the ability of societies to defend themselves against crime and threats to international security. Poor results in combating corruption breed a growing conformity to the *status quo* among the population - a driving force for reform. However, that dissatisfaction also opens the door to populist leaders with an authoritarian bent, who launch attacks against the system but who, once in power, do little to promote government ethics or transparency. Police corruption undermines the ability of law enforcement in many parts of the region, leaving states more vulnerable to criminal groups and international terrorism, while a lack of transparency in the justice system has widely dissuaded international and domestic investment.[6]

Indeed, there are no miracle solutions to combat corruption.

More information is needed, more participation of civil society, more attention not only to the Executive Power and its policies (central power) but also to those people and institutions dedicated to monitoring the performance and good government management, that is, the controlling organisms of the system.

Despite progress in the fight against corruption, we note that in general terms, the response given by legal systems is still unsatisfactory, especially when it comes to holding politicians involved in acts of corruption accountable.

In relation to the problems and gaps observed in the fight against corruption, we have verified:

[6] DeShazo, Peter, "Esfuerzos contra la corrupción en América Latina. Lecciones Aprendidas", Washington, D.C., CSIS American Program, 2007, p. 2.

1. Corruption is combated with a partial approach. The current instruments of control and sanction (laws, regulations, comptrollerships, computerized systems of control and direct surveillance, judicial processes) are not enough to stop corrupt behaviors since they leave aside the essential, everything that refers to the internal sphere of the individual, his education, his values, his perception and convictions, that is, the prelude to his actions;
2. It is fought by reaction, ignoring prevention policies. Prevention measures constitute a less costly investment in the long term, with a positive impact on the public service that favors the relationship with citizens;
3. The lack of political professionalization. Not all states have a basic profile with well-defined values for people who hold public office, which leaves a wide margin for any individual, even if they lack values, to find themselves in a position to hold a state office. Before the law, any person can hold a public office if they are suitable. It is precisely this element of suitability that makes the difference, that is to say, State positions should not be for just anyone but for the fittest, the most loyal to the Constitution, the most capable of practicing justice, for those who truly have dedication to service [...] Currently those who hold public office are not necessarily the most capable or the most committed to the plurality of interests. Charisma has replaced ability, lies for truth, and image for sensitivity. Improvisation in public office is a constant in Latin America;
4. The trivialization of electoral processes. Politics has become a show or spectacle that even falls into grotesque situations in which its protagonists, the politicians, act like true buffoons, detracting from the seriousness and respect of the position. Today, singers, actors, athletes, and entertainers have access to public office, which reflects a trend in the culture of our time that is manifested practically throughout Latin America and that is none other than to consider that they are neither necessary nor specific training to take charge of the resolution of citizen needs.
5. The absence of filters that prevent corrupt candidates from accessing public office. There are no obstacles that prevent persona non grata who carry out corrupt practices or who are suspected of doing so even if it cannot be proven, hold public office and have access to power.[7] To

[7] In Brazil, on June 4, 2010, Complementary Law No. 135 was enacted, which alters Complementary Law no. 64, of May 18, 1990, which establishes, in accordance with Para.

participate in the game of politics, it is enough to be part of a party and have financial support, personal or provided by others (here is the origin of political commitments or debts). This situation causes real gangsters to frequently participate in the political game.

6. The weakness of ethical values in the public sphere. The neglect or omission of instruments, whether normative, or tools of control, supervision, and evaluation, as well as the lack of induction, education and training programs focused on the promotion of ethical values, provides a fertile field for the development of corruption in public institutions.
7. The omission of ethical instruments of practical application. In 1974, after the resignation of Richard Nixon, accused of corruption in the *Watergate* case, two basic instruments to combat corruption were created in this country: the Government Ethics Office and the Public Ethics Law. Three decades later, few Latin American countries have similar instruments. The practical implementation of ethical instruments in a State can undoubtedly make contributions to the democratic process and move towards a "Democracy with ethics".
8. Inconsistency of political discourse in relation to practice. Demagoguery and lack of political will are a constant in Latin American governments. Actions are implemented to change even if nothing changes. Taking the fight against corruption seriously implies strongly and responsibly committing the main decision-making levels, in such a way that the initiatives, programs and measures in this regard are reproduced in a cascade from higher strata to the most modest window official.[8]

IV. Corruption in Brazilian Laws and Customs

We have the terrible habit of saying that corruption is a phenomenon embedded in political power. That is not true. Corruption is everywhere and everywhere. Unfortunately, we too, who belong to the legal family, are not immune to the phenomenon of corruption.

---

9 of article 14 of the Federal Constitution, cases of ineligibility, terms of cessation and provides other measures, to include hypotheses of ineligibility aimed at protecting administrative probity and the morality in the exercise of the mandate (Law of the Clean File).

[8] Bautista, Oscar Diego, "El problema de la corrupción en América Latina y la incorporación de la ética para su solución", *Espacios Públicos Magazine*, Madrid, 2012.

Or in other words, it is difficult to accept that there is also corruption in the broad sense in the judicial family, in the agencies and entities that should defend the Constitution and its values.

Unfortunately, that is the harsh reality. We, as defenders of Law and Justice, should set an example and not apply or twist the Law to accommodate our interests, even if they violate administrative probity.

But, unfortunately, that is not the harsh reality. There are several examples of conduct clearly, in our opinion at least, in violation of the principle of administrative morality practiced by the agencies and entities that should protect and defend it. When the so-called guardians or watchdogs of administrative morality are more concerned with consciously[9] or unconsciously violating it, the timing is worrying.

How can we demand compliance from third parties and the jurisdiction (including political and business power), if the judicial family itself insists on defending privileges and royalties that are dissonant with administrative morality?

On the subject, we have already stated:[10] We believe that political power is still very poorly managed in our country. And more, that politicians and the legal system, in general, if not with gaps, are extremely protective of illegalities in the face of situations that fatally lead to the abuse of the ruler or the public servant, or the public concessionaire, always to the detriment of the fundamental right. of citizens to a upright and honest government.

We can give some examples of this reality.

The *forced retirement* ["*compulsória*" (sic)] of judges as a "sanction"[11] for those who violate the legal order and commit acts of corruption and venality, provided for in the old Organic Law of the National Judiciary (Loman) is a true absurdity law that violates the national conscience, the public treasury and rationality.

The institution of the *privileged jurisdiction (or the prerogative of jurisdiction fuero)*,[12] most of the time (except *express and justified* constitutional provision), is not justified and appears as an intolerable privilege. An archaic concept that

[9] Due to an immoderate corporatism that leads to a gradual policy of preserving institutions and people with intolerable privileges in a Democratic State of Law.

[10] Here we work again the previous text, without being imprisoned to the conclusions established there.

[11] Rarely imposed by Judges of Justice, more recently by the National Council of Justice, sometimes endorsed by the Federal Supreme Court.

[12] On the topic, see Fischer, Douglas, "Renúncia a mandatos eletivos e a alteração da competência penal em razão da função: uma limitação à luz dos preceitos constitucionais", Interesse Público Magazine, vol. 69, 2011.

collides with citizenship and its most expensive values, such as the principle of *responsibility* in a Republic.[13]

The hiring of relatives and political sponsors in all the powers of the republic is also an evil that is being combated, but that still plagues some corners where apparently the prohibition does not seem to be enough.[14]

The abuses committed by politicians, in general, from the President of the Republic[15] to federal deputies, senators, state deputies, state governors,

[13] The Association of Brazilian Magistrates (AMB) has collected data showing that the Federal Supreme Court received, in 2006, 127,535 files, which means an average of 12 thousand files per minister (there are 11 ministers), not counting what has been accumulated for years. Crimes committed by public authorities under the jurisdiction of the Federal Supreme Court were surveyed. In that year, there were 130 lawsuits in progress. The files dragged on indefinitely, without a solution of merit. A large part of the lawsuits processed in the Federal Supreme Court were returned to the First Instance, surely because the term of office of the defendant or defendant had ceased (35.38%). Some were archived due to the extinction of the punishability, due to the death of the inmate, due to peremption or reprocessed as files, due to the transformation of the investigation. Thus, in the investigation carried out by the AMB, no conviction has resulted against any authority, that is, there are zero (0) convictions against aggressors of public property or accused of any type of crime. With respect to the Superior Court of Justice, the data also walks towards the same solution. Numerous files went to the lower court (26.09%). Some convictions resulted in termination of punishment; others were archived with an indication of the reason: others due to resignation, etc. There are only five (5) convictions, which corresponds to 1.04% of the total claims. The conclusion of the AMB is that the "large number of lawsuits against authorities that they held were privileged, as well as the lack of final judgment of these cases, contribute decisively to the feeling of impunity and institutional discredit that currently afflicts Brazilian society". See Oliveira, Régis Fernandes de, "Foro privilegiado no Brasil", Revista do Advogado da AASP, No. 99, 2008.

