Chapter

Corruption and Deterioration of Democracy: The Brazilian Lesson

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Abstract

Although it has emerged, nationally and internationally, as one of the largest investigations against political corruption, Operation Car Wash—at its peak of popular prestige—cleared the path for the political rise of Jair Bolsonaro to the Presidency of the Republic of Brazil. And by doing so, to a certain extent, it paved the way for a set of arbitrary practices that today threaten and weaken the main Brazilian democratic institutions. Brazilian democracy today pays a high price for the Judiciary's lethargic and condescending response to the unorthodox and illegal practices of Federal Judge Sérgio Moro during the golden years of Operation Car Wash (2014–2018). The lesson that the Brazilian episode brings to the international legal community is that the constant disrespect for the rules of due criminal procedure in large cases of corruption erodes the institutional bases that support the proper confrontation of this type of crime. The pertinent fight against corruption in a democracy can only take place in strict obedience to the law.

Keywords: corruption, rule of law, due process of law, lawfare, judicial impartiality

1. Introduction

In a 1996 paper written by Bernand Bertossa, who was Attorney General of the Republic and Canton of Geneva at the time, it was highlighted that representative democracy and respect for the decisions of an independent Judiciary prevent (through the dissemination of power and the meticulous control of its exercise) the emergence of a fertile ground for corruption [1]. In Brazil, on the other hand, the internationally known *Operação Lava Jato* (Operation Car Wash) against corruption in politics left democracy in the hands of Jair Bolsonaro, the President of the Republic who bets on the erosion of the Judiciary and the rule of law through attacks toward the Supreme Court and the electronic voting machines that, ironically, elevated him to the highest position of the nation. Consequently, Brazilian soil, which was certainly not infertile to such practices, has been fertilized for sowing the weeds of illegal acts beyond control in recent years.

In fact, President Jair Bolsonaro was elected as a consequence of Operation Car Wash and now—after 4 years of decrease in institutional standards and aware of the electoral polls which indicates his defeat to political rival Luis Inácio Lula da Silva [2]—is trying to delegitimize the very system that elected him in 2018 [3]. As has been increasingly reported, the democratic regime may be at risk in Brazil [4, 5] and the

turning point in this direction took place with the instrumentalization of the criminal process to withdraw his main political opponent from the 2018 electoral dispute.

From that premise an important lesson can be extracted, one that most of the advanced democracies have already learned, whether from their own or through foreign experience: a nation's criminal procedure structure is the thermometer of the elements of its Constitution ([6], p. 67). When it comes to corruption—especially the one more directly related to the functioning of the democratic regime, which is corruption within the context of politics, the overlap between the criminal procedure model and the regime is even more intense and arises in an especially latent way. Indeed, the shallow and simplistic discourse of the mass media and punitive agencies in the sense that social ills all derive from the relation between "honest" and "corrupt" stifles the conflicts of interests and ideals that serve as the foundation of real power bases of society ([7], p. 419).

This agenda discourages the political participation of the citizen, who begins to understand (and to belittle) democracy itself as a political regime more susceptible to corrupt practices due to the greater opportunity for an interface between political agents, economic agents, and individuals—although what gains strength when compared to authoritarian regimes is not corruption itself, but its possibility of visibility and dissemination ([7], pp. 419–421). Therefore, it is not surprising, at least under a retrospective lens, that Brazilian democratic institutionality has so rapidly degraded. The analysis of the context, the development, and the surprising and melancholic end of Operation Car Wash, with the bias of its main judge recognized nationally [8] and internationally [9, 10], however, seems to be of extreme value, including and especially for the international community. In this case, Brazil has a lot to teach. By means of bad example.

2. The political context of the Brazilian criminal procedure code

The Brazilian criminal procedure suffers from serious historical problems. The Brazilian Criminal Procedure Code dates from 1941 and was reportedly inspired by the 1930s Fascist Italy's *Codice Rocco*. Its authoritarian and anti-democratic basis, therefore, is unquestionable, having served not only the *Estado Novo* (New State) dictatorship (1937–1945) but also the civil–military dictatorship (1964–1985). It does not, therefore, serve democracy—but in it, the Criminal Procedure Code continues to pulsate an unsepulcher autoritharism. In Brazil, the Criminal Procedure Code is the most visible (and systematized) instrument of the "eternal fascism" mentioned by Umberto Eco [11].

