Human Rights, Corruption, and Democracy in Brazil

How International Regimes contributed to the Consolidation and Debacle of Brazilian Democracy

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Abbreviations

CCT – Conditional Cash Transfer

CGU – Controladoria-Geral da União (Federal General Comptroller office)

CNJ – Conselho Nacional de Justiça (National Council of Justice)

COAF – Conselho de Controle de Atividades Financeiras (Council for Finantial Activity Control)

DRCI – Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional (International Mutual Legal Assistance and Assets Recovery Department)

ENCCLA – Estratégia Nacional de Combate a Corrupção e Lavagem de Dinheiro (National Strategy to Combat Corruption and Money Laundering)

FATF – Financial Action Task Force

IACHR - Inter-American Commission on Human Rights

IACtHR – Inter-American Court of Human Rights

IBGE – Instituto Brasileiro de Geografia e Estatística (Brazilian Institute of Geography and Statistics)

ICCPR - International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social, and Cultural Rights

ICHRP - International Council on Human Rights Policy

IPEA – Instituto de Pesquisa Econômica Aplicada (Institute of Economic Applied Research)

MDS - Ministério do Desenvolvimento Social e Combate à Fome (Ministry of Social Development and Hunger Combat)

MESICIC - Follow-Up Mechanism for the Implementation of the Inter-American Convention against Corruption

MJSP - Ministério da Justiça e Segurança Pública (Ministry of Justice and Public Security)

MPF – Ministério Público Federal (Federal Prosecution Office)

OAS – Organization of American States

PAHO - Pan American Health Organization

STF – Supremo Tribunal Federal (Supreme Court)

SUS – Sistema Único de Saúde (Unified Healthcare System)

TCU – Tribunal de Contas da União (Federal Audit Court)

TI – Transparency International

TSE – Tribunal Superior Eleitoral (Electoral Superior Court)

UNCAC – United Nations Convention Against Corruption

UNDP – United Nations Development Programme

UNODC – United Nations Office on Drugs and Crime

UNTOC - United Nations Convention against Transnational Organized Crime and the Protocols Thereto

USAID – United States Agency of International Development

Abstract

The research aims to analyze and explain the impacts of international legal regimes on Brazilian democracy. The thesis proposes that international norms, supranational organizations policies, and transnational agencies agenda can produce paradoxical effects on democracy. We propose a functionalist and pluralist approach that understands democracy as a continuous process of increasing participation and enfranchisement, access to rights, inclusion, and citizenship. Our qualitative research was based on the textual analysis of international conventions, additional protocols, review mechanisms report, multinational organizations publications, transnational agencies toolkits, guidelines, and international courts/commissions decisions. It also involved documental research of domestic legal/institutional unfolding of those international initiatives, such as draft bills, pieces of legislation, case-law, policies data as well as primary data found in Brazilian official datasets. The research consists of a longitudinal study that considers international human rights and anti-corruption legal regimes outcomes in political participation and inclusion. We found that international human rights have been present from the constituent moment onwards in a diverse process of expanding inclusiveness and citizenship enhancement, leading to significant social changes in post-1988 constitutional history. Conversely, international anti-corruption standards strategical absorption contributed to a disruption in Brazilian recent democratic history. The penetration of international anti-corruption discourses and practices into Brazilian reality did not cause the consolidation of democracy advocated by specialized literature, decisively impacting core democratic institutions and procedures. Moreover, anti-corruption packages colonized the public sphere and affected human rights and democratic achievements observed in the rights to food, health, ethnic equality, and indigenous populations protection. The research shows that international regimes that constitute the cosmopolitan/universalist element out of which modern democracy was constituted and spread worldwide can interact with the local, participatory element of democracy in contingent forms. The socio-political background and the institutional framework in which international regimes infiltrate play a decisive role in the way their influences are absorbed and produce effects. We conclude that international anti-corruption norms, regimes and discourses can generate anti-democratic pressures, exclusion, and democracy decay.

Declaration

No portion of the work referred to in this thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

Acknowledgements

A thesis is the final report of a research, and every research is a story. It is a story about how we make sense of perplexities, curiosities, and misunderstandings. It is a tale of failed, adapted, and improved questions and their answers. It is a journey of discoveries, learning, disappointments, and new attempts. People do not always realise that every research has its own story made by people. It begins with a spark, an idea, an intuition, it is all very deformed, weak, and delicate, yet alive, pulsing in the back of our minds, pushing to go forward, striving to grow. It is a moment in which we enjoy the most divine of all attributes: creativity. For sharing with me the capacity to bring to existence something meaningful, I am thankful to God, the One who "worketh in us both the will and the work".

On a more mundane level, there are those people that come to help us nurture that seminal idea, making it viable, and that role was played with extreme sensibility, kindness, and generosity by Roberto Dalledone Machado and Carina Calábria, who deserve my utmost respect and admiration. In this story, some sign ways, give advice, and show themselves ready to help and contribute, as was the case with my colleagues and dearest friends Damla Ercan, Ursus Eijkelenberg, and Guoshu Yang. There are also those who always push our limitations a little further, activating intellectual capabilities that we never believed to possess, making us better academics, better researchers, and better people. Few people can do it the way Chris Thornhill and John Haskell do. John Haskell's calming demeanour gives us the sense we will be able to overcome every theoretical dead end we face along the way, it inspires hope, and a sense of enjoyment in what we are producing. Chris Thornhill is a natural brainstormer. His critiques are accurate, his questions are provoking, and he is always pointing the way forward. It is fair to say that his steady, firm, and present supervision was decisive to the work presented here. Above all, he showed himself to have human qualities that are far beyond his remarkable academic accolades, awards, and career. To this day, I had the very best supervisor I could ever ask for, and from now on, I hope to have a friend in him.

Every good story needs a hero, though. Mine is a Brazilian woman who was born the youngest of five in a very poor family in a Brazilian medium-size urban town in the early 1940s. Brazil was experiencing the transition from a rural to an urban/industrial society, and in that process, the uneducated were relegated to the peripheries. Due to a flood, her family had lost their home and belongings, living in a deactivated railway carriage donated by the federal company to not end up in the streets. Childhood was not easy for her as she was not properly nurtured. For those who live with food insecurity, going to school is not an ordinary task. She

dropped her studies in the second year of primary education, completing her literacy by her own informal means in the coming years. Her great companions were her twin brother, born minutes before her, and her piglet, Tantuim. As a teenager, with her older sisters working and her brother entering the Army, her family was able to move to a house in the vicinities of the city's prostitution district. That was not the best place to grow as a beautiful young woman, who had to deal with harassments, encroachments, and threats as routine, and so she got married at the age of 19 years old. Only four months after she had left her home, on a very rainy 9th of February of 1962, a landslide demolished the little house where her parents, twin brother, sister-in-law, and little nephew lived. They were all there when the accident happened and died instantaneously. Every year, thousands of Brazilians who live in "favelas" and improvised housing in hills, mounts and similar landscapes lose their lives during the rainy season due to landslides. It is known as a kind of death only poor people experience in Brazil. On that evening, it decimated the family of our young girl, who had the strength to move on and build a family despite the immense difficulties. She sacrificed every bit of dream, personal realization, to provide a future for her children. By repaying every suffering, every violence, every sorrow, and pain with grace, love, and unconditional support to everyone around her, she managed to raise a family of five children, thirteen grandchildren, and two great-granddaughters. In her early eighties, she battled cancer with her relentless optimism and faith. She is the hero of my path because her story renews my belief in the human being, she inspires me to believe that even surrounded by the worse conditions, suffocated by the roughest rocks, a flower can bloom. Her daughters and sons all did fairly good in life, they all have their families and careers. Her youngest boy is submitting a doctoral thesis to the Department of Law of one of the 30 best Universities in the World, in the United Kingdom. His thesis is all dedicated to her, who had to add his absence during these last years to her long list of trials.

I am also immensely grateful to my life partner Loiane, who made my dreams and goals her own. I have never met someone so amazingly altruistic; I am so lucky to have her by my side. Letícia and Miguel are my fuel. The task to make such brilliant kids proud of me as a dad is really challenging and makes me want to be better every day, so I guess they have a big part in this as well.

The Author

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Introduction

Following a tendency launched worldwide by socio-populist urban gatherings such as *"Occupy Wall Street"*, thousands of millions of Brazilians took to the streets of Brazil in mid-2013. In the beginning, the protests were related to rises in public transport fares in big cities like São Paulo. Shortly after, a diffuse sense of discontentment led to larger demonstrations in which some were protesting for better education and healthcare public services, others against hegemonic media conglomerates' mass manipulation, while many were also claiming for better representation and against traditional political parties. The virtuous economic cycle initiated in the early 2000s was showing its first signs of exhaustion, the efforts to host two major worldwide sports events were not delivering the expected improvements in urban mobility infrastructure, and people shared a feeling that the best years were passing by, and life was not quite yet what Brazilian society had long longed for. There was a sense of urgency, as if an opportunity was being lost if there was no direct intervention.

For those who were watching the scenes on the news, it was difficult to discern what was being witnessed. The movement was not led by any traditional political parties. In fact, there was a fierce rejection of any partisan initiative in the middle of the mass manifestations, and the workers' unions were marginally present. The perception of a spontaneous popular outburst was corroborated by a pulverized agenda in which every claim seemed to be welcome. With time, some social movements identified with a liberal urban intelligentsia assumed the responsibility for summoning massive gatherings in the most important urban centres in the Country. One of them, simply named *#vemprarua* - "come to the streets" - created an emotional video in which they used the scenes of a Johnnie Walker commercial footage.[1] The film shows the Sugar Loaf mount – one of the most well-known landmarks of Rio de Janeiro – collapsing and a stone giant raising before the astonished and proud eyes of the population. The giant walks confidently into the sea and a subtitle suggests the catchphrase: the giant is not dormant anymore. The massive public rallies became a routine in the following three years, but as time went by, they gained a patriotist aesthetic with a homogenous dominance of national symbols and the Brazilian flag colours. The movements found heroes in young, bold law enforcement authorities who with their decisions, cinematographic arrests, and packed press conferences after spectacular police operations were shaking the political landscape and putting public

[1] Dêivila Martins, 'Comercial Johnnie Walker O Gigante Acordou Rio de Janeiro Brasil' (Youtube, 1 July 2013) <https://www.youtube.com/watch?v=Ja2CP0W3E6c> accessed 06 October 2022

authorities and influential businessmen on their knees.[2] Protesters had a common banner that seemed to encapsulate both the problem and the solution for all the nation's malaise: the fight against corruption. The commercial had a not very subtle reference to a verse of the national anthem that praises Brazil as a *"giant by its own nature"*, the awakening was a metaphor for the decision of the Brazilian *"nation"*, the *"people"*, to voluntarily, autonomously, take the reins of their own destiny on their hands by going to the streets to show their full and unconditional support for anti-corruption efforts.

There was a significant consensus that historic impunity and inefficiency in combating corruption had been an obstacle to democratic consolidation in Latin America and that a holistic integrity system composed of strong, and independent accountability institutions well aligned to the international anti-corruption state of the art was key for Brazilian democracy to reach its ultimate stage of consolidation.[3] The images and emotions were very compelling in the sense that the fight against corruption had sparked the democratic flame in the Brazilian people's hearts, specialized literature pointed in the same direction and transnational agencies, such as Transparency International, were enthusiastic about such a remarkable societal and institutional engagement with their agenda. Yet, a question was still to be systematically answered: has the international anti-corruption regime impacted democracy in Brazil? The theoretical assumption and the striking intuition coming from reality were pushing for an affirmative answer and a positive effect in the sense that compliance with anti-corruption international standards and democracy would be mutually reinforcing. In face of that, our question seemed to be begging for an obvious solution. But, as Babbie recalls, if Darwin dedicated most of his life to *"test things everyone already knew"*, I was determined to insist

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[2] Editorial 'Moro é tratado como herói em manifestação em Brasília' *Estado de Minas* (Brasília, 13 March 2016) <https://www.em.com.br/app/noticia/politica/2016/03/13/interna_politica,743045/moro-e-tratado-como-heroi-em-manifestacao-em-brasilia.shtml> accessed 06 October 2022

[3] Mathew M Taylor, 'Corruption, Accountability Reforms, and Democracy in Brazil' in in C. H. Blake and S. D. Morris (eds), *Corruption and Democracy in Latin America* (University of Pittsburgh Press 2009); Thimothy J Power and Mathew M Taylor. *Corruption and Democracy in Brazil The Struggle for Accountability*. (University of Notre Dame Press 2011); Lindsay Carson and Mariana Mota Prado, 'Mapping Corruption & its Institutional Determinants in Brazil' (2014) SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2497935> accessed 15 November 2021; See also J. C. Calleros-Alarcón, *The unfinished transition to democracy in Latin America* (Routledge 2007); John Bailey, 'Corruption and Democratic Governability' in C. H. Blake and S. D. Morris (eds), *Corruption and Democracy in Latin America* (University of Pittsburgh Press 2009); Stephen D Morris and Charles H Blake, 'Introduction: Political and Analytical Challenges of Corruption in Latin America' in S. D. Morris & C. H. Blake (eds), *Corruption and Democracy in Latin America* (University of Pittsburgh Press 2009); Alfredo Rehren, 'The Crisis of The Democratic State' in C. H. Blake and S. D. Morris (eds), *Corruption and Democracy in Latin America* (University of Pittsburgh Press 2009); Susan Rose-Ackerman and Bonnie J Palifka, 'Corruption, Organized Crime, and Money Laundering' in Basu K. and Cordella T. (eds) *Institutions, Governance and the Control of Corruption. International Economic Association Series*. (Palgrave Macmillan, Cham 2018); Barney Warf, *Global corruption from a geographic perspective* (Springer 2019)

on my own *"fool's experiment"*.[4] The idea was to explore more than eventual intertextualities found between international covenants, constitutions, pieces of legislation or case law. Since its seminal stages, the research aimed at articulating them with other evidence from primary sources such as public data sets, reports, draft-bills records, as well as secondary sources, such as other research reports, rankings, and analysis, to present a view of the relationship between the international anti-corruption regime and democracy from *"outside of law"*, trying to speculate economic, social, political and institutional implications.[5]

Before carrying out literature research, textual analysis or data collection, the research needed a conceptual basis that would underpin our democracy assessment. The research needed to be embedded in a conceptual context that would guide it methodologically.[6] In other words, our intention was to observe the interaction between two variables, international legal regimes inputs would be the independent intervening factor, and democracy would be the dependent variable, the one we would expect to suffer influence and impacts over time. Doing that in a systematic way forced a step back to address two basic epistemological questions that were at the core of the whole endeavour.[7] First, does the dependent variable change? If democracy is a concept that does not tolerate alteration, then the research would be doomed to failure. Second, is the causal inference proposed plausible? Is it possible to theoretically articulate international legal regimes and democracy in a way that the influences of the former on the latter seem reasonable?

As we may see in the next Chapter, *"electoralist"*, *"minimalist"*, or *"low-intensity"* accounts of democracy are of little help to our effort. First and foremost, authors who present democracy as a mode of government merely defined by the occurrence of a periodic procedure to decide who governs tend to adopt a clean-cut differentiation between democracy and dictatorship. Regardless of any means of participatory citizenship, the presence of fair, free and competitive elections between concurring political forces from time to time would draw the line that set apart democracies from arbitrary regimes.[8] In this perspective, the margin for

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[4] Earl R Babbie, *The practice of social research* (9th edn, Wadsworth Thomson Learning 2001) 27

[5] Brian R Cheffins, 'Using Theory to Study Law: A Company Law Perspective' (1999) 58/1 Cambridge law journal <https://www.cambridge.org/core/journals/cambridge-law-journal/article/using-theory-to-study-law-a-company-law-perspective/C24768A253F057E4F534C595E6B1EB0E> accessed 2 November 2022 198

[6] Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (2018) 02 Law and Method

[7] David De Vaus, *Research design in social research* (SAGE 2001) 35-6

[8] Samuel P. Huntington, 'Democracy's Third Wave' (1991) 2/2 Journal of democracy; Gerardo L Munck, 'What is democracy? A reconceptualization of the quality of democracy' (2016) 23/1 Democratization <https://www.tandfonline.com/doi/abs/10.1080/13510347.2014.918104?journalCode=fdem20> accessed 19 March 2021; Adam Przeworski, 'Minimalist Conception of Democracy: A Defense' in I. Shapiro, & C. Hacker-

advances or regresses in democracy is reduced, if existent at all. Moreover, we found the ontological assumption that underlies those accounts of democracy flawed. Notwithstanding their intention to isolate the concept of democracy from any ethical aspects, value-driven discussions, and their aspiration to dissect it from any dimension of meaning or purpose, *"electoral democracy"* became a rhetorical asset in the ideological battlefield during the Cold War. *"Electoral democracy"* became a proxy of *"democracy"* and the driving force behind incremental Western incursions worldwide. It began as advocacy, assumed the form of monitoring mechanisms and multinational financial aid conditionality in the late 20th century, and ended in military intervention in the first decades of the years 2000.[9] The incoherences in minimalist accounts of democracy are not restricted to the fact that their *"descriptive"* objectiveness served *"prescriptive"* purposes. They not only discredit the importance of the *"demos"* for democracy's day-to-day practice but also fail to fulfil their neutral, value-free conceptual assumption. There are considerable variations in how competitive, free, and fair elections are between Countries that are equally assigned as democratic by rankings such as the ones produced by Freedom House. Proceeding from Dahl's polyarchy, our investigation was led to *quality of democracy* theoretical proposals and their empirical tools, rankings, lists, and methods to gauge democracy worldwide. *Quality of democracy* authors acknowledge the importance of free, fair, competitive, and periodic elections in an ambience of civil liberties enjoyment for democracy. But they envision the combination of political and civil rights as only the basic democratic threshold. In other words, without elections and freedom of speech or press, and the possibility to enter and leave associations or political parties, there is no democracy, which does not mean that the presence of those features is enough for a democratic society. For *"quality of democracy"* proposals, above and beyond polyarchal requirements, different democratic dimensions can be perceived in multivariate ways and intensity. Democracy would present itself in different *"degrees"*[10], be merely *"formal"*, advance to a *"participatory"* intermediate level, or achieve inclusion to an extent that would make it really

Cordon (eds) *Democracy's Value (*Cambridge University Press 1999); Adam Przeworski, *Crisis of Democracy* (Cambridge University Press 2019)

[9] Seymour Martin Lipset, *The Encyclopedia of Democracy* (Routledge 1995); Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2003); Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004); Thomas Carothers, *Critical Mission: Essays on Democracy Promotion* (Carnegie Endowment for International Peace 2004); Nicolas Guilhot, *The Democracy Makers: Human Rights and the Politics of Global Order* (Columbia University Press 2005); David Beetham, *Democracy: A Beginner's Guide* (Oneworld Publications 2012);

[10] Guilhermo A O'Donnell, Jorge Vargas Cullel and Osvaldo Miguel Iazzetta, *The Quality of Democracy: theory and applications* (University of Notre Dame Press 2004)

"social" [11]. Democracy could also manifest itself according to *"profiles"* determined by trade-offs between its different dimensions that would make some prevail over others in different societies.[12] The *quality of democracy* literature and its empirical subproducts (Democracy audit, Global State of Democracy, Democracy Barometer, Varieties of Democracy, Matrix of Democracy, etc.) offer our first epistemological question an affirmative answer. It is to say, democracy varies both in time and space, after all.

Moreover, exploring these late 20th century theories of democracy, we noticed that initiatives to promote *"electoral democracy"* have always walked side-by-side with the international human rights movement.[13] Similarly, Dahl's separation between civil and political rights as the core of polyarchy, and social, economic, and cultural rights as mere appendices, resemble the *"justiciability"* criteria that determined the enactment of two separate Covenants on Human Rights by the United Nations.[14] In its turn, research on the *quality of democracy* brings to the fore, as part of democracy assessment, human rights elements often developed by supranational organizations or multinational agencies, such as Rule of Law-like accountability institutions, gender equality or environmental preservation.[15] All those developments alerted us to the fact that democracy is not just about elections, nor solely based on *"popular will"*, *"self-government"* or *"people sovereignty"*, which led us to move on to another theoretical basis for the research.

As we observed such coincidences between the progress of democracy theory and international developments, the second question related to the plausibility of the causal inference we intended to propose was still lingering. Is it reasonable to assert that international legal regimes can affect democracies? Have international norms ever produced such effects in Brazilian most recent democratic cycle? The way we approach these questions also involve a conceptual choice. It depends greatly on the theoretical point of view that underpins our work.

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[11] Evelyne Huber, Dietrich Rueschemeyer and John D Stephens, 'The Paradoxes of Contemporary Democracy: Formal, Participatory, and Social Dimensions' (1997) 29/3 Comparative Politics

[12] Larry Jay Diamond and Leonardo Morlino, 'The Quality of Democracy: An Overview' (2004) 15/4 Journal of Democracy; Hans-Joachim Lauth, 'The internal relationships of the dimensions of democracy: The relevance of trade-offs for measuring the quality of democracy' (2016) 37/5 International political science review; David F J Campbell, *Global Quality of Democracy as Innovation Enabler: Measuring Democracy for Success* (Springer International Publishing 2019)

[13] Thomas Carothers, 'Democracy and Human Rights: Policy Allies or Rivals?' (1994) 17/3 The Washington quarterly

[14] Daniel J. Whelan and Jack Donnelly, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight' (2007) 28/4 Human rights quarterly

[15] Hans-Joachim Lauth, *The Matrix of Democracy A Three-Dimensional Approach to Measuring the Quality of Democracy and Regime Transformations* (2015); Campbell (12)

Brazilian internationalists have always acknowledged that the constituent moment that preceded and immediately followed the enactment of the 1988 Constitution coincided with the insertion of Brazil in the international human rights movement, as proven by the signature and ratification of the main international human rights covenants and protocols.[16] Some argue that, after the enactment of Amendment 45 and the Supreme Court ruling on the HC 87.585, from 2008, Brazil moved to a imbricated hybrid dualism in which international law only integrates the domestic legal system after a complex procedure that involves both the Executive and Legislative ends in a Presidential decree.[17] This ordinary ritual does not necessarily apply to human rights treaties. According to the Supreme Court's understanding, such treaties enjoy supra-legal status - above ordinary legislation and below the Constitution -, until they pass the same procedure prescribed for Constitutional Amendments in which case they integrate Brazilian *"block of constitutionality"*. Notwithstanding all these constitutional procedures to mediate the transition of international law to Brazilian legal system, when we use the expression *"international anti-corruption regime"* we refer to a set of norms and institutions dedicated to foster the fight against corruption worldwide. They are presented as the legitimate expression of the international community consensus on anti-corruption initiatives. Those expressions certainly cover treaties signed and ratified according to the 1969 Vienna Convention on the Law of Treaties, but they also encompass other declarations, covenants, additional protocols, review mechanisms, multinational organisms' reports, guidelines, and toolkits, transnational NGOs awards, rankings, and publication. We have in sight a diffuse and subtle process of infiltration by which international norms and mechanisms, discourses and agendas infiltrate legal and judicial institutions and decisions without necessarily passing the constitutional procedure of international law internalization. We identify the proliferation of issue-specific international legal regimes that invade, drive, and influence decision-making through processes so dynamic and plural that the monist/dualist dichotomy becomes relatively irrelevant.[18]

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[16] Antonio Trindade, 'Dilemas e desafios da Proteção Internacional dos Direitos Humanos no limiar do século XXI' (1997) 40 Revista Brasileira De Politica Internacional; Flavia Piovesan, *Direitos Humanos e o Direito Constitucional Internacional* (Saraiva Educação S.A. 2018)

[17] Juliano Zaiden Benvindo, *The rule of law in Brazil : the legal construction of inequality* (2022) Hart Publishing 2022 184

[18] Nico Krisch, *Beyond constitutionalism: the pluralist structure of postnational law* (Oxford University Press 2010); Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, (Oxford online edn 2012) <https://doi.org/10.1093/acprof:oso/9780199644674.001.0001> accessed 25 July 2022; Martti Koskenniemi, 'Hegemonic Regimes' in M.A.Young (ed) *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012)

If there are cases in which the Brazilian Supreme Court uses international law as a mere *"argumentative tool"*, neglecting decisions of the Inter-American Court of Human Rights and of Uruguayan and Argentinian Courts on transitional justice issues[19], it is also possible to identify rulings regarding the living conditions within Brazilian prison system[20] in which the Supreme Court adopted a completely different approach to Inter-American Court of Human Rights decisions. Direct references to Articles 26 and 37 of the UN Convention Against Transnational Organized Crime (Convention of Palermo) and UN Convention Against Corruption (Convention of Merida), respectively, can be found in the awarded collaboration agreements celebrated by the Car Wash prosecution task force with some of the people investigated. The constitutionality of both Conventions and their place in Brazilian legal system as ordinary law are present in the leading opinion of Rcl n. 2.645, from 2009, in which the Superior Court of Justice – the Brazilian Highest Federal Court, only below the Supreme Court – set the possibility of direct mutual legal assistance beetween Brazilian and foreign prosecutorial authorities, without previous judicial authorization[21]. Yet, in both cases, the Conventions passed the Constitutional procedure and were internalized after the promulgation of Executive Decrees[22], but the penetration of international discourses and agenda on the Brazilian legal system seemed to go beyond the reach of those instruments. International legal regimes can find porosities in the constitutional absorption procedure, finding informal ways to influence and produce legal and institutional unfolding.

Their capacity to infiltrate domestic law does not mean it affects democracy, though. In search for a better understanding of this relationship, we resorted to *"global constitutionalism"* authors and theories. The prevailing debate in this body of literature refers

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[19] In STF [2010] ADPF 153, the Supreme Court decided by a large majority for the constitutionality of the Brazilian Amnesty Law that granted immunity to human rights violations and crime perpetrators during the military dictatorship, which went in the opposite direction of the Inter-American Court of Human Rights' decision on the case *Almonacid Arellano and others vs Chile*, and decisions from Uruguayan and Argentinian Courts that struck down amnesties laws based on their incompatibility with the Inter-American Convention on Human Rights. The STF decision was later censored by the Inter-American Court of Human Rights decision on the case *Gomes Lund and others vs Brazil*. See Benvindo (17) 184

[20] In STF [2015] ADPF 347 MC and STF [2015] RE 592.581 the Brazilian Supreme Court adopted concrete measures to tackle human rights violations inside the Brazilian prison system, determining the immediate and direct application of Articles 9.3 of the Covenant on Civil and Political Rights and Article 7.5 of the American Convention on Human Rights by Brazilian judges in observation to previous convictions Brazil suffered before the Inter American Court of Human Rights in cases related to the situations in *Urso Branco* Penitentiary in Rondonia, the *Tatuape Complex – FEBEM*, in Sao Paulo, the *Dr. Sebastiao Martins Silveira* Penitentiary, in Araraquara and the *Socioeducative Internation Unit* in Cariacica.

[21] STJ [2009] Rcl 2.645

[22] The UN Convention Against Transnational Organized Crime was promulgated as Decree n. 5.015, from 12/03/2004, and the UN Convention Against Corruption was promulgated through Decree 5.687, from 31/01/2006.

to the transferability of *"constitutionalism"* traits such as representative deliberation bodies, or courts endowed with domestic legislation review powers, to supranational organizations like the European Union, or the UN Security Council, to multinational agencies such as the WTO, or even to transnational organisms such as the ICANN or FIFA.[23] The necessity to address this subject from this point of view stems from a concern with a *"legitimation gap"* between legislation passed on, or binding decisions issued by such post-national organisms and the *"people"*, the *"sovereign nations"* that would be affected by them.[24] Their attachment to the idea that legitimacy only derives from effective *"popular participation"*, manifestations of *"self-government"* of the *"people"* have a striking similarity to the most orthodox idealizations of democracy. In fact, the disenchantment some of them show towards the expansion of international law, and supranational organisms draws back to the apparent impossibility to project their idealizations about *"political participation"* or *"democracy"* to the international realm.[25] By focusing only on the flux of national *"constitutionalism"* influences on the international legal, institutional, and political scene and on a mono-source of law legitimacy, those proposals lose sight of how strong and decisive international influences have been for the implementation of constitutional democracies worldwide. By *"breaking"* the Habermasian idea that law only legitimizes itself in the rationality of the communicative process provided by a democratic public sphere,[26] we find that there is no modern democracy that has been put into place or evolved without a decisive role played by international forces, mostly exteriorized under the idea of human rights.[27] In other words, not only is there no contemporary democracy in which domestic decision-making satisfies the same conditions of *"popular participation"* required from international bodies, but also the idea that sovereign and fully stable democracies decided, in a second stage, autonomously to engage in supranational negotiations and comply

[23] David Held, *Models of Democracy* (Polity 3rd edn 2006); Bardo Fassbender, *The United Nations Charter as the constitution of the international community* (Martinus Nijhoff Publishers 2009); Gunther Teubner, 'Quod omnes tangit: Transnational Constitutions Without Democracy?' (2018) 45/S1 Journal of law and society

[24] Neil Walker, 'Post-Constituent Constitutionalism? The Case of the European Union' in M. Loughlin and N. Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008); Samantha Besson, 'Human rights as transnational constitutional law' in A. F. Lang and A. Wiener (eds) *Handbook on Global Constitutionalism* (Edward Elgar Publishing 2017)

[25] Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization' (2006) 8/1 Theoretical Inquiries in Law; Michel Rosenfeld, 'Is global constitutionalism meaningful or desirable?' (2014) 25/1 European Journal of International Law

[26] Krisch (18)

[27] Hauke Brunkhorst, *Critical theory, legal theory, and the evolution of contemporary society* (Continuum 2012); Chris Thornhill, *The Sociology of Law and the Global Transformation of Democracy* (Cambridge University Press 2018)

with international human rights is historically inaccurate.[28] Mostly, contemporary democracy came about, and has evolved ever since, by a dialectical interplay of a national, participatory, and popular aspiration and an universalist, cosmopolitan, international push for some worldwide consensus on ideas such as rights, governance, science, and even democracy itself.

Here, our quest for the reasonability of the causal inference between international legal regimes and democracies made method and theory merge. In search for an answer to the question if international regimes somehow affect democracy, we faced the reality that they are a foundational and constitutive part of what it is. As Babbie puts it, social research involves a hermeneutic cycle in which *"the continual refinement of concepts occurs in all research methods. Often you will find yourself refining the meaning of important concepts even as you write up your final report."*[29] We found that, broadly speaking, our independent variable – international legal regimes – is a component of the concept of the dependant variable – democracy. We claim that *"minimalist"*, *"electoralist"* or *"low-intensity"* democracy proposals provided a concept of *"democracy"* adopted by many international initiatives to install, promote, and foster democracy worldwide. We argue that Dahl's polyarchal requirements reflect a dichotomy also found in the United Nations discussions that preceded the enactment of the two main international human rights Conventions, producing many worldwide repercussions on the assessment and promotion of democracy (USAID, Freedom House, Varieties of Democracy – V-Dem). We point out that *quality of democracy* authors have, either reluctantly or inadvertently, brought to their mechanisms of democracy assessment, many dimensions that are originated from international human rights movements. Some "*global constitutionalism"* authors struck us with the reality that contemporary democracy and international legal regimes have been developed concomitantly in such an imbricated dynamic that it is impossible to historically or conceptualy stablish any causal relation between them. The first Chapter takes the reader through the journey that made us articulate *"quality of democracy"* and *"global constitutionalism"* theoretical references and gaps to reach the following claim: contemporary democracy has been founded and consolidated

[28]James Tully, 'The Imperialism of Modern Constitutional Democracy' in M. Loughlin and N. Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008); Mathias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in J. Dunoff and J. Trachtman (eds) *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009)

[29] Babbie (4) 125

by the constant mutual influence between a local, participatory, electoral core and the influx of international contents related to rights, governance and inclusion.

In face of that theoretical framework, our research question had to be reframed to address not "if" international regimes have affected Brazilian democracy, but "how" has this process happened, producing democracy advances or setbacks, consolidation or debacle. Moreover, we added other international legal movements to the experiment we intended to do with international anti-corruption initiatives, so that we could put our conceptual basis to test. In other words, we brought to the research international human rights regimes to understand the mechanisms by which they have informed, given shape, intervened in Brazilian democracy since the mid-1980s. To the initially intended international anti-corruption legal regime, we extended the analysis to a broader range of international movements that would point to the mechanisms of international human rights penetration into Brazilian law, the stakeholders and actors involved in the absorption process. We addressed the results produced taking into consideration the two-fold understanding of democracy set up in the first Chapter. It means that after describing the main international legal instruments, declarations, and programs related to the specific issue at hand, we moved to the legal and institutional unfolding of those initiatives in Brazil. On another step, we collected some primary and secondary sources of data related to the implementation of those policies, legislation, or case law to, finally, analyse the outcomes in terms of political enfranchisement, and also, in terms of inclusion in the form of access to/enjoyment of the right under consideration. The four international human rights regimes that compose our study are the right to food, the fight against extreme poverty and the implementation of conditional cash transfer programs, the right to health and the Brazilian public health care system, the right to equality and access of ethnic minorities to public universities, and right to recognition and indigenous population's protection.

The first two subjects are translated into the rights vocabulary by the 1988 Constitution as responses to historical deficits in the Brazilian society. The 1988 Constitution elevates the eradication of poverty and reduction of inequalities to the status of objectives to be pursued by the democratic order it inaugurates (Article 3, III), and sets access to health as *"a right of all and a duty of the State"* (Article 196). Therefore, although these constitutional semantics reflect discourses and approaches also found in the international human rights movements related to these issues, they also represent a historical popular claim in Brazil. It is to say that in these two cases, the universalist, cosmopolitan, rights-based element of democracy would tend to cope well with the local, participatory factor, generating a bias risk in favour of our hypothetical theoretical assertion on the inextricable relation between international legal regimes, political

engagement, citizenship enhancement, and inclusion. The last two subjects also have a seat in the constitutional order. The aforementioned Article 3, IV establishes as an objective the promotion of well-being of all, *"without prejudice to race"*, and Article 4, VIII says that Brazilian international relations would follow the principle of *"repudiation to racism"*. The whole Chapter VIII of the 1988 Constitution is dedicated to the rights of the indigenous to their *"social organization, customs, language, creeds, traditions, and to the land they traditionally occupy"*. The historical record of slavery, violence, and genocide against black and indigenous peoples in Brazil show how difficult it has been to realize such rights. As they refer to issues that affect minorities, international organisms' declarations, shared best practices, international courts decisions are often in a collision route of resistance, or alternatively, negligence by the national, majoritarian political bodies of decision-making. The idea to address access of ethnic minorities to higher education and indigenous peoples' recognition and protection is an intentional push for the opposite end of the spectrum in terms of majoritarian political support. It is an attempt to falsify our theoretical assumption that international guidelines, decisions and movements are part of democracy, and, that democracy advance/move back based on the levels of participation and rights attainment and inclusion it produces[30].