[14] What has forced the Supreme Federal Court, in Brazil, to edit the *Súmula Vinculante*, No. 13: "The appointment of a spouse, partner, relative in the straight line, collateral or by affinity, up to the 3rd degree, inclusive, of the authorizing authority of the appointment or of the server of the same legal person, invested in a position of direction, leadership or advice, to the exercise of a position in commission or trust, or, also, of a paid function in the direct and indirect Public Administration, in any of the Powers of the Union, of the States, of the Federal District and of the Municipalities, including the adjustment through reciprocal designations, violates the Federal Constitution".

[15] Despite having expelled a President of the Republic by impeachment in 1990 (Collor de Mello), holding a Head of State accountable before or after the mandate seems very difficult to happen, with rare exceptions around the world. We would hardly read a report in a Brazilian newspaper like the one we read in *Le Monde* on May 9, 2012, p. 10: "Pour Nicholas Sarkozy, la perspective est particulièrement désagréable: lui qui avait tant tenu a la marquer sa différence avec un Jacques Chirac cerne par les juges risque à son tour, une fois son immunité présidentielle arrivée à son terme- un mois après la fin de son mandat, soit le 15 juin a la minuit- d´être convoqué par des magistrats. Redevenu justiciable ordinaire, M.Sarkozy s´expose en effet, dans les procédures où son nom est cité, a la des convocations auxquelles Il aurait a la répondre en cualité de témoin, de témoin asisté, voire de mis en examen [...]

mayors, mayors and the broad protection of *constitutional immunities*[16] found in the Constitution, above all, the first three, in our opinion, are not justified in the Constitution of a country that declares itself as a Democratic State of Law.[17]

Of course, abuses are generally committed in a non-ostensive way. For example, we understand that a President of the Republic who is a candidate for *re-election* is undoubtedly favored by having the administrative machinery in his hands.

In general, deliberately, there is a gap in the regulations that not only allows for a period of incompatibility but also does not establish any type of

---

Dans le volet politique du dossier Bettencourt, instruit a la Bordeaux, le président sortant est soupçonné d´avoir été financé illégalement par le couple de milliardaires lors de sa campagne présidentielle of 2007. L´ancienne comptable des Bettencourt, Claire Thibout, a declare avoir remis a la Patrice de Maistre, alors gestionnaire de fortune, 50.000 euros en espèces. Une somme, à en croire Mme Thibout, destinée à Eric Woerth, trésorier de la campagne de M. Sarkozy".

[16] Article 53 of the 1988 Federal Constitution provides: "Deputies and senators are inviolable, civilly and criminally, for any of their opinions, words and votes. Paragraph 1. Deputies and senators, from the moment they take office, will be judged by the Federal Supreme Court. Paragraph 2. From the time they take office, the members of the National Congress may not be detained, except in flagrante delicto that cannot be bailed. In that case, the records will be sent within twenty-four hours to the respective House, so that, by absolute majority of votes of its members, it can decide on the prison. Paragraph 3. Once the complaint against the Senator or Deputy has been received, for a crime committed after taking office, the Federal Supreme Court will inform the respective House, that, at the initiative of a political party represented in it and by majority vote of its members, it may, until the final decision, suspend the course of action. Paragraph 4. The request for suspension will be assessed by the respective House, within the non-extendable period of forty-five days counted from its receipt by the Board of Directors. Paragraph 5. The suspension of the process suspends the prescription, while the mandate lasts. The responsibility of the President of the Republic is provided for in articles 85 and 86 of the Federal Constitution of 1988. Paragraph 4 of article 86 provides: "The President of the Republic, during his mandate, *cannot be held responsible for acts unrelated to the exercise of their functions*.

[17] Likewise, the option of the 1988 federal constituent regarding the *secret ballot in the event of a parliamentary loss of mandate seems wrong to us*. It does not honor the principle of publicity or transparency. As affirmed by Minister Carlos Britto, of the Supreme Federal Court, in the Direct Action of Unconstitutionality n. 2,461-2 of Rio de Janeiro, "it is forgotten that the parliamentarian does not simply vote for himself; he has to give satisfaction to his voters or his representatives, differently from the individual voter, from the citizen, who only gives satisfaction to himself". Subsequently, as we know, due to the enormous popular pressure that arose from the case of Deputy Natan Donadon, the National Congress ended up amending the Constitution to introduce open voting in the voting to annul mandates. Otherwise, we will surely continue to have absolutely contradictory and vexatious situations in Brazil, as happened in this case. Deputies sentenced to 20 years in prison with their full elective mandates, a true logical, ethical and political nonsense.

restriction to the occupant of the position who launches to contest re-election always with an advantage for the simple fact of being holding office.

It will be said that there is no way to avoid inequality in this case. We disagree.

A year of distancing (de-incompatibility), for example, to dispute the charge, would be a way to *lessen the effects of the agent's manipulation*, which is otherwise unavoidable.

Another very common example is the abuses committed by parliamentarians in the exercise of their mandates, or even before being or to be elected.[18]

Electoral legislation is, in general, very permissive and superficial, which makes it possible to abuse economic power in elections.[19] In addi-

[18] On the topic, see Mendes, Antonio Carlos, "Apontamentos sobre o abuso do poder econômico em matéria eleitoral. Cadernos de Direito Constitucional Eleitoral", São Paulo, Imesp, 1998, No. 3: "o abuso do poder econômico em matéria eleitoral consiste, em princípio, no financiamento, direto ou indireto, dos partidos políticos e candidatos, antes ou durante a campanha eleitoral, com ofensa à lei e às instruções da Justiça Eleitoral, objetivando anular a igualdade jurídica (igualdade de chances) dos partidos, tisnando, assim, a normalidade e legitimidade das eleições" "The abuse of economic power in electoral matters consists, a priori, in the financing, directly or indirectly, of political parties and candidates, before or during the electoral campaign, offending the law and the instructions of the Electoral Justice, with the purpose of annulling the legal equality (equal chances) of the parties, thus tainting the normality and legitimacy of the elections". And later: "O Congresso deveria assumir a responsabilidade de disciplinar, com minudências, os gastos partidários e eleitorais, entregando à Justiça Eleitoral e ao Ministério Público os instrumentos necessários para coibir o abuso do poder econômico, assegurando a lisura e a moralidade dos pleitos eleitorais. Por isso, a proposta de Fábio Konder Comparato guarda absoluta pertinência com a matéria aqui deduzida. Assim, a Constituição Federal deveria abrigar preceito com o seguinte teor normativo: a lei estabelecerá limites de dispêndios, para os candidatos e os partidos, nas campanhas eleitorais, bem como fixará o montante máximo de contribuições que cada candidato é autorizado a receber". "Congress should assume the responsibility of disciplining, with trifles, party and electoral expenses, giving the Electoral Justice and the Public Ministry the necessary instruments to curb the abuse of economic power, ensuring the smoothness and morality of electoral lawsuits. For this reason, Fábio Konder Comparato's proposal is absolutely relevant to the matter raised here. Thus, the Federal Constitution should contain a precept with the following normative tenor: the law will establish spending limits for candidates and parties in electoral campaigns, as well as set the maximum amount of contributions that each candidate is authorized to receive.

[19] It is true that the edition of the "Clean File Law" has been an advance. However, reactions from lawyers specializing in Brazilian electoral law are also observed. This is the case, for example, of Marcelo Ramos Peregrino Ferreira, who compares these concepts and the jurisprudence of the IACHR to observe: "A Lei das Inelegibilidades, nos termos da jurisprudência da Corte Interamericana, ao criar uma extensa lista de obstáculos aos direitos políticos, de maneira um tanto assistemática, pretendeu capturar a desonestidade e expurgá-la do cenário do regime democrático. Para tanto, com o objetivo de atingir tal importante

tion, once elected, the deputies and senators, in general, obtain, by themselves or through intermediaries, concessions of radio channels, sometimes television, obtaining advantages and prestige in their ["currais"] electoral trenches.

We all know that the "owners" of radio concessions in the interior of the vast Brazil are mostly politicians, directly or indirectly, despite the applicable constitutional norms (articles 54 and 55 of the Federal Constitution of 1988), which Others do not contain express prohibitions in this regard.

In addition, the flow of parliamentarians (deputies and senators) towards the Executive Power, by virtue of the possibility opened by article 56 of the Federal Constitution of 1988,[20] does not harmonize with the principle of administrative morality.