Felipe Lazzari da Silveira ([12], p. 22) explains that although the Brazilian state has never been a fascist state, in the criminal procedural field, it fully incorporated the rationality created by Mussolini's jurists. Its *leitmotiv* can be summarized, still according to the author ([12], p. 173), as the technicist-fascist criminal procedural rationality created in Italy that consisted of a kind of technique to weaken the limits of state punitive power in order to make the criminal process more pragmatic in fulfilling its new goals established by Mussolini's authoritarian State.

The Brazilian authoritarian and dictatorial culture was reinforced by political and military groups, in addition to expressive intellectuals, such as Oliveira Viana (1883–1951) and Francisco Campos (1891–1968), the latter did not hesitate to join the forces that articulated the conditions for the 1937 coup, nor in actively participating in the formatting and legal consolidation of both the *Estado Novo* and the civil–military coup that took place less than 30 years later ([13], p. 26, 27). After all, he wrote both the

Explanatory Memorandum of the Criminal Procedure Code of 1941 and the Institutional Act no 01, which gave legal form to the civil–military dictatorship of 1964. No wonder Rubem Braga (1913–1990) once said with slight irony that "every time Mr. Francisco Campos lights up, there is a short circuit in democracy" [14].

Although by various means, both Italian fascism and the Brazilian *Estado Novo* codified their criminal legislation outside the Legislative Branch to demonstrate their own political strength: while in Italy there was a punctual transfer of competence to the Executive Branch, in Brazil this displacement became a general rule ([15], p. 155, 156). As Minister of Justice, Francisco Campos understood that liberalism would have to be overcome due to the considerable increase in ideological tensions in Brazilian society and on account of the inability of members of legislative households to rationally examine complex and technical matters ([13], p. 37). The antagonism to parliamentary activity was strong; therefore, the Brazilian government, through the Ministry of Justice, began to use technicality to legislate in favor of social defense based on the argument that the ends justify the means, initiating a legacy that was later widely exploited during the civil–military dictatorship ([15], pp. 165–170).

Francisco Campos was the Brazilian counterpart of Alfredo Rocco, the Minister of Justice of Fascist Italy. Endowed with a strong personality, both jurists, with great diligence, took on this new way of legislating and were responsible for the constitutional reforms that shifted the political regimes of their countries to the authoritarian spectrum ([15], p. 171, 172). In turn, the collaborators of these legislative endeavors were not jurists consecrated by the professorship or by theoretical writings, but practical applicators of Law, which made coexistence with the authoritarian environment possible and without major constraints: not for nothing, the vast majority of Italian jurists and all the Brazilian jurists involved came from the Judiciary and the Public Prosecutor Office ([15], p. 172, 173).

This overlap between technicality and practicality certainly helped to legitimize the new criminal law and criminal procedure before the Brazilian judges and criminal courts. But not only. It helped to spread the new system also to the legal literature, which was uncritically fed back through the jurisprudence made by themselves—after all, many of the authors of legal works on the Criminal Procedure Code of 1941 were also its practical applicators.

As Francisco Campos later highlighted, he and his assistants (recognized jurists, such as Nelson Hungria, Antônio Vieira Braga, Narcélio de Queirós, and Cândido Mendes de Almeida) intended to develop a criminal process that did not make society's right to defend itself a mere illusion and that offered the necessary means to ascertain the "real truth" so that to the judge was granted a wide margin of maneuver for the evidentiary initiative—which did not mean an authorization to decide contrary to the law, but only that the body of evidence could be freely evaluated, including through the search for new evidence when necessary and always in accordance with the interests of the State ([12], p. 189).

In that conception of criminal procedure, the simple fact of being tried by a judge was, in itself, the greatest guarantee against injustice that a defendant could obtain ([12], p. 192). The mere existence of a judge was enough for the criminal process to be understood as a fair and impartial procedure. Hence the difficulty in obtaining recognition of judicial partiality in Brazilian forensic practice, even in Operation Car Wash—which gave abundant signs of Federal Judge Sérgio Moro's bias to the detriment of Luís Inácio Lula da Silva from the first day and, even so, the Courts (the Regional Federal Court of the 4th Region and the Superior Court of Justice) did not recognize it.

The partiality of Federal Judge Sérgio Moro was not acknowledged until the publication of the series of articles by the Intercept Brazil containing the messages he exchanged, via Telegram app, with one of the Federal Prosecutors responsible for Operation Car Wash [16]. The content of the messages, however, was not formally considered by the Federal Supreme Court when it came to recognizing the judicial bias of Federal Judge Sérgio Moro [17], which demonstrates that the exterior signs were sufficient to conclude in those terms (although until then those outside marks had not yet been declared). Not even the authoritarian matrix of the Brazilian criminal process was able to deny the judicial partiality that came to the eyes of Brazil and the world with the series of reports known as *Vaza Jato* (Car Wash Leaks).