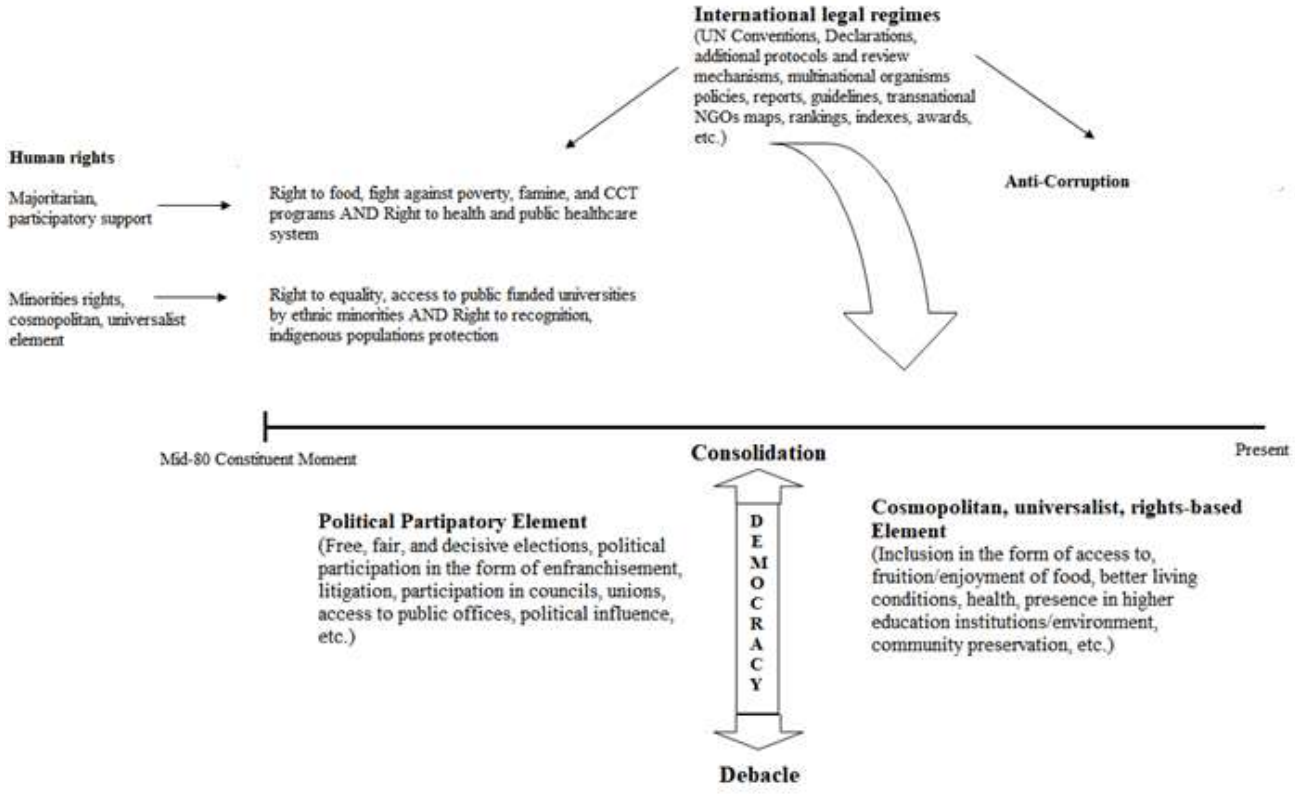
In Chapter II, we summarize the main international instruments related to the right to food and the fight against extreme poverty and famine, the right to health, the right to equality and elimination of all forms of discrimination or prejudice, and right to recognition and indigenous population's protection and how they have influenced, produced, fostered the enactment of constitutional amendments, pieces of legislation, institutional practice, case law, and governmental policies in Brazil. In all four topics, we carried out a documentation analysis of case law in national and international courts, reports, opinions and records from the National Congress committees about Bills and Constitutional Amendments approved in compliance with international guidelines. We also analyzed governmental technical publications on the subjects under consideration, projects and cooperation agreements that indicate the institutional unfolding of international norms or transnational influences. The second stage was to select data, indexes, secondary sources such as research reports, articles, institutional publications that could offer a grasp of empirical outcomes of the implementation of those policies, legislation, or case law. In the case of the fight against poverty and the implementation of conditional cash transfer programs, we focused, obviously, on official data provided by the

[30] De Vaus (7) 9

Brazilian government on the coverage and expending with the program itself, and on data that reflect its impacts on poverty and inequality, such as percentage of the population under poverty/food insecurity lines, and Gini coefficient evolution. In the right to health topic, we resorted to secondary sources of information available on primary assistance coverage and its outcomes in terms of life expectancy at birth, neonatal mortality, infant mortality, and maternal mortality ratio. When it comes to access to publicly funded universities for ethnic minorities, we concentrated on official data-base on the percentage of the population enrolled in public-funded universities by race, and percentage of population with superior degree by race over time. In the indigenous population recognition and protection segment, the research considered public databases information on indigenous reserves demarcated areas in number and territorial coverage and populational growth relatively to the general population. The selection of those indexes and measurement references was based on a double criterion: firstly, we opted preferentially to indicators found in open and official data-bases such as the ones provided by the IPEA – Institute of Economic Applied Research, IBGE – Brazilian Institute of Geography and Statistics, CNJ – National Council of Justice that have data extracted consistently according to the same method over a considerable amount of time. Once we intended to have a longitudinal panoramic view of the *status quo ante* and changes after the intervening variable – international regimes inputs – dealing with same indicators produced by the same sources was relevant for the consistency of our conclusions. Secondly, we chose indexes that were as issue-specific as possible to assess each policy, legislation, or case law. Therefore, conditional cash transfer programs were assessed with a focus on the programs figures and their capacity to change poverty-related index, healthcare programs focused on primary assistance were evaluated according to figures related to coverage and healthcare index that are normally targeted by primary assistance policies, ethnic minorities access to superior education took into consideration the presence of black, or brown students in academic environment, the protection of indigenous populations assessed the reserves dedicated to the preservation of their way of life. It is important to outline here that most of the data analyzed to demonstrate advances and challenges in rights concretization in all four topics have imbricated mutual influences. In other words, the implementation of cash transfer conditionalities related to health assistance might have played a role in the improvement of health indicators in the same way that the nationwide spread of healthcare primary assistance teams might have contributed to the preservation of some indigenous communities. As the reciprocity of influence between the aspects under consideration is an inevitable consequence of the research design, the selection of more specific data attempted to neutralize such crossed influences.

Each section of Chapter II has a concluding remark on the effects produced by the international agenda, legal and institutional action it prompted or fueled, and data collected on the two foundational and constitutive elements of democracy. It is to say, in all four topics of our international human rights regimes, we analyzed the outcomes both in terms of political enfranchisement and participation in elections, litigation before courts, access to public offices and positions of influence, and in terms of inclusion, rights to food, health, equality, and recognition fruition or enjoyment. The interpretation of the material covered, and all the data collected was designed to evaluate the progression of human rights attainment, levels of inclusion and citizenship enhancement over time according to the same research design. (Figure I).

Figure I – Research Design



The analytical framework that underpins Chapter II is also found in the following two Chapters. But as they refer to the international regime that we firstly intended to put under experiment, all the same steps were taken in a different pace. In Chapter III, we transition from human rights to criminal law by showing that, in several cases, international human rights propose imperatives regarding the criminalization of acts and behaviour deemed as

transnational violations to those rights. In those cases, the linkage between those criminalization commands and human rights is a powerful way to rhetorically legitimize the expansion of criminal law by attaching it to such a successful international agenda. The international anti-corruption movement tried to hinge its discourse and exigencies on the idea that corruption invariably involves a human right violation despite the absence of consistent data on the correlation between them.[31] However, the international anti-corruption movement found its perfect embeddedness in the developmental *good-governance* discourse. We address in more detail how few international anti-corruption initiatives had succeeded from the approval of the 1977 Foreign Corrupt Practices Act in the United States and the "cancer of corruption" speech, given by the World Bank President, James D. Wolfensohn in the 1996 World Bank/IMF annual meeting.[32] Then, we explore the surge of a body of publications, articles, and even institutions portraying corruption as more than just a criminal offense, but as a transnational problem which nation-states were not prepared to combat efficiently, a matter of bad management that can be prevented by the adoption of the correct controlling institutions, and a cause in which society must engage to generate the expected results.[33] The mechanisms and direct influence that the international anti-corruption discourse had on Brazilian legislation and prosecutorial activity is also explored. In fact, Brazil went through three cycles of legal reform to implement the key trademarks of the international anti-corruption movement. The *"good-governance"* managerialist approach led to many legislative innovations in the early 1990s related to the implementation of *"efficiency"* measures such as Constitutional Amendment 19, the approval of an administrative improbity law, the enactment of a statute for the public servants, and a new public procurement legislation. Combat to money laundering, public resources distortion and unchecked transnational flux of assets drove an institutional overhauling in the turn of the century, with the creation of the COAF (Council for Financial Activity Control), which is the Brazilian financial intelligence unit responsive to the FATF, CGU (Federal General Comptroller office), the DRCI (International Mutual Legal Assistance and Assets Recovery Department), and ENCCLA (National Strategy to Combat Corruption

[31] Transparency International 'Together Against Corruption: Transparency International Strategy 2020' (TI 2015) <TogetherAgainstCorruption_Strategy2020_EN.pdf (transparencycdn.org)> accessed 25 January 2020

[32] Steven Sampson, 'The anti-corruption industry: from movement to institution' (2010) 11/2 Global crime

[33] Robert E Klitgaard, *Controlling corruption* (University of California 1988); World Bank Group, 'Helping Countries Combat Corruption: The Role of the World Bank' (WB 1997) <http://documents.worldbank.org/curated/en/799831538245192753/Helping-countries-combat-corruption-the-role-of-the-World-Bank> accessed 8 March 2020; Susan Rose-Ackerman, *Corruption and government: causes, consequences, and reform* (Cambridge Unversity Press 1999)

and Money Laundering). And, finally, up-to-date, high-speed investigative methods, and innovative forms of criminalization underpinned the enactment of a new Anti-Money Laundering statute, a new Anti-Corruption law, and a new Law Against Criminal Organizations in the beginning of the 2010s. Lastly, we recall the specialized literature consensus expectations towards Brazil's alignment with the international anti-corruption prescriptions, guidelines, and discourses. In other words, we show how the adoption of strong and independent accountability institutions, better equipped to carry on the fight against corruption, was depicted as the response to the historical social desire for the end of impunity, and the following promise that this was the missing piece of the puzzle for Brazilian democracy to come to a full cycle.

In Chapter IV we advance to empirical evidence on how the discursive turn implemented by the international anti-corruption agenda was reflected in the Brazilian political scenario. We intend to demonstrate how the strategic move to detach the fight against corruption from its criminological roots to harbour it under neoliberal legitimization discourse acquired a strong grip on Brazilian democracy. The triumph of international anti-corruption standards came at the cost of core political traits of democracy. The coupling of the bold and reckless deployment of innovative investigatory methods provided by international anti-corruption law and best practices with the "spetacularization" of criminal prosecution produced by the media and law enforcement authorities was the underlying cause for the interruption of a free and fair elected Presidential term and for a drastic and disruptive intervention on the 2018 general elections that impeded the frontrunner candidate to participate. Massive public campaigns made the loose definition of corruption adopted by Transparency International not only empty Brazilian public sphere of any other political debate but spread its effects to colonize and contaminate all important rights regimes addressed in the research. We turn back to the human rights regimes discussed in Chapter II to show how the obsession with the fight against corruption became the vocabulary of another cycle of exclusion and democratic impoverishment in Brazil[34].

[34] As described in Chapter 4, the connexions between corruption and Brazilian politics have always been present in the Brazilian public debate. The very idea that some sort of corruption is at the roots of the formation of Brazilian society is found in classic Brazilian social theory. Freyre's idea of the predominance of promiscuous relationships between inhabitants of the "Casa-grande" and its surroundings in which the boundaries between family, slavery, religion, and power were all subject to the patriarch's discretion finds a counterpart in Holanda's depiction of "the Brazilian" as the "cordial man", for whom the personal bonds and affections dictate relationships, business, and political preferences more than any critical or analytical capacity. Faoro pushes forward that tradition, with the idea of "patrimonialism" as the key concept for understanding the Brazilian way to interact with the management of the State. Those accounts are disputed on Brazilian contemporary social theory, especially by Souza, who identifies in those Brazilian orthodox social theory patterns not only historical

Although the fight against corruption does not have a seat in the Brazilian Constitutional order, it became the lens through which Brazilian society preferably envisions policies adopted for the realization of the rights provisioned by the Constitution. Therefore, we propose a broader discussion on what are the realistic possibilities of the success of the international anti-corruption movement. Data show that not only it does not generate the promised virtuous developmental cycle, but it also often favours more unchecked corruption. Moreover, the detachment of corruption/anti-corruption from its criminological origins can pave the way for the engulfment of the political, participatory element of democracy. The thousands of millions of Brazilians that crowded streets and beaches wrapped in the Brazilian flag between 2013 and 2016 were not an autonomous outburst of citizenship after all. Their wholehearted engagement in the fight against corruption campaign had been planned, discussed, and desired by technocrats in a UN meeting in Palermo, Merida, or even in an NGO headquarter office in Berlin. The overall disenchantment with politics generated by massive media propaganda often empties the public sphere and favours the rise of national populist leaders only selectively committed to the anti-corruption agenda. The transition from successful horizontal accountability institutions in combating corruption to electoral vertical accountability championed by Transparency International makes each citizen behave as a prosecutorial authority that uses the vote primarily to punish corruption according to a reality that one has little capacity the evaluate critically.[35] The public debate is absolutely dominated and captured by a corruption obsession that obscures every other relevant issue. Moreover, populists elected under the broad anti-corruption banner tend to address every policy through *"control"*, *"audit"*, *"privilege cuts"* discourses. In Brazil, the sequence of *"toothcomb"* operations to detect frauds and distortions in the conditional cash transfer programs superseded initiatives to better target the benefits or enlarge its coverage, generating a shrinking in public

inaccuracies but also a source of prejudice of Brazilians against Brazilians. For Souza, the reliance on such descriptions of Brazil's sociological background had deterministic consequences, as if corruption is inextricably embedded in the Brazilian social fabric. As interesting as that debate in Brazilian social theory is, we thought it would be absolutely foreign to the theoretical framework that drives the research, which is focused on the Brazilian case, but has a universalistic claim on the relationship between the two foundational elements of modern democracy, their coupling, and attritions. Another aspect considered is that, except for Souza, none of the other Brazilian sociologists cited witnessed the surge of the international anti-corruption legal regime, which is key to our proposal. For more on that debate, see Gilberto Freyre, *Casa-grande & Senzala: Formação da Família Brasileira sob o Regime da Economia Patriarcal* (48ª ed. Global editora 2003), Sergio Buarque de Holanda, *Raízes do Brasil* (18ª ed. J. Olympio Editora 1986), Raymundo Faoro, *Os donos do poder: formação do patronato político brasileiro* (Editora Globo 1958), and Jessé Souza, *A elite do atraso: Da escravidão à Lava Jato* (Leya 2017).

[35] International Council on Human Rights Policy, 'Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities' (ICHRP 2010) <https://ssrn.com/abstract=1705396> accessed 05 May 2022 26-7

investment and an increase in the registration backlog until the COVID pandemic struck. Local health councils were discouraged, and programs were discontinued under the conspiracy allegation of *"ideological bias"*, *"political corruption"* and public funds distortion discourse, with direct impact on primary assistance. Some measures were attempted to reduce ethnic quotas policies because they would represent an *"undue privilege"* to the black, and brown populations. The mining exploitation in indigenous reserves became a priority because incumbent political forces see the reserves as an unnecessary hurdle to economic development and a disproportional benefit to indigenous populations to the detriment of the majoritarian interest. Anti-corruption has not only dominated the political participatory element of democracy, but after that, it aimed at the dismantlement of welfare state institutions, policies and programs, leading to a cycle of exclusion related to the rights to food, healthcare, equality, and recognition.

As we see in the next pages, international regimes have played a dubious role for Brazilian democracy. Some human rights regimes generated political engagement, access to rights and inclusion, making Brazilian society more plural and inclusive, contributing to democratic consolidation over the last 30 years. On the other side, the triumph of the international anti-corruption regime sparked and fuelled a major political crisis, affecting democratic institutions (Presidential term) and procedures (casting out a candidate for the 2018 general elections). It also contributed to the impoverishment of the public sphere and to another cycle of exclusion that means a debacle of democracy.

Chapter 1

Democracy and Political Legitimization in Global Society

Introduction

The idea of *"rule by the people"* suggested by the etymology of the word *democracy* - *"demos + kratos"* - still has a strong grip on how the contemporary theory of democracy approaches the subject. Some manifest scepticism towards the possibility of reproducing the dynamics of the Athenian *agora* in large, plural, and complex societies like ours. Others insist that democracy is about "popular will", "national sovereignty", or "self-government by the people" and its preconditions. One way or the other, the way we think of democracy revolves around how accurate, feasible, or desirable that Greek political idealization is. Not all tales about democracy must begin in Ancient Greece, though. Ours focuses on the last transition from an authoritarian to a democratic regime that occurred in Brazil in the mid-1980s and in the process of consolidation of democracy that followed the enactment of the 1988 Constitution. To assess such a recent democratic cycle and its constitutional basis, we will refer to two different bodies of literature dedicated to understanding and explaining democracy and constitutionalism that are as new as Brazilian democracy. The *quality of democracy* and its empirical sub-products provide the research with the theoretical foundation for the ideas that democracy can be "measured", democracy can manifest itself in "different degrees", which means countries can be "more or less" democratic along time, and, finally, democracy comprises different dimensions that vary significantly from country to country. *Global constitutionalism* or the *sociology of a global constitution* underpins the research as its theories approach the different ways through which international legal regimes interact with modern constitutionalism, its principles, and institutions. Be by describing how the ideas of democratic legitimization influence the supranational or multinational power or, in the inverse way, how international bodies, multinational agencies, transnational organizations infiltrate, affect, and inform constitutionalism worldwide, *global constitutionalism* authors and proposals attest to the theoretical plausibility of a research that aims to exploring international regimes impacts on a specific democratic setting.

The main claim of this Chapter is that the articulation of these two theoretical frameworks reveals the fact that contemporary democracy is founded and constituted by the constant interplay of two factors. One factor is substantiated by the participation of the *demos* in political decision-making and the necessary conditions to make that participation decisive

and qualified. The other factor comes about by the global flux of contents, values, and goals, normally originating in the international realm. The former is dominated by the national tidal of political forces, interest groups, social movements, and so forth. The latter vocalized through the vocabulary of rights, spreading like waves from their epicentre – normally in international organizations, multinational agencies, and transnational NGOs rooted in the developed world – to the periphery and reverberating back from the edges to the centre of the *"civilized world".*

In attempting to describe the Brazilian constituent moment, Cavalcanti affirms that constitutional narratives are part of the Constitution and that *"the way a country understands its own Constitution has profound effects on the system's legitimacy"*.[36] If that is the case, it is possible to assert that the prevailing idea of democracy and power legitimization in Brazilian constitutionalism is underpinned by the need to rebuke sceptical views that describe the mid-1980s constituent moment as a process of continuity, and the 1988 Constitution as an elitist pact. The transition from an autocratic regime to democracy in Brazil is often depicted as a moment of manifestation of a *"constituent power"* that longed for broad popular political participation.[37] For some, the 1988 Constitution fits the legitimate constitutional tradition of the country, as a product of the *"constituent power of the sovereign nation",* as it came into being through a constituent assembly freely elected, made of representatives of the national will, legitimized by the democratic principle.[38] The idea of democracy in Brazil is conducive to a historical moment of societal mobilization epitomized by the enactment of a new Constitution, often seen as the *"crowning moment of the transition from the authoritarian regime towards democracy"*.[39] The mutual reinforcement between the two ideas makes the 1988 Constitution appear democratic because it originated in the manifestation of this *"constituent power"*, and the *"constituent power"* is assimilated as a stamp of legitimacy because it was democratic. According to Barroso, *"the debate around the entitlement to the constituent power is a discussion about the legitimacy of power"*, and the *"theory of democracy fixed itself in the conception of sovereignty of the people"*.[40] The idea that shapes mainstream Brazilian constitutional theory is that democracy is a consequence of *"people's constituent sovereignty".* It is a mix of the reminiscence of that ancient Greek imaginary with Sieyès's representation of the French Revolution's aspirations to cut ties with an *"Ancien régime"* and

[36] Ana Beatriz V R Cavalcanti, 'Brazil in comparative perspective: the legacy of the founding, and the future of constitutional development' (2019) 6/1 Revista de Investigações Constitucionais 25-8
[37] José Afonso da Silva, *Curso de Direito Constitucional Positivo* (25ª ed Malheiros 2005)
[38] Paulo Bonavides, *Curso de Direito Constitucional* (15ª ed Malheiros 2004) 168-9
[39] Cláudio P S Neto and Daniel Sarmento, *Direito Constitucional* (Fórum 2012) 147
[40] Luís Roberto Barroso, *Curso de Direito Constitucional Contemporâneo* (Saraiva 2019) 127-9

build a different society from scratch, which would require the manifestation of a prompting force that is autonomous, unconditioned, free, *ex nihilo*.[41] Not without a reason, Paixão provokes the following question as a defining point for how one sees the 1988 Constitution and the democratic cycle that it symbolizes:

> The new Constitution inaugurates a new time in the social and political life of the country or is it only a moment of passage within the regime initiated in 1964? To put it simply: the new Constitution means rupture with the military regime or is it a document of transition?[42]

In the next topic, we will show how the different answers to those questions regarding the Brazilian constitutional identity are representative of different approaches found in twentieth-century theories of democracy. The political discourse and constitutional theory that insist on presenting the 1988 Constitution as a development of the 1967/69 Constitutional order tend to discredit the possibility of a *"popular revolutionary"*, or *"fully participatory"* new democratic order. They show scepticism towards the very idea of democracy as factual *"self-government"* by the *"people"* or the *"nation"*, leaning in the direction of a constitutional transition tutored by economic, political, and intellectual elites mediated by procedures to grant legitimacy to their decisions. That corresponds to elitist accounts of democracy that tend to settle for power transfers by concurring political parties, as long as they are legitimized by free, fair, and periodic elections. Our intention is to explore how the descriptive presumption of those sceptical accounts is inaccurate and how the "electoral" and *"low intensity"* democracy they identified became an ideological weapon in a polarized world. As we stress that "democracy" was transformed into a political asset to be exported, taught, and implemented by American foreign policy agencies, multinational financial aid organisms, international research institutions and think tanks, it will be revealed that contemporarily, democracy is also produced by forces and influences not related to popular participation. It has also to do with absorption, adherence, and compliance to international standards in various subjects, including democracy itself.

The dialectical comprehension of modern democracy presented in this Chapter underpins the whole endeavour ahead. However, first, we need to address how it manifests itself in contemporary approaches to democracy. In the second section, we will explore a theoretical construct around which empirical models, index, and democracy rankings gravitate:

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[41] José Joaquim Gomes Canotilho, *Direito constitucional e teoria da constituição* (Almedina 2013) 72

[42] Cristiano Paixão, 'Direito, política, autoritarismo e democracia no Brasil: da Revolução de 30 à promulgação da Constituição da República de 1988' (2011) 13/26 Araucaria <https://revistascientificas.us.es/index.php/araucaria/article/view/1379> accessed 18 November 2022 162

polyarchy. We will see how in comparison to *electoral* or *minimalist democracy*, Dahl's idea makes the assessment of democracy more complex, refocusing on the national/participatory element of democracy and its conditions of possibility. We will also explore how the cosmopolitan/rights-based element of democracy is implicit in Dahl's polyarchy. Developments of rights regimes, especially human rights, in the international sphere had their influence present not only in Dahl`s theoretical formulation but also in its consequences. We will also address the appeal the concept of polyarchy had on a body of literature developed from the turn of the twenty-first century and their empirical models to gauge the *quality of democracy* worldwide. We will concentrate on authors/projects/reports that created and developed democracy rankings, audits, and metrics on a global scale. They include the Freedom House score, O`Donnell and his democracy audit, Beetham and International IDEA's Global State of Democracy, Campbell and his Democracy ranking, Lauth and the Matrix of Democracy, Buhlmann *et al* and their Democracy Barometer, Coppedge and the V-Dem project (Varieties of Democracy), and the EIU – Economist Intelligence Unit Democracy Index. Beyond their conceptions of democracy, the focus will be placed on identifying the weight the national-local-political-majoritarian element of democracy possess for those different authors and how much that weight is related to the reliance on sources of legitimacy such as *"general or popular will"*, *"self-government"*, *"popular sovereignty"*, and so forth. On the other hand, we will address how the progressive incorporation of rights within democracy analysis represents an openness for the international-universalist aspect of modern democracy and how, either intentionally or inadvertently, it is repelled or latent in those proposals and empirical models.

In the third topic, we turn our attention to authors primarily dedicated to the comprehension of the phenomenon of law production and re-production in the international, transnational, or even post-national landscape. We partially adopt Krisch's framework to group authors and their understanding of global governance regimes into two groups.[43] First, there are those whose work is related to the idea of *global constitutionalism*, that embrace the reality of regulatory regimes originating from international organisms, and courts, but try to provide those orders with legitimacy by *transferring* concepts, institutions, and procedures inherent to the national constitutional environment to the international or supranational ones. Second, there are authors who admit the proliferation and influence of a plurality of different law regimes,

[43] Krisch (18) 13-7

from different and equally multiple sources in the international, multinational, transnational, and even private sectors. Orders that often overlap, contradict, or reinforce each other, and do not depend on orthodox theories of legitimacy to impose and reproduce themselves, *breaking*, thus, with the traditional description of law being the work of a monopolist nation-state centralized authority. We will address how those who are in the *"transfer"* group have the cosmopolitan-universalist-rights-based element of modern democracy in their blind spot, insisting on harbouring the legitimacy of international legal regimes in adaptations of notions such as *"self-government"*, *"sovereignty"*, *"constituent power"*. We will also underline how those attempts are driven by the idea of a legitimization gap in international law. On the other hand, we will explore some of the proposals that *"break"* with that pattern, and how they demystify the *"legitimization gap"* showing that the universalist-cosmopolitan element of modern democracy is not only constitutive of what democracy is in contemporary society but has its fingerprints all over its foundational moment. The central idea of modern democracy being produced and developed by the incremental interaction between the local-participatory and the international-universalist-rights is, then, advanced by showing that the arguments used to put *democracy* under siege in the current moment all over the world refuse, deny, and reject influences from global regimes. We will attempt to show that by advocating the existence of a *"legitimization gap"* in international law decision-making bodies in defence of democracy, this "new" political trend becomes essentially anti-democratic. The challenge to demystify the *"legitimization gap"* will be carried out through a functionalist view of democracy in systems theory terms.

The last topic discusses the Brazilian constitutional moment and how the influences drawn from these two sets of literature – the *quality of democracy* and the sociology of global legal regimes – will guide the way forward. To determine whether Brazilian democracy is approaching its apex or definite decline, if it has advanced or retroceded, we will look at the Brazilian democratic experiment *telos* or profile, and how the two elements out of which it was founded and is constituted have worked in that process.

1.1 Elitist scepticism in Brazilian constitutionalism and modern theory of democracy: from disenchantment to enforcement

As seen above, the understanding of democracy in Brazil is intertwined with the process that culminated with the promulgation of the 1988 Constitution. The Constitution is considered legitimate since it was produced democratically the same way the period that followed is

described as democratic because its legitimacy stems from that Constitution. That construct is jeopardized if the Constitution is depicted as a pact between dominant forces, or as a *"gentleman's agreement"* between members of the armed forces that were at the head of the incumbent regime, traditional oligarchs, and a rising urban intellectuality. Barbosa identifies this *"elitist continuity tradition"* in speeches given by the leader of the opposition party and the Supreme Court Chief Justice in which they welcomed the upcoming constituent assembly as a moment of *"transition"*, *"without rupture or trauma"*, that ended the *"revolutionary cycle"*.[44] The attempts to underestimate popular participation during the constituent works also take the form of criticism of its unsystematic and chaotic methods, or to the inevitable intermediation of political leaders to reach the constitutional text, as done on multiple occasions by former constituent member, Supreme Court Justice, and Ministry of Defence, Nelson Jobim.[45] In Brazilian constitutional theory, Ferreira Filho stands for the idea that, since the constituent assembly was summoned by Constitutional Amendment 26, from 1985, the 1988 Constitution comes from a reforming device present in the 1967 Constitution. According to his account, there was never a *"revolutionary rupture"*, so those who hold a different view are not technically sound, trying to rhetorically strengthen the new Constitution.[46] Those views not only undermine the bond between the 1988 Constitution and democracy, as said, but they also show an undeniable tone of scepticism towards the possibilities of democracy in contemporary societies. They tend to trace a parallel between popular participation, social mobilization and irrationality, disorder, lobbying, interest bargains, and so on, in a way that makes democratic procedures seem secondary. On this view, people, their associations, religious groups, and public opinion mediators have a say in constitution-making only to provide the outcome with enough legitimacy for it to stand. However, the main constitutional framework remains a result of manoeuvres, negotiations, and concessions made by powerful minorities that dominated the debate in the constituent assembly.

According to that description, the main actors in Brazilian constitutional democracy are the elites and their ways to articulate themselves to fight for popular support and to reach power. Przeworski`s definition of democracy is filled with a similar scepticism towards the possibility of democracy being conducive to rationality, representation, or equality. He settles

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[44] Leonardo Augusto de Andrade Barbosa, *História constitucional brasileira: mudança constitucional, autoritarismo e democracia no Brasil pós-1964* (Centro de Documentação e Informação, Edições Câmara 2012) 190-205

[45] Ibid 209

[46] Manoel Gonçalves Ferreira Filho, *Curso de Direito Constitucional* (Saraiva 2012) 49-0

for the definition of democracy as a procedure of competition for votes, emphasizing that it is the institutionalized periodicity of that competition under the same fair conditions that matter. The prevalence of that rule means that parties defeated in elections would be inclined to show compliance with the rules imposed by the winners. The perspective of winning under similar competitive circumstances in the next round would be the reason for the losers to keep *"playing the democratic game"* without appealing to revolution, guns, or cataclysm. That would sum up the advantage of democracy over other forms of decision-making, without any further implications in terms of legitimacy, meaning, values or purpose.[47] Huntington's assessment of the conjectures that led nations to adhere to democratic waves/counter-waves is also influenced by the factual possibility of power transfers through elections. He espouses the idea that periodical and institutionalized government transitions between rival political forces would be evidence of the competitiveness of the electoral system and that this would be enough to assign a regime as a democracy. He shares Przeworski's assumption that democracy can only be empirically verified by the occurrence of elections and the following chances of this procedure producing changes in who exercises power.[48]

Democracy as electoral competitiveness relies, thus, on a presumably value-free, objective, neutral, and aseptic description of a political mode, characterized by one procedure to determine who governs: elections. Looking at those proposals through Sartori's lenses, *electoral democracy* is an effort to precisely depict democracy as it is, trimming the *"ethical fat"*[49] off the classical philosophic idealizations of democracy.[50] *Electoral democracy* is an attempt to recalibrate the classical idea of democracy to make it suitable for a *polis* in which deliberation about every public affair in a single *agora* is no longer feasible wiping out of the concept subjective idealizations about the common good. It is a bittersweet solution for the task to make democracy ideals compatible with the large nation-state *polis* because it does so relegating *"the people"*, and *"the nation"* to a secondary supportive role. In fact, without any guarantees of the socio-political conditions under which elections take place, elections seem like a spasmodic, apathetic, meaningless procedure to legitimize power exercise. Not without reason, *electoral democracy* is also labelled *low-intensity democracy*. However, even the most sceptical Brazilian constitutionalist or theorist of democracy would concede that this political

[47] Przeworski, 'Minimalist Conception of Democracy: A Defense' (8) 15-6
[48] Samuel P Huntington, *The third wave: democratization in the late twentieth century* (University of Oklahoma Press 1993); Przeworski, *Crises of democracy* (8) 16
[49] The expression is used by Marks (9) 50
[50] Giovanni Sartori, *The theory of democracy revisited* (Chatham House Publishers 1987)

procedure must be underpinned by institutional arrangements to assure that voting is an act of autonomous personal will, that every ballot is equally valued and that concurring political thoughts can compete for the electorate's preference with balanced opportunities. The fulfilment of such requirements invariably raises questions related to the very ideas of fairness and freedom, revealing that those proposals' assumption to pinpoint democracy ontology faces many internal incoherencies. As the procedure for the selection of the rulers is inflated by adjectives, there is a considerable loss of objectiveness and neutrality. In other words, if one zooms in on each of those qualifications, questions about how competitive, how fair, or how free the electoral system ought to be to constitute a democracy come to the surface, subjectivity enters the scene and ontological assumptions have to address their shortcomings.

Competitiveness in elections, for instance, implies a dispute between a plurality of competitors with evenly strong weapons to fight each other, which means equal opportunities to present their political platforms, clearly informing and influencing the electorate. Disparities in access to funding, for example, can dangerously unbalance an electoral dispute or even make it not competitive at all. If pressure groups or lobbyists concentrate a huge amount of investment between a pair of hegemonic political parties, the competitiveness of elections can be compromised.[51] Fairness of elections also poses some difficult questions that may not have an all-or-nothing answer. As Dahl says, the minimum requirement to consider an election fair is voting equality, which means equal opportunity to vote for all and that, once cast, votes must have the same value.[52] However, disparities between the popular vote and the Electoral College results in Presidential elections have repeated themselves twice since the beginning of the century in the United States, raising discussions about the difference in weight between American voters. The very existence of the Electoral College has posed some hurdles to American democracy.[53] Redefining democracy as a competition for popular votes or as a mix

[51] In decisions such as the ones delivered in *Buckley v Valeo* 424 US 1 (1976) or *Citizens United v Federal Election Comission* 558 US 310 (2010) the US Supreme Court stepped down from intervening in campaign financing in order to defend American political system competitiveness. Conversely, in *ADi 4.650/DF* STF (2015) the Brazilian Supreme Court decided that donations of private corporations and companies to political parties and electoral campaign were unconstitutional. The difference between the American and the Brazilian positions on the consequences of private campaign financing for the competitiveness of the electoral system is diametrically opposite to one another, although both countries equally check as "free" according to the Freedom House democratic score.

[52] Robert Alan Dahl and Ian Shapiro, *On Democracy* (Yale University Press 1998) 37

[53] In *Chiafalo et. al. v Washington* 591 US _ (2020) the US Supreme Court unanimously decided that sanctions to the *"faithless electors"* are constitutional. The decision reflected the perplexity caused by 10 votes not responsive to the results of State's popular choice in the 2016 American Presidential election, and ultimately closed that flank from attacks against the majoritarian decision in the 2020 elections. After the saga the world witnessed the US went through to have its elections result confirmed, if the Court had acknowledged electors' right to give their votes regardless the result of their State's ballot, the chances of a complete collapse of the

of free, fair and periodical elections with equal voting and universal suffrage is only a supposedly clear, objective and unmistaken ontology of democracy. In the end, variations in different levels or degrees of fairness, competitiveness, freedom, and periodicity of elections are not likely to be found, they are a given fact. The combination of partially free and fair election with some sort of rights surveillance and limited freedom of the press or even the existence of universal and periodic elections controlled by deficient checks or accountability institutions is the default setup of many "democracies" around the world. Even those who still adopt a *"minimalist"* or *"electoral"* concept of democracy have to admit that hybrid situations in which periodic elections and universal suffrage are in place while incremental deterioration of freedom of press, and opinion occur, or deficient accountability institutions operate partially are the political reality all around the planet.[54]

Despite its internal incoherencies and all the disenchantment it poses, *electoral democracy* had a strong grip on international policies, strategies and agencies created and dedicated to exporting it worldwide. It turns out that the descriptive failures of the model did not impede *electoral democracy* from having profound prescriptive implications. It went from disenchantment to enforcement.

Electoral or *low-intensity democracy* had a major global impact on the second half of the twentieth century. When Huntington claims that between World War II and 1962, 36 Countries became *"democracies"*, which were accompanied by 30 more nations that made the transition between 1974 and 1990, the classification criteria behind his clean-cut differentiation between regimes is a *"whether-or-not"* democracy test. He looks to the presence or, conversely, the absence of *electoral democracy* as a synonym of *democracy*.[55] When Przeworski affirms that democracy was born in the United States in 1788, and that in the World's current political landscape only one in sex nations experience it, he refers merely to the possibility of peaceful changes in office as a result of an election with universal suffrage.[56] The enthronement of periodic, free and broad elections as a universal moral value simply

American electoral system would have been considerable. Uncertainties regarding the fairness of American political system are often taken to the Judiciary. Only in the 2018 term, the Supreme Court ruled *Rucho v Common Cause* No 18-422 588 US _ (2019), and *Lamone v. Benisek* 588 US_ (2019) cases on the possibility of Federal Courts intervene in local legislative measures adopted to reshape electoral districts. The Supreme Court considered that those type of legislation could potentially be *"incompatible with democratic principles"*, once incumbent parties could use it to strategically impede the formation of majorities against them. Nevertheless, it decided that this is a strictly political issue, not susceptible to Court's scrutiny. With that decision, the Supreme Court refrained itself from exercising any kind of control over a political manoeuvre known as *"gerrymandering"* that has been part of the United States' electoral system since 1812.