The conflict of interest and the promiscuity of the information received in the Executive (and the original relationship with the Legislative), in these situations, most of the time, makes that relationship of cohabitation promiscuous and intolerable. The parliamentarian does not leave his ties from day to night when assuming a temporary and temporary position in the Executive and the same when he returns to the Legislative, with information collected in the Executive.

Also, personally, we do not accept, due to an express offense to the principle of administrative morality, the possibility that a Promoter of Justice (member of the Federal or State Public Ministry) hold the position of state or federal deputy.

There is a *visceral incompatibility* between occupying the position of promoter of justice, defending the unavailable social and individual interests of the population and the legal order and being, at the same time, a state or federal deputy or senator.

---

desiderato, tentou aprisionar em conceitos objetivos aquelas pessoas indesejáveis para a participação em eleições". Ferreira, Marcelo Ramos Peregrino. "O controle de convencionalidade da Lei de Ficha Limpa–Direitos Políticos e Inelegibilidades" Dissertação de Mestrado. Orientação do Prof. Dr. Roberto Dias da Silva, São Paulo, Pontifícia Universidade Católica de São Paulo (PUC-SP), 2014.

"The Law of Ineligibility, according to the terms of the jurisprudence of the Inter-American Court, by creating an extensive list of obstacles to political rights, in a somewhat unsystematic manner, has tried to capture dishonesty and purge it from the scenario of the democratic regime. To This, with the aim of achieving such an important desideratum, tried to imprison in objective concepts those undesirable people to participate in the elections". Ferreira, Marcelo Ramos Peregrino, *op. cit.*

[20] "Article 56. The Deputy or Senator will not lose their mandate: I) invested in the position of Minister of State, Governor of the Territory, Secretary of State, of the Federal District, of the Territory, of the Capital Municipality or head of a temporary diplomatic mission".

And it is not said that a license from the institution that allows the promoter to occupy the parliamentary mandate would solve the problem. Clearly that would not be the solution. For the same reasons, it is not admitted that the judge (federal or state) can hold another public office other than that of university professor.[21]

They are certain functions of the State in defense of society that do not allow accumulation with other attributions or sphere of interests outside the chosen career. [22]

However, we note the existence of some promoters of justice occupying the position of state and federal deputies, elected, and authorized by their institution of origin, even after the 1988 Constitution. These facts do not harmonize with the principle of administrative morality so defended by the Public Ministry itself in forums throughout Brazil.

The Brazilian Public Ministry has received, for the first time in the history of Brazil, broad constitutional regulation. This defines it as a permanent institution, essential to the jurisdictional function of the State, and in charge of defending the legal order, the democratic regime, and unavailable social and individual interests.

The Constitution establishes unity, indivisibility, and functional independence as institutional principles of the Public Ministry. In addition to the traditional functions of *legis* costs, prosecutor of the law, and promoter of public criminal action, of direct action of unconstitutionality or constitutionality, of interventive representation, and of electoral functions, there are new functions (post 1988) institutions of the Public Ministry promote public civil investigation action and public civil action for the protection of public and social heritage, the environment, and other diffuse and collective interests.

---

[21] With schedule compatibility. Although we recognize that occasional abuses also occur here. There are some judges who violate the rule, teaching in more than one Institution of Higher Education (HEI) or even in just one (formally) teaching courses and in other HEIs, receiving cash to prevent the control of who should supervise them. The same happens on a larger scale with the Public Ministry. But it is necessary to recognize that the National Council of Justice (CNJ) has tried to face this problem, unlike the CNMP which, unfortunately, has not found its constitutional identity until now, being constantly attracted or neutralized by the structures of the (Ministry Public) in the States and by the corporatism of impunity.

[22] Unfortunately, we know of the existence of promoters of justice who are owners of business firms, shareholders of limited companies. They affirm that they do not exercise management or administration in said companies. Many times, the one who alleges that condition is also the intellectual leader of the company, be it of a cultural or scientific (educational) nature or even his true intellectual mentor.

It is also the responsibility of the institution to ensure that the public authorities and public services respect the rights guaranteed in the Constitution, judicially defend the rights and interests of the indigenous population and exercise, in addition, external control of police activity.

Therefore, with so many and such relevant powers, it would no longer be possible for the members of the Federal or State Public Ministry to "accumulate" other functions.[23]

Furthermore, in addition to the problem of undue accumulation, today we have an obvious super-affectation of the powers of the Public Ministry that ends up plastering the state administrative machinery. Under the pretext of supervising the Public Administration, many times what we see is a clear and intolerable improper invasion of the Public Ministry in the administrative management of government, not only of the Direct Administration but also Indirect at the various levels of the Brazilian federation.[24]

---

[23] We have not even mentioned another equally serious problem, which is the abusive exercise of powers. There are situations, for example, in which the Public Ministry should not act because there is simply no relevant public or social interest present and, even so, that body insists on intervening, wasting public and human resources and spending its energy on merely private matters. See, for example, the case of soccer. It is not uncommon for the Public Ministry to discuss the *results of soccer championships* through public civil action under the pretext of complying with the "statute of the fan". The newspaper El *Estado de Sao Paulo*, from April 10, 2014 (p. A-27) prints the following headline: "CBF obtains victory in the dispute with LUSA. Court of Justice of SP denies a Public Civil Action filed by the promoter XXX "The MP's public civil action alleges non-compliance with the Fan Statute in sanctioning the loss of four points imposed on LUSA due to the irregular call-up of midfielder Héverton, which caused the team's relegation. According to the understanding of the MP, the athlete's suspension should have been published on the CBF page, which did not happen". He wonders: what would be the public interest that justifies the action of the Public Ministry in this case? Fortunately, the The Court of Justice considered that the MP *does not have the legitimacy to propose such an action.*

[24] For this reason, Minister Celso de Mello of the Federal Supreme Court rightly affirms that the elections made by the Public Administration in the exercise of discretionary administrative powers should not be annulled or questioned by the Public Ministry, except for evident illegality, disproportionality, and administrative immorality. However, in practice, unfortunately the Public Ministry, in many cases *ends up interfering in any and all public policy* trying, not uncommonly, to replace the public administrator in his legitimate elections and adopted technical criteria. It confuses auditing with legitimate decision-making. In some cases, it intends to completely suppress the freedom enjoyed by the indirect Public Administration and its public companies and mixed economy companies to act in compliance with their statutory and legal objectives. In this sense, *inter-plures*, see: MS 24845, MC-DF Rel. Min. Celso de Mello judged on March 25, 2004, and Resp 429570, Rel. Min. Eliana Calmon, Resp 469.475, Rel. Franciulli Netto, judged on May 13, 2003.

The problem is much bigger than the number of attributions; It is about the evident quality and importance of the powers that effectively do not admit the exercise of another function, except for a single *one of teaching*.[25]

For this reason, Generaldo Brindeiro, former Attorney General of the Republic, tells that, in 1996, he entered the Federal Supreme Court with two direct actions of unconstitutionality against the party affiliation of the members of the Public Ministry simultaneously with the exercise of his institutional functions.[26]

And more, Promoters of Justice, Magistrates, Public Attorneys and Public Defenders may not occupy, in our opinion, any other public position

[25] Norm also openly mocked without control by the corregidores of the Public Ministry and the Judiciary in Brazil. It is known that there are judges and promoters with more time in Law Academies, Law Schools, on national and international trips than in their jobs. The question always arises: How do they manage to keep the demands that are under their responsibility in order? Surely it is not them, but their advisers who "judge" or who give their opinion, thus blatantly violating the Constitution and its values. In the end, the Constitution also establishes for its Members of the Public Ministry guarantees and prohibitions analogous to those of the Judiciary. Its lifetime, immovable nature and the irreducibility of salaries are guarantees whose purpose is exactly to ensure its independence *for the exercise of its functions*, and not for its intellectual delight or even to increase its salaries with talks, classes and conferences, everywhere. of the world. Certainly, the National Council of the Public Ministry and the National Council of Justice have a lot of work to do in the future. We must make it clear: we support the constant improvement of magistrates, promoters, defenders, attorneys, etc., including through their respective professional schools. That is one thing, another, very different is that the magistrate or the promoter, dedicate more time to teaching (in an Institution "formally" and in another 10 informally), preferring the Academy to their Institution of choice, by public competition. The two lose, because the work will surely be of poor quality in both, in the academy and in the Judiciary or in the Public Ministry, Ombudsman, Attorney General's Office, etc. We recognize that the National Council of Justice (CNJ) has advanced seeking to confront the problem. Unfortunately, we cannot say the same about the CNMP. In general, there is a wrong understanding of the issue. A limit of 20 hours is set in the teaching profession as tolerable to accumulate the position of professor with that of promoter of justice or judge. The issue is much more complex, since a certain promoter or judge may have an official link and also two or three other informal ones in preparatory courses, for example, flouting the rule in its essence. Or also declare that he is within the limit of 20 hours (academic) and occupy – irregularly – due to visceral incompatibility with his constitutional powers, a management position (administrative) in law schools, even receiving administrative hours in addition to academic hours. Or even maintain two links with false hours. In other words, he claims to have 10 hours in each institution, although adding in fact the time dedicated to his students in postgraduate courses, and other activities carried out in the Academy(s), evidently, he commits himself globally and consumes much more time. of which he has declared, flouting the Constitution. The question, as can be seen, is not resolved only by controlling the hours dedicated to academic activity or its limits, but by means of a broad and exhaustive investigation of the different functions and attributions effectively maintained by the promoter or judge outside the function.