3. The Brazilian criminal procedure's inquisitorialism

Both in Italy and Brazil, the criminal procedural models were orchestrated with the objective of legitimizing the neutralization of fundamental guarantees, and this structure continued to guide legal literature, jurisprudence, and legislative reforms even after the end of the authoritarian regimes that promoted them: Italians only forsook it in 1988, with a new Code of Criminal Procedure; Brazilians, however, continue with inquisitorialism to this day ([12], p. 191).

Despite the legislative reforms carried out with the alleged aim of democratizing the Brazilian criminal procedure to adapt it to the Federal Constitution of 1988, it is undoubted that they were all late and insufficient to produce any significant change to the spirit of the Criminal Procedure Code of 1941 and that, despite them, jurisprudence has developed in the sense of violating the accusatory system ([18], p. 526). According to Jacinto Nelson de Miranda Coutinho ([19], p. 11), this is because none of them reached the core of the 1941 Criminal Procedure Code system, which is completely out of step with the 1988 Federal Constitution.

Indeed, the center of the inquisitorial system consists in enabling the criminal judge to *manage the evidence* (by seeking it when he deems it necessary to clarify the truth of the facts) and, while procedural reforms do not manage to radically alter it, Brazilian criminal proceedings will never be accusatory because all the other elements are merely secondary to the definition of the procedural system ([19], p. 11). In fact, no procedural reform has ever approached the pivotal point of the problem: to this day, criminal judges in Brazil can seek evidence to decide at their convenience, evaluating it as they like.

The rationality that authorizes and legitimates this sort of procedure is the same that guides the premise that there is in fact a "real truth" and that it can be found through human knowledge, especially through criminal proceedings. Part of the doctrine distinguishes "real truth" from "formal truth," which is a serious mistake because, according to Francesco Carnelutti ([20], p. 4, 5), the truth is obviously unique and can never be reached by human beings, regardless of the method chosen to do so.

Lenio Luiz Streck ([21], p. 290, 291) cuts across and demonstrates that the concept of real truth is not sustainable because it proclaims something "real" and that, therefore, is justified by itself at the same time that it does not obviate the need for an interpreter to give it meaning—which leads to the judicial protagonism that makes fundamental guarantees more flexible for the sake of public or social interest that cannot be precisely defined. Consequently, according to Salah Khaled H. Jr. ([22], p. 1), the search

for truth is nothing more than an unlimited search for confirmation of a hypothesis previously chosen by the magistrate.

The great problem of the inquisitorial system (in general and of the Brazilian criminal procedure in particular), therefore, lies in the legitimation of the search for the truth that, by reflecting the past in an integral way, at least in theory, certainly distinguishes and accurately determines innocents and guilty. Hence the reason why, in the name of this absolute truth, all flexibilization of fundamental guarantees and all judicial abuse are legitimized, whether in the search for evidence or its subsequent evaluation.

4. The context of Operation Car Wash and the judicial partiality of Federal Judge Sérgio Moro

Operation Car Wash took place after the enactment of the so-called Clean Record Law (Supplementary Law 135/2010), which prevents anyone criminally convicted by a collegiate body from running for any elective office for 8 years. Without this restriction limiting the will of the electorate, Operation Car Wah would probably not have caused so much institutional turmoil: after all, the mere non-definitive conviction by a collegiate body would not have removed the leader of the polls from the 2018 electoral dispute.

Mariana Mota Prado and Marta R. de Assis Machado explain that in July 2013 there were huge protests against corruption and an increase in the attention of the press and institutions responsible for accountability to the issue, which may have created a window of opportunity for changes ([23], p. 10).

Structured and publicized since the beginning (2014) as the biggest operation against corruption in the history of Brazil, Operation Car Wash clearly had a predestined aim: to strike the Workers' Party (PT), which at the time occupied the Presidency of the Republic with Dilma Rousseff (she was impeached in 2016), and especially former President Luiz Inácio Lula da Silva, who would seek reelection in 2018 (when he was leading the polls [24]) but ended up in prison for 580 days due to a non-definitive conviction—and without evidence—delivered by an admittedly biased judge.