[54] Przeworski, *Crises of democracy* (8) 15

[55] Huntington, 'Democracy Third Wave' (8) 12

[56] Przeworski, *Crises of democracy* (8) 16

referred to as *democracy* did not occur in an ideological vacuum, though. *Electoral*, *low intensity*, *minimalist democracy*, or simply *democracy* became one of the most important assets in a battlefield of a divided world. Initiatives to promote this specific model of *democracy* by multilateral organisms and the United States agencies was part of an articulated American foreign policy derived from the necessity to fight Communism also in the ideological and progressive thought arenas.[57] The preference for this political template as the ideological commodity to be pushed worldwide has its rationales. As Marks argues, the choice for *low-intensity democracy* as a proxy for *democracy* itself obeyed a discursive legitimation strategy that associates that choice with *rationality*, the apex of a political world *narrative*, or a *natural* option.[58]

The *rationalization* strategy is connected with the methodological advantage *electoral democracy* has to offer. It is to say that if *democracy* is found wherever periodic and competitive elections with universal suffrage occur, its assessment can maintain an allegedly neutral scientific objectiveness. This version of *democracy* facilitates diagnosis and underpins the construction of maps, lists, and rankings that sort countries and regimes into democratic/undemocratic ones with a supposedly non-ideological method: identifying democracies becomes an exercise of formal legal and institutional framework analysis with a "tick the boxes" task. The study promoted by Przeworski and others to map the determinants and plausible causes for *democracy* is an example of objective empirical analysis with prescriptive repercussions. The work aims to verify the correlation between economic development and *democracy*. While economic development is measured by income per capita, the political regimes comported only two variations: *democracy* and dictatorship. The indicator by which a nation fell in one or the other category or even fulfilled the transition between regimes is the *"periodic and competitive elections + universal suffrage"* double-check that corresponds to a minimalist view of democracy.[59] Once *democracy* is defined as a "whether-or-not" question or as a technical and objective goal achieved just above a certain basic standard of electoral participation, the construction of such correlational scenarios is facilitated. Beyond that, if the results show a positive linkage between the adoption of this political mode and economic development, its preference over other political arrangements becomes a matter of rational choice.

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[57] Huntington, *The third wave: democratization in the late twentieth century* (48) 15; Guilhot (9) 31; Campbell (12) 240

[58] Marks (9) 63-7

[59] Adam Przeworski and others, *Democracy and Development: Political Institutions and Well-Being in the World, 1950–1990* (Cambridge University Press 2000)

Here, *electoral democracy* assumes its universalist feature; it poses an irresistible neutral, scientifically observed advantage. Conceptions of democracy that orbit around elections inspire analysis on a global scale and triumphalist views of the liberal democracy model prevalence as the inescapable political destiny of the civilized world. The *narrativization* strategy is present in ideas such as *waves of democratization* or the *end of history* in which *electoral democracy* is depicted as the last step of the political evolution of all nations.[60] It is the natural path to be followed by the whole world; it is the horizon to be achieved, the political nirvana to be adopted regardless of any local specificity or even without popular agreement. As said, despite their descriptive assumption, the *electoral democracy* model has had prescriptive implications, once the democratic *"deficits"* described by their scientific subproducts trigger initiatives and projects like the USAID's (United States Agency of International Development) *"Democracy, Human Rights and Governance Strategy"* which sponsors many interventions around the globe in support of *"free and fair elections"*.

As Lipset states:

> Various international agencies like the European Union, the North Atlantic Treaty Organization, the World Bank, and the International Monetary Fund require a democratic system as a condition for membership or aid. The cost of avoiding free elections – in terms of lost foreign aid, lost foreign trade, and lost productivity from a repressed populace – are becoming prohibitive, particularly in Southeast Asia, Eastern Europe, Latin America, and to some extent in Africa.[61]

The international agenda on democracy that arose from the necessity to make the *"electoral democracy template"* spread worldwide has presented itself in various forms, from the imposition of conditionality to financial aid and trade to programs of democratic assistance and electoral monitoring and, ultimately, even armed invasion.[62] Suffice it to say that the main latest military incursions of NATO superpowers in the Arab World took place under the necessity to *"free nations from tyranny"* and lead them to *democracy*. The propaganda for the adoption of the western electoral political template success is so resounding that the very idea of *democracy* is now surrounded by an undisputed favourable aura, causing the appropriation of the term even by its enemies. As Shapiro poses *"authoritarian rulers seldom reject democracy outright"* claiming to hold temporary transition regimes towards *democracy* or even that their governments are, somehow, more democratic than their opposition would be if

[60] Francis Fukuyama, *The end of history and the last man* (Hamish Hamilton 1992); Huntington *The third wave: democratization in the late twentieth century* (48)
[61] Lipset (9) 1xxv
[62] Beetham, *Democracy: a beginner's guide* (9) 103-9

they were in power.[63] Once *democracy* was elevated to such canonical status, no regime, nation, or country happily accepts the label of undemocratic or authoritarian. *Democracy* became a desired commodity in international relations in which some Countries are regarded as owners of institutional expertise and donors of reform packages while others are considered needy, defected, and, thus, borrowers of such expertise and consumers of those packages.

Electoral, *minimalist*, or *low-intensity democracy* established a collision route for the two foundational and constitutive elements of modern democracy. It made the cosmopolitan, universal trait outweigh the local, participatory, popular aspect by displacing the *demos* from centre stage and making the worldwide spread of universal suffrage and elections synonyms of democracy, disregarding the conditions under which those periodic popular consultations ought to happen. In other words, *electoral*, *minimalist,* or *low-intensity democracy* imposes itself worldwide as a political mode irrespective of manifestations of the *"people"*, the *"general will"*, or *"popular sovereignty"*. If periodic elections under disputable levels of freedom, fairness, and competitiveness seemed to provide representatives and their decisions with poor political legitimacy, the top-down imposition of this political template only aggravates the feeling of democratic illegitimacy. The paradox resides in the fact that this political mode called *"democracy"* does not necessarily result from the very same procedure it prescribes as legitimate, but it originates in theories, discourses, institutional packages, foreign policy strategies, and intervention initiatives decided in international organisms closed to a limited club of States (e.g UN Security Council, WTO, IMF). The very choice for *democracy*, in this scenario, would not be obtained through elections or any form of majoritarian consultation.

The triumph of the universalist element of modern democracy over the participatory one is a Pyrrhic victory after all, once democracy is not one nor the other, but the resultant of their interaction. The development of the concept in Brazil, for instance, took the opposite path. As seen, sceptical elitists portray popular participation in the Brazilian constituent assembly procedures as – in effect – a concession made by elites. Elections would have such a relative weight to democracy that the fact the constituent assembly was freely elected, and other means of participation were granted to the society during the Brazilian constituent moment would be almost irrelevant to them. All the evidence of popular mobilization and participation would be overshadowed by the arrangements made by party leaders during the 1988 Constitution-making process.

[63] Ian Shapiro, *The state of democracy theory* (Princeton University Press 2003) I

As a reaction to a constitutional narrative that reflects such disaffection with democracy, a considerable part of the Brazilian constitutionalists decided to make the democratic character of the constituent assembly the source of legitimacy of the new Constitution. Benvindo acknowledges that the *"clash of narratives"* on the constituent assembly circumstances had a strong impact on the idea of rule of law in Brazil. He concludes that from the participatory character of the Constitution formation does not follow a participatory constitutional practice.[64] Although Benvindo does not believe the two concurrent versions of Brazilian constitutional moment are mutually excluding, he aligns with most of Brazilian constitutionalism scholars in the sense that the unprecedented levels of popular engagement and participation in the production of the 1988 Constitution are an unequivocal sign of an aspiration for a rupture with authoritarianism and turn to democracy. Silva says that Constitutional Amendment 26, from 1985, was a political act and not a technical legal resource, once it did not intend to preserve the 1967 Constitution, but to destroy it.[65] Likewise, Barbosa relativizes the importance of the fact the constituent assembly was summoned by an amendment to the previous Constitution, emphasizing that *"the constituent process represented a moment of rupture, and was underpinned by a singular performative sense, the idea of an active people, main role actor"*.[66] Neto & Sarmento argue that the 1988 Constitution *"was an authentic manifestation of popular sovereignty, which does not need, to exteriorize itself, of a violent revolution"*.[67] The prevalent idea of democracy in Brazil is linked back to the constituent moment that preceded the enactment of the 1988 Constitution, often described as more than just the occurrence of elections for the constituent assembly, but a moment of singular social mobilization, ideological effervescence, and political participation through different channels and means.

Democracy, in Brazil, is a concept very much identified with the classic conceptions of *"popular sovereignty"*, *"self-government"*, and *"general will"* that strongly emphasize the national-political-participatory element of democracy and ignore the universalist-cosmopolitan-rights-based component out of which the political mode was implanted worldwide.

[64] Benvindo (17) 77
[65] Silva (37) 87
[66] Barbosa (44) 45
[67] Cláudio P S Neto and Daniel Sarmento (39) 138

1.2 Quality of Democracy and their *"Democracymeters"*: Democracy Shall Not Live of Popular Will Alone

Attentive to the weakening of political participation throughout modern society, Robert Dahl coined a different term to refer to the political regime in force in the western developed world. His idea of *"polyarchy"* or *"polyarchal democracy"* is based on the claim that the modern representative democratic government is so much greater in scale than the original classical democracy, that it needs a different name (Dahl et al., 1998). *"Polyarchal democracy"* certainly encompasses the idea that officials must be elected through free, fair, and frequent ballots but it also means that elections must be held in an ambience of freedom of expression in which opinion can freely circulate, influence, and persuade. More than that, Dahl qualifies democracy with the idea that people should have access to alternative sources of information and associational autonomy. In addition, Dahl stresses that an enlightened understanding of public affairs and control of the public agenda must be granted to all citizens. Dahl's *"polyarchal democracy"* incorporates into the electoral process some additional societal guarantees of its fairness and the quality of popular participation. It adopts a version of inclusionary citizenship, which is primarily dependent on suffrage and the right to join political associations as a means to obtain information, and *"opportunities for discussion, deliberation, and the acquisition of political skills"*.[68] The *polyarchies* of Dahl do presuppose openness for public contestation and inclusiveness, but the latter is taken as political participation in smaller groups of ideological identities construction or common interests that would come together to give shape to a pluralist society.[69] *Polyarchal democracy* has the merit to take democracy assessment further and deeper than only electoral participation, surrounding the guarantees of periodic, fair and competitive elections with supporting features such as access to information, freedom of speech and association. In that regard, Dahl produces a theoretical bridge between *low-intensity democracy* and the idea that *contemporary democracy is about free, fair, and periodic elections as much as it is about its surrounding civil liberties.* It also represents the relocation of *"the people"* as the main component of democracy rescuing their *"will"*, *"consent"*, and other representations of *"popular sovereignty"* from oblivion. The people appear as the central pillar of democracy, supported and sustained by collateral guarantees, such that it manifests itself as a collective well-informed self-consciousness. *Polyarchy* makes

[68] Dahl and Shapiro, *On Democracy* (52) 90

[69] Robert A Dahl, *Polyarchy: participation and opposition* (Yale University Press 1971)

the national-political aspect of democracy regain its importance, which not only reflects human rights developments in international law but also has an influence on the construction of the cosmopolitan-universalist comprehension of democracy itself.

Dahl introduces human rights as necessary supporting features of a *polyarchy*. He concentrates, though, on specific categories of human rights: political and civil. His apology for frequent elections with universal suffrage is accompanied by ideas such as access to *"alternative sources of information"*, which is a consequence of freedom of the press, for instance. In its turn, an *"enlightened understanding of public affairs"* is a goal achieved through access to information, freedom of association, opinion, and other classical civil liberties. Dahl's preference for civil and political rights as *polyarchy* indicators reflects a cleavage also perceived in international law. Although the Universal Declaration of Human Rights purports the principles of interdependence, interrelation, and the equal importance of all categories of human rights, when the United Nations engaged in concrete negotiations to set forth human rights in binding Treaties or Covenants, they were split into two different instruments. Although the thesis of an early clash between the capitalist western world and the socialist east is disputed, it seems plausible to argue that the *"justiciability"* criteria, firstly brought up in the discussion by Netherlands and Canada, was translated to democratic theory through Dahl`s *polyarchal* model.[70] Dahl's polyarchal democracy contains electoral, political, and civil rights, which are immediate, individual and judicially enforceable (International Covenant on Civil and Political Rights-ICCPR) as components of his concept. Meanwhile, incremental, programmatic, economic, social, and cultural rights (International Covenant on Economic, Social, and Cultural Rights-ICESCR) play a marginal role.

Dahl`s *polyarchy* not only mirrors the developments of human rights discourses in international law, but it is also a source of transnational initiatives to promote *democracy* worldwide. Dahl's conceptual framework and its bondage with political and civil human rights influenced rankings like the Freedom House's *"Global Freedom Score"*. The nations have their democracies rated by the combination of two different grades, one regarding political rights and the other related to civil liberties. The questions used to assess political rights address the existence of free, fair, and competitive elections for offices in the executive and legislative branches and the opportunities for political association and opposition. The questions aimed at civil liberties focus on freedom of expression and association and due process of law

[70] Whelan and Donnelly (14) 929

guarantees. The results in 2020 show developed countries like Germany and the United Kingdom reaching an almost perfect 94 points, while developing nations of the Global South, such as South Africa and India, score below 80. According to Freedom House, in Latin America, while Costa Rica, Uruguay, and Chile all surpass 90 points, Brazil struggles at 75. Those indexes and rankings build up a discourse in the sense that there might be something about German, British, Costa Rican, Uruguayan, or Chilean political regimes that are missing in other countries, especially if the low score is accompanied by a label of *"partly free"* country, like in the cases of Colombia, Ecuador, and Bolivia. Dahl`s theoretical proposal and Freedom House rankings reinforce the prescriptive implications of the international agenda on democracy despite their controversies. Lack of access to information, data transparency, and chairs in Parliament reserved for non-elected members would seem strikingly undemocratic features of a political system if faced with Dahl`s exigencies for free elections and *"enlightened understanding of public affairs"*. Notwithstanding those being historical problems of the British political system, the United Kingdom ranks at the top of the Freedom House score, which provides credibility for Britain to pose as a donor, not a borrower of democratic expertise worldwide.[71] Chile is elevated to the condition of a democratic oasis in Latin America despite recent disturbing social turmoil – *Estallido Social* - that brought to the spotlight a disruptive disconnection between large portions of the population, especially the working class, and a Constitution reminiscent of Pinochet's dictatorship era. Despite these incoherencies, the *"Global Freedom Score"* remains an influential index, and democracy is assumed as a combination of political rights and civil liberties that resembles the six requirements of Dahl`s *"polyarchal democracy"*.

Based on these assumptions, Dahl and Shapiro themselves carried on external observation and formal legal framework comparisons and check-ups, concluding that from 1950 onwards, there were only 22 continuous democracies in the world.[72] Although the attempt to classify and list countries according to their propensity to adhere to the *polyarchal* template is still present, Dahl's proposal makes democracy assessment more complex. To put it simply, it is fair to assert that no society has achieved civil and political rights at a uniform level. Disparities in those matters are not only probable but certain. Therefore, the more we amplify the scope of democracy theory, the yes/no answers become rare and are progressively replaced by more/less analysis. O'Donnell and others are very aware of the difficulties in drawing the

[71] David Beetham, *Democracy and Human Rights* (Wiley 1999) 158
[72] Dahl and Shapiro, On Democracy (52) 119

internal and external boundaries of the requirements of a democracy. In other words, they find it difficult to determine what civil and political rights embody the essence of democracy and what social and economic rights inflate the concept of democracy with ideological desires and wishes.[73] Their attempt to sort them out took them to consider that those thresholds cannot be found between the kind of rights that belong or not to the concept of democracy but are probably encountered in the search for the extent by which all of them are effectively realized within a society. That change of focus made them abandon the democratic/undemocratic dichotomy to consider *"different degrees of democraticness"*.[74] Similarly, the asymmetries in the way different democratic principles are perceived in different realities made Beetham affirm that *"democracy is not an all-or-nothing affair, but a matter of the degree to which the basic principles are realized: a comparative rather than an absolute judgment"*.[75] O'Donnell and others explicitly say that the premise of his analytical model *"is that the quality of democracy in given countries may be gauged by its different degrees of democraticness along several dimensions"*.[76]

That perception led to the emergence of a theoretical stream that takes *polyarchy* as a minimum requirement for democracy, or as *"a necessary, yet not a sufficient, condition for a high-quality democracy"*.[77] *Quality of democracy* appears as this theoretical trend to dismiss the automatic association made by American political science between *democracy* and *polyarchy*, to consider the latter the minimum ground for the consolidation of the former.[78] It presupposes *democracy* as a complex socio-political phenomenon that cannot be encapsulated or understood through minimalist lenses, but demands the analysis of how its *"necessary"*, *"promotional"*, and *"sufficiently obstructive factors"* are interrelated in the net of cross-influence between its various dimensions and institutions.[79] The *quality of democracy* literature proposes that *polyarchy* only sets the first cutline above the terrain of negative certainty. In other words, if a regime does not feature free, competitive, and regular elections with civil

[73] O'Donnell and others, *The Quality of Democracy: theory and applications* (10) 53
[74] Ibid 64
[75] Beetham, *Democracy and Human Rights* (71) 69
[76] O'Donnell and others, *The Quality of Democracy: theory and applications* (10) 21
[77] David Altman and Anibal Pérez-Liñan, 'Assessing the Quality of Democracy: Freedom, Competitiveness and Participation in Eighteen Latin American Countries' (2002) 9/2 Democratization <https://www.tandfonline.com/doi/abs/10.1080/714000256?cookieSet=1> accessed 23 October 2021 86; Diamond and Morlino (12) 21
[78] Michael Coppedge, 'Quality of Democracy and Its Measurement' in G. O'Donnell, J. V. Cullell and O. M. Iazzetta (eds) *The Quality of Democracy* (University of Notre Dame Press 2004) 240
[79] Marc Buhlmann and others, 'The Democracy Barometer: A New Instrument to Measure the Quality of Democracy and its Potential for Comparative Research' (2011) 11/4 European political science 520; Lauth, *The Matrix of Democracy* (15)

rights related to freedom of press, association, and manifestation, then, it cannot be considered a democracy at all. That does not mean that there are no asymmetries in the levels of attainment of these minimum requirements, nor that they are enough to characterize a consolidated one. In the pursuit of ways to dissect democracy as a social and political phenomenon, those theorists created mechanisms to measure *"the quality of democracy"*, they attempted to put it into metrics, and they developed *"democracymeters"*.

The importance of *polyarchal* attributes or the weight of *minimalist competitive electoralism* in the different *quality of democracy* models tends to vary according to how binding ideas such as *"people sovereignty"*, *"general will"*, and *"rule by the people"* are for the authors who idealize them. Even among those often ascribed to the *"quality of democracy"* trend, there are voices that claim the absence of a sufficient clear conceptual alternative to the minimalist definition of democracy, and that the hyperinflation of the concept of democracy ultimately deprives it of its political content.[80] Similarly, others argue that the confusion between democratic processes (access to power) and democratic outcomes (exercise of power) produced by *quality of democracy* initiatives impoverishes the methodological possibilities of correlational analysis between *democracy* and other socio-political-economic constructs, causing a misunderstanding of democratic developments in Latin America.[81] He proposes that most of the studies misidentify democratic deficits in the region by focusing on the incomplete transition from patrimonialism to professionalized bureaucracy instead of targeting the transition from authoritarianism to democracy. By doing that, they end up jumbling the assessment of modes of access to power with forms of exercise of power. Mazzuca`s dichotomy is informed by the idea that democracy is only about the procedure by which one reaches power rather than about the ways by which power is exercised by those who have it. Altman & Pérez-Liñan's Latin America *quality of democracy* assessment expressively drew its analytical elements from Dahl`s *polyarchy* definition, comparing the effectiveness of civil rights, electoral participation (voting turnout), and party competition between 18 countries in the region. Not surprisingly, the highest Z-Scores of their *"Quality of Democracy in Latin America"* belong to Uruguay, Costa Rica and Chile, the only Countries to score above 1 in the indicator.[82] In fact, for a considerable number of the *quality of democracy* authors, different levels of democracy are perceived by the degrees of realization of *polyarchal* traits. Teorell

[80] Munck (8)

[81] Sebastián L Mazzuca, 'Access to Power Versus Exercise of Power Reconceptualizing the Quality of Democracy in Latin America' (2010) 45/3 Studies in comparative international development

[82] Altman and Pérez-Liñan (77) 92

and others advocate the adoption of the V-Dem (Varieties of Democracy) index precisely because it better reflects *polyarchal* requirements than the concurring indexes, such as Freedom House`s.[83] Their proposal is underpinned by Dahl`s theoretical framework, focusing on elements of *polyarchy*; fair elections with *"inclusive citizenship"*, freedom of expression, associational autonomy, and access to alternative sources of information. The criteria to measure those aspects are limited to the fruition of civil and political rights divided into five components. The first formative component takes into consideration *"decisiveness of elections"*, which is defined as the capacity of the elected officials to effectively exercise power after the elections. Some of the reflective components are *inclusive citizenship*, which is narrowed to the extension of suffrage; *free and fair elections* gauged through an index related to the cleanness of electoral procedures; *associational autonomy*, which analysis is centered on the possibility of creation and free functioning of political parties; *access to alternative sources of information*; and *freedom of expression*. The model gives concreteness to the authors' conception that *"democracy without the inclusion of the people, or without liberties that make elections meaningful, is an oxymoron"*.[84] The results for 2017 (last year with indicators for all Countries) point to Northern Europe democracies at the top of the ranking (Norway 2nd, Sweden 3rd, and Denmark 6th), with Costa Rica (7th), Chile (15th) and Uruguay (19th) being the strongest *polyarchies* in Latin America. The United Kingdom (14th) and Germany (16th) also feature high scores, while the US figures as the 32nd *polyarchy* in the World, behind Countries like Jamaica (30th), Cyprus (26th), and Portugal (11th).

Even if to a lesser extent, *quality of democracy* proposals that go above and beyond *polyarchal* requirements give an important role to free, fair, competitive elections and classical public liberties. Nine out of the fifteen dimensional/institutional indicators of Lauth's *matrix of democracy* are related to electoral rights and guarantees, freedom of association and political party participation, freedom of the press, and access to information.[85] Five out of eight of Diamond & Molino's dimensions of *quality of democracy* are related to freedom (personal liberty, security, and privacy), political equality, electoral competitiveness, responsiveness, and vertical accountability.[86] In the same direction, aspects of *polyarchy* are also found in some of the functions (individual liberties, public sphere, competition, participation, and

[83] Jan Teorell and others, 'Measuring Polyarchy Across the Globe, 1900–2017' (2018) 54/1 Studies in comparative international development

[84] Ibid 75

[85] Lauth, *The Matrix of Democracy* (15) 15

[86] Diamond and Morlino (12)

representation) of all three principles (freedom, control, and equality) of the *quality of democracy* for Buhlmann and others, and correspond for one of Campbell's "*quintuple-dimensional structure of democracy"*.[87]

An important tendency found in Lauth, Buhlmann and others, Diamond and Molino, and Campbell's theoretical proposals and correlated empirical tools is that they expand democracy theory to understand it in broader terms. Instead of focusing on specific institutional/legal requirements for democracy, their departure point is the shared idea that democracy has three basic dimensions: freedom, equality, and control.[88] Diamond & Molino's eight dimensions could also be summarized to the aforementioned three, once aside from freedom and equality, the remaining aspects highlighted by them are Rule of Law, vertical accountability, horizontal accountability, and responsiveness, all tautologically related to the generic conception of control.[89] Campbell adds to those three major expressions of democracy sustainable development.[90] The importance of those contributions and the projects they underpin (Matrix of Democracy, Democracy Barometer, Democracy Ranking) is the correlated openness of those *"democracymeters"* to indicators, data, influences, and inputs that have no intrinsic link to elections. Here, the quality of democracy authors transcend the attachment shown by their colleagues to ideas such as "self-government", "popular sovereignty", and "rule of the people" to incorporate other constitutive elements of democracy not necessarily dependent or instated through elections, votes, or suffrage. Buhlmann's Democracy Barometer, for instance, regards as the quality of democracy functions the presence of rule-of-law guarantees, such as judicial independence, the existence of mechanisms of mutual checks of powers, measures for public administration transparency, fight against corruption, and minorities' representation in decision-making forums.[91] Campbell incorporates in his Democracy Ranking sub-dimensions such as gender equality, income equality, human development, and non-political development, assessed through indicators as varied as the Gini Index, life expectancy at birth, school enrolment, and CO2 emissions.[92]

We see, in such theoretical and empirical endeavours, signs of expansion of the comprehension of democracy to the incorporation of agendas, institutional settings, and

[87] Buhlmann and others (79) 523; Campbell (12)
[88] Buhlmann and others (79) 521-2; Lauth, 'The internal relationships of the dimensions of democracy' (12) 608-9
[89] Diamond and Morlino (12)
[90] Campbell (12) 14
[91] Buhlmann and others (79)
[92] Campbell (12) 40

governance goals that are seldom produced by majoritarian deliberation (elections, plebiscites, or popular referendum). In fact, many of those dimensions or indicators of the quality of democracy were historically pushed forward by international forces. According to Rodriguez-Garavito, a great part of constitutional, institutional, and legal reforms adopted in Latin America aiming to strengthen the Rule of Law were strongly influenced by the so-called *"institutional turn"* of the Washington Consensus, promoted by institutions such as the USAID, the World Bank, and the IADB – Inter-American Bank of Development.[93] Santiso adds that those "*efficiency/good-governance"* and "*Rule of Law"* packages involved, in practice, the enactment of new legislation and institutional arrangements that would promote judicial independence in the region.[94] The adherence by developing countries to such accountability mechanisms and institutional arrangements to grant the Judiciary independence to check up on measures adopted by the other branches of power was a matter of compliance with international standards. The internalization of those packages was a demonstration of susceptibility to the interventions of multinational organizations and transnational propaganda rather than as a choice of *"popular will"*, or a *"self-government"* display. The same can be said of the gender equality agenda. It has been championed through efforts started in the 1970s by the United Nations with the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and culminated with the enshrinement of gender equality and the empowerment of women and girls as the 5th Sustainable Development Goal for the XXI Century. Although women represent half of the world`s population, gender equality measures have resulted from the globalization of the feminist movement's claims and the broad understanding of gender equality as a fundamental human right rather than from electoral choice worldwide. The last striking example is related to the right to a balanced environment. Beginning with the establishment of the UNEP (United Nations Environmental Programme) in 1972, passing through the many declarations, conventions, and summits for climate action, all the way to the Paris Agreement to strengthen the global response to the threat of climate change, adopted in 2015, the international environmental movement is probably the backstage

[93] César Rodriguez-Garavito, 'Toward a Sociology of the Global Rule of Law Field: Neoliberalism, Neoconstitutionalism, and the Struggle over Judicial Reform in Latin America' in Garth B and Dezalay Y (eds) *Lawyers and the Rule of Law in an Era of Globalization* (Routledge 2011) 159

[94] Carlos Santiso, 'Economic reform and judicial governance in Brazil: Balancing independence with accountability' (2003) 10/4 Democratization <https://www.tandfonline.com/action/showCitFormats?doi=10.1080%2F13510340312331294077> accessed 11 December 2021

of the most powerful and endurable transnational agenda ever developed. In that scenario, the pressures on nations for the reduction of CO2 emissions come much more strongly from NGOs, think tanks, and multinational agreements than from local pieces of legislation or popular mobilization.

The widening of democracy analysis to encompass factors such as the existence and efficiency of institutional checks-and-balances mechanisms, equality of gender progress, and reduction of CO2 emissions as elements of quality of democracy woke the cosmopolitan-universalist element of modern democracy from the dormant status it was put by polyarchy and previous accounts of the quality of democracy. Moreover, this move points to the invasion of the concept of democracy, once dominated by the political vocabulary of elections, vote competitiveness, expansion of suffrage, by the semantics of rights, human rights. Enough to say that the Democracy Index, published by The Economist Intelligence Unit, in its methodological definition of how to measure democracy mentions that human rights integrate the index because *"the principle of the protection of basic human rights is widely accepted. It is embodied in constitutions throughout the world as well as in the UN Charter and international agreements such as the Helsinki Final Act"*.[95] Campbell defines democracy as *"a system of self-ruling, self-government or self-governance by the people and of the people that is based on human rights"*.[96] This proximity between democracy and human rights is not an innovation to the *quality of democracy* literature. On the contrary, in one of the pioneering *quality of democracy* empirical projects (the Democracy Audit), O'Donnell and others proposed the existence of a difference between a democratic regime and a democratic society. A democratic regime would be found wherever free and fair elections are held while a democratic society would have to offer inclusion to a much more comprehensive pallet of rights.[97] Beetham shares this idea of indivisibility between democracy and human rights. He considers that theoretical proposals that consider human rights and democracy as merely mutual enforcing values, empirically correlated phenomena, or complementary features are mistaken. For him, human rights and democracy are an organic unity, constitutive parts of one another.[98] Huber and others present the idea that democracy can be seen as a political phenomenon that entails many unfolding dimensions. In their account, electoral democracy

[95] The Economist, 'The Economist Intelligence Unit's Index of Democracy 2008' (2008) The Economist Intelligence Unit 2008 <https://graphics.eiu.com/pdf/democracy%20index%202008.pdf> accessed 13 March 2022 16

[96] Campbell (12) 12

[97] O'Donnell and others, *The Quality of Democracy: theory and applications* (10) 9

[98] Beetham, *Democracy and Human Rights* (71) 90-3

would correspond solely to part of the formal aspect of democracy, which requires, along with regular free, and fair elections with universal suffrage, mechanisms of accountability, and guarantees of basic civil liberties and due process of law. Way beyond that, participatory democracy would also assure high levels of participation without any kind of gender, ethnic or social class-oriented cleavages and social democracy would encompass all previous dimensions and add social and economic equality improvement.[99]

By amalgamating democracy with human rights, those concepts make democracy assessment more complex. Democracy can be perceived in many different degrees of fulfilment of its different requirements. The combination possibilities are endless. Bühlmann's Democracy Barometer and Campbell's Democracy Ranking point to Nordic countries as the region with the highest *quality of democracy* in the World, although none of them features Constitutional Courts nor a Judiciary inclined to strike down pieces of legislation.[100] In Nordic countries, the dimension of control seems retracted while they enjoy high levels of freedom and equality. Campbell`s Democracy Ranking indicates that Latin America performs better than Asia in the dimensions of political freedom and sustainable development, but lags in income equality.[101] It also shows that the thirty-five OECD (Organization for Economic Cooperation and Development) Countries tend to fare way better in economic development, and economic and political freedom than the average of the other one hundred and twenty-two Countries of the World, while their lead in gender and income equality is only marginal. In face of such results, Campbell suggests that the conquers in freedom observed in those Countries happened at the cost of equality.[102] The possibility of trade-offs between the various dimensions of democracy opens a whole new field of investigation for the quality of democracy research.[103] The prevalence of freedom over equality, or equality over control and accountability raises possible speculations on the development of different *democratic profiles* in different parts of the planet, with some regimes skewing towards a more libertarian trend, while others would have a more egalitarian or controlling trait.[104]

Another way to look at these trade-offs between different dimensions of democracy and the consolidation of different *democracy profiles* is to understand them as outcomes of the interaction between the national, political-participatory, and cosmopolitan-universalist

[99] Evelyne Huber and others (11) 323-4
[100] Buhlmann and others (79) 529; Campbell (12) 288
[101] Ibid 188
[102] Ibid 302
[103] Diamond and Morlino (12)
[104] Lauth, 'The internal relationships of the dimensions of democracy' (12)

elements that founded and consolidated democracies in the contemporary world. As we will see in more detail in the next section, the vocabulary through which the international consensus infiltrate, shape, and influence democracies all over the world is the vocabulary of rights. It manifests itself in the form of legal reform packages that sometimes meet popular expectations and claims at the national level and, then, are enacted, while on other occasions face resistance, reluctance, and incorporate local democracies incompletely. Since its very foundational moment, contemporary democracy bears this openness to the constant influx of content generated and spread internationally. Modern democracy has always been a system impregnated with the capacity of producing rights. Even if seen as a simple procedure of *"popular or general will"* consultation, this procedure – *democracy* - has been invariably and forever open to the insemination of contents generated internationally. Not without reason, some authors argue that even if the international push for democracy and international human rights are not the same movement, their overlaps, and intersections blurred the boundaries between law and politics.[105]

Of course, the *quality of democracy* literature addressed here leads to the clear conclusion that democracy has an undeniable participatory core, well represented by the presence of *polyarchal* civil and political rights in all theoretical accounts, ranks, scores, or *"democracymeters"* ever developed to gauge democracy. It also shows that to this participatory element other dimensions, institutional settings, rights, and procedures have been aggregated over time through processes of decision-making that rarely lie in the hands of the people, or are produced by the manifestation of the general will or popular sovereignty. To a great extent, the adoption of electoral democracy as the prevalent procedure to determine who rules is a decision that has been made for nations more frequently than by them. Likewise, the adoption of Rule of Law mechanisms and institutions, the adherence to human rights, the compliance with accountability packages, and so forth, witnessed from the last quarter of the Twentieth Century onwards are decisions more pushed over by multinational organizations, international agencies, transnational discourses, and actors than longed for by the populace.

It is worth noticing that the presence of dimensions of democracy that are not produced through the quintessential democratic procedure has different effects on the *quality of democracy* authors. Some understand rights derived from international sources as a challenge

[105] Thomas Carothers, 'Democracy and Human Rights: Policy Allies or Rivals?' (13) 13

to the prevalence of the *"popular will"*, and a threat to *"self-government"*.[106] Munck affirms that *"when everything is a right, there is no politics; and when there is no politics, there is no democracy"*.[107] These are authors that can be ascribed as the ones who want to resist the cosmopolitan/universalist/rights-based element of democracy because their understanding of democracy is still anchored exclusively in the national-political component. They recognize no source of legitimacy other than *"self-rule"*, *"popular sovereignty"*, *"constituent power"*, and other descriptions conducive to the idea of an original manifestation of the *volonte general.* Their approach to the striking evidence of the ongoing role played by the cosmopolitan/universalist trait in founding, shaping, and influencing democracy is blatant denial. On the other hand, some other authors/projects on the *quality of democracy* welcome rights and even absorb them as part of their democracy analysis.[108] The fact that most of them originated in the post-national realm, by initiatives of international organizations and courts, by efforts of multinational financial aid agencies, or as consequences of transnational NGO`s campaigns and are, yet, left unattended. Although there is a broad acceptance of norms, institutions, and procedures produced internationally within their concepts and tools to measure the *quality of democracy*, there is little articulation on how to legitimize such influence. The idea that the cosmopolitan/universalist/rights-based element is foundational and constitutive of contemporary democracy is like a blind spot for them. Maybe it is not for those who dedicate their attention to the consolidation of governance standards at the global level, or the development of legal orders beyond and throughout the nation-states. In the next section, we will turn our focus to literature dedicated to *global constitutionalism* or the *sociology of global constitutions* to check if they can illuminate our quest or if they too have a blind spot.

1.3 Global Governance and the Necessity to Break with the Traditional Constitutional-Normative Paradigm to Understand Elements of Contemporary Democracy

Quality of democracy authors who have engaged in the development of mechanisms to gauge *democracy* worldwide have often disagreed on the very definition of *democracy*. While some researchers and institutions settle for a minimalist definition limited to checks on basic

[106] Daniel H Levine and Jose Enrique Molina, *The quality of democracy in Latin America* (Lynne Rienner 2011) 12; Brigitte Geissel, Marianne Kneuer and Hans-Joachim Lauth, 'Measuring the quality of democracy: Introduction' (2016) 37/5 International political science review

[107] Munck (8) 18

[108] Beetham, *Democracy and Human Rights* (71); O'Donnell and others, *The Quality of Democracy: theory and applications* (10); The Economist (95); Buhlmann (79); Campbell (12)

political and civil liberties[109], others tend to adopt an approach faithful to *polyarchal* requirements.[110] Yet, other authors, institutional assessments, and indexes embrace an even more comprehensive definition of *democracy* that incorporates economic, social, and environmental rights, the efficiency of control and accountability institutions as democratic components (e.g. IDEA Global State of Democracy, Democracy Barometer, Matrix of Democracy, Democracy Audit).[111] The former are keen on the traditional forms of legitimacy for the democratic order: *"popular consent"*, *"general will"*, *"self-government"*, and so forth, while the latter, yet very much tied to those concepts, inadvertently aggregate to democracy evaluation a myriad of rights, regimes, procedures, and institutions generated in international forums. Notwithstanding their theoretical disagreement, the reference for their analysis is the political setting of the nation-state, which can explain why the existence of the cosmopolitan/universalist/rights-based component of modern democracy slipped away from their sight. To fill that theoretical blank, we now examine internationalists, scholars, and authors who take the international, supranational, and transnational legal orders as their object of observation, and, thus, might be more aware of this phenomenon.