[26] *Revista Trimestral de Direito Público*, (RTDP), vol. 13, 1996.

or private paid or command function, except (a single function) in the superior teaching profession.

No exception to this rule should be allowed under penalty of absolute subversion in the spirit that must govern said careers and their institutional purposes.

V. The "mensalão"

The *Mensalão* is undoubtedly one of the largest corruption schemes in Brazilian history. It involves members of the National Congress, political parties, directors of agencies of the direct and indirect federal public administration, financial institutions, and private companies.

The name *Mensalão* derives from periodic payments (some of them made month after month), of illicitly obtained amounts, to parliamentarians and political parties, in exchange for support for the Government's proposals and applications in the National Congress.

It has been verified that the political-partisan indication for occupation of command positions in various agencies and entities of the federal Public Administration, resulted in the capture of public resources through overinvoicing of prices in hiring, receipt of tips and other spurious means. The resources obtained were used to finance electoral campaigns, attract parliamentarians and parties to the support base of the government in the National Congress and illicitly enrich public agents, politicians, businessmen and other participants in the scheme.[27]

According to Lucas Rocha Furtado, the resources that fed the *Mensalão* scheme came, in large part, from the administrative contracts entered by various agencies and entities of the Federal Public Administration with the advertising companies DNA Propaganda Ltda. and SMP&B Comunicaciones Ltda. linked to businessman Marcos Valério Fernandes de Souza.

At first, in the State of Minas Gerais, then governed by the PSDB, the scheme prospered. The companies mentioned obtained the main accounts of the State Government, and due to the influence of some mining politicians, as of 1998 1998, they obtained some accounts in the federal sphere.

Similarly, after winning the presidential elections, the Workers' Party (PT), with a view to, among other goals, negotiating political support with

[27] Furtadp, Lucas Rocha, "As raízes da corrupção no Brasil. Estudos de casos e lições para o futuro", *Belo Horizonte: Fórum*, 2015, pp. 351 et seq.

parliamentarians and other parties and paying electoral campaign expenses, tried to approach Marcos Valerio, so that the advertiser would implement, in the federal sphere, the same scheme operated in Minas Gerais.

Once the agreement was signed, the corruption scheme was organized. In his complaint, the Attorney General of the Republic dismembered the scheme into three aspects of participation: the central nucleus, formed by José Dirceu (then Chief Minister of the Civil House) and Delúbio Soares, José Genoíno and Sílvio Pereira (at the time, treasurer, president and secretary of the Workers' Party, respectively); the first operational and financial nucleus, in charge of the publicist Marcos Valerio and his companies, and the second operational and financial nucleus, formed by the senior management of Rural Bank.

To carry out the corruption scheme, the advertising agencies DNA Propaganda and SMP entered several contracts with federal state agencies and entities. In 2003, Marcos Valerio also got the important advertising account of the Chamber of Deputies.

In the complaint, the Attorney General of the Republic highlighted the close relationship between the Federal Government and Marcos Valerio's companies.

In the contracts signed between the advertising companies of Marcos Valerio and the Federal Government, several irregularities were found: tax evasion, maintenance of parallel accounting, issuance of false invoices to justify costs in the provision of services, among others. All these irregularities were related to the mechanism of illicit collection of resources aimed at financing the corruption scheme.

The facts were made public after the disclosure, by the press, of the existence of a video recording in which the former Postmaster was caught requesting an undue advantage to benefit businessmen interested in entering the role of suppliers of the state.

The talks also revealed an exchange of political support in the National Congress for command posts and positions in state-owned companies and various public agencies. Initially, a Parliamentary Commission of Inquiry was created (2005). Subsequently, the then deputy Roberto Jefferson ended up revealing that the corruption scheme in which he participated was not limited to the state Post Office company, but, rather, to a complex system of illegal financing of the political support base of the Government in Congress. National.

He also clarified that the action of members of the Federal Government and the Workers' Party to guarantee the support of parliamentarians for projects of interest to the government was carried out through the politi-

cal assignment of public positions, which he called "money factory", and for the distribution of a "monthly payment" to parliamentarians, which he called *Mensalão*.[28]

Lucas Rocha Furtado points out as reasons that led to the fraud, the existence of flaws in Brazilian legislation, the excessive number of positions in commission (of trust) in the Executive Power and its political rigging. From the political angle, the existence of money laundering schemes, diversion of public resources and flaws in the Brazilian political structure. It would take "a profound political reform" in the vision of some Brazilian politicians.

In addition to the successive condemnatory decisions of the Justice in Brazil involving those guilty[29] of these schemes, several proposals were presented to modify the legislation, to avoid the repetition of such problems and illicit acts. Among them, we highlight modifications to the Administrative Integrity Law, reduction of discretion in public tenders, institution of the incentive program for disclosures of public interest, creation of the National System to Combat Corruption (SNCC), transformation of the National Council of Control of Financial Activities (COAF) in the National Financial Intelligence Agency (ANIF), reformulation of the current Brazilian System for the Protection of Confidential Information, end of the privileged jurisdiction reserved for various federal and state authorities, end of private financing of political campaigns and more transparency in the public machine.

Lamentablemente pocas de las medidas propuestas se transformaron en ley y/o en medidas concretas. Otras llegaron, sin embargo, buscando cambiar esa realidad y combatir la corrupción.

For example:

1. The privileged jurisdiction in the Federal Supreme Court still exists in Brazil. Deputies and Senators have formal and material immunity and can only be detained in flagrante delicto. In addition, its Chamber may decide on imprisonment (art. 53, §2 of the Federal Constitution).

The previous regime was even more protective since the Parliament had to authorize the establishment of the action. Today, that requirement no longer exists. But even so, the jurisprudence of the Federal Supreme Court resolved to create an equivalent rule, requiring that the police and/or the

[28] *Ibidem*, p. 359.

[29] Except for politicians with privileged jurisdiction whose accountability has been very slow.

Public Ministry request authorization – from the Federal Supreme Court – to investigate those who enjoy privileged jurisdiction. This reinforced the idea that there are citizens of different classes in the country.

In addition to other drawbacks, the privileged jurisdiction, by providing for the trial of politicians and other high authorities of the Republic in the Supreme Federal Court, is also inconvenient because the Supreme Court is already a constitutional court with hundreds of thousands of files and does not have vocation to originally judge complex criminal cases that require procedural instruction,[30] not uncommon in the most varied states of the Brazilian federation. The production of the evidence, the testimonies, in short, the entire investigation of a criminal procedure is not compatible with the functions of a constitutional court based in Brasilia, with 11 ministers. And this without mentioning the risk of prescription in several processes.

The matter is pending in the Federal Supreme Court. We hope that a more realistic interpretation of the privileged jurisdiction will emerge shortly, especially with regard to political mandate holders and a constitutional reform that reduces the jurisdiction to an indispensable minimum for very few authorities.

2. The end of the possibility of private financing in political campaigns was approved after enormous popular pressure and anti-corruption institutions, including the Brazilian Order of Lawyers.

It is evident that the private financing of political campaigns by companies – normally large corporations – causes problems of abuse of economic power, administrative contracts signed after the election, and unbalances political disputes between candidates with greater or lesser economic power.

But there is a huge distance from there to radically prohibiting direct or indirect private financing. We understand the public outcry that associates electoral donations with corruption, but personally, we have never been in favor of the simple extinction of all types of private financing.[31]

---

[30] While the United States Supreme Court rules 100 cases per year, the Brasilian one rules 100,000.