One of the changes referred by Mariana Mota Prado and Marta R. de Assis Machado may be directly linked to the very definition of corruption. The Brazilian Penal Code describes corruption as two distinct crimes: active corruption (supply side) and passive corruption (demand side). Former President Luiz Inácio Lula da Silva was convicted of passive corruption—a crime that requires the actions of requesting, receiving, or accepting a promise of undue advantage on behalf of the public function in exchange for an action, an omission, or a delay in its performance—for allegedly receiving gifts from private companies. As the authors point out, when substantiating the conviction Federal Judge Sérgio Moro expressly highlighted out that it was unnecessary for those private companies to have received any advantage in retribution for those treats for the setting of the crime of passive corruption. He acknowledged that this was a controversial interpretation of the crime of passive corruption but maintained it, arguing that it was necessary to tackle high-level corruption ([23], pp. 13–14).

Although the Brazilian Penal Code is not entirely clear on the matter, until recently the tendency of the courts was to demand proof of the existence of a connection between the payment promised or made by the private agent and the benefit received

by the public official (in a word: *quid pro quo*), still according to Mariana Mota Prado and Marta R. de Assis Machado. However, this trend was abandoned in *Mensalão* Case, when—a few years before Operation Car Wash—the Brazilian Supreme Court "ruled that there was no need to prove a causal connection between the payments and a particular action" and that it was enough to prove that the public official had received an undue advantage in exchange for performing acts related to his public function ([23], p. 15).

According to Mariana Mota Prado and Marta R. de Assis Machado, to criminally convict Luís Inácio Lula da Silva, Federal Judge Sérgio Moro went even further: the conviction was based on indicia that private companies were planning to give him a triplex in Guarujá/SP, but the only substantial evidence was that the senior managers of Petrobras (the Brazilian petroleum corporation)—who is not even appointed by the President of the Republic but by the board of directors of the state company—favored the companies that were supposedly providing the gift. There was no direct relationship between the triplex and the performance of Luís Inácio Lula da Silva as President of the Republic—the link was established through the following chain: the board of directors of Petrobras appointed individuals (senior managers) recommended by a government minister, in turn, appointed by the President of the Republic ([23], p. 15).

In the words of the authors, the assumption was that Luís Inácio Lula da Silva appointed high-level officials "who would, in turn, appoint corrupt directors, who would then strike the deal for overpriced contracts between construction companies and Petrobras." ([24], p. 16). However, it was not demonstrated that the appointments had this deviation purpose, much less that Luis Inácio Lula da Silva had any knowledge about the corruption scheme inside Petrobras. The conviction was based on a presumption against the defendant, not on substantial evidence.

The vices of that sentence are numerous. João Paulo Allain Teixeira, Gustavo Ferreira Santos, and Marcelo Labanca Corrêa de Araújo ([25], p. 67) stated that "In espousing and courting public opinion fostered by the national mass media, Judge Moro transformed evidence into mere procedure details. When the evidence (or lack of it) does not speak for itself, any verdict is unpredictable, depending on the whims and convenience of the moment." "A decision that appears nothing like a judicial sentence. It is more like a long—as it has more than 200 pages—personal opinion in relation to the accused," in the words of João Ricardo W. Dornelles ([25], p. 68).

Pedro Estevam Alves Pinto Serrano, Anderson Medeiros Bonfim, and Juliana Salinas Serrano ([26], p. 42, 43) demonstrate that, if in the United States of America and continental Europe it is possible to identify both a clear jurisprudence of the Criminal Law of exception and measures of exception in special laws on the subject of national security (terrorist threats), in Brazil the enemy is fought by the criminal law and criminal procedure of every day, reinterpreted in an exceptional way, so that the criminal justice system (magistrates, public prosecutors, and police precinct chiefs) became—with the fundamental support of the media—the sovereign author of the exceptional measures.

Also according to the authors ([27], p. 43), the exceptional jurisdiction is characterized by the simplification of the judicial decision itself, which is no longer mediated by Law—in fact, it temporarily suspends it in specific situations, without any coherence or rationality (so much that it does not produce jurisprudence, since changing the actors involved or the political purpose, also changes the decision, which can return to Law or produce a new exception).

It is difficult to interpret Operation Car Wash otherwise. Pedro Estevam Alves Pinto Serrano *et alia* ([27], pp. 45–47) point out, among other extravagances, that Federal Judge Sérgio Moro (i) did not remain equidistant from the prosecution and the defense; (ii) issued the decree of coercitive conduction of Luís Inácio Lula da Silva in violation of the law (on the grounds of avoiding possible riots – with clashes between political activists in favor and against the former President if the coercitive conduction did not occur); (iii) determined his appearance at the hearings of the 87 witnesses listed by the defense, despite the Criminal Procedure Code does not require the presence of the defendant in such acts and (iv) successfully intervened, even while on vacation, to keep him in prison after a court decision that restored his freedom in a *habeas corpus* decision [28]. The authors ([27], p. 47) continue to argue that, after the conviction of Luís Inácio Lula da Silva to 9 years and 6 months in prison for corruption and money laundering (on 07 December 2017), both the prosecution and the defense appealed to the Federal Regional Court of the 4th Region, which was resolved at an absolutely atypical speed for Brazilian standards, with the conviction being maintained and the sentence upsurged. From then on, the requirement of the Clean Record Law was fulfilled in order to prevent Luis Inácio Lula da Silva from running for the 2018 elections.