A significant number of such authors approaches the emergence of international legal regimes *"by transferring key domestic concepts and institutions to regional and global levels"*.[112] Although displaying remarkable differences between themselves, two prototypical proposals of the *"transfer"* trend are the ones proposed by Held and Fassbender.[113] Held proposes a *"cosmopolitan democracy"* as a solution to the legitimization riddle. It would demand the creation of new participative institutions at the global level that would coexist with the traditional political systems of the States but with the power to override the State's autonomy in clearly defined spheres of activities in which it is possible to demonstrate transnational/international consequences.[114] Fassbender identifies in the United Nations Charter the consolidation of a universal agreement around a set of rules, such as the prohibition of genocide, armed aggression, use of the force, slavery, and trafficking of human beings, respect for self-determination.[115] He also outlines the provision for institutional guarantees of

[109] Przeworski, 'Minimalist Conception of Democracy: A Defense'(8); Mazzuca (81); Munck (8)
[110] Teorell and others (83); Freedom House, *Freedom in the world 2019: the annual survey of political and civil liberties* (Rowman & Littlefield Publishers 2020)
[111] Evelyne Huber (11); Beetham, *Democracy and Human Rights* (71); O'Donnell and others, *The Quality of Democracy: theory and applications* (10); Buhlmann (79); Lauth, *The Matrix of Democracy* (15); Campbell (12)
[112] Krisch (18) 13-7
[113] Held (23); Fassbender (23)
[114] Held (23) 298-05
[115] Fassbender (23) 73;123

their enforcement, such as the Security Council (Chapter VII) and the International Court of Justice (Chapter XIV), and the existence of clauses of normative hierarchy, such as *jus cogens* and some obligations *erga omnes* as reflections of an expansion of constitutionalism beyond the sovereign state. While the former stands for the creation of effective and accountable political, administrative and regulative agencies in the international realm, the latter defends that the UN Charter features *"all the homogeneity which is needed"*. Held sees the necessity to narrow down the gap between the people and the decision-making processes carried on the national, regional, and global spheres. Fassbender believes that the original state consent to the UN Charter supplies the international community constitutional order with the legitimacy it needed to be founded and that after that, it gains autonomy and independence towards that initial building moment.[116] Despite their differences, both proposals are attempts to juxtapose constitutional concepts or make them suitable for the international legal order. That type of theoretical undertaking is similar to the way Lang and Wiener aim to adapt concepts like Rule of Law, separation of powers, and *"pouvoir constituant"* to the legal orders found in the post-national scenario.[117] Following those accounts, *global constitutionalism* would be

> a strand of thought (outlook of perspective) and a political agenda which advocates the application of constitutional principles, such as the Rule of Law, checks and balances, human rights protection, and democracy, in the international sphere to improve the effectivity and fairness of the international legal order[118]

Brown makes this projection of constitutional traits to the international legal order by global constitutionalism authors appear too apologetic as if there is an intentionality behind it trying to legitimize it at any costs. A different way to look at it would be Dunoff's *"functionalism"* based on the idea that *"although no formal international constitution exists, certain international norms fulfill constitutional functions"*.[119] One way or the other, to criticize it or to explain it objectively, both Brown and Dunoff only see the phenomenon of the rise of international legal regimes through *"transfer"* lenses, projecting concepts, institutions, and principles that pertain to traditional constitutionalism theory to the praxis of international or supranational institutions. Although Dunoff and Trachtman mention *"supplemental constitutionalization"* as one of the forms of constitutionalization produced by international

[116] Ibid 54

[117] Anthony F Lang and Antje Wiener, 'A constitutionalising global order: an introduction' in Lang A and Wiener A (eds) *Handbook on Global Constitutionalism* (Edward Elgar Publishing 2017) 3

[118] Garrett Wallace Brown, 'Cosmopolitanism and global constitutionalism' in Lang A and Wiener A (eds) *Handbook on Global Constitutionalism* (Edward Elgar Publishing 2017) 100

[119] Jeffrey L Dunoff, 'The multifaceted relationship between functionalism and global constitutionalism' in Lang A and Wiener A (eds) *Handbook on Global Constitutionalism* (Edward Elgar Publishing 2017) 188

legal orders, as the term suggests it would consist of a complementary role played by international norms in filling gaps in domestic constitutional settings to integrate them in a context of legal globalization.[120]

Our claim is bolder in the sense that international regimes have been part of the constitutional foundation and democracy adoption, shaping, influencing, and driving constitutionalism paths in different nations all over the world in contemporary times. This is the missing point for all *"transfer"* international constitutionalists. Such authors focus on the export of constitutional formulas of legitimation from the nation-state to the supranational or international landscapes and devote little or no attention to the flux that comes from the other side of this two-way road. In other words, they competently explain the emergence of international norms, the hypertrophy of international courts competences, the actuation of international organisms, transnational agencies appellative bodies, and arbitral mechanisms through the language of national constitutionalism in a bottom-up copy and paste theoretical exercise. Nevertheless, their vision is often blurred when they try to show how this very same machinery determines who, when, and how shall adopt democracy, human rights, developmental agendas, constitutional courts, environmental policies, and anti-corruption toolkits in a top-down stream of legal, constitutional reforms. At this point, *"transfer"* global constitutionalists and *quality of democracy* proposals have the same blind spot: the cosmopolitan/universalist/rights-based component of modern democracy.

One possible explanation is that the presence and influence of the European Union had a striking effect on the minds of those who study the intersections between law and globalization in Europe. From its creation in the early 1990s to the proposal of an actual European Constitution in 2004, passing through the establishment of a European Parliament and the expanding role played by the European Court of Justice, the reality of a supranational instance with so many constitutional-like institutions and procedures generates motivation. Understandably, *"much of the emerging debate on constituent power in global constitutionalism has focused on the European Union"*.[121] The idealized European experience is also a possible explanation for the attachment to the idea that legal regimes produced by international forums have to overcome an inescapable *"legitimization gap"*, once the creation of their norms, procedures and institutions can hardly be traced back to a manifestation of

[120] Jeffrey L Dunoff and Joel P Trachtman, 'A Functional Approach to International Constitutionalization' in Dunoff JL and Trachtman J (eds) *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009)

[121] Peter Niesen, 'Constituent power in global constitutionalism' in Lang A and Wiener A (eds) *Handbook on Global Constitutionalism* (Edward Elgar Publishing 2017) 227

"popular will", *"rule of the people"*, *"self-government"*, or *"constituent power"*. This concern makes Rosenfeld deem international law *"inherently unsuited to purposes of fulfilling the minimum requirements regarding democracy"*, although he acknowledges global constitutionalism as a two-way road.[122] He sees global constitutionalism as a dual move that encompasses the projection of constitutional standards to international law as much as it explains the infiltration of international law in shaping constitutionalism worldwide from the mid-20th Century onwards but is still in pursuit of a participatory element capable of legitimizing power and law. Similarly, Besson correctly sees that human rights regimes are consolidated by the dialectic relationship between international norms and domestic legal orders, but insists that they need to be legitimized by a system of mutual validation very much conditioned by the domestic participatory practices.[123] The attempt to fill the so-called *"legitimization gap"* is what drives Walker to compose his version of post-constituent constitutionalism. For him, the constituent power of the supranational constitution manifests itself *ex post facto* by a dual-factor; the consent of states, and the mechanisms that grant participation to "peoples" in decision-making panels, constituting a democracy of many peoples, a *demoi*-cracy.[124]

The blind eye to the phenomenon of the worldwide spread of certain legal/political features such as electoral democracy, human rights, developmental agenda, environmental standards, and anti-corruption mechanisms seems to be accompanied by the necessity to find justification for the legal order in the *"consent"*, *"will"*, *"decision"*, or *"rule"* by the *"people"*. This blind spot can only be illuminated by theoretical accounts that *"break"* with the temptation to associate legal order legitimacy with popular participation. Krisch proposes this kind of rupture through an idea of legal pluralism that comprehends that monists and dualists have been superseded by the reality of multiple layers of law, from equally plural sources in the international, regional, and national levels that have decoupled political processes from the nation-state, and detached legitimacy from traditional descriptions of democracy.[125] The different ways by which international norms, international courts decisions, rules of multinational organizations, and domestic law statutes might entangle and claim application upon the same issue shown by Teubner and Korth exemplify the type of rupture the heterarchical coexistence of different specific legal regimes poses both to sovereign self-

[122] Rosenfeld (25) 191
[123] Besson (24) 238
[124] Walker (24)
[125] Krisch (18)

governing constitutionalism and contractual consent-based public international law.[126] Teubner's *"societal constitutionalism"* is based on the idea of the proliferation of self-founding specific normative orders, each of which possessing its conflict settling bodies, means of norm reproduction, and application. Those partial legal orders in proliferation in the contemporary world would be autonomous to state-centered sources of power, be they domestic legislation or public international law, but would be abounding also in private multinational corporations. According to him, *"not just ubi societas, ubi ius, as Grotius once said, but ubi societas, ibi constitutio"*.[127] Conversely, Koskenniemi sees *"deformalization"* and *"fragmentation"* of international law as tendencies that oppose the *"Kantian mindset"* horizon of building an international order under the auspices of *"peoples"* self-determination. In that sense, the issue-specific *"sliced up"* legal regimes, translated into *"managerial"* terms, would oppose the *global constitutionalism* project, represented by the Kantian aspirations.[128] The contradiction between the global constitutionalist project and the plural, fragmentary, rights-specific mini-orders only makes sense if you look at both phenomena through a *"transfer"* perspective. In other words, a multiplicity of partial orders that envision themselves as *"epistemic wholes"* might hamper the idea of building a unitary, coherent international order built upon nations' and peoples shared values, but they are the most efficient ways by which international discourses, agendas, political strategies infiltrate, influence and colonize national constitutionalism all over the world. So, if on one hand, the rights-fragmented transnational regimes might demolish the idea of an international community constitution, it is through them that the international community has built many national constitutions and democracies.

Even Brunkhorst, who strongly believes that social evolutionary bursts and legal revolutions derive from class struggle and social mobilization concedes that in the aftermath of World War II *"mass democracy became an evolutionary universal"*.[129] As he explains, *"democratic constitutionalization"* was a phenomenon that happened simultaneously at the national and cosmopolitan levels, so *"the idea of a universal democracy is co-original with human rights"*.[130] As we have been stressing throughout this Chapter, the co-existence between

[126] Gunther Teubner and Peter Korth, 'Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society' in Young MA (ed) *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012)
[127] Gunther Teubner, *Constitutional fragments: societal constitutionalism and globalization* (Oxford online edn 2012) <https://doi.org/10.1093/acprof:oso/9780199644674.001.0001> accessed 25 July 2022 48
[128] Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization'(25)
[129] Brunkhorst (27) 391
[130] Ibid

the political/participatory/national and the cosmopolitan/universal/rights-based elements is not only constitutive, it is foundational to contemporary democracy. As Thornhill puts it *"contemporary democracy has the paradoxical feature that it is not created democratically"*.[131] His historical recollections of democratic and constitutional unfolding are very appealing in this sense. American and British systems are both presented as historically *"less democratic"* than what is commonly agreed on. In the case of the United States, the exclusion of non-white voters from the political system until 1965 is the basis for the conclusion of the existence of a quasi-democratic system.[132] Similarly, the British mode of government is qualified as *"at least intermittently – less democratic than most other European polities"* because of property qualification barriers to the universalization of the right to vote.[133] It is only after a movement of adherence to ethnic minorities' civil rights, especially after the Warren Court period, that American democracy experienced a much more inclusive political system.[134] In the same way, the rise of British judicial human rights adjudication, with decisions very much aligned with supranational courts paradigms, resulted in democratic advances in the United Kingdom.[135] The cosmopolitan/universalist/rights-based component came in those cases to generate/improve political participation. Likewise, in contemporary democracies, the manifestations of *"popular will"* do not happen randomly, but are accepted inasmuch they are aligned to an elevated rationale, it must be *"a will that wills rights"*.[136] As Tully shows, it is simply historically inaccurate to idealize a linear historical process by which autonomous, sovereign peoples found their way to build strong and well-established domestic constitutions and democracies, engaging, in a later evolutionary phase, in the construction of supranational institutions that mirror those same ideals. On the contrary, *"European states, as state empires, developed within global systems of imperial and colonial law from the beginning"*.[137]

The idea that democracy and human rights were co-developed in the contemporary world, with reciprocal foundational influences between the international and the domestic/nation-state levels does seem counter-intuitive, especially for the developed world and to how self-conscious the Western super-power nations are of their democracy. American

[131] Thornhill, *The Sociology of Law and the Global Transformation of Democracy* (27) 166
[132] Ibid 287
[133] Ibid 328
[134] Ibid 304
[135] Ibid 348
[136] Chris Thornhill, 'The Enlightenment and global constitutionalism' in Lang A and Wiener A (eds) *Handbook on Global Constitutionalism* (Edward Elgar Publishing 2017) 72
[137] Tully (28) 319

democracy is based on a strong belief in the *"We the People*" preamble of the Constitution, it has been praised as a society of freedom since the XIX Century, and is considered the cradle of democratization projects for the World (USAID, Freedom House, etc.).[138] It is daring to affirm it as a *"faulty democracy"* until the racial segregation regime had to cede to the embarrassment it caused to the US before the international community.[139] Britain is proud of its unwritten constitutional tradition of more than 800 years of bills of rights, charters, and agreements based on *"self-government"*, and *rule by consent* of the ruled. The necessity to adopt a Human Rights Act and to empower a Supreme Court as late as the 2000s to comply with the international consensus on what democracy, Rule of Law ought to be in our days also represents a challenge to that tradition. Similarly, Germany holds a constitutional tradition that dates back to treaties such as the ones that installed the kingdoms of Wurttemberg and Saxony and goes on to the Weimar constitution and derivative influential constitutional theories. The fact that after World War II, the commitment to international legal orders and human rights was imposed on German constitutionalism by the victorious allied forces undermines their assumptions about the force of their *Rechtsstaat*. Germany as it is today, politically and socially speaking, started in the 1989/90, due to the inception of a geopolitical development foreign to them; leading to the end of the Soviet Union and the Cold War. With regard to constitutionalism, Rule of Law, democracy, human rights, and so forth, those societies often see themselves as *"expertise"* donors, never borrowers. This is why there is a tendency to see constitutionalism and democracy as legal-political commodities which they created and developed as sovereign actors, and, in consequence, which they are better equipped to export to the international field.

For now, the most important point we intend to make is that democracy as we know it in the contemporary world, wherever we look at (or for) it, was founded and is constituted by the constant interaction between a political/participatory/local factor and a cosmopolitan/universalist/rights-based element. This interaction is dialectical. Democracy is the synthesis of a relationship that can be of reinforcement or attrition, attraction, or repulsion. The European Union's demands for austerity measures, cuts in wages, and pension reforms faced a strong societal reaction in Greece during the 2010s. The supranational developmental agenda consubstantiated in legal reforms that aimed at the reduction of public revenue deficit were strongly repelled by a wave of protests, strikes, and election results. The two constitutive

[138] Alexis de Tocqueville and Henry Reeve, *Democracy in America* (Saunders & Otley 1835)
[139] Brunkhorst (27) 390

elements of democracy clashed. In Portugal, the sequence of Constitution Revisions that happened between 1992 and 2005 to adapt the constitution to the provisions of the Treaties of Maastricht, and Amsterdam, enacted to open Portuguese constitutionalism to the reception of rights such as no discrimination for sexual orientation found a much smoother environment. The reforms resulted in granting foreign citizens the right to vote, amplifying the means for political participation with mechanisms of popular legislative initiative. The cosmopolitan/universalist/rights-based factors pushed for more participation and local constituencies' empowerment.

The reactions and resistances one factor or element of democracy imposes on the other can be seen as manifestations of an expansionist and dominating tendency they both have. Koskenniemi affirms that the fragmented, technical, specific rights regimes in expansion would carry in themselves a solipsist and imperialist tendency to dominate issues and describe the world through their lenses.[140] His reluctance against the *"extraordinary rhetorical power of rights"* is a critique of the engulfment of politics by technocracy and *"managerialism"*.[141] Indeed, the multiple partial legal regimes that are created and, then, spread to the four corners of the world tend to encapsulate reality into their language. International human rights would describe bad living/work conditions of cocoa producers through the idea of a human rights violation to be ruled by ILO Conventions while *lex mercatoria* would look at the same issue as a matter of inobservance of trade rules and WTO previous decisions and principles regarding export/import of international goods. Social media gigantic multinationals tend to develop their panels to discuss rules and procedures of restriction/removal of abusive content, while democratic institutions would look at the same procedures through the prism of the necessary level of freedom of speech for free and fair elections.

The political/participatory/domestic element of democracy shares the dominant tendency shown by the cosmopolitan/universalist/rights-based one. One might say that the prevalence of the national/majoritarian element over the cosmopolitan/universalist one is the basis for the most dangerous attacks democracy suffers nowadays. Whether you consider the Brexit decision, the predominant discourses in Poland, Hungary, India, Italy, and Turkey, the far-right ascension in Brazil, or Venezuelan/Bolivian Bolivarianism, the common appeal is for the renaissance of nationalist populism against the *"evil"* forces of international organizations, multinational agencies and transnational legal bodies. As well identified by Kumm and others,

[140] Koskenniemi, 'Hegemonic Regimes' (18) 317
[141] Martti Koskenniemi, *The Politics of International Law* (Hart 2011) 136

aside from Islamic fundamentalist theocracies, and authoritarian technocracies, popular nationalist authoritarianism is the only alternative to liberal constitutional democracies in vogue. They all have in common the weakening of checks-and-balances institutions and their replacement by a sectarian view of *"the people"* as a morally virtuous fragment of society.[142] Trumpism's strategy of bashing international institutions, withdrawing from treaties, questioning multinational organisms' intentions, and putting their rights proposals in conflict with the *"national"*, *"popular"*, *"sovereign will"*, and his attacks on democracy are not two different moves.[143] Those arguments and their sub-products in Brazil, Hungary, Poland, and Turkey represent an orchestrated attack on democracy as a whole in two steps. First, the political/participatory/national element of democracy nulls any input from the cosmopolitan/universalist/rights-based factor, and, then, the mechanisms of political/electoral participation are corrupted, co-opted, and distorted. Even convinced to stand for his minimalist or electoral concept of democracy, Przeworski spots the current world "crisis" of democracy as instability, unpredictability, unbalance, a transitory state of affairs in which *"some threat to democracy has already materialized, yet the status quo democratic institutions remain in place"*.[144] We see this incremental deterioration taking place mainly through attacks, violations, and resistance against human rights, international scientific consensus, global environmental commitments, and so forth, in such a powerful and pervasive way that civil liberties constraints or political/electoral repercussions can happen after the point of no return has already been reached. To use an analogy that is dear to Koskeniemmi and Brunkhorst, although Dr. Jekyll and Mr. Hyde both craved to be the dominating personality, they were both the same person and the prevalence of one would ultimately imply the doom of both.[145] The same is true for contemporary democracy. It is made of both, the political/participatory/local and the cosmopolitan/universalist/rights-based elements, with different reciprocal influences and forms to legitimize themselves.

So far, our defence of the dual-factor nature of contemporary democracy sounds too Habermasian. Habermas also proposed that democracy and human rights would circularly and recursively legitimize each other. Human rights would provide the minimum conditions of possibility for a communicative process that could provide its outcome with legitimacy, and

[142] Mattias Kumm, Jonathan Havercroft, Jeffrey Dunoff and Antje Wiener, 'Editorial: The end of 'the West' and the future of global constitutionalism' (2017) 6/1 Global constitutionalism

[143] Jonathan Havercroft, Antje Wiener, Mattias Kumm and Jeffrey Dunoff, 'Editorial: Donald Trump as global constitutional breaching experiment' (2018) 7/1 Global constitutionalism

[144] Przeworski, *Crises of democracy* (8) 10

[145] Koskenniemi, *The Politics of International Law* (141) 143; Brunkhorst (27) 48

this legal outcome would only be legitimized if the procedure for its production is participative, and democratic.[146] Habermas imputes the legitimacy of law to the rationality of the discursive process that characterizes democracy. Human rights would pave the way for the existence of this robust public sphere in which society would be communicatively engaged, the will-formation would be endowed with the rationality of the democratic procedure that would be *"the only post-metaphysical source of legitimacy"*.[147] As seen, Habermas still trusts the idea that *"democratic procedure should ground the legitimacy of law"*, or that law depends on *"the legitimizing force of the democratic genesis"*.[148] His formula is particularly similar to the aforementioned Besson's idea of the *"mutual democratic legitimization of domestic and international human rights law"*.[149] We do not discredit the legitimacy that comes from participatory, majoritarian, political deliberation procedures, but we believe that the same persuasive effect can be produced by other means or from different sources. If we believe in the rupture with the constitutionalist tradition of a centered unitary source of legitimacy, we must take Krisch's *"break"* mindset to its ultimate consequences.

Following his idea of a pulverized, fragmented, multiple mini-constitutional societal regimes, Teubner proposes that the principle of self-legislation through representation must be replaced by channels of dissent that would generate mechanisms of self-contestation within those regimes.[150] Thus, legitimacy would not come from participation *prior* to the decision-making, but from societal participation in mechanisms of contestation that would generate constraints from within the partial issue-specific orders. Legitimacy would be generated in the making of these legal regimes, by corrections produced by the regimes themselves as they are contested by reality. According to his own words, *"devils would be cast out by Beelzebub"*.[151] The problem with his formulation is how long those partial regimes would take to correct their trajectories and how the effects of the delays and deficiencies in these self-contestation sources of legitimacy are asymmetrically felt in different parts of the World.[152] Yet innovative, Teubner's idea still relies on the notion that there is a *"legitimization gap"* between the transnational legal orders and their addressees when the reality is that *"there are no special*

[146] Jurgen Habermas *Between facts and norms: contributions to a discourse theory of law and democracy* (Polity 1996) 121-0
[147] Ibid 448
[148] Ibid 151; 288
[149] Besson (24) 238
[150] Teubner, 'Quod omnes tangit: Transnational Constitutions Without Democracy?' (23) S14
[151] Teubner, *Constitutional fragments: societal constitutionalism and globalization* (127) 86
[152] Emilios Christodoulidis, 'On the Politics of Societal Constitutionalism' (2013) 20/2 Indiana journal of global legal studies

legitimacy problems connected to international law that are not shared by constitutional law".[153] In other words, there is a mythic aspect involving the idea of the *"legitimization gap"* that is very much based on an association between the concept of legitimacy and elections, voting, and factual participation of people in decision-making that is as unlikely in the international realm as it is in the national domestic one. Even enthusiasts of mechanisms of direct participation in modern democracies acknowledge that it has practical limitations and that factual mass deliberation in every issue is simply insensate, materially impossible, and also inconvenient for the complexity level of our industrial modern societies.[154] The *"legitimization gap"* solutions demand a capacity for world's issues cognition, collective articulation, global or regional moral consensus, consideration, and regard for the mechanisms of participation that are beyond any known citizenship practice at the nation-state level.[155] In other words, if there is a *"legitimization gap"* affecting international legal regimes because the means of popular participation in their production are too slim or absent, the same can be said about many Constitutions and legal statutes all over the world. The *"legitimization gap"* myth stems from a misconception of legitimacy itself that leads to disappointment and scepticism towards its functions.

Legitimacy is not a concept that has a substantial meaning of its own. It is, in this sense, a meta-concept that always refers to another semantic content; it is an effect, an outcome, a symptom produced by something else. One may ask if Carnival is a legitimate expression of Brazilian culture, others may question whether crypto money is a legitimate source of wealth, and so forth. In the logical regression one makes seeking a justification for the legal order, legitimacy is produced by that ultimate persuasive argument or semantic category beyond which no more justification is required. It means that legitimacy is the bond that holds society together around a legal order even though if confronted with the reality that such a legal order is the product of sheer power, will, and interest trade-offs, society would disintegrate into chaos, cataclysm, or war. To avoid that unbearable level of possibilities (complexity) and opportunities of disappointment (contingence), social systems develop concepts, ideas, and abstractions that are capable to impede access to the raw paradox or tautology that is in their core. The role to cover such paradoxes must be performed *"latently"* or *"without mentioning"*

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[153] Kumm (28) 323

[154] Norberto Bobbio *The Future of Democracy: A Defence of the Rules of the Game* (University of Minnesota Press 1987)

[155] Norbert Lechner, 'On the Imaginary of the Citizenry' in G. O'Donnell, J. V. Cullell and O. M. Iazzetta (eds) *The Quality of Democracy* (University of Notre Dame Press 2004) 208

by contingency formulas.[156] Contingency formulas operate like a veil, a barrier that contains the impetus to reveal systems' core paradoxes or tautologies. When Koskenniemi shows his skepticism towards the *"warm sense of contentment looking for no further justification"* produced by rights regimes, he is misplacing his disappointment.[157] He is not contesting the fragmentary rights regimes but legitimacy itself. The functional differentiation of law from politics provides rights with the ability to extract their legitimacy from the law itself, a constitution is amended, a statute is enacted, a constitutional court decision is laid on the grounds of a rights requirement, a human rights exigency, and in the context of contemporary democracy, that is as much justification as you can get. The attempt to keep pushing the justification chain forward to its political roots is an evolutionary regression, if the legitimacy curtain is removed, as proposed by Koskenniemi, there is nothing else behind the scenes unless a nude king. The function to cover backstage is performed by contingency formulas, and the contingency formula of the political system is legitimacy. As King and Thornhill present Luhmann's account, a legitimate political system is any political system that produces laws that are accepted as legitimate because the system itself sustains its legitimacy (King & Thornhill, 2003).[158] That sounds like a tautology and it is indeed. We claim that the specific function to spare law from dealing with that tautology can be performed by multiple sources other than *"general will"*, *"constituent power"*, *"self-government"*, *"rule by the people"*, or *"popular will"*. As King and Thornhill argue

> The processes through which a political system creates legitimacy for itself are extremely complex and diverse. All endeavours to establish mono-causal models of legitimacy inevitably neglect the variable and endlessly evolving character of the political system.[159]

Thornhill`s description of the *"global transformation of democracy"* is, in some sense, a version of how the historical evolution of the idea of citizenship brought changes to political legitimization. As he presents it, democracy as we know it has as one of its main features the transition from the figure of a collective political subject called *"people"*, or *"nation"* as the legitimization source of law to a *fictionally universalized individual subject*, holder of human rights provisioned by international norms.[160] This new *citizen* is not an *a priori* author of the

[156] Niklas Luhmann, *O direito da sociedade* (Martins Fontes Selo Martins 2017)
[157] Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization' (25) 14
[158] Michael King and Chris Thornhill, *Niklas Luhmann's theory of politics and law* (Palgrave Macmillan 2003)
[159] Ibid 72
[160] Thornhill, *The Sociology of Law and the Global Transformation of Democracy* (27) 216

law but its center of attribution which decisively changes how we might think of democracy.[161] As Thornhill says:

> (…) the original chain of legitimization in more classical ideas of democracy is broken, and the presence of the people as a real aggregate of citizens is symbolically translated into an idea of the people as a holder of rights, internalized and cyclically reproduced within the law. The chain of legitimization becomes a chain that connects not real people to the organs of government, but different elements of the global legal system, each of which converges around human rights norms.[162]

The connection between democracy and human rights that derives from the understanding of the citizen as an agent and the consequent requirements for the exercise of that agency found in Thornhill is common to O'Donnell and others.[163] It also points to democracy as more than just a system of participation, but mainly a system of inclusion for which elections, and legislatures cooperate with international norms. National and international courts are provoked by social movements and by transnational agencies, all to promote continuous and comprehensive inclusion through access to human rights.

However, if one carefully examines the historical backgrounds Thornhill explores, it is possible to suggest that classical political rights are more important as a defining characteristic of democracy for him than one would assume by analyzing exclusively his theoretical framework. His assessment of different democratic stages in the United States, United Kingdom, Russia, South Africa, and Colombia reconstructs how international human rights infiltration was determinant to producing democratization in the form of political enfranchisement. On his account, the cosmopolitan/universalist/rights-based element would be part of democracy consolidation only if and inasmuch it contributes to the expansion of suffrage, electoral turnout, and so forth. Our proposal distances itself from his in two aspects. First, the cosmopolitan/universalist/rights-based factor of democracy draws legitimacy not only from human rights, but also from other types of agendas, projects, and programs based on *"international consensus"*. Second, democracy is founded and evolves by the constant interaction of its dual factors, but what determines if it is progressing or decaying is not only the capacity of the cosmopolitan/universalist/rights-based element to generate improvements or advances in local political participation. For our democracy assessment, side by side with civil rights, and political enfranchisement is the ability of the cosmopolitan/universalist/rights-

[161] Ibid 276
[162] Ibid 216
[163] O'Donnell and others, *The Quality of Democracy: theory and applications* (10)

based vector to make the inclusion/exclusion scale bend to higher levels of attainment of social, and economic rights.

We agree that international human rights became a source of democratic legitimacy itself. Yet, we have reason to believe that the cosmopolitan/universalist element of democracy relies upon other legitimizing concepts. Indeed, democracy is a rights incubator; successful policies tend to be translated into rights and gain a life of their own, not depending on politics to reproduce themselves. Rights are the language through which contemporary democracy manifests itself and they are often brought to the fore by international conventions, multinational organizations' reports, and guidelines, transnational organisms rankings, indexes, and maps. But some rights and legal reform packages stem their legitimacy from the "economic developmental" agenda, or even from "international scientific consensus", for instance. We have already mentioned how the international developmental agenda entered national democracies imposing constitutional revisions, institutional reforms, and legal overhauling to decrease the size of the State under the discourse of Rule of Law improvement, collective rights to efficiency, and good governance in public administration. Although articulated in the form of legal reforms necessary to give concreteness to diffuse rights to better management of public resources, accountability of public officials, the worldwide adoption of judicial independence monitoring agencies, public-private partnership legislation, and administrative reforms found their legitimizing basis in the idea of *"economic development"*. Similarly, during the COVID-19 pandemic, we saw the adoption of unseen legal restrictions on freedom of circulation, and business, based solely on what was regarded as the *"international scientific consensus"* on the matter. Although all those international inputs were translated in the form of law, speaking the *"rights vernacular"*, their source of legitimacy was economic developmental theory or scientific findings. It is to say that the cosmopolitan/universalist/rights-based element of democracy can carry within itself inputs that present themselves in the form of legal reforms, principles, and *"rights"*, but with different ultimate sources of legitimization in the international forums. This assertion is decisive for the comprehension of the legitimizing turn the international anti-corruption regime went through, as will be discussed in Chapter 3, and its influences on Brazilian democracy, the subject of Chapter 4.

Another important aspect of the analysis of Brazilian democracy to come is that our assessment of democracy enhancement or debacle reflects on how the cosmopolitan/universalist/rights-based inputs influenced legislation, judicial adjudication,

social mobilization, and participation at the national level but does not stop at that. Of course, if the cosmopolitan/universalist/rights-based element can produce political enfranchisement, increment participation, and representativeness of excluded layers of the social fabric, that is a major sign of democracy ripeness. But, as Kennedy adverts *"people in the Global North and the Global South understand the nature of global power and order quite differently"*.[164] So, if the institution of *low intensity* or *minimalist* democracy requirements was enough for the triumphalist views on the spread of liberal constitutional democracies around the world, the recipients of that political mode might not be as optimistic or satisfied at that point. Maybe, from the standpoint of the Global South, the expectation towards the process of constant penetration of cosmopolitan/universalist/rights-based contents in forming, shaping, influencing, and driving local constitutionalism and democracies is that it can promote inclusion.[165] So, regardless of its source, if a constitutional provision or a piece of legislation comes from international standards or class struggle, social mobilization, what ultimately deems it as promoting or menacing democracy is its capacity to generate inclusion/exclusion to/from rights, be they civil, political, economic, social, or environmental. Inclusion for the purpose of rights fruition is not necessarily conducive to political mobilization, electoral registration, or political parties' success. If a policy produces an increase in poor families' wages and improvement in their capacity for consumption, it brings inclusion and democracy enrichment in the form of inclusion, even if those families decide never to vote again. If a healthcare judicial decision impacts the number of deaths by childbirth it promotes inclusion in the form of not dying before 5 years old, even if the children's beneficiaries of such decision would not have any political rights until they become 16 years old. The cosmopolitan/universalist/rights-based factor of democracy can result in advances by promoting more political engagement and participation in elections, plebiscites, referenda, and courts litigation, but it can also make society more democratic by promoting inclusion.

Whatever their implications, these last remarks do not unsettle the fact that contemporary democracy hinges on the constant interaction between the inputs drawn from transnational legal regimes, whatever their source of legitimacy might be, and its national participatory element. That is how contemporary democracy came about and it is how it evolves wherever you look, including in Brazil, which is what we are about to see.

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[164] David Kennedy, 'The Mistery of Global Governance' in J. Dunoff and J. Trachtman (eds) *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009) 40

[165] Marcelo Neves and Kevin Mundy, *Transconstitutionalism* (Hart Publishing 2013) 292

1.4 Democracy in Brazil: The Dual-Factor Democracy in Processes of Inclusion/Exclusion

It is fair to say that Brazil had not experienced any relevant democratic continuity until the Constituent Assembly was installed in the middle 1980s. After the general elections for the constituent assembly of 1933/34, Getúlio Vargas became constitutional President for another term, implanting the *Estado Novo* through an auto-*coup d'état* in 1937. It was a regime with no mechanisms of checks and balances between the branches of powers. In fact, during the following nine years, both houses of the National Congress were closed and elections were suspended. The absence of any political rights and the seizure of basic civil rights related to freedom of the press, for example, jeopardized an already stumbled draft of citizenship. The 1946 Constitution initiated a period of democratic tendencies, with periodic elections disputed by a plurality of political parties, reasonable levels of access to civil rights, and to independent judicial courts. The experience did not last long. In April of 1964 another *coup d`etat* occurred, this time by the military forces, which installed a regime of exception that endured until the 1986 Constituent Assembly.

During the military dictatorship, a hybrid political regime, with periodical elections to local assemblies and limited seats in the National Congress was put in place back in 1974. The *anos de chumbo* (metal lead years), in which the press and artistic expressions were subject to strong censorship, public gatherings were repressed by armed forces with arrests and violence, were left behind and the opposition progressively gained political power and influence. In the 1978 and 1982 elections, with the support of civil organizations like the Brazilian Bar Association (OAB), the Brazilian Press Association, the National Conference of Brazilian Bishops (CNBB), and an already vigorous unionist movement present in the growing urban peripheries, the MDB (Brazilian Democratic Mobilization) party imposed large and strategical defeats to the incumbent party. Battered by the worldwide petrol crises and the economic depression that came along with it, the backlashes from the military rulers were incapable to prevent massive popular gatherings in favour of the *"Diretas-Já"* movement, which claimed for general direct elections for President. The rising mobilized working and artistic classes, different social movements, interest groups, and broad media coverage realized their ideal of popular participation in the constituent assembly. As Barbosa poses, *"even if it was not possible to identify some common claims, what brought together all the new actors was their effort to participate in the process, to influence the works, present their arguments..."*. The 1988 Constitution was considered democratic because *"the civil society played a central role in the*

gestation of the new Brazilian constitutional order. An unprecedented role in our constitutional history".[166]

As important as the national-political-participatory element was to institute democracy in Brazil, it is undeniable that foreign aspects contributed to the transition from the military regime to the constitutional democracy. With the Cold War coming to an end, American foreign policy interest in spreading electoral democracy and *"freedom"* to Latin America outweighed concerns with Brazil leaning towards the Soviet Union or Cuba, which removed the only international support the dictatorial regime had. International political isolation was accompanied by economic stagnation, price inflation out of control, and the absolute ineptitude of the military to deal with a crisis that deemed the 80s as *"the lost decade"*. To that scenario of absolute exhaustion of the pillars of the dictatorial regime, you add a profound social discontentment expressed not only as a claim for more participation but also for rights. Barbosa mentions two events that put on display the aspiration for a new Constitution that preceded and fuelled the constituent moment. The V National Conference of the Bar Association, occurred in 1974, entitled *"The lawyer and the rights of men"*, and the National Conference of the Working Class, in 1981, which produced a report called *"Elaboration of a Constitution that guarantees the Fundamental Rights of the Working Class".*[167] In his assessment of the 1988 Constitution, Silva says that democracy *"is the regime of general guarantees for the realization of men's fundamental rights".*[168] Barroso concedes that *"the virtuous face of globalization"* after World War II was the development of a *"universal ethic"* around the idea of human rights, which is similar to what Neto and Sarmento call *"ethical cosmopolitism"* regarding human rights.[169] Having in sight the historical response given by Latin American constitutionalism to international human rights, Gargarella affirms that, in the last decades, they came from a place of marginalization to *"forge a new direction for public life in the region".*[170] The cosmopolitan/universalist/rights-based push for the adoption of democracy and human rights echoed in the local/political/participatory claims for a change, a rupture, a new Constitution, more political participation, the enjoyment of civil liberties, for access to social, economic, and cultural rights. The coupling between the two constitutive elements of contemporary democracy created a social boiling point, an amount of pressure for citizenship that was more

[166] Barbosa (44) 242-3
[167] Ibid 151; 169
[168] Silva (37) 132
[169] Barroso (40); Cláudio P S Neto and Daniel Sarmento (39)
[170] Roberto Gargarella, *Latin American Constitutionalism,1810-2010: the Engine Room of the Constitution* (Oxford Scholarship Online 2013) 169

than armed forces that did not have economic resources to fuel tanks could handle, and that is how Brazilian democracy came about and has evolved since then.