[31] We share the understanding of Bruno Speck (minority) in the sense that "private money for electoral campaigns strengthens democracy, but that there must be rules to prevent parties from becoming dependent on large financiers ... It is that in most countries, donations made by associations and unions are allowed and are important pillars of the healthy party system" ... As long as politicians depend on a small number of donors for their campaigns, the problem of corruption will continue latent" (Interview, Veja Magazine. April 4, 2006). See: Fonseca, Thiago do Nascimento, "Doações de campaña implicam en retornos contra-

We believe that the problems would be lessened with the institution of a reasonable contribution ceiling by companies and individuals with strong control by the Electoral Justice. It happens that the latter alleges that it does not have the conditions to carry out audits or better control over corporate donations. There begins a vicious circle when private donations are prohibited due to the lack of adequate control.

Today corporate donations are prohibited, especially because of the latest scandals. The solution found by Congress does not please Brazilians because it has created millionaire public financing in a country in economic recession.

The project —which contemplates funds of R$ 4.4 billion in the 2018 Annual Budget Law— still depends on presidential sanction, although everything indicates that it will be approved.[32]

Worrying, however, in the project is the forecast that allows the party commandos to decide how the money will be distributed among the candidates, strengthening what has been called political *caciquism.*[33] The strongest leaders and politicians will receive more resources than the candidates with less strength and penetration in the political environment.

3. Specific modifications in the Administrative (Im) Honesty Law (Law no. 8.429/1992) and the institution of the Clean File Law (Complementary Law no. 135/2010).

The Administrative Improbity Law meant progress in the fight against corruption because, in a more effective way, it seeks to prevent and punish the illicit enrichment of public and private agents. Being a civil and not a

tuais futuros? Uma análise dos valores recebidos por empresas antes e depois das eleições", Journal of Sociology and Politics, vol. 25, No. 61, March, 2017.

[32] The Plenary of the Chamber of Deputies approved on October 4, 2017 the creation of another public fund to finance candidates. The proposal continues for the sanction of the President of the Republic. Case sanctioned in 2018, about R$2 billion of public resources will be allocated to the parties. The proposal also includes the end of party propaganda (not electoral propaganda) on TV and radio. That was always the intention of the Legislature, especially after the decision of the Federal Supreme Court that prohibited, in 2015, that the companies continue financing the parties and, consequently, the candidates. Among the proposed changes is the release of paid advertising on the Internet, electoral telemarketing and some modifications in the rules of electoral debates on TV, in addition to an amnesty of fines already applied to political parties by the Electoral Justice.

[33] Among the recently approved proposals we have a spending ceiling on electoral campaigns. Until 2014, it was the parties that defined their expenses. For the approved proposal that continues to be sanctioned or vetoed by the President of the Republic, there is a ceiling of R$ 70 million for a candidate for president, and R$ 21 million for governors, depending on the size of the state.

criminal law, which provides for severe sanctions such as the unavailability of assets and the suspension of political rights and loss of public function, it has in its favor the possibility of capturing political and private individuals in its meshes, in addition to not being reached for the criminal immunity of politicians.

Over the years, the Administrative Improbity Law has been widely used by the Public Ministry to prosecute acts of administrative improbity in the three spheres of the Brazilian federation.

At his side we also have the "Clean File Law", the result of a successful *popular initiative* campaign[34] led by the Movement to Combat Electoral Corruption (MCCE) and other civil society organizations, with the purpose of giving responses to the social demand for increased rigor in the criteria for defining candidacies and to the constitutional determination of article 14, §9 of the Federal Constitution, which charged the National Congress with this provision.

In summary, the hypotheses of ineligibility contemplated in the "Clean File Law" are the following: a) judicial convictions (electoral, criminal, or for administrative improbity, pronounced by a collegiate body; b) rejection of accounts related to the exercise of public position or function (necessarily collegiate, when dictated by the Legislature or by the Court of Auditors, as appropriate); c) loss of office (elective or effective appointment), including the forced retirement of magistrates and members of the Public Ministry, and for the military, indignity or incompatibility with the official position; d) Resignation of an elective public position before the imminence of the establishment of a procedure capable of causing the loss of the position; and e) exclusion from exercising the regulated profession, by decision of the corresponding professional body, for violation of ethical-professional duty.

It is impossible to analyze all these hypotheses or show all the positive and negative comments alluding to the Law. For our purposes in this article, it is enough to report its existence.

4. Approval of the Anti-Corruption Law (Law n.12,846/2013)

This is a new law that provides for the administrative and civil liability of legal entities for the practice of acts against the public administration, national or foreign, and determines other measures.

Despite the classification of the crime of corruption in the Brazilian Penal Code, society accused the lack of a norm that also reaches the compa-

[34] With more than 1,600,000 subscriptions.

nies involved in the various cases of corruption, since the positive sentence was only applied to the personal sphere.

Until then, the punishment of legal entities caught in situations of this nature consisted only of being prevented from participating in public tenders and entering contracts with the Administration (suspension or declaration of suitability).

Finally, after long years of processing in the National Congress —in flagrant response to the numerous street protests that occurred in June 2013, which highlighted widespread corruption at all federal levels— and even in response to an international claim, the new law comes to fill an existing gap in Brazilian legislation by reaching the companies of the corrupter, extending the punishments of public officials involved in corruption crimes to the companies where they work.

In short, the law allows administrative and civil penalties to be sanctioned against a company considered corrupt, forcing it, in practice, to compensate public coffers, in addition to authorizing, in extreme cases, its forced extinction by court order.

The law, therefore, adopts the mechanism of *strict liability* of the legal person for acts that violate public assets, national or foreign, against the principles of the Public Administration or against the international commitments assumed by Brazil, practiced in its interest, without the need to prove bad faith or negligence, of the individual responsibility of natural persons (directors) or any other person or participant in the illegal act.

e) The Awarded Delation (or Collaboration) Law and the Criminal Organizations Law

Perhaps the most important set of criminal laws to deal with corruption in Brazil consists exactly of these laws. Since 1998 we have Law n.9.613, of March 3, 1998, which provides for the crimes of "laundering" or concealment of assets, rights and values, reformulated by Law n.12.683, of July 9, 2012.

With the emergence of the "Operation *Lava Jato*" developed by the Federal Police of the State of Paraná, involving financial diversions of great magnitude from the state-owned Petrobras, the institution of the award-winning denunciation was gaining prominence during said criminal persecution. It began to be continuously disclosed, not only in the police and forensic media, but also by the press, in all its communication segments.

The rewarded denunciation is an institution of a penal nature, since it constitutes a factor of reduction of the legal reprimand or judicial pardon, extinctive cause of punishability.

Following the North American and Italian traditions on the matter, the institute of rewarded denunciation was timidly introduced in Law n.8.072/1990, which dealt with "gang or gang" crimes; finally, in Law n.9.080/1995, which disciplines crimes against the tax and economic order and determines other measures.

In several other later laws, we find the institute. As in the drug crime law (Law n.11.343/2006), in the law for the protection of victims and witnesses (Law n.9.807/1999) and in the law that defines "criminal organization" (Law n.12.850 /2013).

Michelle Barbosa de Brito[35] teaches that Law n.12,850, of August 2, 2013, in addition to having addressed an old jurisprudential and doctrinal demand for the definition of a criminal organization, has provided for criminal investigation, the means of obtaining the evidence, correlative criminal offenses and the criminal procedure to be adopted in cases involving organized crime, repealing Law n.9.034/1995.

Among the means of obtaining evidence allowed in any phase of the criminal prosecution, provided for in article 3 of Law No. 12,850, the rewarded denunciation, under the name of "rewarded collaboration", has gained procedural discipline in its 4th articles, 5th, 6th and 7th. In addition to the benefits already canceled, such as judicial pardon, the reduction of the sentence and the substitution of the custodial sentence for restriction of rights, the possibility of the Public Ministry refraining from offering the complaint in the case was considered. that the collaborator is not the leader of the criminal organization and is the first to provide effective collaboration (article 4, §4).

With divergent positions in the Brazilian doctrine, the institute of denunciation continues to be a powerful instrument of investigation.

Along with it, or at its side, we also have the leniency agreement, partly inspired by its North American counterpart leniency program, applied first in the field of competition law (Law n.12,529/2011), and later, in the field criminal and criminal procedure (Law n.12.846/2013).

Undoubtedly, Law n.12.850/2013, by expanding the assumptions of awarded collaboration, has generated a significant increase in criminal investigation actions. Following the logic that the State benefits from the contribution of the agents involved in illicit actions perpetrated by criminal organizations —which enables a greater scope of its repressive action— the rule grants benefits to the collaborator to the extent of the assistance provided.

[35] Brito, Michelle Barbosa de, "Delação premiada e decisão penal: da eficiência à integridade", Belo Horizonte, D´Placido, 2016.

As in antitrust (competition) legislation, rewarded collaboration[36] inserts the destabilizing element of criminal organizations by granting a significant advantage to those who inform on others involved in the illegality.