For Brazilian democracy, as already exposed, the direct consequence was the removal of Luís Inácio Lula da Silva from the electoral dispute (he was leading the polls even at the pinnacle of Operation Car Wash) with the consequent election of Jair Bolsonaro in 2018. For the anti-corruption agenda, the consequence was its discredit in front of the perception that it is in fact a speech easily used against political opponents by chance. This feeling became even stronger when Federal Judge Sérgio Moro left the Judiciary a month after the elections to join the newly elected government as Minister of Justice and Public Security [29]. When he later announced his departure from Jair Bolsonaro's government [30] and tried to run in the 2022 presidential election [31], it was already clear to everyone that his political project had begun much earlier.

In addition to specific problems related to the way in which the turn state's evidence (institute on which the convictions in Operation Car Wash were built) was envisioned in Brazil through Law 12.850/2013, Federal Judge Sérgio Moro took advantage of circumstances and structural deficiencies of the Brazilian criminal procedure to reach the conviction of Luiz Inácio Lula da Silva. The manipulation of the electoral process through the criminal procedure was only possible in Brazil because (i) the punitive agencies joined the mass media for the spectacular dissemination of excerpts of turn state's evidence in order to garner the support of the population against politicians and great businessmen (similar to what happened in Operation *Mani Pulite*, in Italy—and where the Federal Judge Sérgio Moro clearly drew inspiration, since more than a decade before he had written a paper sustaining that public opinion would be essential for the success of the legal action [32], (ii) the Brazilian Criminal Procedure Code is inquisitorial and was structured in such a way as to enable the neutralization of individual guarantees that the system formally enunciates, and (iii) the doctrine and the technicist jurisprudence that began to form after the enactment of the Criminal Procedure Code has progressively fed back into the system to the present day, ignoring and emptying the new reality imposed by the Constitution of the Federative Republic of Brazil of 1988.

5. Conclusion

The intention of this article was to demonstrate that the constant disrespect for criminal procedural guarantees in large cases of political corruption is particularly harmful to democracy, especially when Law is used to interdict the popular will expressed in polls for voting intentions.

Through the Operation Car Wash, the Brazilian case is the reference of a bad example in this sense, as former President Luis Inácio Lula da Silva was convicted and held in custody for 580 days when he was leading the voting intentions in 2018 only to be recognized by the Supreme Court, after the election of the new President Jair Bolsonaro, the partiality of Federal Judge Sérgio Moro. A judicial bias that was already clearly perceptible from the beginning for those with a minimum knowledge of criminal procedure.

The construction of the conviction of a popular former President was only possible because:

1. The mass media aligned itself with the interests of the Federal Prosecutors to receive first-hand information and publish it in a sensationalist way;

2. Over the precedent years, a shallow and banalized perception that political activity is impregnated with corrupt people had already been created;

3. The Brazilian Criminal Procedure Code (1941), inspired by the *Codice Rocco* of Fascist Italy, cannot guarantee due process of law in terms of democracy (its inquisitorial structure authorizes the judge to seek evidence and interpret it freely);

4. The authoritarian spirit of the 1941 Brazilian Criminal Procedure Code was spread to doctrine and jurisprudence, having crystallized over the decades;

5. The legal reforms after the 1988 Federal Constitution were not enough to change the core of the original Brazilian Criminal Procedure.

Considering that the now President Jair Bolsonaro took anti-political speech to extreme levels, that after winning the elections he started to delegitimize the electronic voting system and that it is already beginning to be said that he can even bar the October 2022 elections [33], it is possible to correlate the disrespect for individual guarantees operated by Operation Car Wash with political and institutional instability that recalls the worst moments of recent Brazilian history.

It is important to emphasize that legal sanctions against acts of political corruption are necessary and healthy for democracy and for the very realization of social rights. But due process of law can never be neglected; Law cannot be manipulated to achieve political and punitive purposes in a specific case, even under the pretext of fighting corruption. Otherwise, democratic institutions—including the Judiciary—shall become weakened.

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