Nevertheless, because they reject the sceptical, elitist continuity discourse, they engaged in the development of a constitutional theory of democracy that relies heavily on *"popular sovereignty"*, *"general will"*, and *"rule by the people"*. The most influential constitutionalists in Brazil tend to understand international commitments to human rights as limitations or constraints on the manifestation of the *"constituent power"*.[171] Their idea that the *"constituent power"* cannot deny human rights, offend other nations' independence or self-determination, or harm supra-positive principles of justice try to create a zone of prohibition, matters where a constitution cannot go without denying its legitimacy, something like a domestic version of *jus cogens*. They fail to note, however, how historically contemporary democratic constitutions were built upon the inextricable idea of a political regime based on the protection and access to human rights. This entanglement between local political enfranchisement and the universalist assumption to protect the rights of men is foundational to French and German constitutionalism and became part of older constitutional traditions such as the British and American for them to still be considered democracies in our days. Likewise, as seen, the Brazilian 1988 Constitution and the democratic cycle it flags did not happen by the sudden irruption of a *"constituent power"*, but by the incremental coupling of historical facts, social mobilization, popular pressure, international geopolitics, and appropriation by Brazilian society of their entitlement to universal human rights that go way beyond the right to vote.

Universal suffrage, with the extension of the right to vote to the illiterate, was enacted by a constitutional amendment approved in May 1985. Civil human rights such as freedom of manifestation, expression, and thought were, in practice, exercised by different social movements before the new national constitutional assembly was installed in 1987, as shown by the massive gatherings during the *"Diretas-Já"* campaign. When Brazil conceived its 1988 Constitution with civil, political, and participatory rights enshrined in many of its precepts, social inequalities were deep, and the levels of regional, ethnical and social exclusion were so overwhelming that it is difficult to assert that it was a democratic society right from its approval. According to Ulysses Guimaraes' speech, given on the very same day the *"Citizen Constitution"* came into force, by that time, more than 30 million Brazilians were illiterate, which corresponded to an *"outrageous 25% of the population"*. Not without a reason, Article 3rd of that very same Constitution, sets out as the nations' main objectives the consolidation of

[171] Canotilho (41) 81; Cláudio P S Neto and Daniel Sarmento (39) 224-5

"a free, just and solidary society", the eradication of *"poverty and substandard living conditions"*, the reduction of *"social and regional inequalities"*, and the promotion of *"the well-being of all"*.

As shown by Guilhot, the *promotion of electoral democracy* was part of an American propaganda strategy in which the periodicity of elections and freedom of expression, manifestation, or press was highlighted while underachievement in health care, economic and ethnic inequality were relegated to discussions about governance performance.[172] O'Donnell and others say that democracy theory produced in the developed world tends to consider the universalization of political rights as the last step of the journey towards democratization because minimum standards of social rights and the homogeneous distribution of the State's authority over the territory are considered given facts or simply taken for granted.[173] Indeed, although European first welfare experiences date from before the World Wars[174] being a precondition for the flourishing of democracy throughout the continent, economic and social rights are often neglected or have a secondary role in some European initiatives to assess democracy, such as the Global State of Democracy, the Swedish V-Dem (Variaties of Democracy), or The Economist Intelligence Unit Democracy Index. As for Latin America, the turn to constitutional democracies in the late XX Century had to deal with a different quest.

Campbell's analysis of Brazilian democracy shows that Brazil has above-average levels of political freedom, considerably higher than China and Russia. It also demonstrates that the GDP per capita is above Latin America and Asia averages, but the Country underperforms strikingly in income equality in a display that the wealth distribution system does not follow from wealth increase in Brazilian democracy.[175] Lauth would propose that the possible trade-offs between dimensions of freedom and equality in Brazil portray Brazilian democracy's *"libertarian profile"*, while we would say it is evidence of our democratic experiment failures in fulfilling its vocation: generating inclusion and equality. Here we align with democracy theories such as those proposed by O'Donnell, Huber and others, or Beetham in the sense that minimum standards of food security, access to drinkable water and healthcare are constitutive

[172] Guilhot (9)

[173] O'Donnell and others, *The Quality of Democracy: theory and applications* (10) 47

[174] In Germany, pension systems and other specific social security schemes were in place since the Bismarckian Empire, influencing, among others, the French welfare system. In Britain, beginning with the 1905 Unemployment Workman Act and the 1911 National Insurance Act, the whole network of social rights was enacted by 1948, with two new National Insurance Acts and the creation of the NHS – National Health System in 1946. See Whelan & Donnelly (14) 927.

[175] Campbell (12) 155-1

elements of a democracy. Even if one considers that democracy is strictly about participation in elections and civil liberties, there must be a dignity baseline below which political and civil rights just do not make sense because people are not agents, they are sub-citizens. In other words, the most recent Brazilian democracy was founded and has been evolving since the mid-1980s by the coupling of international influences and its participatory procedures and institutions. That interaction is the subject of all the Chapters to come, but its outcome for democracy cannot be limited to whether it increased political participation, or generated electoral changes, it must add to the capacity of those cosmopolitan/universalist/rights-based inputs to generate inclusion.

After the 1988 Constitution came into effect, there was no relevant change in the set of political rights provided by Brazilian legislation. The electorate increased by 23,41% between 2000 and 2010, reaching 77% of all Brazilians in 2010, which can also be explained by the change in the age pyramid, with a larger concentration of the population in older age bands, for whom electoral registration is mandatory, and a considerable decrease of the population under 19 years old. The steady pace of electoral registration, following *pari passu* the demographic changes over time, obviously does not mean that the Brazilian democracy has stayed the same for more than 30 years. The journey to the construction of citizenship and democratic consolidation in Brazil did not end in the 1988 Constitution; 1988 was its beginning. The difference is that, if in developed countries democracy assessment implies electoral rights and basic civil liberties because minimum social living standards are considered given facts or simply put out of the equation, in the realities of developing countries democracy has to be perceived differently.

As Karl presents it (Karl, 2004, p. 193):

> (…) in countries where large parts of the population still are not ensured a minimal standard of living or where significant sectors are frustrated due to relative inequalities, democracy tends to be defined in socioeconomic terms (as gains in the standard of living or "progress"), and a positive cycle is possible only to the extent that particular governments "deliver". When the attitudes and beliefs of ethnic minorities (or majorities in the case of some countries) are factored in, visions of democracy become even more complicated. For example, democracy can mean "coming together", "agreement", "a spirit of solidarity", or "doing what we need to survive", which is far cry from notions of electoral competition, alternation in power, or elections as conceived of by a political class or international organizations promoting democracy.[176]

The evaluation of the *"quality of democracy"* in Brazil needs, necessarily, to address governance performance regarding the provision of social rights and its repercussions not only

[176] Terry Lynn Karl, 'Latin America Virtuous or Perverse Cycle' in G. O'Donnell, J. V. Cullell and O. M. Iazzetta (eds) *The Quality of Democracy* (University of Notre Dame Press 2004) 193

in political or participatory aspects but also for specific and crucial aspects of inclusion in the public sphere. That is the framework that guides the following Chapters: fragmentary, pulverized, plural, cosmopolitan/universalist rights regimes inputs, influences, constraints, pushes by one side and their counterpart national, domestic, internal political/legal repercussions by the other. Their capacity of generating citizenship enhancement in both ways, political participation, and inclusion as signals of democracy improvement. The detrimental interaction between the cosmopolitan/universalists and the local/participatory will also play a part as a possible explanation for cycles of exclusion and democratic decay. The research hinges on the assertion that if the two foundational and constitutive elements of democracy are separated or if one obliterates the other, the coupling ceases to exist, and democracy perishes. Democracy is not the sole dance of one partner, nor the other, but the continuous dance of them together! The next chapter is an invitation to watch how that dance evolved in Brazil in the last 30 years.

Chapter 2

International Human Rights and Democracy in Brazil: The Contributions for the Democratic Consolidation

Introduction

During the transition from the military regime to democracy that culminated with the promulgation of its new Constitution, Brazil ratified the Convention on the Elimination of All Forms of Discrimination against Women in 1984.

In the first four years that followed the enactment of the Constitution, Brazil ratified the Inter-American Convention to Prevent and Punish Torture, the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment, the UN Convention on the Rights of the Child, the very International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the American Convention of Human Rights.

The 1988 Constitution states in article 4that Brazil would follow the principle of human rights prevalence in its international relations. The Constitution also brought an innovative clause of openness to human rights set forth in international treaties. Amendment 45 to the Constitution, passed in 2004, reinforced the constitutional commitment to international human rights law, granting human rights treaties supra-legal/constitutional *status*. This suggested that Brazil might adopt of a *"block of constitutionality"*: that is, a system of higher norms, incorporating both the original Constitutional text and human rights provided by the international law. According to the innovative constitutional mechanism (Article 5, Paragraph 3), once international human rights treaties pass through the same legislative procedure prescribed to the enactment of Constitution amendments - 3/5 of votes in two turnouts in each house of the Parliament – they are incorporated as constitutional amendments themselves, they are integrated into the Brazilian constitutional *corpus*.

Considering that the 1988 Constitution is a democratic milestone in Brazilian history, Brazil`s full integration into the international human rights movement can be considered contemporary to the process of democratization. Moreover, human dignity is enshrined as a core principle for both, the Brazilian Constitutional system inaugurated in 1988 and the human rights international norms. As we have argued in the last Chapter, this coordination suggests that Brazilian democracy was, decisively, longed for by the *"people"*, and pushed by societal

mobilization, but not only. All the movements that wished for democracy during the constituent moment were willing to participate, and to vote, but were also craving for rights, the right to education, the right to healthcare, the right to recognition, and protection. Most of these rights claims were built through a dynamic in which societal needs meet international movements and are synthesised in the form of multinational organisms' declarations and agendas, legal norms and court decisions reverberating back into the local, and national domains.

The Constitutional integration to international human rights integration set forth in the normative, formal levels raises a question of how the interaction of international human rights and the Brazilian democracy effectively worked out in the years that followed the 1988 Constitution. In other words, how have international human rights affected democracy in Brazil?

In the previous chapter, we stated our endeavour to find ways to evaluate Brazilian democracy's achievements and shortcomings. We have also highlighted that our analysis would focus on the specific challenges the Brazilian society had ahead of the promulgation of the 1988 Constitution, which persists today. As seen, our assessment covers the existence of periodic elections with universal suffrage, and due process of law guarantees. However, it goes beyond those political and civil rights to address social, economic, environmental, and intersubjective rights that provide the basic conditions of possibility for any meaningful citizenship.

We proceed from the consideration that certain levels of exclusion and deprivation are conducive to generalized disenfranchisement, making approaches that equate democracy with electoral participation incomplete. We adopt a functionalist view according to which, in face of the global society and the infinite links, relations, and entanglements between national law, international treaties and covenants, multinational companies' pressures, and transnational influences, the sources of law legitimization are equally diverse. Sometimes, to be deemed as democratic, the law will rely on the political support of a "people", "nation", or correlated collective entities. On many other occasions, the law is considered legitimate as it endows people with human rights necessary to the exercise of citizenship, or, alternatively, it harbours its legitimacy on international managerial, economic, or scientific consensus.

Democracy and citizenship certainly involve the capability to participate in elections consciously, and freely, but, especially in the Global South, that comes as a development of the free fruition of rights to food, health care, educational opportunities, and the right to not be extinguished. As stated in the First chapter, in order to identify the democratic consequences of international human rights in Brazil, we aimed exactly to assess four of those basic rights:

the right to food and the combat against extreme poverty; the right to health and the public health care system; the right to racial equality and access of ethnic minorities to public universities, and indigenous population's recognition and protection.

As explained in the introductory chapter, the first two subjects are related to social rights of which huge portions of the Brazilian society have been historically deprived. The fight against poverty, reduction of social inequalities and access to health care are issues that affect a considerable proportion of the population, affecting their capacity for effective participation in the public sphere and for promoting the consolidation of democracy in Brazil. By the other hand, black community access to public funded universities and recognition and protection of indigenous peoples are analysed to cover issues that are often neglected by public attention, and which are of crucial importance for the Brazilian society to overcome historical inclusion deficits and democratic obstacles.

The democratic evaluation for each topic follows the same analytical framework. Domestic policies, legislative initiatives, international legal regimes inputs, transnational NGOs reports, multinational organisms' rankings, and maps and their reciprocal relationships are explored to highlight how the regimes prompted the development of policies, statute changes, and judicial adjudication. Democracy is, then, assessed according to two-fold criteria: outcomes of those regimes in terms of domestic participation and in terms of inclusion and access to human rights.

As we may see in the following sections the international human rights influence has been present in the process of citizenship construction in Brazil from the mid-1980s constitutional movement forward. The combination of constitutional rules with international human rights regime inputs resulted in both, more opportunities for participation and rights attainment, and increased levels of inclusion that changed profoundly Brazilian society. In all areas observed, Brazil has become considerably more receptive to the participation and engagement of people and ethnic minorities that were just deprived of life in society before. Nevertheless, the processes by which it happened are very diverse and present different features according to the subjects analysed.

Regarding the rights to food and social assistance, it was possible to identify a cycle of legitimization between state action and international norms, targets, declarations, or transnational institutions` indicators and assessment. The international human rights agenda infiltrated state policies in a more subtle and fluid manner. Its norms, protocols, goals, and reports provide a source of rationales for the action of state officers, representatives, and agencies. Although somewhat indirect, the linkage between the targets, goals and prescriptions

found in international documents and the policies implemented is perceived in a common rhetoric of mutual reinforcement.

Conversely, if we consider the public health care system, it is possible to identify much stronger formal institutional connections between WHO initiatives and offices and the policies developed at the national level. The strength by which access to health care was materialized as a right is shown by the fact international regimes' integration overcame the mutual "principle-guided" rhetoric to materialize into concrete joint projects and technical agreements, and by the increasing participation of the health care system users in local councils and in judicial litigation on causes related to the right to health issue.

On the other hand, minorities` rights, such as access of black students to publicly funded universities or recognition and protection of indigenous people, followed a different path. The initial approach for international human rights support did not come from national political or representative bodies but from diverse initiatives from different stakeholders. The chain of cooperation between universities, social movements, international scientific community members, NGOs and international courts created the needed pressure to prompt state action. Judiciary participation was late in the case of affirmative action and somehow dubious and resistant to international human rights documents in the case of indigenous people`s right to land.

The main conclusion of this Chapter is that international human rights have, in general terms, contributed to increase the levels of inclusion, the enhancement of citizenship and the consolidation of democracy in Brazil through different means and actors. While political and representative branches of power tend to continuously and circularly extract legitimacy for their action from the international human rights apparatus, the participation of the judiciary in those processes vary and tend to absorb international norms and decisions normatively.

2.1 The Right to Food, Fight Against Poverty and Hunger, and Conditional Cash Transfer Programs

The 1988 Constitution states as one of its fundamental objectives the *eradication of poverty and substandard living conditions*. It also establishes, in its article 6, among others, the social rights to *health, food and housing* and, in the letter IV of the same article, a minimum monthly wage capable to cover expenditures with *"housing, food, education, health and etc"*. Those constitutional provisions are very similar to what Article 25 of the Universal Declaration

of Human Rights says about everyone`s right to an *"adequate standard of living"* that guarantees access to health care, food, clothing and housing, and so forth.

In 1993, the UN World Conference on Human Rights resulted in a Declaration that assured the human right to minimum standards of living conditions, including access to food. Although the UDHR dates from 1948 and Brazil assumed correspondent social responsibilities in its Constitution and before the international community in 1993, in 2005, the Brazilian Gini coefficient was 0.548 and 59.4% of the population had an income of up to the minimum legal wage, out of which 12% were in the poorest band, with monthly income *per capita* below ¼ of the minimum wage, 20.4% receiving between ¼ and ½ of the minimum legal wage, and 27% in the band between ½ and 1 minimum wage salary *per capita*.[177] In 1995, the UN promoted a World Summit for Social Development in Copenhagen, which the final Declaration acknowledges the urgency to *"address profound social problems, especially poverty, unemployment and social exclusion"* throughout the world. The States that attended the Summit also agreed on a commitment to *"eradicate poverty"*.

Also in 1995, some regional initiatives of conditional cash transfer programs started to take shape in big cities of São Paulo State. In the Federal District, a program called *"Bolsa Escola"* (School Allowance) set a conditionality related to primary school attendance by the children of families included.[178] At national level, the social protection initiatives were still very connected to the idea of *"safety nets"*, with the State action towards the poorest extract of the population being intermediated by NGO`s, and charities in general.[179]

The year 2000 was marked by the UN Millennium Declaration, which had very specific targets related to poverty eradication like the one to halve, by 2015, *"the proportion of people who suffer from hunger"*. It is symbolic that the first of the eight Millennium Development Goals (MDG) was exactly to *"eradicate extreme poverty and hunger"*.

In 2001, the World Bank put poverty fight in its developmental agenda, adopting a purposely holistic view on situations of social vulnerability that would guide States to develop their strategies and arrangements to fight poverty, a tool called *"social risk management"*.

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[177] IBGE, *Síntese de indicadores sociais: uma análise das condições de vida da população brasileira* (Instituto Brasileiro de Geografia e Estatística IBGE 2016)
<https://biblioteca.ibge.gov.br/visualizacao/livros/liv98965.pdf> accessed 08 March 2020 91-3

[178] Diego Sánchez-Ancochea and Lauro Mattei, 'Bolsa Família, poverty and inequality: Political and economic effects in the short and long run' (2011) 11/2-3 Global social policy 302

[179] Romulo Paes-Sousa and Jeni Vaitsman, 'The Zero Hunger and Brazil without Extreme Poverty programs: a step forward in Brazilian social protection policy' (2014) 19/11 Ciência & saude coletiva 4352

The Constitutional Amendment proposal 21 was also presented before the Brazilian Senate in 2001. The proposition only intent was to add the word *"food"* among the social rights listed in Article 6 of the Constitution and its main reasoning was the Brazilian vote for the adoption of the 1993 Vienna Declaration of Human Rights and the recognition of the right to food during that international conference. The proposal became Constitutional Amendment 64, from 2010.

Also in 2001, Brazil took some decisive steps to tackle poverty at a national level. The Federal Government created two different conditional cash transfer programs, *"Bolsa Escola"* (School Allowance) and *"Bolsa Alimentação"* (Alimentary Allowance). The first was mirrored in the Federal District pioneer initiative, with similar values and conditionalities. The second was related to compliance with health assistance protocols regarding childhood vaccination and pregnancy medical assistance.[180] More than that, the Federal Government proposed a Draft Bill to create the Poverty Fight and Eradication Fund, formed by part of the public revenue and donations, of which 85% should be applied to families and individuals living below poverty standards.

It would be very simplistic to think that the sequence of international solemn declarations against poverty and hunger, the mobilization of a transnational powerhouse like the World Bank towards this same subject and the institutional developments of the same nature in Brazil briefly summarized here are just a chronological coincidence. As Barrientos and Hulme affirm:

> The International Development Goals, Millennium Declaration in 2000 and subsequent agreement on the MDGs has focused the attention of international organizations, poor and rich governments and the citizens and celebrities of Europe and North America on poverty and vulnerability reduction more than any other global initiative in the past.[181]

Brazil`s adherence to this global humanitarian agenda might have been strategic at its primary stages, and it might have even developed some original mechanisms. Yet, it certainly was not independent of international influences, as some studies would suggest.[182] The principles that informed the international commitments assumed on attacking poverty and eradicating misery were present in the policies and laws mentioned above. As said, the very

[180] Romero Cavalcanti Barreto da Rocha, 'Programas condicionais de transferencia de renda e fecundidade: Evidencias do bolsa familia' (2018) 22/3 Economia aplicada 6

[181] Armando Barrientos and David Hulme, 'Social Protection for the Poor and Poorest in Developing Countries: Reflections on a Quiet Revolution: Commentary' (2009) 37/4 Oxford development studies 443

[182] Bernhard Leubolt, 'Institutions, discourse and welfare: Brazil as a distributional regime' (2013) 13/1 Global social policy 76

proposal to amend the constitutional text to add the word *"food"* to list of social rights nominated in Article 6 of the 1988 Constitution was expressly inspired by the international commitments assumed by the Brazilian State before the international community, although it can be argued that the amendment, by itself, did not trigger substantial unfolding, but was more of a rhetorical manoeuvre to signalize an unspecific will to collaborate or comply with the international standards on the matter. One way or the other, international human rights activists, and organizations discourse were very concentrated on an agenda that was impossible to oppose. Fight against poverty invoked a sense of human solidarity, it appeared like a compelling international consensus that gave propulsion to an increasing sum of efforts in the same direction: outreach the poorest, human beings living below the most basic dignity standards.

In 2003, Brazilian government launched the *"Fome Zero"* (Zero Hunger) Program, aiming to boost State intervention against famine. In another striking example of how the national and international initiatives to fight poverty were discursively aligned, an official report of the program asserts that *"the Fome Zero and the first Millennium Goal – Eradicate Hunger and Misery – symbolize and summarize one unique and comprehensive emancipation policy of inclusion and social justice".*[183]

The most impressive achievements in attacking poverty and misery happened after all different policies were condensed in one major conditional cash transfer program. Law 10.836, from January 2004, created the *"Bolsa Familia"* (Family Allowance) rationalizing institutional action under the management of one single Ministry of Social Development and Hunger Combat.[184]

In 10 years, the number of households reached by the program more than doubled, going from 6.572.060 to 13.980.524 families from January 2005 to January 2015. In the same period, the public expenditure with the program had an even sharper increase, varying from R$ 430.841.390,00 to more than R$ 2.342.594.866,00.[185] Studies register that *"Bolsa Familia"*

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[183] MDS, *Fome Zero: Uma História Brasileira* (Vol. 3 Ministério do Desenvolvimento Social e Combate à Fome 2010) <https://www.mds.gov.br/webarquivos/publicacao/Fome%20Zero%20Vol1.pdf > accessed 13 March 2020 169

[184] Jeni Vaitsman, Gabriela Rieveres Borges de Andrade GR and Luis Otavio Farias, 'Proteção social no Brasil: o que mudou na assistência social após a Constituição de 1988' (2009) 14/3 Ciência & saúde coletiva 736

[185] Ministério da Cidadania, *Programa Bolsa Família - quantidade de famílias e valores (até outubro/2021)* (Secretaria de Avaliação e Gestão da Informação) <https://aplicacoes.mds.gov.br/sagi/vis/data3/v.php?q[]=r5u5ZNnryaG4emVqrWZ9f2RdiJxlmm9kiqx9YWx5sZzfmL7Cm4y9wqClo5TJ7rJvsLqqn7R0wcCskpKcpt%2BqVr%2FhrKqog6ms7p6IwqmivJxu3q%2BowraIp7G1WLWaYbCvqpJ32JvPq1Od3bOTrbyZmd%2BauoxnTcvJmNhdpczwu5hkiJeg2K%2B5iHGbzM6Y3KaWjLuvmpu5qZ7Yn667Y1%2BAgZjWsJh96cKgqGiaqN1ibstyk7jNps94mb7nwJl3g5ub5ayyiXKgzM6vsJ6gICi5nZ27

became an important source of income for ¼ of the total Brazilian population, answering for a considerable share of improvement on inequality levels Brazil experienced in the last decades, impacting a 44% reduction of the proportion of people in poverty between 1990 and 2009.[186]

In fact, although the aforementioned CCT program cannot be identified as its main cause, it is worthy to notice that the Gini coefficient dropped from 0.548 in 2005 to 0.491 points in 2015. As said, after *"Bolsa Familia"* program initiated and was nationwide structured, it was combined with a sustained and incremental increase in the real consumption capacity of the minimum legal wage, and the expansion of the *BPC – Benefício de Prestação Continuada* (Continuous Benefit), which is a lifetime non-contributory social insurance pension that covers the elderly and disabled. With all those policies put in place together, the proportion of the population with a monthly *per capita* income below the minimum legal wage fell from 59.4% to 57.3% in 10 years. The most significant changes happened, though, within that group of low income *per* capita. The poorest band of the population with monthly income *per capita* below ¼ of the minimum wage fell from 12% to 9.2%, the 20.4% that had monthly income *per capita* between ¼ and ½ of the minimum legal wage in 2005 became 17.8% in 2015, while the band between ½ and 1 minimum wage salary *per capita* increased from 27% in 2005 to 30.3% in 2015.[187] These data show a gradual, but progressive ascension of fringes of the population from a situation of extreme poverty and, especially, food insecurity. Official data show that in 2004, 39.9% of the population were living in food insecurity situation, with 7.7% dealing with severe food insecurity, and 14.1% subject to moderate food insecurity. Those figures plummeted until 2013, when 25.8% of the population were still under food insecurity situation, but the percentage of severe and moderate food insecurity more than halved to reach 3.6% and 5.1% of the population, respectively.[188]

This perfunctory description of *"Bolsa Familia"* CCT program's empirical outcomes helps to unveil another interesting interaction between national and international spheres of poverty and social inequality combat: the recurrence to international community approval as legitimation source for State's policies. The program official propaganda folder mentions that

VXzep7K0oJDAJNTcppTQnqOVqLenWs2owa%2BjTanGo8uwpr7fvFeSqaGp61maEeCRwNBTzqymfb2yoqGu%2BOfcorzBs52S> accessed 18 May 2022

[186] Diego Sánchez-Ancochea and Lauro Mattei (177) 306; Sergei Soares, 'The efficiency and effectiveness of social protection against poverty and inequality in Brazil' in Midgley J and Piachaud D (eds) Social Protection, Economic Growth and Social Change (Edward Elgar Publishing 2013); Flávio Eiró, 'The Vicious Cycle in the Bolsa Família Program's Implementation: Discretionality and the Challenge of Social Rights Consolidation in Brazil' (2019) 42/3 Qualitative Sociology 38

[187] IBGE (177) 91-3

[188] Ibid 38

"Bolsa Familia" was one of the main factors for the achievement of the first Millennium Development Goal and contributed to Brazil's exclusion from the FAO - UN Food and Agriculture Organization Hunger Map. An official report on the 10th anniversary of the *"Bolsa Familia"* proudly presents the fact that Brazil received the 2013 Award for Outstanding Achievement in Social Security, an international prize granted by the International Social Security Association (ISSA) for the measures taken to tackle poverty and social inequality.[189] Another official source explores the benefits of mutual support between Brazilian governmental strategies to eradicate famine and social mobilization by ActionAid, an NGO that developed an index, called HungerFREE Scorecard, which pointed Brazil as the best performance in fighting hunger among 29 developing countries in 2009.[190] The 2015 UNDP Human Development Report names *"Bolsa Familia"* as one of the most successful programs of social protection around the world.[191]

By consequence, the international agenda on human rights related to dignity, eradication of poverty and misery fight and its institutional implementation in Brazil were intrinsically related in a circular, self-reinforcing dynamic. It takes effect, first, as an inspirational, principle-guided prompting force that puts the State into action, and, second, as a legitimation source for its outcomes and achievements which, in turn, motivates more investments and institutional developments. In this legitimation cycle, international human rights operated predominately in a cognitive way. The constant interaction between international instruments, constitutional and legal changes, social policies conception and international community approval witnessed here can be described as a continuous process of institutional experimentation and learning. International declarations, targets, and prizes were often recalled by police makers and legislative authorities as political commitments that must orient expectancies related to poverty fight and social inclusion within the society.

2.1.1 The Right to Food, the Fight Against Poverty and Hunger, Conditional Cash Transfer Programs, and Democracy

Even if it is difficult to identify an *"individual rights"* discourse developed before or by courts in this respect, one argument in favour of the improvement of Brazilian democracy

[189] Tereza Campello and Marcelo Côrtes Neri, *Bolsa Família Program: a decade of social inclusion in Brazil* (Ipea 2014) 9

[190] ActionAid, *HungerFree Scorecard 2010: Who's Really Fighting Hunger* (2010)

[191] UNDP, *Human Development Report 2015* (United Nations Development Programme 2015) <http://report2015.archive.s3-website-us-east-1.amazonaws.com/> accessed 21 April 2020 170

through the conditional cash transfer programs can be made once the international movement against poverty became coupled with a cycle of inclusion that led to political mobilization and the development of a new social right to a minimum income for the most vulnerable.

There are studies pointing out that the decentralized management of the *Bolsa* program makes it susceptible to local government agents' bias and preferences in households' selection, which impedes its concretization as a right, leading to mistarget.[192] Conversely, another study shows that this very same mixed selection mechanism, with a federal spatial criterion that focus on poor regions, complemented by local authorities appointment, made *"80% of Bolsa Familia funds currently reach families below the poverty line. 73% of Bolsa Familia benefits are distributed to the poorest quintile of the population, and 94% to the poorest two quintiles"*.[193] Regardless the index used to evaluate effectiveness of coverage, the beneficiaries and the benefits of conditional cash transfer policies, the Brazilian *Bolsa Família* appears among the better-targeted programs in Latin America, which is particularly remarkable considering its extension.[194]

The *"Bolsa Familia"* program also faces critiques that it would generate political clientelism.[195] The benefits would be granted in exchange for political support in a manoeuvre of incumbent politicians to capture society in a social assistance trap to stay in office for a long time. According to that claim, clientelism depends on a *quid pro quo* rationale. The recipient of social assistance can only be viewed as *clients* if the benefits are conditioned to vote. This trade-off logic erodes if there is no significant correlation between the concession of the benefit and electoral support or, in other words, if elections results have no influence in the targeting mechanism of the CCT program at all.[196]

Another evidence against the *"clientelism theory"* rise if there is not enough evidence that recipients` votes are fully determined by the concession of the benefit. Hunter & Sugiyama point that the *Bolsa* design, with overlapping check points either in local and national levels, driven by technical and impersonal criteria, helps to create a sense of independence between

[192] Flávio Eiró, 'The Vicious Cycle in the Bolsa Família Program's Implementation' (186) 388

[193] Sewall Renee Gardner, 'Conditional Cash Transfer Programs in Latin America' (2008) 28/2 The SAIS review of international affairs 179

[194] Gibrán Cruz-Martínez, 'Going beyond aggregated measures in the conditional cash transfer programs: The effective coverage of benefits and beneficiaries' (2015) 14/27 Cadernos PROLAM/USP 109

[195] Felipe J Hevia, 'Society-State relationships, citizen participation and political clientelism inside programs that combat poverty. the case of Bolsa Familia in Brazil' (2011) 57 América Latina, hoy; Anthony Hall, 'The Last Shall be First: Political Dimensions of Conditional Cash Transfers in Brazil' (2012) 11 Journal of Policy Practice

[196] Armando Barrientos and Juan Villa, "Economic and Political Inclusion in Human Development Conditional Income Transfer Programmes in Latin America" (2016) 15 Social Policy and Society

the recipients of the benefit and specific political authorities.[197] As Bohn argues, *Bolsa Família* recipients tended to support the opposition candidate when the CCT programs were first put in place and even within this group, political support varies significantly by geographic region.[198] Similarly, Kerbauy concludes that CCT programs cannot explain alone the results of the 2010 Brazilian election, once the decisions to vote in both candidates (incumbent and opposition) were just slightly different if program participants and non-participants voting intentions were compared.[199]

The clientelist critique is not only too simplistic. It is also outdated, referring to fatalist descriptions of the power relations found in orthodox Brazilian sociology, which has always seen policies related to social assistance as a cruel façade of the old authoritarian patrimonialism. Social protection policies seen through the patrimonialism lenses are nothing but a useful tool in the hands of the incumbent populist, be it Pedro II or Vargas, to prevent the beneficiaries from participating rather than enhancing their capabilities.[200] Those descriptions of democratic deficits in Brazil that rely on the traditional forms of domination exercised over the needy portion of the electorate by rural local authorities, known as *coronelism*, also often disregard empirical evidence that shows a profound change in Brazilian electorate profile. A considerable portion of the electorate is not majorly isolated in rural communities in the deep countryside like in the first half of the XX Century but is part of an urbanized working class that lives in the peripheric communities of the big cities.[201]

Nevertheless, it is possible to identify some connection between the program beneficiaries' political preferences and political actors often related to those social policies. Some studies show it linking aggregate electoral results and inequality maps. Kerbauy demonstrates that in the 2010 general election the incumbent candidate largest winning percentage coincided with the region with the largest number of *Bolsa Família* beneficiaries.[202] Sewall, by the other hand, explores how the policy was part of the campaign discourse in 2006

[197] Wendy Hunter and Natasha Borges Sugiyama, 'Assessing the Bolsa Família Successes, Shortcomings, and Unknowns' in Kingstone PR and Power TJ (eds) *Democratic Brazil Divided* (University of Pittsburgh Press 2017) 148

[198] Simone R Bohn, 'Social policy and vote in Brazil: Bolsa Família and the Shifts in Lula's Electoral Base' (2011) 46/1 Latin American Research Review

[199] Maria Tereza Miceli Kerbauy, 'Os programas de transferência de renda e o voto regional nas eleições presidenciais de 2010' (2011) 17/2 Opinião pública: publicação do CESOP

[200] Faoro (34)

[201] Fernando Limongi F and Eoin Paul O'Neil, 'Democracy in Brazil: presidentialism, party coalitions and the decision-making process' (2007) 3 Novos Estudos-Cebrap

[202] Kerbauy (199) 478

election.[203] Indeed, other study that worked with analytical data collected from surveys aimed to assess beneficiaries' perception on political institutions and principles demonstrates that while *Bolsa Família* recipients and non-recipients' peers consideration for abstract democratic values don't vary significantly. The first group tends to show more support for democratic institutions and actors immediately identified with the CCT programs, which shows reciprocity trends in political support, but no change in the perception of core democratic principles and institutions legitimacy.[204]

It is worth mentioning that there is literature that identifies the positive effects of the Brazilian CCT program in primary school attendance, consumption capacity of the beneficiary families and well-being.[205] Thus, if the CCT programs had a political impact - as some aggregate data might suggest -, without any empirical evidence of relevant correlation between individual program participation and vote, it is possibly the result of a collective decision of the poorest part of the electorate to support policies that meet their interests and needs through voting.