As Valmir Moysés Simão and Marcelo Pontes Vianna:[37] "even the most cautious doctrinaires admit the use of awarded collaboration when weighing its usefulness against the harmfulness of the criminal organization's actions and the difficulty in combating it".

On the subject, Nucci teaches:

> ... t seems to us that rewarded denunciation is a necessary evil, since the greatest good to protect is the Democratic State of Law. It is not necessary to point out that organized crime has wide penetration in the heart of the state and has the conditions to destabilize any democracy, without being able to combat it efficiently, disregarding the collaboration of those who know the scheme and are ready to denounce co-authors and participants. In the universe of good human beings, without a doubt, betrayal is unfortunate, but we do not believe that the same can be said when transferring our examination to the field of celito, by itself, unregulated, opposed to legality, contrary to monopoly conflict resolution state, governed by esdrújulas and extremely severe laws, completely distant from the governing values of fundamental human rights.

For us, immoral is not "negotiating" with the corrupt to disrupt gangs and criminal organizations, but to stop uncovering crimes that devastate Brazilian and world public heritage.

VI. The "Lava Jato"

On March 17, 2001, several money changers were being investigated by the federal police and by federal judge Sergio Moro. The target of the diligence was not Petrobras, but the owner of a service station, located in Brasilia, where the name of the "Lava-Jato" operation was born.

---

[36] Awarded collaboration (or awarded accusation) is a means of obtaining evidence in cases involving criminal organizations. The collaboration is recognized in international treaties, such as the United Nations (UN) conventions against transnational crime and against corruption.

[37] Simão, Valmir Moysés and Vianna, Marcelo Pontes, "O acordo de leniência na Lei Anticorrupção", São Paulo, Trevisan, 2017, p. 94.

It was already known that the main operator of that money laundering scheme was the money changer Alberto Yousef who had already spent more than 2 years in prison and was serving a home sentence. From the investigation of Yousef's activities, Paulo Roberto Costa, former director of Petrobras, was appointed in 2004 at the request of the Progressive Party. There was discovered the "distribution" of the directors of Petrobras in the PT government. The top three were awarded to the PT, PP and PMDB, but other parties also benefited.

Both confessed their participation in multiple crimes and betrayed many people, including several politicians and businessmen, who would also be stubborn criminals. At the same time, the involvement of the political-business sector was discovered from the rewarded denunciations and the emergence of new evidence.

Strictly speaking, not only at Petrobras, but also at *Mensalão*, the corruption scheme, in a general way, involves politicians, businessmen, public agents and financial operators, who each acted in their specific core, as follows:

1. The political nucleus formed by parties and their members, mainly parliamentarians, who indicated and maintained high-ranking officials in the Public Administration, receiving undue advantages paid by the companies that make up the economic nucleus;
2. The economic nucleus, formed by the cartels of companies that were contracted by the Public Administration and that paid undue advantages to high-ranking officials and members of the political nucleus;
3. The administrative nucleus, made up of high-ranking officials of the Public Administration, who were indicated by the members of the political nucleus and perceived undue advantages from the company cartels that made up the economic nucleus;
4. The financial nucleus, formed by the operators both from receiving the undue advantages of the cartels of companies that made up the economic nucleus and from passing on that tip to the components of the political and administrative nucleus, through strategies of concealment of the origin of these values.[38]

[38] The performance of the Economic Nucleus was intrinsically dependent on the performance of the Political Nucleus, since it was responsible for indicating and maintaining an Administrative Nucleus in the contracting public organisms geared towards carrying out illicit interests. The Economic Nucleus paid illicit advantages to the members of the Political

It is true that with the denunciations of Paulo Roberto Costa and Yousef, the Petrobras scandal became public. As the remembered Minister of the Federal Supreme Court Teori Zavascki has said, "for each feather that is plucked in the process, a chicken comes out".

More than 150 (in the year 2017) rewarded denunciations[39] were made both by directors of the Odebrecht company, as well as by politicians and different authorities. The result was devastating. The largest corruption scheme ever seen in Brazil was discovered.

The great effort of the "Lava-Jato" —which has given rise to hundreds of other investigations and criminal proceedings, in addition to revealing a web of promiscuous relations between the public and the private, with serious interference in the electoral process— has shown the country to the possibility of a coordinated, fast and efficient action between the Federal Police, the Corregidor General of the Union, the Public Ministry, various professionals such as tax auditors and the inspection bodies of the Brazilian federation. Today, the "Lava-Jato" operation reveals impressive numbers.[40]

The tips paid are estimated at around R $6.4 billion. The recovery of the diverted money has already reached R$10 billion, the result of prize-winning collaboration agreements and prize-winning denunciations. Until December 2016, there were already 24 convictions, against more than 120 people, with 1,300 years of prison sentences. Even the most skeptical and distrustful recognize the merits of the "Lava-Jato", which is still criticized for not having reached all the political parties of various ideologies.[41]

Nucleus, either to benefit from public contracts, or to obtain political protection (Proc. n. 54347/2017-GTLJ-PGR-STF).

[39] Since its inception, the "Lava-Jato" in the first instance convicted more than 120 people, while the Federal Supreme Court (STF) did not have, until 2017, any sentence of merit in this area. In the first instance, 259 inmates have already been charged. In November 2016, 362 investigative actions against persons enjoying privileged jurisdiction were underway at the STF, or under its direction. Of these, 23 actions were being processed for more than six years. Seven of them more than ten years ago. This shows the disaster was privileged.

[40] And it goes on, it is not known when it will end, since it has unfolded in several other operations and investigations.

[41] Gomes, Luiz Flávio, "O jogo sujo da corrupção", São Paulo, Astral Cultural, 2017, p. 143.

The "Lava-Jato" operation[42] has also had the merit of exposing the corruption embedded in the Brazilian political system.[43] Many attribute part of the problems to so-called coalition presidentialism. In this model, the President of the Republic, to govern, needs to set up a broad base of parliamentary support in the National Congress.

In the early years, the system has functioned reasonably and has guaranteed the governability of the country, but over time, a large balcony of spurious business has been revealed.

Although all the evils of corruption cannot be attributed to the electoral system[44] – which is true – it is necessary to modify the party system by re-

[42] The recent testimony of a former minister of the Civil House, Antonio Palocci, of the Lula and Dilma governments was devastating in the field of "Lava-Jato". He attributed to former President Lula the command of the attack on the coffers of Petrobras to make possible the succession of Dilma Rousseff. Add to this the complaint by the Attorney General of the Republic, placing the current President Temer at the center of a criminal organization, which operates in the field of the sale of legislative acts, public contracts and access to community resources, such as the FAT, give the dimension of the political degradation that we have reached. But Oscar Vilhena is right, who, when analyzing the present political situation, affirms: "As expected, the reactions of those involved, investigated and denounced have been virulent, questioning not only the integrity of the operation, but also its possible benefits for the society. Moralist, selective, messianic, persecutory and irresponsible are some of the adjectives attributed to the operations. Indeed, some actions of law enforcement agents, such as information leakage, illegal wiretapping, unnecessary extension of procedural prisons, culminating in the obscure participation of a member of the Public Ministry in the superawarded denunciation agreement of Joesley Batista, they are intolerable. That is why they must be annulled and those responsible duly punished. However, you have to be very careful not to "throw the baby out with the bath water". The Mensalão trial, as well as the Lava-Jato Operation, with all its deficiencies, are barely imposing a new paradigm in the conduct of public business in the country. Its disruptive nature has been putting in check not only the perverse model of law enforcement, which for centuries has ensured the broadest impunity for the powerful of all kinds, but also a lazy, cruel and inefficient model of capitalism that makes the taxpayer, especially the poorest, the wives of big businessmen, such as Eike Batista, Marcelo and Joesleys, as well as the clique that serves them from the palaces of the Republic. Thus, the possible failures of said operations, which must be corrected, cannot jeopardize the civilizing benefits of said movement of universalization of the rule of law". Vilhena, Oscar Vieira. *Folha de S. Paulo*, September 16, 2017.

[43] In large part, because of the *awarded denunciation* that several people have made. From these denunciations, it has been possible to discover an entire underworld of organized crime unknown to the majority of the Brazilian population.

[44] In a general way, we can say that political corruption is characterized by the use of public goods or values to obtain benefits or private advantages of any kind. Public goods or values can be of various kinds, such as, for example, a public position for himself or for relatives or friends, or illicit means used by the public servant (in the broad sense) for private or personal benefits for himself or herself. for third parties that in the end have benefited him. From a conceptual point of view, corruption is a phenomenon that transcends politics

ducing the number of parties; It is also necessary to allow the renovation of the Brazilian political cadre, perhaps with new politicians and independent candidacies, today prohibited in Brazil.

También parece importante disminuir la influencia del *marketing* en las campañas electorales que fabrican candidatos y conceptos sin cualquier relación con el mundo real y sus problemas.

Political campaigns must be reformulated and so must their method of financing, with more participation from the Electoral Justice, a combination that encourages the private sector to participate in politics, without corrupting it, and the public sector to contribute a portion of funds public.

The parallel accounting of political parties and companies (box 2) arises to finance organized crime and political parties and will not end the mere and naive prohibition of private financing, *tout court.*

Everyone must contribute to form citizenship without any distinction. Obviously, clear and objective limits must be established so that one or several large corporations do not finance politics or only a few politicians with million-dollar administrative contracts negotiated before and after the elections.

Patronage and physiologism still mark the Brazilian scene. It is necessary to break this vicious cycle, broaden and perfect the mission of the Republic's oversight agents, condemn corruption and impunity, and educate the people for citizenship.

Finally, as in any purification process, we do not know where we will arrive. If there will be a reaction from the corrupt, aborting anti-corruption efforts – as has happened in some countries, or if we will go ahead without fear.

Flávia Cristina Piovesan is right[45] when teaching:

> Latin America has the highest degree of inequality in the world. Poverty in the region has decreased from a level of 43% to 33.2%, in the period from 1990 to 2008. Five of the most unequal countries in the world are in Latin America, including Brazil. The accentuated degree of inequality is not enough, the region also stands out for being the most violent in the world.

---

and does not end in certain historical moments as it is also not exclusive to a certain political regime. It can be widely understood as a set of actions that break with the rules of conduct, transgress ethical principles, and may or may not violate the law. All acts of corruption are identified with acts of dishonesty, although not necessarily all dishonesty can be considered an act of corruption.

[45] Piovesan, Flávia Cristina, Temas de derechos humanos, 9th ed., São Paulo, Saraiva, 2016, p. 130.

It concentrates 27% of homicides when it represents only 9% of the world population. Ten of the twenty countries with the highest homicide rates in the world are Latin American. Security emerges as one of the main problems in the region. In surveys conducted by the Latino-barometer, in 2013, on support for democracy in Latin America, although 5% of those interviewed consider democracy preferable to any regime, the affirmative answer finds in Brazil the endorsement of only 49% and, in Mexico, 37%. According to the survey, 31 believe that there can be democracy without political parties and 27% believe that democracy can function without a National Congress. The Latin American region marked by post-colonial societies has thus been characterized by a high degree of exclusion and violence, to which are added democracies in the consolidation phase. The region suffers from an authoritarian centralism of power, which generates the phenomenon of "*hyper-presidentialism*" or forms of "*delegative democracy*". Democratization has strengthened the protection of rights, without, however, specifying profound institutional reforms necessary for the consolidation of the Democratic State of Law. The region also lives with the reminiscences of the legacy of dictatorial authoritarian regimes, with a culture of violence and impunity, with the low density of States of Law and with the precarious tradition of respect for human rights at the domestic level.

You see that we have many challenges ahead.

VII. Conclusion

1. Corruption is as old as man. Today, the aim is to establish common *standards* capable of combating this phenomenon globally and wherever it is present, both in the public and private spheres.
2. Corruption hinders development, harms economic growth, taxing the poorest disproportionately and undermines the effectiveness of investments and financial aid, therefore, combat strategies must be integral parts of a formulated development model to help countries eradicate poverty.
3. Corruption exists in both democratic and non-democratic countries, in countries with freedom of the press and in countries with almost no freedom of opinion.
4. Corruption can and must be tackled globally. The democratic Constitutions of the whole world, including in Latin America, allow, through various Conventions, the gradual change of this scenario of corruption.

5. There must be good governance, good administration at the local, regional, national and international levels, as well as broad popular participation in the control of the administration and of money and public affairs.
6. Information and technology are essential for understanding the problems and solutions involved in the issue of corruption.
7. There is no lack of laws in Brazil to combat corruption. However, we continue with scandals and great acts of corruption in the country. At the same time, several new anti-corruption practices and an effort to combat them have emerged. It is necessary to strengthen preventive mechanisms to combat corruption.
8. Few are the countries of Latin America with positive indices regarding the control of corruption. Political power and the electoral process still lack profound changes to achieve more efficiency and good governance in the countries of the region.
9. There are still not enough mechanisms to prevent notoriously corrupt people from occupying public positions and positions.
10. Corruption does not distinguish power. It reaches all political "powers" without exception (legislative, executive, and judicial).
11. Customs and laws, including those of a constitutional nature, are not always in accordance with the high standards of administrative morality always required in the fight against corruption and places.
12. The "judicial family" that should set a good example in combating corruption often yields to a "negative corporatist" conception, which makes it grow.
13. The "*mensalão*" and the "*lava-jato*" are huge and recent corruption scandals in Brazil that have undermined the credibility of politicians and various business sectors.
14. The controversial instrument of "awarded denunciation" has been widely used in the fight against criminal organizations in Brazil.

VIII. Recent Events involving the Lava-Jato Operation

In an individual, surprising and unusual decision, the Minister of the Federal Supreme Court Edson Fachin, on March 8, 2021, annulled all the processes against former President LULA, restoring his political rights; they say, an alleged attempt to protect former judge Sérgio Moro, who had issued the rulings in the first instance.

The argument used – incompetence of the 13th Federal Court of Curitiba to prosecute and judge the former president, because there was no direct connection with the corruption and contracts related to the Petrobras scheme. Minister Fachin understands that the accusations against the former President are not specifically restricted to Petrobras, and, therefore, will exceed the limits of action of the 13th Federal Court. The causes, as he has established in his decision, must continue in the Justice of the Federal District, in Brasilia.

According to the current version in the Brazilian press, the Second Chamber of the Federal Supreme Court, which includes Fachin, already gave concrete indications that it would accept a request for a declaration of partiality from Judge Moro, petitioned by LULA's defense. This circumstance, if confirmed, would not only annul the main sentence imposed on the former president, but would open the way for other defendants to also escape from the Judiciary. It would be, as he (Fachin) himself states, the total implosion of Operation Lava-Jato, the password for a "general amnesty" without criteria, which would confirm that the powerful continue to be above the law.

Dissatisfied, the Attorney General's Office appealed to the Supreme Court (STF), trying to reverse the ruling in favor of the former president. According to the understanding of the Attorney General, the jurisdiction of the 13th Federal Court of Curitiba, in the state of Paraná, should be maintained to judge the four criminal actions in progress against the former President, the cases of the triplex of Guarujá, of the fifth of Atibaia , of the headquarters of the LULA Institute and of the donations to its Institute, "with a view to preserving legal certainty and procedural stability", and, according to the PGR, the convictions must be maintained and the processes continued.

If the Court does not accept the request that the 13th Federal Court of Paraná remain responsible for criminal actions, the PGR postulates that the decision take effect from now on, that is, it requires that all procedural acts of instruction and decision made in Curitiba.

For its part, the defense of former president LULA has declared, naturally, that the decision of the Second Chamber of the STF "strengthens the justice system" by decreeing the bias of former federal judge Sérgio Moro, who sentenced the PT in the case of the Guarujá triplex.

Some points of this surprising judgment deserve reflection. The first, concerning the vote of the Rapporteur Judge, which in practice disavows not only his previous interpretation on the matter, but all the instances of

the Brazilian Judicial Power that had already judged the former president. They are seven years of judicial work "revoked" by a simple individual resolution, as if judges of first or second instance were worth nothing. The Federal Regional Court of the 4th Region, which examined the rulings of the magistrate in the first degree, more than once, in various appeals filed by the defense, has also been summarily discredited.

No one, either, had accused this court, until then, of having been biased or not independent.

The truth is that Operation Lava-Jato had its importance, reaching powerful politicians and businessmen. However, as has happened in Italy with Operation Clean Hands, it reached its peak and began its decline, propitiated by the *establishment* itself.

The Lava-Jato Operation went through 80 stages. There was a total of 120 rewarded accusations, approved by the Federal Supreme Court itself, which have given rise to the payment of fines totaling R $1.37 billion reais. Lava Jato modified the game of power, fueling the *impeachment* of Dilma Rousseff, in 2016, until it was undermined by resolutions of the Federal Supreme Court itself and the Attorney General's Office. In addition, the image of the operation was corroded by the disclosure of messages stolen by hackers, exchanged between Moro and the prosecutors who acted in it.