If the first signs of class balance brought by the consistent implementation of policies aimed to tackle extreme poverty resulted in palpable electoral outcomes, it must be seen as a step forward in the direction of a transition from a formal democracy into a social one, as proposed by Huber and others and not as a setback.[206] If the poorer part of the population, which is the vast majority, can articulate their voices in the direction of assuring their rights, this is not the characteristic behaviour of clients of a favour but of rights holders well aware of their weigh in the formation of collective will, exercising it in the most classical democratic way. Beyond the electoral effect that the cash transfer programs enacted to fight extreme poverty in Brazil might have brought to citizenry, it is necessary to point to the sense of belonging to the society the recipients were endowed by it. From oblivion and invisibility, the poor gained the opportunity to consume, and to interact in different social environments. It is possible to suggest that millions of people that were historically disenfranchised, could articulate themselves to make their "voice" heard.[207]

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[203] Sewall (193) 183

[204] Mathew L Layton, Maureen M Dounagly and others, 'Does Welfare Provision Promote Democratic State Legitimacy? Evidence from Brazil's Bolsa Família Program' (2017) 59/4 Latin American Politics and Society

[205] Rocha (180) 12

[206] Evelyne Huber and others (11)

[207] Dietrich Rueschemeyer, 'The Quality of Democracy: Addressing Inequality' (2004) 15/4 Journal of democracy 83-4

Here, we perceive the universal-cosmopolitan-rights-based element of democracy igniting the articulation of the local-popular-participatory one in a very cooperative manner. The incorporation of the international agenda on the fight against poverty and the eradication of hunger through policies and legislation brought about a cycle of inclusion that is a pre-condition for generalized citizenship. In fact, it is practically impossible to talk about citizenship when the main objective for a fifth of the population was not to die from starvation, as it was the case of Brazil in 2005. If democracy is a system not only of increasing levels of participation, but also of broad inclusion that enables people to exercise a range of political rights, it is particularly problematic to have such a huge share of the population not even nurtured properly to take part of a plural public sphere.

The elevation of more than 30.000.000 people from extreme poverty to minimal dignity standards is certainly one of the most remarkable social changes in the direction of the universalization of citizenship based on human rights the world might have witnessed in the beginning of the XXI Century and this phenomenon brought to the national political economy a part of the society that could not articulate their political preferences before.

The political ascension and strength of this new actor – the poor - can be felt through the almost *"untouchable"* status of CCT programmes in the current political scenario, regardless of the ideological orientation of governs. As said in the previous chapter, contemporary democracies are rights incubators, successful policies, developed from programmes and agendas created internationally tend to be reproduced through the right lexicon and incorporated through participatory mechanisms, such as elections, legislative changes, or even constitutional amendments. Constitutional Amendment 29, from 2020, has been already approved by the Senate and awaits voting by the Chamber of Deputies to enshrine the concession of a basic family income as a constitutional social right. CCT programs that contributed to diminish food insecurity, and poverty lifted deprived portions of the population that absorbed such policies as rights and not charity. This political empowerment means a significant improvement in the quality of democracy in a society in which the masses have been historically and systematically left out of the most important political decisions.

2.2 The Right to Health and SUS: The Universal, Decentralized and Participative Health Care System

The 1988 Constitution states in Article 196 that *"health is a right of all and a duty of the State".* In the following sections of its text, the 1988 Constitution stablishes that the health

care system should be decentralized, comprehensive and participative. The decentralization means the effective participation of all federative spheres of government in its management, the comprehensiveness indicates an assistance that starts with preventive care and reaches complex treatment and interventions, and the participative character regards to the communitarian input in decision making.

Sarlet and Figueiredo consider the constitutional highlight on the right dimension of health assistance a sign of the adoption, by Brazil, of an approach very approximate of the health care definition adopted by the WHO following the Almaty Declaration guidelines.[208] Nevertheless, in the years that followed the Constitution promulgation, Brazil faced a period of impacting economic measures adopted to contain hyperinflation and political turmoil that ultimately impeded Laws 8.080 and 8.142, from 1990, to substantially change the health care system scenario.[209]

The formal creation of SUS was incapable to shift an institutional culture still attached to the idea of a contribution-based social security system that offered health assistance only to formal workers. The real transformation only came after the extinction of the National Institute of Medical Assistance and Social Security (INAMPS) by Law 8.689/1993 and the publication of the Basic Operational Rules nº 01, from 1993 and 1996, by the Ministry of Health.[210]

Those norms brought concrete unfolding to the principles of decentralization, comprehensiveness and participation. Sarlet and Figueiredo point out that *"the budget handover from the Union to the Municipalities that reached 144 localities in 1996, became to encompass 5.539 cities in 2002"*.[211] That is a major sign of practical management decentralization by means of financial support from the national government to municipalities to enable them to better allocate resources.

The devolution of the administration of health assistance to the local sphere is palpable in figures. According to Fleury and others, 96,4% of the basic assistance and 43,4% of medium complexity procedures delivered by SUS in 2009 happened in the municipalities' health care units and 55.32% (more than 6 million) of hospital internment were under municipalities

[208] Ingo Wolfgang Sarlet and Mariana Filchtiner Figueiredo, 'Algumas considerações sobre o direito fundamental à proteção e promoção da saúde aos 20 anos da Constituição federal de 1988' (2008) 17 Revista de Direito do Consumidor

[209] Tatiana Wargas de Faria Baptista, Cristiane Vieira Machado and Luciana Dias de Lima, 'State responsibility and right to health in Brazil: A balance of the Branches' actions' (2009) 14/3 Ciência & saude coletiva 831; Armando de Negri Filho, 'Brazil: a long journey towards a universal healthcare system' in Zuniga JM, Marks SP and Gostin LO (eds), *Advancing the Human Right to Health* (Oxford Scholarship Online 2013) 3

[210] Sarlet and Figueiredo (208); Filho (209)

[211] Ibid 26

management.[212] If one thinks of comprehensiveness, it is worth mentioning that according to Castro et al. primary assistance (PA) policies such as the *"Saúde da Família"* (Family Health) Program had an expansion in family health teams (doctors, nurses and other health professionals) *"from about 2000 in 1998 (the first available data) to 42.975 in 2018"*, and increased its coverage *"from 7 million (4% of the population) to 130 million (62% of the population) people, incorporating more than 264.000 health agents and 26.000 oral health teams"*.[213]

In general terms, the combination of those attributes in the SUS institutional dynamics was accompanied by a considerable improvement in many indices related to health care in the last decades. The preventive actions made the proportion of population with at least one visit to a SUS Doctor in the last 12 months rise from 49.27% in 1998 to 69.32% in 2013. Between 1990 and 2015, life expectancy arose from 65,34 to 75,20 years, neonatal mortality decreased from 25.7 to 8.2 per 1.000 livebirths, infant mortality in children under 1 year old that was of 53.4 per 1.000 livebirths came down to 14. Mortality in children aged 5 years or younger also fell from 64.2 to 15.7 per 1.000 livebirths as well as maternal mortality ratio, which was from 104 per 100.000 livebirths in 1990 to 44 per 100.000 livebirths in 2015.[214]

In face of those results, Brazil`s health care system has been cited as a positive example of universal coverage by the WHO.[215] Likewise, the Ministry of Health has referred to the authority of the WHO`s assessments of health care systems and to its favourable appraisal to Brazilians policies such as the *"Saúde da Família"* strategy. The official report published in 2018 featuring a commemorative balance of SUS first 30 years of implementation was a co-production of the Brazilian Ministry of Health and the Pan American Health Organization, which is the regional office of the WHO.[216]

In this subject, once again, the cycle of legitimation is manifest. The Brazilian Constitution adopted a concept of health as a universal right very much aligned with WHO guidelines. This semantic convergence propelled a variety of laws and programs, which were, then, validated according to the support received to its accomplishments by the very same

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[212] Sonia Fleury and others, 'Local governance in the decentralized health care system in Brazil' (2010) 28/6 Revista panamericana de salud pública 447

[213] Marcia C Castro and others, 'Brazil's unified health system: the first 30 years and prospects for the future' (2019) 394/10195 The Lancet (British edition) 348

[214] Ibid 394

[215] WHO, *The World Health Report Health Systems Financing*: *the path to universal coverage.* (World Health Organization 2010) <https://apps.who.int/iris/handle/10665/44371> accessed 01 May 2020 8

[216] PAHO, *Relatório 30 anos de SUS, que SUS para 2030?* (Pan American Health Organization 2018) <https://iris.paho.org/handle/10665.2/52517> accessed 05 May 2020

international organisms. If that aspect of the international human rights regime influence over the Brazilian health care system is somehow similar to the way the social protection, especially the CCT programs, were generated from and integrated to the international humanitarian agenda, it is possible to identify that the international human rights movement and Brazilian official agencies liaison around the concretization of a universal right to health assistance went a little further.

The discursive and rhetoric alignment was concretized in the form of institutional cooperation. The international organization and the Brazilian government have joined their efforts through about 70 technical cooperation agreements that reach all spheres of federative authorities, like the States of Espírito Santo, Pará, and Tocantins, and the Municipalities of São Paulo, and Florianópolis. Maybe one of the most emblematic examples of the intense cooperation between Brazil`s Health Care agencies and the WHO was the implementation of the *"Mais Médicos Para o Brasil"* (More Doctors for Brazil). The program was focused on the nationwide spread of primary assistance through the allocation of doctors, including foreigners in communities that are not particularly attractive to Brazilian doctors' ordinary workforce offer. The agreements between Brazil and other nations, especially Cuba, were totally intermediated by the WHO and the Pan American Health Organization. According to a WHO report on the subject, it mobilized more than 20.000 Cuban doctors, increasing the coverage of primary care assistance from 62,7% to 70,4% of the whole population, reducing avoidable hospitalizations from 45% to 41% in three years. The same report shows that 63% of that workforce went to the poorer municipalities in the northeast region of the Country. The report also refers to the mobilization, training e logistic preparations to the allocation of the Cuban doctors in Brazil as *"an unprecedented challenge that was successfully conducted by PAHO/WHO"*.[217]

It is fair to assert that while the influence of the international human rights agenda in the *right to health* judicial adjudication is indirect, the mechanisms of international cooperation for the implementation of programs and the production of technical reports of policies` assessment is the result of a very much imbricated institutional dynamic between international and national agencies and offices.

[217] WHO, *Brazil: The mais médicos programme* (World Health Organization 2018) <https://apps.who.int/iris/bitstream/handle/10665/326084/WHO-HIS-SDS-2018.19-eng.pdf> accessed 07 May 2020

2.2.1 Health Care System and Democracy

It is hard to establish a connection between right to health and electoral democratic outcomes. If a minimalist conception of democracy, or low intensity democracy is set as the standard, one would be tempted to say that health care and democracy are absolutely dissociated. As we have discussed, the national/popular/participatory element of democracy is not a seasonal device actioned from election to election. Social mobilization around a right, manifested through litigation can be considered a display of democratic enhancement and participation, even if it is mediated by Courts. In other words, contemporary democracy in the globalized world is not fully perceived through electoral fetishism, but it is open to a broader sense of agency that acknowledges litigation over social rights as an important channel of democratic participation. In that regard, it is worth mentioning the considerable increment in the levels by which society has provoked the judicial machinery to claim for rights related to health care in Brazil.

The strong integration of international and national initiatives and stakeholders has created an amalgamated institutional culture towards a "*rights-based"* health care system in Brazil that was reflected in the way judicial intervention happened. According to research published by the Brazilian National Council of Justice, the number of new lawsuits related to health care subjects increased 130% between 2008 and 2017, while the growth in the number of lawsuits in general was of 50% in the same time span.[218] The majority of those cases is related to two subjects: (i) medicine provision, and; (ii) hospital treatment. From 2014 and 2019, new lawsuits which subjects were logged as medicine provision and/or hospital treatment have oscillated around the 200.000 cases.[219]

Despite the fact the participation of the Judiciary has been predominantly concentrated in two specific topics of a health care system, the Brazilian Judiciary has given its contribution to the strengthening of the idea of health as a right. After 1997, the Brazilian Supreme Court started to produce a case law on the right to health. Even though the overall management of the health public service and the necessity of criteria for judicial intervention in health care were brought up in some cases, it is possible to affirm that the Supreme Court has granted medicine

[218] Insper, *Judicialização da Saúde no Brasil: Perfil das demandas, causas e propostas de solução* (Conselho Nacional de Justiça 2019)
[219] CNJ, *Justice in Figures* (2021) <https://paineis.cnj.jus.br/QvAJAXZfc/opendoc.htm?document=qvw_l%2FPainelCNJ.qvw&host=QVS%40neodimio03&anonymous=true&sheet=shResumoDespFT> accessed 30 May 2022

and treatment under the *"right to health"* constitutional clause in almost all cases in which the plaintiff is successful to demonstrate the gravity of the patient situation[220].

The discussions about the impact of judicial decisions on resources allocation were the subject of a public hearing held by the Supreme Court in 2009 and justified the creation, in 2010, of a permanent Health Forum in the National Council of Justice. Nevertheless, criteria like previous existence of the vindicated medicine/treatment in the national policy, scientific or official recognition of its efficiency and safety, the inadequacy of other medicine/treatment provided by the system and history of success in patients that can afford it are either unspecific in its internal rationing rules or simply ignored by the Courts.[221] This radical interpretation of the *right to health* as an unconditional constitutional promise faces critiques in the sense that judicial intervention tends to increase inequality in the distribution of ambulatory and medical assistance, favouring those who can afford litigation, often represented by a limited and professionalized set of lawyers.[222] The percentage of health care cases issued by Public Attorney's offices and other legal aid institutions is still below what would be expected in such an inequal society – 15%. Recent data also show that the share of lawsuits related to private health insurance is disproportionally high in relation to the cases related to the public health care system if considered the coverage of both, suggesting that judicialization is a resource more accessed by the wealthier portion of the population.[223] Nevertheless, the openness of the judicial institutions, included Public Attorney's and Legal Aid offices, to demands related to health assistance is a novelty brought by the treatment given to health care by the 1988 Constitution and the impacts the international human rights regime had on State officials perception of it.

Not without reason, observers show that through health care litigation Brazilian citizens have been able to hold authorities from all federal spheres of the state accountable to the observation of the health care system principles. Litigation has become a valuable tool to the inclusion of marginalized layers of the society, such as HIV patients, into the policies` target.[224]

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[220] See STF [2010] SL 47 AgR/PE, j. 17.03.2010; STF [2010] STA 175 AgR/CE, j. 17/03/2010; STF [2018] STP 24/MG, j. 02/08/2018; STF [2011] STA 558/PR, j.02/09/2011; STF [2010] SS 3962/SE, j. 07/04/2010 etc.

[221] Daniel WL Wang, 'Courts and health care rationing: the case of the Brazilian Federal Supreme Court' (2013) 8/1 Health Economics, Policy and Law

[222] Ana Luiza Chieffi, Rita de Cassia Barata Barradas and Moises Golbaum, 'Legal access to medications: a threat to Brazil's public health system?' (2017) 17 BMC Health Services Research <https://link.gale.com/apps/doc/A511292175/AONE?u=jrycal5&sid=bookmarkAONE&xid=8254978e> accessed 02 June 2020

[223] Insper (218) 72-3

[224] Baptista and others (209)

It is not possible to identify, in the mentioned Supreme Court case-law on the right to health, any direct reference to international norms related to health care. However, the Judiciary has increased its importance as a forum of discussion of the health care system, adopting a view that connects the *right to health* to the *right to life* and *human dignity*. This chain of rights has an unequivocal semantical resemblance with the way the WHO addresses the issue. Therefore, the Judiciary usual discourse is preferably underpinned by the Constitutional provisions on the *right to health*, which do not differ substantially to the UN organisms` consensus on the matter.

The SUS also features a remarkable participative character if one considers Law 8.142, from 1990, which created local Health Councils, permanent and deliberative bodies responsible for formulating strategies and oversight of health policies in each federative sphere of government. Article 1st, paragraph 4th, stablishes that the Councils composition is evenly split between users and other segments of society such as government representatives, health services providers and health professionals. Moreira and Escorel registered 5.463 local Health Councils functioning in Brazil in 2009, with 72.184 councillors, out of whom 36.638 were representatives of the health system users that came out of neighbourhood associations, religious groups, workers associations and other minorities` groups.[225]

Financial, structural deficiencies and councillors` lack of qualification were still felt in local Health Councils located in small towns, which contributes to knowledge asymmetries and political encroachments in some cases.[226] Nevertheless, in 2009, 82% of the local Health Councils meetings occurred monthly with not even one cancelation due to lack of *quorum* registered in the past 12 months in 66% of them. In more than 70% of the local Health Councils the President was freely elected among councillors, in 75% of the Councils the right to voice was granted to anyone who wished to participate and 83% of the meetings were open to the public.[227]

Another study conducted through surveys applied to municipalities' heads of Health Offices in 1996 and again in 2006, shows that while in 1996, only 15,3% of local Health Care managers considered the influence of Health Councils in budget allocation important, in 2006, that percentage arose to 28,3% of them. Nothing less than 92.7% of the Health Offices were

[225] Marcelo Rasga Moreira and Sarah Escorel, 'Municipal health councils of Brazil: A debate on the democratization of health in the twenty years of the UHS' (2009) 14/3 Ciência & saude coletiva 800-1

[226] Andrea Cornwall and Alex Shankland, 'Engaging citizens: Lessons from building Brazil's national health system' (2008) 66/10 Social science & medicine 2173

[227] Moreira and Escorel (225)

accountable before the Health Councils, including the duty to demonstrate and explain public expenditures in health care assistance to councillors.[228]

One way or the other, when average common citizens, NGOs and health professionals have a saying in budget placement, definition of priorities, management surveillance and control, the beneficiaries of the system are empowered as right holders and not only clients. The achievements of SUS can be considered results of a complex engine in which users are benefited by health care policies that they contributed to elaborate and enforce, be through direct participation in local Councils, pushing Public Attorneys and legal aid offices to go to Courts or litigating themselves.

The strong sense that access to health care belongs to their political and legal entitlements as citizens is a remarkable example of how, in democracies, successful policies tend to be converted into rights once their achievements are incorporated by their addressees as a component of citizenship. That is exactly the process of empowerment produced by the coordination and interaction between universalist/rights-based international regimes law and national legislators, police-makers and Courts. It is a dialectic relationship between universal citizenship and democratic agency legitimized by human rights that characterizes democracy in the context of the world society.[229]

Despite of the form by which the phenomena present itself, it is possible to assert that international human rights principles, organisms and influence overall are present in the way SUS was conceived and consolidated, producing important levels of inclusion in the form of access to health care. The system heads nationwide primary assistance programs such as the *"Saúde da Família"* (Family Health) as well as the largest public organs transplant system in the world, responsible for financing 96% of this kind of complex procedures throughout the Country. More than that, expanding access to health care and assistance might have contributed to a change in Brazilian society itself reflected in the substantial improvement in life expectancy and child mortality rates. As Sen poses it, probably the most elementary of all freedoms is *"the ability to survive rather than succumb to premature mortality".*[230]

The decentralization of health care management to the local arena has been coupled with the openness of the system to social oversight. Judicial intervention has held public officials accountable to policies and rights set forth by international forums, the Constitution,

[228] Fleury and others (212)
[229] Thornhill, *The Sociology of Law and the Global Transformation of Democracy* (27) 422-3
[230] Amartya Sen A, *Development as freedom* (Oxford University Press 2001)

law or even technical cooperation agreements between national agencies and the WHO. The multivariate ways by which the international human rights discourses on the right to health interacted with local, national initiatives and mobilization most certainly contributed to the consolidation of Brazilian democracy in the last years.

2.3 Right to Equality, Affirmative Action, and Access of Ethnic Minorities to Public Universities

The 1988 Brazilian Constitution strongly represses the practice of racism, considering it a non-bailable crime (Article 5, item XLII). The criminal approach seemed powerless to deal with situations of structural racism, often perpetrated by the State itself through its rules and institutional culture. The admission system to public funded universities is an example of such institutionalized racial inequality. Brazilian public universities have always faced a paradox. Due to their responsibility to form the national intelligentsia, it has historically adopted a very strict admission process. The other face of that coin is that the exam exigencies privilege students from private schools predominately attended by the white elite in detriment of poor and black students, coming out of precarious primary schools situated in urban periphery.

The outcome is public universities of the higher level of education packed with white students that can afford for superior education and private, expensive, and less qualified faculties attended by vulnerable members of the black community. Childs and Stromquist show that *"66% of students enrolled in college in Brazil are from the highest income quintile, while only about 5% are from the lowest two".*[231]

The International Convention on the Elimination of All Forms of Racial Discrimination already provisioned the adoption of *"special measures"* of positive discrimination to ensure the fruition of equal opportunities by historically discriminated ethnic groups since 1965. However, discussions on alternatives to overcome inequalities in admission for superior education in Brazil only gained force in events organized in the middle 1990`s by Brazilian publicly funded Universities, in which theories and experiences about affirmative action measures were interiorized.[232]

[231] Childs P and Stromquist NP, 'Academic and diversity consequences of affirmative action in Brazil' (2015) 45/5 Compare 792

[232] Sales Augusto dos Santos, 'Affirmative Action and Political Dispute in Today's Brazilian Academe' (2014) 41/5 Latin American perspectives 141

The turning point was the Brazilian state's participation in the Durban Conference against Racial Discrimination, in 2001. After the Declaration and Programme of Action urged the State Parties to adopt affirmative or positive action initiatives to overcome racial discrimination, the topic gained strength in different Brazilian forums with some institutional consequences, especially in the form of quotas schemes in admission processes held by important publicly funded Brazilian Universities, starting in the State of Rio de Janeiro in that same year.[233] The official recognition of racial cleavages in Brazilian society and of the necessity to face them were intrinsically connected with the international discourse on the elimination of all forms of racial discrimination adopted by the UN Convention and, then, reinforced by the Durban World Conference discussions and report.

Official reports on racial and gender inequalities present some interesting data that could be related to the adoption of affirmative action in public universities admission systems. If in 2001, 67% of higher education students of public universities were white and 31.5% were black, in 2015, the share of white students in public funded universities had declined to 53.5% while 45.1% were black students, a figure closer to black/brown share of the whole population, which was 53.9% in 2015. The proportion of blacks in the population with a superior graduation degree arose from 26.6% in 2012 to 32% in 2017, and the share of the black population that has accomplished that level of education also increased from 8.8% in 2016 to 10.1% in 2018.[234]

By the time the Supreme Court delivered a ruling on the adoption of affirmative action to grant access advantages to black students, 125 superior education public institutions already had a "quotas" programs in place and the Congress had approved Law 12.228/2010, known as Statute of Racial Equality.[235] The Statute of Racial Equality endorses the adoption of affirmative action to diminish racial disparities in the educational systems. During its discussions in the parliament, the Brazilian State contradictory approach to the subject was mentioned, especially considering the signature of the International Convention on the Elimination of All Forms of Racial Discrimination by a dictatorial government that, at the same time, repressed any attempt to freely discuss racial discrimination and injustice.

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[233] Stanley R Bailey, Fabricio Fialho and Michelle Peria, 'Support for race-targeted affirmative action in Brazil' (2018) 18/6 Ethnicities 768-9

[234] IBGE, *Síntese de Indicadores Sociais* (Instituto Brasileiro de Geografia e Estatística IBGE 2012-2020) <https://www.ibge.gov.br/estatisticas/multidominio/condicoes-de-vida desigualdade-e-pobreza/9221-sintese-de-indicadores-sociais.html?=&t=resultados> accessed 25 January 2021; Tatiana Dias Silva, *Ação Afirmativa e População Negra na Educação Superior: Acesso e Perfil Discente* (Instituto de Pesquisa Econômica Aplicada – Ipea 2020) 17-22

[235] Dos Santos (231) 142

In the decision of ADPF 186, the Supreme Court also expressly brought up the International Convention on the Elimination of All Forms of Racial Discrimination permission for positive discriminations policies and outlined its supralegal normative status to assure, once more, the constitutionality of affirmative action adopted to favour ethnic minorities access to public funded universities in Brazil. Right after the decision, Law 12.711/2012 made the "quotas" policy compulsory for all federal technical, secondary and superior education institutions.

The judicial intervention in this matter cannot be considered unimportant because of its lateness. If it is true that the Supreme Court played a mere supporting role for the adoption of affirmative action by public universities in Brazil, it is also certain that it provided definitive legitimacy to the policies in course, avoiding the loss of all achievements those policies had so far, making their continuity possible.

Although it is a matter of citizenship, the factor that ignited state action towards the inclusion of black people in public higher education in Brazil did not come from electorate representatives nor from the judiciary. On the contrary, different stakeholders diffusively and subtly incorporated it from the international agenda. Public universities adopted the "quotas" system almost a decade before the Statute of Racial Equality and the Supreme Court decision in ADPF/DF 186. The policies derived from independent dialogue with international agencies. The data collected by the Brazilian scientific community, formed by sociologists, anthropologists, and black people`s rights movements were so compelling that Brazil had to recognize during the Durban Conference, before international community, its racists vestiges, assuming a commitment to overcome it.

National and international movements dedicated to the racial equality cause created a decisive turning point for Brazilian academic environment and society that, in later stages, were corroborated by the legislative and the Judiciary. Nevertheless, the recognition of international conventions and declarations towards the necessity of positive discriminatory policies in favour of ethnic minorities consolidated the enrichment of citizenship in Brazil, making it much more difficult for occasional governments to retrocede in the levels of inclusion achieved.

By consequence, even if one considers that the affirmative actions to grant access to public superior education for the black community are still shy of their full potential in reducing racial inequalities in Brazil, it is possible to assert that it has started a broader movement to mitigate the inter-generational aspect of racial discrimination.

2.3.1 Right to Equality, Affirmative Action, Ethnic Minorities Access to Public Universities and Democracy

Structural and state discrimination against ethnic minorities in Brazil are not anecdotal. As discussed in a passage of Holanda, slavery was mixed with policies *"to impede the excessive influence of the coloured man in the life of the colony"* such as prohibitions to occupy public offices, which were considered ineffective, accommodating too many exceptions like the case of a brown man, appointed by the Crown to be a Public Attorney in the State of Pernambuco in 1731 *"despite his problem of being brown".*[236]

Possibly the crudest face of the regime of access to public universities in Brazil was its capacity to perpetuate the racial inequality equation. The white elite formed by the renowned public universities would keep getting better jobs with higher pay grades while the black graduates would ever be deprived of opportunities to socially ascend, passing on the iniquity from generation to generation. A place in a public university in Brazil means more than just an opportunity to get a fancy diploma to hang on a wall, it means access and the possibility to contribute to the intellectual elite of the Country and to the democratic public sphere.

The necessity to extend the affirmative action to the working market culminated with the enactment of Law 12.990, from 2014, that reserves 20% of vacancies in federal public offices filled through public selection procedures to black people. The Judiciary and the Federal Public Prosecutors office followed the measure in their mechanisms of appointment. A case study that took into consideration public selections of the Federal Police Department in 2006, 2007 and 2015 shows that the share of white candidates approved in 2006 was 71.69%, while black and brown were 23.07%. In the public selection of 2015, after the enactment of Law 12.990, the white new formed policeman were 46.99% and the black and brown were 48.04%, which is a major shift in the racial composition of the main investigative agency of Brazilian State.[237]

It might be still too early to identify major changes in black presence in influential and strategical policymaking spots, but it seems feasible to believe that the normative framework needed to tackle the veiled form of racial apartheid that stained the Brazilian society since

[236] Holanda (34) 55

[237] Anderson Pereira dos Santos and Gilson Matilde Diana, 'O perfil racial nos quadros da administração pública no Brasil: um primeiro balanço dos efeitos da reserva de vagas para negros em uma organização de segurança pública' (2018) 69/4 Revista do Serviço Público 964

slavery is in force, which makes citizenship reach black communities, enriching Brazilian democracy.

2.4 Right to Recognition and Protection of Indigenous Peoples

The 1988 Brazilian Constitution dedicated a whole chapter of its text to enshrine rights of the indigenous populations stating that *"their social organization, customs, languages, creeds and traditions"* should be recognized and the land traditionally occupied by them should be demarcated and protected by the Union.

This was an important innovation in the sense that, prior to the 1988 Constitution, all legislative acts related to indigenous people treated them with a discriminatory tone. The 1916 Civil Code considered the *"forestry"* relatively incapable and subject to tutelage until their *"adaptation"* (Civil Code, Article 6, IV and Paragraph) and Law 6.001/1973, known as the Indigenous Statute, stablishes in its first article that one of its purposes is to, progressively and harmoniously, *"integrate"* the indigenous communities to *"national communion"*.

What is undisguised in those legal documents is the vision of the indigenous peoples as primitive and inferior beings that needed to be accustomed to the civilized community to reach full citizenship. The 1988 Constitutional assertion of their rights to have their own way of life protected and preserved disrupted this *"assimilationist"* approach.[238]

According to the constitutional view, indigenous people's diversity does not set them apart from Brazilian society, but, on the contrary, it is the very reason they must be recognized as part of it. This change of orientation did not occur suddenly. It was a result of an intense interaction between international anthropologists, local movements, catholic dissident missionaries (especially linked with the liberation theology), journalists and international organizations that had been drawing attention to indigenous people's situation in Brazil since the 1960`s.[239]

Transnational and international organisms offered support to social movements that were not strong enough to influence official representatives. If none of the eight indigenous candidates to the Constitutional Assembly of 1986 was elected, the United Nations awarded

[238] Maria Guadalupe Moog Rodrigues, 'Indigenous Rights in Democratic Brazil' (2002) 24/2 Human rights quarterly 488

[239] Ana Carolina Vieira and Sigrid Quack, 'Trajectories of transnational mobilization for indigenous rights in Brazil' 56/4 RAE 380 <link.gale.com/apps/doc/A461945309/AONE?u=jrycal5&sid=bookmarkAONE&xid=21c036b9> accessed 7 September 2021

Davi Yanomami for his environmental achievements, making it possible to the indigenist movement to have a voice in the constituent moment.[240] It is important to consider that back in 1985, the Inter-American Commission of Human Rights recognized that the construction of a road and the concession of mining permits inside the Yanomami`s territory constituted violations of their rights to life, freedom and security, residence and locomotion, health, and welfare. The Commission also recommended the demarcation of an indigenous reserve to protect Yanomami`s land and culture from invasion increasing international community concerns and pressure on Brazil to take some action regarding the issue. The Yanomami Park was only created after the Constitution enactment, in 1992, which was not very effective to abolish mining activity into Yanomami`s territory once the demarcation of the reserve in *"islands"* showed that mining sector interests were still prevalent.

If compliance with international standards was an important reason for the adoption of concrete measures such as policies, programs, statutes, or Supreme Court decisions regarding poverty fight, health care system structuration and affirmative action towards ethnic minorities inclusion in public funded universities, the adherence to the main international landmarks related to the protection of indigenous population's rights came later. Among South American countries, Brazil was one of the last countries to ratify the Indigenous and Tribal Peoples Convention (ILO 169) in 2002. In 2004, the Inter-American Commission on Human Rights adopted precautionary measures for the protection of the indigenous peoples of Ingarico, Macuxi, Wapichana, Patamona, and Taurepang, all occupiers of the Raposa Serra do Sol region, in the northern state Roraima, an indigenous reserve with a demarcation procedure that had been pending since 1977.

In face of that embarrassment, the Supreme Court issued a controversial ruling on the case in 2009. The ruling itself can be considered a step forward in terms of indigenous populations protection, once it determined the territorial continuity of the demarcated area, rejecting claims to the limitation of the reserved areas in *"islands"* or *"clusters"* at the same time it determined the immediate removal of non-indigenous occupiers of the area. Nevertheless, the indigenous people`s right to recognition and land was subject to so many conditionalities that it is difficult to assert exactly in which extent it was enhanced or hampered by the decision.[241]

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[240] Rodrigues (237) 500-1

[241] Christian Teófilo da Silva, 'A homologação da terra indígena Raposa/Serra do Sol e seus efeitos: Uma análise performativa das 19 condicionantes do STF' (2018) 33/98 Revista Brasileira de Ciências Sociais

Although Pet 3.388/RR has not become a judicial precedent with binding arguments, the decision brings Justice's opinions that are very resistant to the recognition of the indigenous populations as *"peoples"*, reinforcing orthodox concepts of sovereignty and refusing any to effects to the UN Declaration on Rights of Indigenous Peoples. Those opinions also ignored International Courts' case law on the matter.[242]

Brazil voted for the Declaration in 2007 in a demonstration of its increasing international commitment with the protection of indigenous cultural and land rights, which was acknowledged by other Justice opinion in Pet 3.388/RR decision. He made clear that, however the UN Declaration on Rights of Indigenous Peoples does not have the normative force of a treaty, it has an *"undeniable hermeneutic value, able to bound States` actions towards indigenous peoples"*.

In fact, the scientific community, transnational and international organizations and national indigenist movement's pressures and constraints over Brazil that set the conditions for the 1988 Constitution provisions regarding indigenous people's rights were a reaction to a continuous process of atrocious genocide. According to the Brazilian Institute of Geography and Statistics (IBGE), the indigenous population in Brazil in the XVI Century, estimated in 2.431.000 people, was reduced to 294.131 people by 1991. Entire populations were simply extinct in that period, like the Aimores, Caetes or Tamoios. In 2000, that population had already grown back to 734.127 reaching 817.963 people in the 2010 Demographic Census. Those figures mean that, in the first 20 years under the 1988 Constitution, the indigenous population in Brazil grew 64% compared to 23% of the general population[243].

Their struggle to be fully recognized as citizens is not over yet. Even after the Pet 3.388/RR ruling by the Supreme Court, land conflicts in Raposa Serra do Sol reserve still happen, which motivated the Inter-American Commission on Human Rights to admit the *Indigenous Council of Roraima (CIR) and Rainforest Foundation US vs Brazil* case in 2010. Brazil also faced a conviction, imposed by the Inter-American Court of Human Rights in 2018, for violating protections rights to the Xucuru people.

Even the Yanomami people still suffer from the presence and activities of non-indigenous people in their living environment. A research conducted by Fiocruz – Oswaldo

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[242] Rafaela Teixeira Sena Neves and João Daniel Daibes Resque, 'Diálogo judicial transnacional: a Recepção dos Tratados Internacionais na Jurisprudência do Supremo Tribunal Federal sobre Territórios Indígenas' in Lopes AMDA and Lima MMaB (eds) *A Internalizacao de Direitos Internacionais de Direitos Humanos na America do Sul* (Livraria do Advogado 2017) 218-0

[243] IBGE, *Indígenas: Gráficos e Tabelas* (Instituto Brasileiro de Geografia e Estatística) <https://indigenas.ibge.gov.br/graficos-e-tabelas-2.html> accessed 12 October 2021

Cruz Foundation in 2014 shows that in the Yanomami`s communities in Aracaca 66% of the children and 100% of adults present levels of mercury concentration above the limits accepted by the WHO.[244] The presence of mercury in their bloodstream is not a coincidence but direct reflex of the use of it in illegal mining activities inside the demarcated preservation areas that ends up contaminating the indigenous tribes' main sources of water.

2.4.1 Indigenous Rights Protection and Democracy

Due to the progressive embeddedness of Brazil in the international indigenous population`s protection system, they certainly increased their visibility and capacity to participate of the Brazilian *demos*, litigating whether in internal or international courts for their rights.

Proof of their increased capacity to influence pivotal decisions related to their interests is that in Pet 3.368/RR, the Supreme Court granted the right to participate of the judicial case as *amicus curiae* to 7 indigenous communities. The indigenous communities of Soco, Barro, Maturuca, Jawari, Tamandua, Jacarezinho and Manalai could file petitions, present their briefings and oral arguments during sessions without any intermediaries. The possibility of indigenous populations to be heard by the Brazilian Supreme Court, the protection of the reserves where they live and the preservation of their way of life corresponds to the basic right to not be extinguished as a people or a culture. All and all, it seems like a compelling example of integration between a universalist/rights-based element of preservation of those indigenous rights and the internal, popular, participatory mobilization to guarantee those rights in parliament or Courts. We can speak of a process of increasing inclusion and recognition of the indigenous rights by the whole country.

Nevertheless, as the indigenous population grew back in the last decades, some electoral repercussions might also be suggested as important changes in the participatory electoral element of democracy as well. No less than 38,22% of the indigenous population in Brazil dwell the North Region of Brazil which witnessed 41,14% increase in the electorate between 2000 and 2010, the largest registered in the whole Country. Roraima, the State of the North Region with the greatest proportional indigenous population of the whole Country - 12,42% of the whole population of the State are indigenous – also experimented an increase of 45,89% in

[244] Paulo Cesar Basta and Sandra de Souza Hacon, *Avaliação da exposição ambiental ao mercúrio proveniente de atividade garimpeira de ouro na Terra Indígena Yanomami* (Fiocruz, PUC-RJ, Instituto Socioambiental Hutukara, Associação Yanomami, and Associação do Povo Ye'kwana do Brasil 2016)

electoral registrations, almost two times the national average (23,41%) and more than the regional average.[245]

Not without reason, in 2018 general elections, an Indigenous Parliamentary Front was created with 130 candidates of 24 States spread in different parties. For the first time in Brazilian history, an indigenous, Sonia Guajajara, was candidate to Deputy President of Republic and after 36 years, an indigenous was elected for the Lower Chamber, Joenia Wapixana, the first indigenous woman to ever get a bachelor's degree in Law, in a sign of capacity of political articulation and effective democratic participation.