The sociologist and member of the Brazilian Academy of Sciences, Simon Schwartzman, in an article published in the newspaper O Estado de São Paulo, edition of March 12, 2021 (page A2), comments:

> The decisions of the ministers of the Federal Supreme Court (STF) that annulled the processes of the Lava-Jato Operation due to formal errors of jurisdiction or alleged improper behavior of judges and promoters, may be issued with conviction, but they do not cease to be contribute to the growing demoralization of our courts. This demoralization had already been accentuated by the successive rulings of "guarantee" judges, who, before public opinion, are no more than "Chicanas" in favor of those prosecuted for corruption.

The notion that, without adequate procedures, people cannot be convicted, finds as one of its inspirations the historic decision of "*Miranda v. Arizona*", of the US Supreme Court, in 1966, which annulled the sentence of a confessed criminal because his right to defense had not been duly respected. This decision has been of enormous importance in establishing limits to the often prejudiced, arbitrary and violent behavior of the police in the US,

which, like in Brazil, tends to affect, above all, minorities, and the poorest people. Compared to its profits, the fact that some criminals get away with it is a small price to pay.

The other side of the coin is that, for it to continue to be valid, the vast majority of criminals must be convicted. It is the effectiveness of the judicial system, and not the formality of its decisions, that makes society respect and consider its authority legitimate.

To achieve this respect, the Judiciary needs to act with balance and common sense, guaranteeing formalities and punishing criminals, without letting one side prevail over the other. In Brazil, in the absence of a clear policy to defend civil rights, many people without resources are arrested and sentenced for alleged crimes, if not killed by the police, while criminals with more resources manage to escape through formal breaches of the law.

The Judiciary is feared, but little respected, and this serves as a breeding ground for extreme right-wing movements against human rights and for the impunity of police violence. The first "*Mensalão*" and the "*Lava-Jato*" Operation, later, have brought great notoriety and legitimacy to the leadership of the Brazilian Judiciary, which has shown itself capable, for the first time in history, of judging and condemning politicians and powerful businessmen, which has also given the STF legitimacy to manage the institutional crises that have become increasingly frequent since the *impeachment* of Dilma Rousseff.

Said legitimacy, however, has been eroding daily due to the increasingly clear perception that, since the STF's decision on the end of the prisons, despite having been sentenced in the second instance, they are conspiracies to achieve impunity. from the political class from the extreme left to the extreme right, passing through the notorious "Center", and not the defense of the legality of the procedures which have prevailed in the Superior Courts of Justice.

At the same time, the sensation of impunity and of a strong setback in the effective fight against corruption in Brazil is latent in all the powers of the Republic. In the Executive, where e. g. at every moment the sons of the President are "shielded" through political pacts or by action of the Presidency of the Republic itself; in the Legislative, which, full of deputies and senators who are corrupt or accused of acts of corruption, seek to legislate, not in favor of Brazil or society, but in order to reduce the sanctions that

should correspond to them[46] and to the Judiciary itself,[47] which also has been condescending in the effective fight against corruption, with few honorable exceptions.

As Law Prof. Joaquim Falcão,[48] Counselor of International Transparency and Director of the Law School of FGV-Rio says:

> Minister Edson Fachin turned the table. Not that of the Second Chamber of the Supreme. There, he lost. But the table of hidden manipulations, of procedural strategies in which, under the cloak of legality, the fight against corruption is abandoned. The Supreme Court does not judge whether there has been corruption. The Supreme dodges and hides in front of the visible facts in Brazil. He doesn't dive. He stays on the edge".
>
> Ministers Lewandowski, Carmen Lúcia and Mendes have not given an answer to what Brazil wants to know. Hacking can produce proof? Lawful or Illicit? In the session, they repeated that they were not based on the recordings. They did not exist, even though they were present. Lewandowski said the recordings "are just to bolster the argument". Carmen Lúcia said: "I repeat, I am not basing myself on interceptions". Mendes, with rhetorical contempt: "No hacker babble". The Supreme Court hesitates because, if it declares lawful evidence, it will encourage hackers, everywhere. Meanwhile...
>
> Minister Fachin has confronted the issue. Hacked recordings should be investigated. The Regional Court of the 4th Region must open a process. They are not denouncing individuals or groups, but rather a justice system that may be far from the ethics and standards that a democratic rule of law requires.
>
> Minister Kassio Marqués has also addressed the issue. He stated that the hacked tests are illicit. He has done it gently, serenely, and with the respect that a minister owes to another minister. And he defended his State, Piauí, Victim of gross aggression. Moment in which he reminded me of João Ca-

[46] They process in the Chamber of Deputies and in the Federal Senate bills whose clear objective is to benefit corrupt politicians or those accused of corruption and similar crimes. Eloquent examples of said political movement are: reforms to the money laundering law, to the criminal data protection law, to prison after being confirmed in the second instance, to the law of administrative improbity, of accountability not presented by politicians and non-regulation of nepotism, allowing the appointment of relatives.

[47] The Superior Court of Justice also consolidates the reputation of being a true "cemetery of operations" of the Federal Police, sealing the outcome of operations that have made politicians and their relatives, executives, bankers and private companies uncomfortable. Since 2011, the investigations of the operations "Castelo de Areia", "Satiagraha", "Boi Barrica" and Operation France, have been shot down by determination of said Court. Now, the case of the "*Rachadinhas*" in the former cabinet of President Bolsonaro's son, Flávio Bolsonaro, risks reaching the same result.

[48] Newspaper, *O Estado de São Paulo*, March 24 2021, p. 8.

> bral de Mello Neto, Pernambuco poet: "Good eloquence is to speak loudly, but without fever".
>
> It should be noted that, at no time, no pronouncement of the Judiciary addressed the reversal of the judgments (merit) of the illicit and crimes committed or attributed to the former President of the Republic, Lula da Silva.

The Organization for Economic Cooperation and Development —entity in which Brazil is applying to join— is concerned about the "surprising end of Operation Lava-Jato", the use of the law against the abuse of authority and the difficulties of sharing of information from financial organizations for investigations

Faced with what has been seen as a setback in the fight against corruption, the Organization has made an unprecedented decision: to create a permanent monitoring group on the matter in Brazil.

The measure, never adopted with respect to any country, represents an escalation in the positions of the OCD, which since 2019 has issued public alerts to the Brazilian government and even sent a high-level mission to talk with authorities and try to reverse actions to destructure the investigative capacity against corrupt practices.[49]

As the jurist Márcio Cammarosano has rightly said:

> Em poucas palavras: inacreditável que, depois de tantas investigações exitosas da Polícia Judiciária, que culminou por desvendar o maior esquema de corrupção institucionalizada no Brasil, especialmente, mas não só, na Petrobras, com tantas colaborações premiadas, homologadas até pelo Supremo Tribunal Federal, que ensejaram produção de provas a mão cheia, e condenações de tantos corruptos, muitos dos quais réus confessos, com decisões transitadas em julgado, o próprio STF venha agora, na undécima hora, proclamar o que deveria ter sido proclamado há vários anos, no que concerne à violação do devido processo legal desde o nascedouro com algumas ações penais já julgadas até por Órgãos Colegiados de segunda e terceira instâncias. Sem adentrar no mérito dessas ações, e considerando que os vícios processuais já vinham de há muito sendo apontados, fica aquela sensação que deixou-se passar tanto tempo para que recomeçar tudo agora só venha ensejar a ocorrência de prescrição, ou, quando menos, extinção da eficácia de sentenças condenatórias. Pode haver maior frustração e descrédito na Justiça? Sem embargo, continuo teimosamente a repetir: Em uma República não há intocáveis, observado o devido processo legal.[50]

[49] *Ibidem*, March 16 2021 edition.

[50] Facebook post by Prof. Márcio, March, 2021.

In a nutshell: it is unbelievable that, after so many successful investigations by the Judicial Police, which ended up uncovering the greatest institutionalized corruption scheme in Brazil, especially, on the ground at Petrobras, with so many award-winning collaborations, even approved by the Federal Supreme Court, which has given rise to the production of abundant claims and convictions of so many corrupt people, many of them confessed, firm consents, the STF itself comes now, at the last moment, to proclaim what should have been proclaimed before several years, in what concerns the violation of the due legal process, since its origin, with some criminal actions that have been judged, including, by Collegiate Bodies of second and third instances. Without entering into the merits of these actions and considering that the procedural vices had been pointed out for a long time, that feeling that it has been going on for so long that, recommencing everything now can only result in the course of the prescription falls, or, at least, in the extinction of the effectiveness of condemnatory sentences. Could there be more frustration and discredit in Justice? However, I continue to insist insistently that in a Republic there is no untouchables, observing the due legal process".[51]

[51] Facebook post by Prof. Márcio, March, 2021.