Conclusion

Brazilian society has experienced remarkable levels of increasing inclusion in the last three decades. People deprived of access to the most basic dignity standards of living conditions and health care gained a place in the life of the society, presenting their claims and defending their interests. The superior education environment became plural and open to new points of view from marginalized communities that, until then, were just allowed to stare at the gates of public universities. Indigenous people are recognized as legitimate parts of the public sphere, becoming aware of their rights, and mobilizing to participate actively of judicial litigation or the electoral processes. To a larger or lesser extent, the dialectic relation between the input from different international human rights regimes and the local, participatory, deliberative component of democracy created a cycle of mutual reinforcement and legitimization that led to more participation, inclusion, and access to rights.

A concurrent view to the one posted here would point out that those achievements have nothing to do with citizenship construction and democratic consolidation but were the mere results of economic growth. I would suggest that the economic aspect might not have played such a decisive role, though. In the early 70`s, for example, Brazil recorded higher economic growth rates than the ones registered between 2000 and 2010. However, studies demonstrate that the so-called *"Brazilian economic miracle"* was also characterized by concentration of

[245] TSE, *Estatísticas do eleitorado* (Tribunal Superior Eleitoral 2020) <https://www.tse.jus.br/eleitor/estatisticas-de-eleitorado/estatistica-do-eleitorado-por-sexo-e-grau-de-instrucao> accessed 2 November 2021

income among the wealthier and the worsening of social inequality, with the Gini coefficient, for example, ramping up between 1960 and 1980.[246]

I do agree that economic growth boosts the state capacity to carry on social policies, but I insist that those state actions only produced social inclusion because of a pre-commitment to human dignity and democracy, set forth in the 1988 Constitution and strengthen by international human rights. The coupling between international law, human rights, policies developed or enhanced by representatives and Courts has brought interesting advances in all social aspects analysed. Therefore, this Chapter proposes that the described social change in different areas has been, in some degree, influenced by the penetration of international human rights in the way constitutional rights, promises and guarantees were interpreted and concretized. It also argues that State action and the participation of the Judiciary might have come to play differently in the topics analysed.

The first sensible difference regards how political branches engage with the international organisms and norms. While in issues related to social rights with strong public appeal the coordination is led by State policies, in the case of minorities` rights, State action comes as a response to a net of mutual support built by different actors.

In the first cases, there is an initial semantic alignment between constitutional and international norms` provisions that seemed to compel the State to develop policies towards social inequalities and access to health care. International standards, commitments and principles were invoked as a reason to the adoption of State programs and draft bills approvals. Once they were in place, official reports and public agencies recurred back to international offices for technical cooperation and support – which is very sensible in the institutional bond between the Ministry of Health and the Pan American Health Organization. Transnational organism`s recognition and favourable appraisal – which is the case of official reference to prizes and ranks given or developed by NGOs dedicated to poverty fight – is also a source of legitimacy to push those efforts forward.

In the case of affirmative action to concretize the right to equality, the process started with the adoption of positive discrimination policies by a few federal universities. If we consider the recognition and protection of indigenous people, the mutual influence exchange

[246] Rosane Silva Pinto de Mendonça and Ricardo Paes de Barros, 'A evolução do bem-estar e da desigualdade no Brasil desde 1960' (1995) 49/2 Revista Brasileira de Economia – RBE; Hoffman R, 'Desigualdade e Pobreza no Brasil no Periodo 1979-90' (1995) 49 Revista Brasileira de Economia - RBE

started between the indigenist movements, some indigenous representatives and international scientific community, press and NGOs. State policies, legislative measures and judicial decisions came after the constraints and pressure from international commitments – like the Durban Conference – or international commissions and courts decisions became politically impossible to resist.

The participation of the judiciary also varied according to the subject analyzed. It was negligible if one considers the implementation of cash transfer programs aimed to fight poverty and hunger, but very influential to establish the right to health as a matter of elevated concern. A body of Supreme Court case-law was developed linking it to the rights to life and human dignity as a Constitutional setup that only mirrors international understandings on the matter, even if the decisions do not make many express references to international norms.

The declaration of constitutionality of affirmative action in public universities admission processes by the Supreme Court might have come late but was important to bring other institutional developments towards racial equality. The enactment of Law 12.990, which extended the positive discrimination policy to public offices recruitment processes has brought encouraging early results in terms of access of black people to strategical positions within the State structure. The Pet 3.388/RR ruling on the demarcation of *Raposa Serra do Sol* indigenous reserve was very controversial and resistant to international human rights law, but the fact that 7 indigenous communities participated of the case as *amici curiae* shows how indigenous people have become more aware of their rights and able to participate of decisions of their interests.

As said, more people gained citizenship as they came out of extreme poverty to assume a decisive political role as a collective actor able to unbalance electoral results in the recent general elections. Users of the health care system started to participate as both, right holders and policy makers, once local health councils became an instance of decision and control with which local authorities now have to deal. The Judiciary has been opened to claims that hold those authorities accountable to the policies enforcement. More black students are present in public universities campus, bringing new insights and experiences to academic sphere, and the affirmative action advanced to reach access to important public offices. Indigenous people are part of the society, not only respected in their own way of living and being, but also participating of judicial litigation, voting and being voted in elections for important federal offices.

Not all that would happen by means of electoral participation only. International human rights treaties, covenants, declarations, protocols and targets, were progressively transformed

into State policies and decisions through constitutional law procedures. Poverty, health care, racism and ethnical diversity became issues discussed in *right/not right* basis with a considerable sum of legal debate before judicial or *quasi*-judicial institutions such as constitutional and international courts, accessed through lawyers and other legal professionals. If that looks like an engulfment of the society life by law, it is important to notice that it brought with it the necessity of the law system to open itself to different inputs and expertise. Social assistants probably had more to say about poverty than a Justice of the Brazilian Supreme Court, as well as doctors have in what regards to health care, sociologists on historical causes of racism and anthropologists about indigenous way of life.

So, if by one side, international human rights and Brazilian Constitutional law and institutions advanced over matters related to social welfare or ethnical minorities protection, by the other, those normative provisions had to incorporate concepts, targets and methods from different fields of knowledge and translate them into law discourses. That is a two-way road in which law, sociology and other social sciences (history, anthropology and etc.) share constant disturbance, a permanent channel of mutual learning.

Expectations towards state policies, social behaviour take shape and generate challenges, achievements and disappointments, which are taken into consideration to reorient those expectancies and adjust them to previous outcomes. That cognitive approach can be identified in the process of unification of cash transfer programs in *Bolsa Familia* and the creation of one Ministry of Social Development and Hunger Fight to manage it years after the first experiences with that kind of policy had begun. It appears again in the form of extinction of a State agency (INAMPS - National Institute of Medical Assistance and Social Security) as a needed step to concretize the principles of decentralization, universalization and participation in the health care system. It explains the progression of affirmative action to black community inclusion, from access to a few federal universities to all federal educational institutions and, then, to all federal offices public selection processes.

The international standards on poverty fight, right to health and equal opportunities for historically disadvantaged ethnic groups underpinned all those adjustments conducing to considerable achievements. That was possible because of the Judiciary approach to international human rights norms. This mode of participation of the Judiciary in the way international human rights interact with the internal order seems to have had some impact in all four topics analysed. It means, above all, a tendency of the Judiciary assuming the role to intermediate or translate international legal regimes into the domestic scene. If that happened in areas in which the Judiciary does not hold the monopoly of reasoning, such as fight against

poverty, health care, ethnic minorities, a similar or stronger role may be expected in areas fully dominated by judicial actors and discourses.

It is also possible to assert that in those areas, the judicial actors adopted a different, subtle and innovative way to incorporate international norms with participatory and human rights repercussions, which affects, by consequence, Brazilian democracy itself. This is what will be addressed in the Chapters to come.

Chapter 3

Human Rights, Corruption, and the International Regime Antidote

Introduction

Our endeavour to determine how international regimes impacted democracy on Brazil is still ongoing. As seen in the previous Chapter, throughout 30 years since the democratic transition, international covenants and treaties have inspired constitutional amendments and legislation. International agencies have engaged in implementing policies and programs through technical cooperation, non-governmental organizations have appraised governmental initiatives with maps, rankings and ratings, and worldwide strategic goals have contributed, in different manners and degrees, to enhance citizenship and participation, as well as to promote inclusion and access to human rights.

It is important to highlight that, as discussed in Chapter 1, especially in developing countries of the Global South where societies still struggle with high levels of inequality that affect the satisfaction of basic needs, democracy depends on several underlying conditions of possibility. Therefore, just as we refuse to minimize democracy to universal electoral participation with a few surrounding civil liberties, we recognize the difficulties involved in assessing all aspects necessary to build a democratic society. Thus, we settled to offer an estimate of different degrees of *"democraticness"* in given issues, according to a functionalist view of citizenship.[247] Citizenship, on that account, requires factual participation of individuals in political decisions that might affect their lives as much as higher and higher levels of inclusion to human rights, once contemporary democracy is a political mode made by participation, but that participation needs to be qualified by a diverse, plural, and inclusionary environment. All the international regimes analysed so far were put under a double test in which we assessed their capacity to generate participation, political enfranchisement, as well as inclusion and fruition of human rights. This Chapter does not differ in terms of the analytical framework but focuses on a different topic: the international anti-corruption regime.

In the following section, we will explore how the protection of certain human rights was coupled with criminalization mandates to State Parties of international law instruments. That approach pushes for the expansion of the punitive arm of the State over areas of historical

[247] O'Donnell and others, *The Quality of Democracy: theory and applications* (10); Thornhill, *The Sociology of Law and the Global Transformation of Democracy* (27)

human rights violations such as human trafficking, or domestic violence against women. We will also address how the international anti-corruption movement also attempted to legitimize itself by depicting corruption as a cause of human rights violations that demand international support and cooperation with internal anti-corruption agents, despite of some problems with the supposedly causality implied by the official discourse and with legal implications of such correlation.

The second topic addresses how the fight against corruption came to be one of the beacons of the "Rule of Law" developmental agenda. In fact, the international anti-corruption regime found legitimizing force as it departed from that criminalization command approach to a much broader movement than just a criminal law punctual intervention. Although still present, the criminal approach is just a part of a combination of norms, reports, guidelines, toolkits, NGO's activism that involve institutional overhauling, the surge of new modes and agencies of governance. The specific investigative mechanisms are less focused on traditional responses to crime than on its economic, managerial aspect.

The third section discusses how that international anti-corruption regime was incorporated in Brazil and how, from the OECD Convention on Combating Bribery of Foreign States to the UN Convention Against Corruption, passing through the OAS Convention Against Corruption, the Financial Action Task Force recommendations, and the Transparency International interventions, many developments of those inputs took place in a multi-diversified way. As explained in the previous Chapter, international regimes do not always interact and generate reflexes into the national arena through only one channel of influence. The integration happens simultaneously in many different fronts. It is a fluid and subtle flux of content that may occur via institutional unfolding of international law provisions, such as the enactment of new national laws, institutional reengineering, international mutual legal assistance, and the development of policies.

At last, the Chapter is dedicated to present how that literature on democratic maturation by means of more effective corruption combat matches the current formal rhetoric of the international anti-corruption regime. Regarding this last aspect, it is going to be shown how a substantial part of the literature on democracy in Latin America and Brazil presents the *"modernization"* or the *"effectiveness"* of the efforts to fight corruption as the *"missing part of the puzzle"* for the definitive consolidation of democracy. Democracy is conditioned, by those authors, to the adoption, by Brazil, of a specialized technocracy, or of a specific institutional machinery well equipped to monitor, detect, investigate and punish deviations

related to public procurement, budget allocation, political campaign, personnel recruitment and so forth.

To analyze the various aspects covered in this Chapter, we performed a qualitative documental analysis of reports of Brazilian institutions, Draft Bills files, International Conventions and review mechanisms reports, and specific documents such as awarded collaboration agreements. The documental analysis reached international treaties, covenants, protocols, multilateral organisms reports, recommendations and NGO's index, rankings, and awards.

The main goal here is to outline that the impacts on democracy eventually caused by the way the international anti-corruption regime was incorporated in Brazil did not happen without an underlying social context. The triumphalist self-description of the international anti-corruption regime presents it as a source of different tools and approaches to solve a problem portraited as the source of all evil. That discourse found judicial authorities willing to respond to the public opinion unanswered desires. The capacity of the international anti-corruption regime to fulfil its promise to take Brazilian democracy to its full circle is the speculation that will enable our endeavour to move forward.

3.1 Human Rights, Transnational Criminal Law, and Corruption: An "Empowerment" Strategy

The International Covenant on Civil and Political Rights – ICCPR and the International Covenant on Economic, Social, and Cultural Rights – ICESCR are milestones of the international human rights movement. Articles 14 and 15 of the ICCPR provision universal rights to due process of law that shall be granted to any defendant under criminal prosecution, establishing boundaries, limitations, and opposition to the States' punitive power. Paradoxically, many issue-specific international human rights instruments that followed opted for criminalization as a means to protect the rights they provided for. As argued by Dissenha and Incott Jr, international human rights invoke a *"cosmopolitan conscience"* not only of rights, but also of risks, insecurity, and conflicts that, in some cases, make them the value to be protected by criminal law, working not as its limits but rather as its very basis.[248] This rationale underpins a transnational criminal law that consists of the incorporation in domestic legislation

[248] Rui Carlo Dissenha and Paulo Roberto Incott Jr, 'A internacionalização do poder punitivo: riscos normativos e políticos da demanda por leis penais universais' (2018) 147 Revista Brasileira de Ciências Criminais

of criminal offences originated in international conventions.[249] Different of international criminal law, as defined by the Rome Statute of the International Criminal Court, this other trend materializes itself by the transnational standardization of repression to certain human rights violations through criminalization commands and innovative methods of prosecution. Provisions for the criminalization of certain activities and behaviours, the deployment of new investigative devices, and international mutual legal assistance can be found in the 1979 Convention on the Physical Protection of Nuclear Material and Nuclear Facilities, the 1984 UN Convention Against Torture and Other Cruel, Unhuman or Degrading Treatment or Punishment, the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the UN Convention Against Transnational Organized Crime, and the Protocol to Prevent, Suppress and Punish Trafficking in Person, especially Women and Children, as well as in the UN Convention Against Corruption, just to name a few.

Brazil, for instance, has a long history of problems regarding misogyny. Although the country ratified the Convention on the Elimination of All Forms of Discrimination Against Women back in 1984 and hosted the approval of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women in Belém in 1994, very little was done to tackle the problem. It was after Brazil was convicted by the Inter-American Commission on Human Rights in *Maria da Penha Maia Fernandes vs Brazil* case, in 2001, that the pressures for effective action arose. The plaintiff had been shot while sleeping by her husband and became paralysed from the waist down. When she returned home from hospital, she suffered an attempt of murder by electrocution while she was on the shower by the same man who ultimately remained free for 15 years until the case was finally taken to the international forum.[250] Law 11.340, from 2006, also known as "Maria da Penha Law" created new mechanisms to fight domestic violence against women, especially preventive protective measures such as restraint orders against the aggressor, pushing him away from the household or prohibition of victims approach, provisory alimonies in favour of the victim and children and other rights restrictions. According to an Institute of Applied Economic Research report, in 2009, 1.447.694 women suffered physical assault, 43% of them were at home when it occurred, and almost 70% of them were perpetrated by the partner, the ex-partner, someone

[249] Nicolas Cordini, 'The internationalization of criminal law: Transnational criminal law, basis for a regional legal theory of criminal Law' (2018) 8/1 Revista Brasileira de Políticas Públicas 262

[250] Ludmila Aparecida Tavares and Carmen Hein de Campos, 'A Convenção Interamericana para prevenir, punir e erradicar a Violência contra a Mulher - Convenção de Belém do Pará" - e a Lei Maria da Penha' (2018) 6/3 Interfaces Científicas - Humanas e Sociais 14

known, or a relative.[251] In 2015, Law 13.104, created the figure of the feminicide, which is the homicide qualified by gender reasons or consequence of domestic violence against women. The new modality of crime has tougher penalties and was included in the heinous crimes list. The claim for an effective response to those iniquities against women is rightful, but undoubtedly add an extra pressure over the criminal justice system. Another report, produced by the National Council of Justice, showed that 194.812 of the aforementioned protective measures were determined in 2016 while nothing less than 236.641 judicial restraints were imposed in 2017, an increase of 21% in the number of people under the criminal system surveillance in two years.[252] The same report (CNJ 2018, 19) registered 1.287 new formal charges for feminicide in the Brazilian Judiciary in 2016, which more than doubled to 2.643 new lawsuits in 2017.[253] Legislative and judicial actors answered to the pressure from international commissions, feminist NGO's activism and general indignation against impunity in the cases of violence against women with the expansion of criminal law to reach a larger group of offences and individuals. In this case, the human rights platform unfolded in the form of criminalization, changes in legal statutes to make penalties harder, which may pose a threat to other categories of human rights once these figures announce more sentences and more incarceration for the years to come.

Similarly, the first Palermo protocol, adopted to supplement the UN Convention against Transnational Organized Crime, highlights in its Article 5, criminalization as one of the preferential mechanisms to be used by State Parties in order to prevent, investigate and punish trafficking in persons. Since 2008, an interinstitutional task force captained by the Ministry of Justice has put forward a National Plan to Face Trafficking in Persons (PNETP - Plano Nacional de Enfrentamento ao Tráfico de Pessoas) with strategic axes aimed at prevention, attention to victims, repression, and prosecution, each of which with tasks, targets, stakeholders, and timelines. The initiative is already in its third cycle and its work was decisive in structuring the Draft Bill 479, from 2012, which resulted in the enactment of Law 13.344, from 2016. According to the opinion of the Rapporteur in the Chamber of Deputies the Draft Bill's *"typification of the crime of trafficking in persons is in perfect consonance with the*

[251] Cintia Liara Engel, *A Violência Contra a Mulher* (IPEA - Instituto de Pesquisa Economica Aplicada 2019) <https://www.ipea.gov.br/retrato/pdf/190215_tema_d_a_violenca_contra_mulher.pdf> accessed 2 November 2021

[252] CNJ, *O Poder Judiciário na aplicação da Lei Maria da Penha* (Conselho Nacional de Justiça 2018) <https://www.cnj.jus.br/wpcontent/uploads/conteudo/arquivo/2018/06/2df3ba3e13e95bf17e33a9c10e60a5a1.pdf> accessed 15 November 2021 11

[253] Ibid 19

Palermo Protocol, comprehending all modalities of trafficking in persons, filling the existing gaps in the legislation". An official report produced by the UN Office on Drugs and Crime, the Swedish, and Brazilian Governments show that since the adoption of Law 13.344, the number of investigations for trafficking in persons raised from 15 in 2017 to 218 in 2020, and the number of people convicted for those crimes also went from 21 up to 146 in the same period.[254] The human rights of the victims of trafficking in persons have become the prompting force for international criminalization commands with several institutional and legislative repercussions in Brazil such as the increase of investigations and criminal sanctions.

A similar attempt to link human rights and corruption has been made by the international anti-corruption movement. Transparency International has tried to stablish that *"promotion and protection of human rights and efforts to end corruption are mutually reinforcing"*.[255] According to that view, in Countries where there is low adherence to human rights provisions corruption tends to thrive the same way where levels of corruption are high, human rights tend to fare not so well. To put it in Koechlin and Carmona's words, *"it is intuitively and empirically plausible that there is a significant correlation between low levels of development, human rights abuses, and the spread of corruption"*.[256]

Most of the attempts to link anti-corruption measures to human rights protection rely on syllogisms that try to associate corruption with low economic growth and lack of foreign investment and the burden they represent to the poorest part of the population, or that simulated land sales and registration tend to harm indigenous people and minorities, or even that a bribe for a doctor or a teacher in exchange for treatment or a place in a school are violations to the right to non-discriminatory treatment and, consequently, to the rights to health care and access to education.[257] Intuitively sound as those hypotheses may seem, the causality between the adoption of anti-corruption packages and the improvement in human rights fruition is yet to be empirically demonstrated.[258] As suggested by Khan, it is not accurate, either historically or

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[254] UNODC and MJSP, *Relatório Nacional sobre Tráfico de Pessoas: Dados 2017 a 2020* (Ministério da Justiça e Segurança Publica 2021) <https://www.unodc.org/documents/lpo-brazil/Topics_TIP/Publicacoes/relatorio-de-dados-2017-2020.pdf> accessed 21 June 2022 51-65

[255] ICHRP, 'Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities' (34) vii

[256] Lucy Koechlin L and Magdalena S Carmona, 'Corruption and Human Rights: Exploring the Connection' in Rotberg RI (ed), *Corruption, Global Security, and World Order* (Brookings Institution Press 2009) 310

[257] International Council on Human Rights Policy, 'Corruption and Human Rights: Making the Connection' (ICHRP 2009) <https://ssrn.com/abstract=1551222> accessed 07 May 2022; Anne Peters, 'Corruption as a violation of international human rights' (2018) 29/4 European journal of international law

[258] Jomo Kwame Sundaram, 'Good Governance, Anti-Corruption, and Economic Development' in Rotberg RI (ed), *Corruption, Global Security, and World Order* (Brookings Institution Press 2009) 458

empirically, to identify strong governance/anti-corruption capacity as a cause for high per capita income in developed countries. This suggests the existence of a reverse causality that would advise caution with the adoption of anti-corruption reform packages in the developing world.[259] Even in legal terms, those who advocate the idea of corruption as a violation of international human rights concede that under the UN Convention Against Corruption (UNCAC) *"it is hardly possible to hold a State Party internationally responsible if it fails to fulfil its obligations or does so only poorly"*.[260] The adoption of the so-called *"human rights approach"* to corruption is more an attempt to draw the legitimization strength of human rights to the international anti-corruption regime. However still hypothetically linked, the international anti-corruption agenda would benefit greatly from borrowing the legitimation effect generated by human rights. According to Koechlin and Carmona, the linkage with human rights would *"persuade key actors to take a stronger stand against corruption"* or, to rephrase it in Peters' terms, it would be a rhetorical strategy that would give the anti-corruption movement *"empowerment"*.[261]

Differently from the previous examples related to violence against women and trafficking in persons, it is not clearly divisible which human rights demand the expansion of criminalization of corruption or the adoption of new investigative methods to prevent and repress its transnational maleficent influence. So, if it is possible to assert that the cosmopolitan/universalist/rights-based element of democracy can manifest itself in the form of criminalization commands originated in international law, not all branches of this transnational criminal law can legitimize themselves as human rights exigencies. But human rights are not the only source of legitimacy international legal regimes recur to in search of that ultimate semantic value capable of building broad consensus – or *"warm sense of contentment"*[262] - that make their exportation worldwide virtuous, advisable, and desired. Created from demands for balancing business opportunities between multinationals from different countries, the international anti-corruption regime found legitimatizing strength when it tuned in the appropriate discourse to depart from its criminological origins to present itself as an inescapable trait of the transnational, complex, and market oriented new world order.

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[259] Mushtaq Khan, 'Governance And Anti-Corruption Reforms In Developing Countries: Policies, Evidence And Ways Forward' (2006) G-24 Discussion Papers 42, United Nations Conference on Trade and Development

[260] Peters (257) 1276

[261] Ibid 1276

[262] The expression is used by Koskenniemi in Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization' (25)

3.2 International Anti-Corruption Regime: The "Managerial" Turn from Crime to Business, Governance and Society

Corruption, just like democracy is a term that can bear multiple meanings, and, in both cases, the conceptual disputes do not take place in an interest vacuum nor in an economic and politically void arena. As we have previously set out, in the case of democracy, scepticism led to a thin version of electoral competitiveness that fits best the mould of the western capitalist societies, opening the possibilities for the creation of index, rankings, rates that highlight their strengths and forsake their shortcomings. Democracy, in that account, is presented as a compact mix of periodic, universal suffrage, surrounded by some handily picked civil liberties, such as freedom of speech, association and press, for instance. That description points to a stabilized institutional praxis in some parts of the world while a significant part of the globe still lags in dimensions of social, economic, environmental rights that are preconditions for the exercise of civil and political liberties. Although badly neglected by contemporary theories of democracy and global constitutionalism, democracy as we know it was founded and is daily constituted by the local, popular, "we the people" participatory element as much as by inputs of a cosmopolitan/universalist, and rights-based component often developed internationally and, then, adopted domestically. Electoral democracy itself, constitutionalism, human rights have all been pushed forward by multinational organisms, international bodies, transnational NGOs and so forth and that is not what make them democratic/undemocratic, but their capacity to promote/impede participation and inclusion.

In the case of corruption, as Hindess reminds us, the term carries a colloquial meaning related to any malfunction, impurity, or loss of essence. An electronic file damaged by a virus that prevents it from opening as it should is corrupted, an old syringe cannot be reused because it can corrupt its content, be it a medicine or a sample, a wine that turns into vinegar is corrupted.[263] When it comes to the deviation of public funds or property, or even if one thinks of the misuse of power to favour someone, the criminal law draws the conceptual boundaries between the actions that incur into corruption or not. Bribery, which happens when an undue advantage is given or received, offered, solicited, or promised in exchange of an action or

[263] Barry Hindess, 'Good government and corruption' in Larmour P and Wolanin N (eds) *Corruption and Anti-Corruption* (ANU Press 2013) 5

omission from an official, is a classic description of a corruption act, often criminalized all over the world. Embezzlement and other modalities of misappropriation of state property are also well-known forms of corruption repressed by criminal law. Other behaviours that transit in the borderline of the private-public realms, such as trading in influence, illicit enrichment, or even situations in which there is favouritism towards the family (nepotism), friends (cronyism) or political allies and supporters (patronage), are increasingly not tolerated by some criminal justice systems, while still in the shadows of legality in other cases.[264]

That was the way corruption was treated before: a criminal problem addressed by each nation state according to their law.[265] Internationally, developed countries had a relative complacence towards corruption in the developing world. Until the 1990's, German companies were entitled to tax deductibility for expenditures with bribery of foreign officials and France showed a great reluctance to discuss the issue in global terms.[266] The inclusion of corruption related issues in the international arena was an initiative of the United States. They presented a "Draft International Agreement on Illicit Payments" to discussion in the United Nations as early as 1976.[267] In 1977, the US passed a Foreign Corrupt Practices Act, criminalizing bribery of foreign officials, which created a discomfortable market disadvantage for American business abroad, increasing the pressure for an international covenant on the matter that could put companies from the OECD counterparts under similar constraints. The US emphatic effort to put the subject on the United Nations and Organization for Economic Cooperation and Development agenda did not render fruits until the 1990s, when the first international norms against corruption were adopted.[268] The OAS – Organization of American States summit in Miami, in 1994, resulted in the Inter-American Convention Against Corruption. In 1997, the American diplomacy achieved its goal with the enactment of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transaction.[269]

The Inter-American Convention Against Corruption came into force in 1996 and has been signed and ratified by 24 State Parties from all parts of the American continent. In its

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[264] Jean-Patrick Villeneuve, Giulia Mugellini and Marlen Heide, 'International Anti-Corruption Initiatives: a Classification of Policy Interventions' (2019) 26/4 European journal on criminal policy and research 440

[265] Peter Larmour and Nick Wolanin, 'Introduction' in Larmour P and Wolanin N (eds), *Corruption and Anti-Corruption* (ANU Press 2013) xi

[266] Anja P Jakobi, 'Global Anti-Corruption Norms' in Jakobi AP (ed), *Common Good and Evils?: The Formation of Global Crime Governance* (Oxford University Press 2013) 244

[267] Ibid 252

[268] Jo-Ann Gilbert and JC Sharman, 'Turning a Blind Eye to Bribery: Explaining Failures to Comply with the International Anti-corruption Regime' (2016) 64/1 Political studies 77

[269] Jakobi (266) 6

preamble, the Convention adopts premises that would become trademarks of the international anti-corruption movement: (i) it calls for a coordinated international response for the problem of corruption, seen as a transnational threat to markets linked to other criminal activities; (ii) it relates corruption with democratic deficits and administrative inefficiency, and; (iii) it stresses the importance to involve the civil society, through awareness campaigns, rallies, and litigation in the fight against corruption. Its Article VI brings very detailed descriptions of the behaviours that consubstantiate acts of corruption, which could be seen as a reminiscence of roman-germanic principles of criminal law, such as strict legality and determinability. In Article VII, the OAS Convention Against Corruption requests the specific criminalization of all of them by the State Parties' domestic law. Another trace is the centrality of transnational bribery of foreign officials. The Convention not only determines the enactment of laws that deny any favourable tax treatment for expenditures with bribery (Article III, 7), but also dedicates a specific Article just to reinforce the necessity of its criminalization and consideration as an act of corruption (Article VIII). The condemnation of transnational bribery was to be expected once it was the driving force behind the US efforts to take the subject to the international forum. The most interesting aspect of the Convention, though, is the transition from a purely criminal approach of corruption to a broader discourse that depicts it as more than a parochial criminal issue. Corruption is addressed as a transnational problem that requires international responses, something that can be repressed not only by criminal law, but prevented through governance improvement, and a cause for civil society engagement. One of the mechanisms of governance implemented by the Convention is the follow-up mechanism for its implementation (MESICIC), that involves periodic review of State Parties legislation and institutions on the fight against corruption to assess levels of compliance with the Convention standards. The MESICIC consists of analysis carried out by Technical Secretariat experts that perform on-site visits, issue recommendations and reports on best practices and provide guidelines and models to help areas in which the State Party under evaluation underperforms in combat corruption.

The description of corruption as a pervasive transnational phenomenon, found in the OAS Convention Against Corruption, has become one of the beacons of the international anti-corruption rhetoric during the present Century. According to that vision, corruption not only disregards nation states boundaries but is also a modality of crime that mobilizes a worldwide spread industry of very sophisticated illicit networks, unbalancing international markets Hypothetically, bribery is offered by a company from one country for an official from another, often paid in a third nation that feature strict bank secrecy legislation and tax immunities, also known as "tax heavens", through multi-layered fake legal persons created to hide the proceeds

of crime. It is commonly linked to public procurement frauds, favouritism in public funds allocation and other forms of deviation of public funds that generates distortion in market opportunities for private entrepreneurs.

The 20th Century witnessed the development of organizations with multiple ramifications specialized in mediating in international connections between public and private actors, creating opportunities for corruption and hiding the illicit financial outcomes of those transactions. Those organizations seize a globalized environment of ever-increasing flow of people, business and money to establish criminal networks powerful enough to defy States authorities' capacity to investigate or disarticulate their activities.[270] Wolf reports that multinationals such as Siemens and Daimler have already admitted, in prosecutions carried in the United States, to have paid millions of dollars in bribes for Russian officials.[271] Meanwhile, massive data leaks have shown that some of them have moved USD 2 billion dollars through international bank accounts in singular transactions worthy USD 200 million each, with a friend of President Putin holding an account with a £19 million balance in a Swiss bank. Estifania A. Co. mentions that Ferdinand Marcos` regime in Philippines was characterized by the distribution of public owned companies, resources and concessions to cronies that would safeguard the proceedings of the illicit exploitation of public assets abroad. The scheme would be exemplified by the Lopez family wealth, comprising the ownership of newspapers, tv and radios stations in Philippines, evaluated in USD 400 million, headed by Mr. Eugenio Sr, who lived in the U.S. during most of the 1970`s and 1980`s.[272] Okojie and Momoh argue that donors' incentives for internal solutions to combat corruption in developing countries, without coordinated efforts between international investigative agencies, are insufficient to solve the problem, as would be demonstrated by Transparency International data, according to which 140 million Nigerian nairas were deviated from the Nigerian National Petroleum Corporation, with stolen funds found in more than 130 different banks overseas.[273] Those cases are strikingly convincing in the sense that the indifference or even condescendence of international community towards corruption, that dominated the field for the most of the twentieth century,

[270] John McFarlane, 'Transnational crime corruption, crony capitalism and nepotism in the twenty-first century' in Larmour P and Wolanin N (eds), *Corruption and Anti-Corruption* (ANU Press 2013) 132
[271] Wolf ML, 'The World Needs an International Anti-Corruption Court' (2018) 147/3 Daedalus 146-7
[272] Edna Estefania A Co, 'Challenges to the Philippine Culture of Corruption' in Bracking S (ed), *Corruption and Development: The Anti-Corruption Campaigns* (Palgrave Macmillan 2007) 125-6
[273] Okojie P and Momoh A, 'Corruption and Reform in Nigeria' in Bracking S (ed), *Corruption and Development: The Anti-Corruption Campaigns* (Palgrave Macmillan 2007) 104-6

would be at odds with complex criminal organisms that invade countries, pillage their resources, and allocate funds into private hands through multileveled schemes of offshore fake companies, trusts and banks. More than that, they would evidence the incapacity of the traditional approach, rooted in each State criminal justice system, to adequately repress that new type of criminality. Souheil El Zein, Director of Interpol for Legal Affairs, stated that *"corruption has become an increasing international problem which needs to be addressed by the entire community…the need for international action against corruption may never have been more acute than today"*.[274] Following the same thread, Chaikin says that:

> The tracing of assets is an extremely complex task, which has been made more difficult in a world where wealth is mobile and money laundering more sophisticated. (…) Few international investigations are supported by adequate intelligence and surveillance system. The traditional passive methods are often unsuitable in the context of detecting serious economic crime.[275]

Wolf describes the recovery of assets as *"legally complex, forensically difficult, and ponderously slow"*, citing the USD 30 million agreement settled between the US Department of Justice and Teodorin Obiang, son and second vice president of Equatorial Guine, as an example of how transnational corruption and money laundering can still pay off in the long run considered that his illicit profits would probably amount USD 100 million laundered in mansions, sports cars and Michael Jackson memorabilia in the United States.[276] Prosecutors and investigative authorities needed a toolbox to overcome the limits of their respective national criminal justice systems, enabling them to engage in specialized and technically complex international operations that could match the level of expertise shown by the transnational criminal networks they are supposed to fight.

The tendency to treat corruption as a global threat may have been ignited by the U.S. Government attempt to internationalize concerns with bribery of foreign officials, which influenced the adoption of the Inter-American Convention Against Corruption and the OECD Convention on Combating Bribery of Foreign Officials in International Business Transaction. Corruption was definitely considered a transnational crime, though, in 2000, when the UN Convention Against Transnational Organized Crime requested, in its Article 8, the criminalization of bribery and *"other forms of corruption"* by the State Parties. To remediate

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[274] McFarlane (270) 136

[275] David A Chaikin, 'Controlling corruption by heads of government and political élites' in Larmour P and Wolanin N (eds), *Corruption and Anti-Corruption* (ANU Press 2013) 100-1

[276] Wolf (271) 148

those investigative bottlenecks and the nation States` prosecution authorities incapacity to cope with the intensification of transnational criminality, the UN Convention Against Transnational Organized Crime provides normative basis for international cooperation aimed to seizures, freezing, and confiscation of assets (Articles 12 and 13), mutual legal assistance between the State Parties (Article 18), the possibility of joint investigations (Article 19), and the adoption of special investigative techniques, such as controlled delivery, electronic surveillance, and undercover operations (Article 20). The UN Convention Against Transnational Organized Crime inaugurated a new moment in the international anti-corruption movement that advanced from the previous focus on the criminalization of bribery to stablish corruption, in a broader sense, as a transnational crime that demands internationally coordinated actions to be efficiently battled. By the time it was signed, the negotiations for a specific international agreement on corruption were already in course resulting in the UN Convention Against Corruption, from 2003. The Merida Convention enshrines the connections between corruption, money laundering and transnational organized crime as premises for its enactment. In its Article 3 prevention, investigation, and prosecution of corruption are intertwined with the mechanisms of capture and return of misplaced resources. The UN Convention Against Corruption reproduced references to freezing, seizure and confiscation of goods (Article 31), mutual legal assistance (Article 46), joint investigations (Article 49), and special investigative techniques (Article 50) already found in the UN Convention Against Transnational Organized Crime, adding detailed procedural rules and best practices standards related to those topics and also to the rewarded collaboration of people implicated in investigations with law enforcement authorities (Article 37), the cooperation for purposes of confiscation (Article 55), and even training and technical assistance specially designed for the recovery of distorted funds (Article 60). The UNCAC (UN Convention against Corruption) also adopts a peer review mechanism through which each State Party would eventually be evaluated in its level of compliance with the Convention by delegations of other State Parties.

As said, once the initial concerns with asymmetries in the way each country dealt with bribery in their respective legislation was sorted out, the focus of the international anti-corruption agenda turned to the recovery of the financial losses caused by corruption in all its forms. The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, for instance, had provisions regarding mutual legal assistance, however its main goal was to ban bribery and any favourable tax deduction schemes still present in some legislations. The emphasis on international cooperation for purposes of evidence exchange and extradition, identification, freezing, seizure, confiscation, and recovery

of the proceeds of bribery came only after the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions added recommendations to the OECD Convention in 2009, when the UN Convention Against Corruption was already into force and the anti-money laundering multilateral governance agency had a considerable accumulated experience in tracing suspect financial behaviour worldwide.

The Financial Action Task Force (FATF), created in 1989 by the G7 as an initiative to stablish standards by financial authorities to refrain money laundering in the world, first added the financial encroachment of terrorist activities to its goals, and then, measures to assure transparency and fight against corruption to its duties. The entity, that has 39 member States but no formal seat in international public law, put forth 40 Recommendations that are the international normative core of best practices and guidelines regarding monitoring and investigating suspicious financial transactions worldwide. Those recommendations were progressively revised and amplified to target terrorism financing, transparency, and corruption combat along the last three decades. The centrality of the FATF recommendations for the anti-money laundering global governance was reached through mechanisms of coercion such as the Non-Cooperative Countries list, which was deactivated in 2007, when the last country was delisted, and the mutual evaluation system by which countries are assessed according to their technical compliance and effectiveness of the anti-money laundering paradigms.

The expansion of the focus of the international anti-corruption efforts and its overlapping with other global regimes such as FATF's anti-money laundering initiatives do not represent that the competitiveness of markets lost its importance. On the contrary, as a 2010 Anti-Corruption Action Plan approved by the G20 Anti-Corruption Working Group gathered in Toronto recalls *"corruption threatens the integrity of markets, undermines fair competition, distorts resource allocation, destroys public trust, and undermines the rule of law"*. For the international anti-corruption movement, as important as the conception of corruption as a transnational widespread evil to which national criminal justice systems and prosecution authorities were not well equipped is the representation of corruption as more than a criminal phenomenon. Corruption is depicted as a governance malfunction that can be explained by an economic point of view, and thus, more effectively tackled through institutional reform packages. The replacement of the traditional criminological roots of corruption for economic explanations of it through rent-seeking logics was very influential for the international anti-corruption regime. Klitgaard calls for the engagement of developmental policies studies to focus on the problem of corruption and presents a hypothetical scheme to understand its

dynamics.[277] Such scheme explores the corruption possibilities that arise from an institutional setup in which there is a continuous relationship between a principal, in the figure of the representative that conceives the policies, an agent, represented by the state official bureaucrat responsible for the implementation of the policy and the client or customer as the taxpayer, the private recipient of the policy. According to him, corruption would be the resultant of agents empowered with the monopoly of a given service or activity, enjoying great discretion in public resources management working in a scenario in which the accountability mechanisms are week. He even represents it in the formula *Corruption = Monopoly + Discretion – Accountability*.[278] Similarly, Rose-Ackerman affirms corruption has as a background the organization of the state and the society, and that reforms should aim to reduce the incentives and increase the risks for state officials to engage in corruption behaviour.[279] Despite of the limitations of those descriptions of corruption, once they leave out the possibility of nonfinancial (e.g. political, familiar) purposes or even its occurrence in purely private organizations , they shaped the way the anti-corruption rhetoric evolved since the middle 1990`s.[280] In *Helping Countries Combat Corruption*, a report published in 1997 by the World Bank, the idea that the causes of corruption are related to high incentives, represented by economic rent-seeking opportunities, and low accountability, identified with institutional weakness, was fully adopted.[281] Once the causes are known, the solutions involve measures that could diminish services offered by the State and the empowerment of accountability agencies. Corruption ceases to be a criminal problem to be solved *ex post facto* to become a preventable matter of good governance. That is the main subject of the *Corruption and Good Governance* report, published by the UN Development Programme in 1997, which affirms that *"corruption is a symptom of something gone wrong in the management of the State"*, and adopts a-critically the principal-agent-client model of explaining how corruption takes place.[282] The UN Office for Drugs and Crime *Anti-Corruption Toolkit*, from 2004, also shares the idea that corruption is the product of a deliberated analysis of the opportunities offered by the amount of discretion enjoyed by a public agent in perspective with the risks of the illicit activity, posed

[277] Klitgaard (33)
[278] Ibid 75
[279] Rose-Ackerman (33)
[280] Ed Brown and Jonathan Cloke, 'Neoliberal Reform, Governance and Corruption in the South: Assessing the International Anti-Corruption Crusade' (2004) 36/2 Antipode 283
[281] World Bank Group, 'Helping Countries Combat Corruption' (33) 12
[282] UNDP, *Corruption and Good Governance* (United Nations Development Programme 1997) <https://digitallibrary.un.org/record/1491472> accessed 11 December 2021 7

by how accountability mechanisms are efficient or not.[283] The World Bank developed a GAC (Governance and Anti-Corruption) Strategy which presented as the 2006 Singapore's summit conclusion a report that links the fight against corruption to governance improvement.[284] Transparency International highlights the shift of anti-corruption international efforts from its criminological origins to public management and good governance solution as a turning point in the middle 1990s, calling it the *"birth of a diverse anti-corruption movement"*.[285]

According to Brown and Cloke, the policies developed by organizations such as the UNDP, the World Bank, the USAID, under the connections stablished between the fight against corruption and good governance were concentrated on the enactment of transparency legislation regarding public data, specially related to budget information, judicial reform, creation and strengthening of agencies and institutions responsible for financial oversight and auditing, professionalization of recruitment and promotion criteria in the civil service, public procurement legislation and electoral reform.[286] To reach such a wide range of themes, the economic representation of the idea of corruption was more flexible than narrow criminal definitions tied to criminal law principals that demand *a priori*, complete, determined definitions of every aspect of the behaviour to be penalized by law. Based on the economic theories about corruption, the World Bank defined corruption, in all its forms and manifestations, as *"the abuse of public office for private gain"*.[287]

A conception of corruption that could be transformed into a catchy moto for the international anti-corruption movement was an important asset for the third aspect that characterizes it: the involvement of civil society in the cause. The most prominent example of this particular trend is the role played by Transparency International in the conception, development and propaganda of the international anti-corruption agenda worldwide. The NGO, founded in the early 1990`s by former directors of the World Bank to champion the cause of corruption fight worldwide, started to publish its Corruption Perception Index in 1995.[288] The

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[283] UNODC, *Anti-Corruption Toolkit* (United Nations Office on Drugs and Crime 2004) <https://www.unodc.org/documents/treaties/corruption/toolkit/toolkitv5_foreword.pdf> accessed 18 December 2021

[284] World Bank Group, *Strengthening World Bank Group engagement on governance and anticorruption: Main Report* (WB 2007) <https://documents.worldbank.org/pt/publication/documentsreports/documentdetail/426381468340863478/main-report> accessed 13 March 2020

[285] ICHRP, 'Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities' (35)

[286] Ed Brown and Jonathan Cloke (280) 276-7

[287] World Bank Group, 'Helping Countries Combat Corruption' (33) 8

[288] Kalin S Ivanov, 'The Limits of a Global Campaign against Corruption' in Bracking S (ed) *Corruption and Development: The Anti-Corruption Campaigns* (Palgrave Macmillan 2007)

index has become a consensual reference for studies and corruption status diagnosis, exercising a huge influence in aid agencies decision making and in multinational investment strategies despite of being a perception index that often reproduce stereotypes and bias. More than that, Transparency International has intensively participated in the formulation of the main international anti-corruption norms, support reports, and documents elaboration. Founders and directors of Transparency International Peter Eigen and Jeremy Pope contributed for the aforementioned *Helping Countries Combat Corruption*, a World Bank report from 1997 which considers that *"Civil society and the media are crucial to creating and maintaining an atmosphere in public life that discourages fraud and corruption (...) corruption is controlled only when citizens no longer tolerate it"*.[289] The strong discourse on non-tolerance towards corruption is also found in letter *c* of 2003 UN Convention Against Corruption Article 13, entirely dedicated to the participation of the society in combating corruption. The UN Office for Drugs and Crime *Anti-Corruption Toolkit*, from 2004, says that *"policies and practical measures are most likely to succeed if they enjoy the full support, participation and ownership of civil society"* and the same UN Office *Technical Guideline to the UN Convention Against Corruption,* published in 2009 mentions public campaigns to raise awareness of corruption as a practical way to comply with Article 13 that should be a priority and a public commitment of governments around the globe.[290] In the document *"Together Against Corruption: Strategy 2020"* produced by Transparency International, the NGO presents itself as a civil society spokesman, highlights how corruption revealed itself to be a rally ground for citizen action in Brazil in recent years. Moreover, TI defines corruption as *"the abuse of entrusted power for private gains"*, in a subtle manoeuvre to scape criticism of anti-Statism and stablish the partnership with people and institutions to build a strong movement able to prevent corruption and pressure the OECD and UN Conventions enforcement in each country level.[291]

Starting in the last decades of the twentieth century, the international anti-corruption regime was incrementally built by the US Government interests, international covenants, additional protocols, revision mechanisms, reports from multinational organisms and NGOs that reciprocally reinforce each other, embodying a robust set of rules, initiatives, reform

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[289] World Bank Group, 'Helping Countries Combat Corruption' (33) 44-6

[290] UNODC, *Anti-Corruption Toolkit* (283) 21; UNODC, *Technical Guide to the United Nations Convention Against Corruption* (United Nations Office on Drugs and Crime 2009) <https://www.unodc.org/documents/treaties/UNCAC/Publications/TechnicalGuide/0984395_Ebook.pdf> accessed 21 December 2021 62-3

[291] Transparency International 'Together Against Corruption' (31)

packages, index, and discourses that influence the reality in many parts of the World. All this articulated effort made of the anti-corruption agenda a mega hit. The UN Convention Against Corruption has 140 signatories and 187 state parties. The international anti-corruption regime is obviously centred in the criminalization of corrupt behaviours, the investigation, prosecution, and punishment of those involved in it, but much more than that, it pushes for more comprehensive institutional reforms and deeper legislative changes. In portraying corruption as a global governance matter with economic causes and summoning the society to take part in the process of preventing, detecting, whistleblowing corrupt practices, the international anti-corruption agenda becomes an idea that can have a much more pervasive penetration in local democracies. In that scenario, corrupts in jail, as the mob claims, can come just as a side effect or a propaganda tool. The ways by which that international anti-corruption regime was incorporated in Brazil is what we will attempt to describe in the next section of this Chapter.

3.3 The Anti-Corruption regime in Brazil: From State Efficiency to an Integrity System

Article 127 of the 1988 Constitution granted Public Prosecution offices functional independence and administrative autonomy. That means that criminal prosecution would be performed by a highly professionalized category of prosecutors that have no hierarchical attachment to any representative of the three branches of power. According to the new constitutional order, the Public Prosecution offices would, beyond that, enjoy autonomy to prepare their budgetary proposals and to organize their internal bodies free from any interference from the Legislative, the Executive, or the Judiciary. Some argue that it could be considered a *"de facto fourth branch of power"*, authorized to independently investigate and prosecute even influential authorities or businessmen.[292]

In the early 1990s, Brazil also engaged in constitutional and legal reforms intended to reorganize the state, make it lighter, more efficient, and more adequately managed by the implementation of new good-governance principles and a comprehensive privatization agenda.[293] Law 8.112, from 1990, established rules for federal public service personnel recruitment through public selection exams, laid the structure of the federal public servants' career, including criteria for promotion and a detailed disciplinary regime to punish any kind

[292] Carson and Prado (3) 18

[293] Luiz Carlos Bresser Pereira, *A reforma do estado dos anos 90: lógica e mecanismos de controle* (Ministério da Administração Federal e Reforma do Estado 1997)

of misbehaviour in public offices. In 1992, Law 8.429 was enacted to regulate the hypothesis of administrative improbity. It encompasses any type of illicit enrichment or undue advantage by public servants or representatives (Article 9), any act that could bring damage to the public treasury (Article 10), or any posture that attempts against the principles of public administration (Article 11) with the following administrative sanctions. Also, in 1992, Law 8.443 came into force to organize the Federal Account Court (TCU), responsible for the financial, operational, patrimonial and account supervision of any of the branches of power, including the assessment of the Federal executive annual accounts. Law 8.666, from 1993, disciplined public procurement rules by means of different modes of public bidding processes, criminalizing many acts that would harm the regular flow of the procedures described in its rules. That first set of institutions and rules shaped the first cycle of efforts to build an accountability system, although, by that time it was very much skewed to the professionalization and control of public administration.

After some unpromising results of the first round of measures prescribed by the U.S Department of Treasury, the IMF, and the World Bank to tackle economic instability in the developing world, the so-called "Washington Consensus" kept pushing for deeper institutional reforms that would attack spots of State inefficiency that were supposedly preventing public expenditures constraints and privatization agendas to reach their full potential to trigger development.[294] The reflexes of that approach added to Brazil's institutional framework new audit organisms, governance agencies and controlling bureaus aimed to increase transparency, detect suspicious financial transactions, and coordinate efforts to insert Brazil into the anti-money laundering and anti-corruption international vanguard. In 1998, the first comprehensive legislation specifically dedicated to the criminalization of money laundering and other crimes against the financial system created the Financial Activities Control Council (COAF) as an intelligence unit responsible for monitoring transactions and flux of money, issuing reports about suspicious behaviour. In the motivation charter of Law 9.613, one of the rationales for its proposition was:

> Such measures are found all over the compared legislation, which demonstrates the absolute necessity of its inclusion in Brazilian Law. See, for example, Belgium (Article 4 of the Law from January 11th, 1993), Spain (Article 3, number 1, Law 19/93, regulated by Article 3 of Royal Decree 925/95); Portugal (Art. 3, number 1 of Law-Decree 3131, from September 15th, 1993), CICAD (Interamerican Drug Abuse Control Commission, Article 10 Model Regulations) and European Community (item 12 of "The Forty Recommendations").

[294] Thomas Kelley, 'Beyond the Washington Consensus and new institutionalism: what is the future of law and development? (2010) 35/3 North Carolina journal of international law and commercial regulation

For some technicality mistake, the FATF (Financial Action Task Force) recommendation was attributed to the European Union, which does not change the fact that it functioned as a driving force for the adoption of the new legislation. In 2002, Law 10.467 was approved to criminalize bribery of foreign officials. Article 1 states that the Law exclusive intent was to comply with the 1997 OECD Convention on Combating Bribery of Foreign Officials in international Business Transactions. In 2003, Law 10.683 created the Federal General Comptroller Office (CGU) with the missions to defend the public revenue, conduct internal audits and work as the federal administration ombudsman. One year later, the National Strategy to Combat Money Laundering (ENCLA) was inaugurated. It is a joint initiative by all spheres of government to engage multiple stakeholders in advancing the mechanisms of detection, monitoring, and investigation of money laundering, and financing terrorism, which from 2006 onwards, added the combat to corruption to the acronym, finally becoming the ENCCLA (National Strategy to Combat Corruption and Money Laundering).

The ENCCLA aggregates 88 participants from the three branches of power amongst federal and state organisms, members of Public Prosecution offices and has the contribution of NGO's such as Ethos Institute and Transparency International. The initiative sets goals or actions to be achieved by the participants of the intergovernmental web of institutions without any kind of sanctioning mechanisms. The failing agencies or branches of power are only accountable before the public opinion as non-cooperative with the anti-money laundering, anti-terrorism and anti-corruption agendas, a soft-law approach that mirrors the naming and shaming strategy used by the FATF, for instance. The ENCCLA is often cited in reports of international anti-corruption covenants review mechanisms as the reference of initiatives towards the fulfilment of their requirements. The last MESICIC report mentions ENCCLA's articulations to increment international legal cooperation and *"the formation of joint transnational investigative teams"* and the efforts of the initiative to the enactment of legislation to protect whistle-blowers in corruption cases.[295] It is also referred as a sign of success and a good practice by the UN Convention Against Corruption peer review mechanism report produced by Mexico and Haiti.[296] In fact, ENCCLA has championed the adoption, by

[295] OAS, *Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption* (Organization of American States 2011) <http://www.oas.org/en/sla/dlc/mesicic/docs/mesicic3_bra_en.pdf> accessed 09 January 2022

[296] UNODC, *Review by Haiti and Mexico of the Implementation by Brazil of articles 15 – 42 of Chapter III. "Criminalization and law enforcement" and articles 44 – 50 of Chapter IV. "International cooperation" of the*

Brazil, of many instruments imported from the FATF recommendations, guidelines and international law mechanisms. The insertion of ENCCLA as an interlocutor of the international anti-money laundering and anti-corruption regimes is explained by Barreto in the commemorative booklet of the Strategy's 10th anniversary:

> After the recognition of the transnational character of organized crime, Brazil has been negotiating a series of judicial and police international cooperation instruments, aiming the joint efforts to combat criminal activities that are executed, simultaneously, in many countries. In the UN, the Palermo Convention, from 2000, is a significative milestone in transnational crime fight. The punishment of the guilty and the recovery of crime proceeds could not be under threat by the simple transpositions of one border. International cooperation mechanisms were stablished aiming a better criminal instruction, crime punishment, and the recovery of assets distorted abroad. The organization of a combat system to crime in the international instance, however, needed to be accompanied by a solid national system, internal, based on cooperation, in which the joint efforts would promote work agility, avoiding the multiplication of initiatives.[297]

ENCCLA's targets have historically aimed to influence the Legislative to not only assure the approval of laws required by the international laws, but also to make international substantive consensus prevail in the internal discussions of Draft Bills. ENCCLA's Action 8, for 2010, for example, involved the follow up and analysis of Draft Bill 5.228, from 2009, which later became Law 12.547, from 2011, known as the Access to Information Law, considered a landmark for the Brazilian State transparency and corruption prevention and monitoring. Action 9, for 2011, focused on the push for the Draft Bill 3.443, from 2008, that brought many modifications to the organized crime and money laundering legislation in Brazil. Action 9 is regarded as an unfolding of 2004 Target 20, that foresaw the proposition of alterations in the original proposal to amplify the hypothesis of money laundering, the introduction of administrative seizure of assets and a new definition of organized crime and terrorism. The Bill was enacted as Law 12.638, from 2012, and the ENCCLA influence was decisive to make Senator Pedro Simon's substitutive proposal successful, aligning the Brazilian legislation on the matter to international provisions from the FATF and the UN Convention Against Organized Crime in many aspects. The main change compared with the Law 9.613

United Nations Convention against Corruption for the review cycle 2010-2015 (United Nations Office on Drugs and Crime 2016) <https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2017_01_19_Brazil_Final_Country_Report.pdf> accessed 11 December 2020

[297] Luis Paulo Barreto, 'A Enccla e o Combate ao Crime no Âmbito Doméstico e Internacional' in *Enccla: Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro: 10 anos de Organização do Estado Brasileiro Contra o Crime Organizado* (Ministério da Justiça 2012) < http://enccla.camara.leg.br/quem-somos/enccla-10-anos> accessed 16 December 2020 56

provisions and the original proposal was the end of the list of precedent crimes, which made money laundering an autonomous offense to be prosecuted independently from the type of the original crime or its investigation outcome. ENCCLA's Action 1, for 2018, was the elaboration of a National Plan to Fight Corruption, partly inspired in a joint project developed by Getúlio Vargas Foundation and Transparency International that was qualified by TI itself as the *"greatest anti-corruption package ever produced in the world*".[298]

The ENCCLA initiative has played the role of an intergovernmental agency that works as a vector of influence from the international anti-money laundering and anti-corruption norms, guidelines, and principles to Brazilian institutions. As Araújo points out, the ENCCLA has no commitment with the effectiveness of incarceration as a response for transnational corruption, it is much more focused with the financial aspects of the phenomenon, such as the illicit flux of money and goods over borders and with the spread of the anti-corruption movement, its mechanisms, and tools to as many institutions as possible.[299] One of the main programs developed by the initiative is the National Training Program on Combat to Money Laundering and Corruption, a course offered to more than 19.000 public servants from the Federal and State administrations. ENCCLA's actions, thus, depart from the view of corruption as a criminal problem to present the international anti-corruption system as a more comprehensive response to it, which offers the criminalization commands as a first but not only approach.

The criminal prosecution and punishment of corruption acts are still a trademark of the international anti-corruption movement, but it has assumed a residual role in face of managerial/good governance measures fostered by international anti-corruption agencies. The prevalence of modes of cooperation concentrated on assets recovery and the engagement of civil society in the anti-corruption debate would be a consequence of the perception that the criminal procedures have their pace, usually slow, requiring a package of measures that intervene in the problem of corruption in another gear, much faster.[300] Some would call this mode of broad governance of the anti-corruption efforts championed by ENCCLA as a *"whole*

[298] Michael Freitas Mohallem and others, *Novas medidas contra a corrupção* (Fundação Getúlio Vargas-Rio 2018) <https://static.poder360.com.br/2019/05/Novas_Medidas_pacote_completo.pdf> accessed 2 February 2021 4

[299] Felipe Dantas de Araújo, 'Uma análise da Estratégia Nacional contra a Corrupção e a Lavagem de Dinheiro (ENCCLA) por suas diretrizes' (2012) 2 Revista Brasileira de Políticas Públicas 53

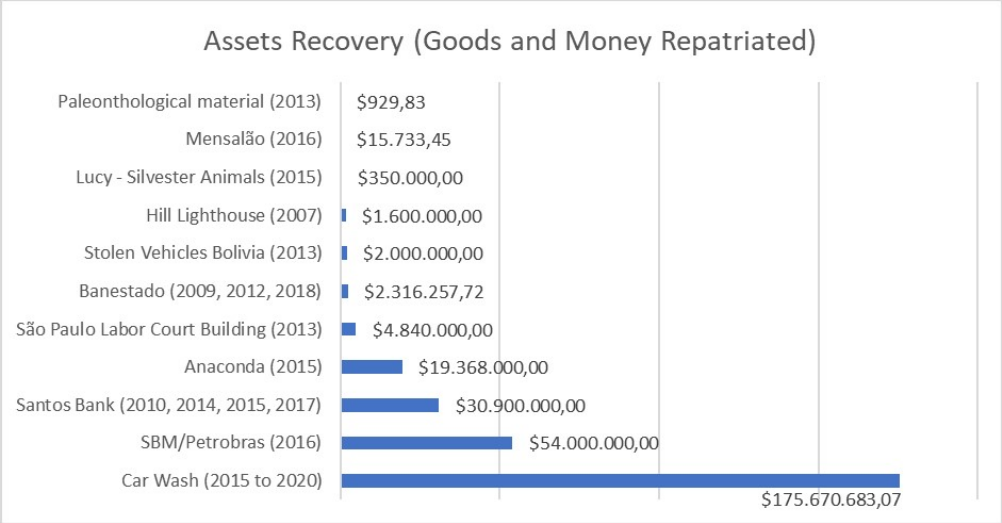
[300] Felipe Dantas de Araújo, 'Corrupção e Novas Concepções de Direito Punitivo: Rumo a um Direito de Intervenção Anticorrupção?' (2011) 8/2 Brazilian Journal of International Law 224

of government approach" or *"joined-up government"*, in which administrative measures for monitoring and prevention prevail over criminal repression.[301]

The ENCCLA executive secretariat is a responsibility of the Department of Assets Recovery and International Mutual Legal Assistance of the Ministry of Justice (DRCI). The Department was also structured in the early 90s and has the institutional role to concentrate the Mutual Legal Assistance requests that Brazilian authority's issue (active) and receive (passive), be they related to criminal prosecution, investigative measures, freezing of bank accounts and assets confiscation and recovery or to civil matters such as international children adoption. The number of criminal mutual legal assistance requests, both active and passive, shows a progressive integration of Brazil into the international arena of information and investigative sharing. Between 2005 and 2011, the criminal mutual legal assistance requests oscillated between 1.000 and 1.250. After that, it experienced a steep rise from 1.301 requests in 2013 to 2.329 in 2017, with ever increasing figures in all the years in that time span. In 2018 and 2019, there was a retraction, but the number never fell below 2.000 requests. The monetary value of goods and assets frozen overseas chart shows a similar pattern. Except for a peak of USD 195 million seized in 2004 and another rise to USD 83 million in 2008, Brazil never had more than USD 50 million of frozen money abroad until it recorded a record USD 499 million in 2015, the same year it also reached a record of USD 145.218.000 repatriated. The impact of *Car Wash* operation in those figures is undeniable. Between 2014 and 2020, the operation that was heavily underpinned by UNCATOC (UN Convention Against Transnational Organized Crime) and UNCAC (UN Convention Against Corruption) investigative methods, such as the criminal activity participants awarded cooperation with law enforcement authorities (UNCATOC Article 26, UNCAC Article 37) responded alone for USD 728.960.600,64 in goods and assets frozen abroad and for the definitive recovery of USD 175.670.683,07.

Figure 2 – Assets Recovered via International Legal Mutual Assistance/Operation (in USD Thousands)

[301] Michael Freitas Mohallem and Carlos Emmanuel J Ragazzo, *Diagnóstico institucional: primeiros passos para um plano nacional anticorrupção* (Fundação Getúlio Vargas-Rio 2017) <https://bibliotecadigital.fgv.br/dspace/handle/10438/18167> accessed 16 February 2021 49-52



Source: DRCI - Department of Assets Recovery and International Mutual Legal Assistance of the Ministry of Justice

The efficiency of the mutual legal assistance requests made by Brazil also increased considerably due to the possibility of direct cooperation between investigative authorities to routine exchange of information that favours the tracking of offshore companies and accounts in tax heavens. The debate over the necessity of judicial authorization for that kind of cooperation between investigative authorities for preparatory measures to the request of mutual legal assistance was settled by a decision of the Superior Court of Justice in the Reclamation 2.645, from 2009.

The ruling states that:

> Concerned with the phenomenon of transnational organized crime, the community of Nations and international organisms have approved and are executing, in the last years, mutual cooperation measures for prevention, investigation and effective punishment of crimes of this kind. It presupposes an efficient system of communication, exchange of information, evidence-sharing, decision-making and implementation of preventive, investigative, instructive or cautionary measures, of an extrajudicial nature. The cooperation system, established in bilateral and plurilateral international agreements, does not, of course, exclude the relationships that are established between judicial bodies, by the system of precatory letters, in lawsuits already submitted to the jurisdictional sphere. But in addition to them, it encompasses other many measures, affected, within the internal scope of each State, not to the Judiciary, but to police or Public Prosecutors linked to the Executive Branch.

And concludes:

> The clauses of treaties and conventions on international legal cooperation (see art. 46 of the Convention de Mérida - "United Nations Convention against Corruption" and art. 18 of the Palermo Convention - "United Nations Convention against the Transnational Organized Crime") are not unconstitutional. Those norms establish forms of cooperation between authorities linked to the Executive Branch, in charge of prevention or criminal investigation. The constitutional norm of article 105, item I, letter i, does not give to the STJ the universal monopoly of these relations mediation. The competence established there - from granting execution orders to rogatory letters -, exclusively concerns relations between the organs of the Judiciary,

> neither preventing nor being incompatible with the other forms of legal cooperation provided for in the aforementioned international normative sources.

The judicial decision draws normative force from the UN Conventions to reinforce the relationship between investigative bodies of different countries exempting the necessity of judicial authorization for all those day-to-day investigative information exchange for which the Constitution does not expressively require judicial authorization. That decision opened the channels of communication between prosecution authorities and made the mutual legal assistance requests managed by DRCI more precise and effective.

Carson and Prado trace a very interesting summary of how, despite its deficiencies, the arsenal of accountability institutions mentioned above contributed to uncover a series of corruption scandals beginning with the impeachment of former President Fernando Collor in 1992. A few years later, a Parliamentary Inquiry Committee investigation revealed the misuse of budget amendments by a group of congressmen known as the *"budget dwarves"*, in a reference to their overall low stature. Those members of the Brazilian Congress used pork barrelling prerogatives to deviate budget resources to fake social organizations and contractors in a kickback corruption system. The study also describes how a Congress members bribery scheme in exchange for support for the approval of the *"Reelection Amendment"* during President Fernando Henrique Cardozo tenure became public, and the sequence of arrests and criminal convictions related to money distortion in the São Paulo Labour Court new building construction. The randomized audits carried on by the Federal General Comptroller (CGU) was responsible for the discovery of overprice and corruption in the procurement of ambulances by local health authorities with decentralized federal money, called the *"Bloodsuckers Operation"*, and the Federal Police Department gained public credibility for the deflagration of other nationwide operations related to corruption in regional aid programs (Sudene/Sudam). The Federal Police also discovered a system of bribery for judicial decisions known as *Operation Anaconda*. At last, but definitely not least, the Brazilian institutional set to fight corruption unveiled the *Mensalão* case, a major scandal involving the use of overpriced contracts in State owned companies to provide the continuous payment of a secret monthly wage to Congress members to assure their votes in Draft Bills of strategical interest for the government.[302] The case struck down the directive board of the Workers Party , resulting in the criminal conviction for corruption, money laundering and criminal organization of 26 people,

[302] Carson and Prado (3) 18-22

including the general treasurer and the former president of the Workers Party, the former President of the Deputy Chamber, and the former Secretary of State.

By the time of those investigations, though, the international anti-corruption main instruments were in their early stages of implementation and the legislative reform to comply with the international standards in Brazil was not complete. A third round of Draft Bills and laws were enacted in the beginning of the 2010 decade. In 2011, Law 12.527 came into force to regulate the right to information provisioned by Article 5, item XXXIII of the 1988 Constitution. The Access to Information Law is considered a milestone in Brazil's integrity system once it stablishes the publicity of information as the guiding principle of the public administration, and the secrecy as an exception, set forth the obligation of providing public information regardless of requests to the public offices, preferably through technological resources, fostering the social control of public administration. The motivation charter attached to the Draft Bill 5.228, from 2009, a substitutive proposal presented by the Executive Branch to the original Draft Bill 219, from 2003, refers the importance of the measure for democracy, citizenship exercise, corruption fight and transparency, as follows:

> In 2008, the United Nations Educational, Scientific and Cultural Organization - UNESCO released a report that shows that in 1990, only thirteen countries had regulated the right of access to information. Currently, more than 70 countries have already adopted this legislation, while dozens of others are in an advanced process for its elaboration. Another advance pointed out by UNESCO, lies in the recognition by many countries of the right to information as a fundamental right. The guarantee of the right of access to public information as a general rule is one of the great mechanisms for the consolidation of democratic regimes. Access to public information, in addition to being indispensable to the exercise of citizenship, is one of the strongest instruments for combating corruption. The preliminary project in question, therefore, appears as yet another measure adopted by the Federal Government to promote ethics and increasing transparency in the public sector.

In 2012, Brazil adopted a new anti-money laundering statute. As explained in a previous passage, the ENCCLA had a direct influence in the Legislative discussion of the matter. Senator Pedro Simon presented a substitutive proposal to the Draft Bill 209, from 2003, before the Senate's Economic Affairs Committee in which he mentions the necessity to integrate Brazil to the "third generation" of international anti-money laundering efforts:

> The most recent proposition, PLS no 225, of 2006, has the merit of inserting Brazil among countries that have the so-called "third generation" of laws in the fight against money laundering, which consists in the elimination of the list of antecedent crimes. Thus, assets, rights and values arising from any criminal offense (crime or criminal misdemeanor) may characterize money laundering. For this reason, we believe that Amendment no 1, proposed by Senator Arthur Virgílio, which aims to recompose in PLS no 225, of 2006, the closed list of antecedent crimes, is against the most recent advances in the international landscape.

The legislative overhauling to expand anti-corruption measures way beyond criminal prosecution had another chapter in Law 12.813, from 2013, which regulates the conflict of interests in the Federal Public Administration. The message attached to Draft Bill 7.528, from 2006, which generated Law 12.813, was produced by the Federal General Comptroller (CGU) and expressively clarifies that the main goal of the proposition was to *"adapt domestic legislation to international conventions provisions, with emphasis on the United Nations Convention against Corruption, adopted by the United Nations General Assembly on October 31, 2003"*.

In 2013, Law 12.846, also known as the Anti-Corruption Law was approved to discipline the legal persons responsibilities for acts of corruption against the Public Administration, both domestic and foreign. The Anti-Corruption Law details the requisites and procedures for the celebration of cooperation agreements between companies involved in corruption and law enforcement authorities, a mechanism that has enabled the repatriation of goods and values distorted abroad, widely used in recent investigations, such as the *Car Wash* operation, in which 22 cooperation agreements were celebrated with many representatives of the private sector, including some of the Country's biggest multinational contractors (Odebrecht, OAS, Andrade Gutierrez and Camargo Correa). According to the Federal General Comptroller (CGU) information, those agreements are already responsible for the return of R$ 3.840.367.468,77 to public coffins with more than R$ 10 billion already agreed to be repatriated soon. During the Draft Bill 6.826, from 2010, legislative procedure, the Special Committee for Acts Against the Administration of the Deputy Chamber issued an opinion in the sense that:

> The control of corruption has, therefore, become fundamentally important in strengthening democratic institutions and enabling countries to grow economically, which is why the United Nations Convention against Corruption, the Inter-American Convention to Combat Corruption and the Convention on Combating the Corruption of Foreign Public Officials in International Business Transactions were drafted, all of which Brazil is a signatory. As a result, our country has forced itself to punish legal entities that commit acts of corruption, against the national public administration and, in particular, those called transnational bribery, characterized by the active corruption of foreign public officials and international organizations representatives. Hence, there arose the need to elaborate specific legislation that would reach, by means of administrative and civil accountability, the legal entities responsible for the acts of corruption described in international agreements.

Once more, not only the necessity to comply with international laws is brought up as a sufficient rationale for passing the new legislation, but also the international anti-corruption discourse on the causal relations between effective fight against corruption, economic development and democratic consolidation is incorporated. Likewise, Law 12.850, from 2013,

which redefines criminal organization and regulates new investigative methods is strongly backed up in international law provisions. The Deputy Chamber's Constitution and Justice Committee opinion on the Draft Bill 6.578, from 2009, highlights that:

> Indeed, this Bill, inspired by the aforementioned Palermo Convention, brings together the constituent elements of the criminal organization offense, allowing it to be distinguished, where appropriate, from the crime of gang, now called "criminal association", as provisioned in article 288 of the Penal Code. In addition, it brings specific rules on criminal procedure and regulates more robustly the means of obtaining evidence, such as awarded cooperation, controlled action and the infiltration of agents, currently provided for in Law 9.034/95 but seldomly applied due to the absence of necessary rules to ensure its effectiveness.

The investigative toolkit offered by UN Convention Against Transnational Organized Crime and UN Convention Against Corruption was fully adopted by Law 12.850. It introduced in Brazilian criminal procedure law mechanisms developed in a different legal system that reflect the American tradition of a negotiated criminal jurisdiction. In Brazil, the criminal procedural law is affiliated to the Roman-Germanic legal framework, which imposes some difficulties to reconciliate the international norms with some constitutional principles and dogmas.[303] The possibility to award someone under investigation for a collaboration, for instance, is not exactly a novelty to Brazilian criminal procedure law. The idea that the system should encourage participants of complex criminal offenses to collaborate with the prosecution via the reduction of prison time is found since article 25, paragraph 2, of Law 7.429, from 1986 (Crimes Against the National Financial System Law), article 8, paragraph 1 of Law 8.072, from 1990 (Heinous Crimes Law), article 16, paragraph 1 of Law 8.137, from 1990 (Crimes Against the National Tax System Law). Article 159, paragraph 4 of the Penal Code, added by Law 9.249, from 1996, has similar provisions related to kidnapping and the hostage's freedom. Nevertheless, in all those cases, the benefit is limited to a prescribed fraction of time sentence reduction and its concession is absolutely under judicial discretion by the time of the final verdict. The time of the collaboration, the extent of its contribution to the investigations, and the participation of prosecution authorities in it has never been clear in those legislations and, probably due to its poor regulation, the mechanisms never achieved notoriety.

The awarded collaboration as an autonomous procedural legal transaction between Police or the Public Prosecution authorities and the person under investigation with the possibility of negotiation of multiple levels of benefits, according to the relevance of the collaboration only comes to Brazilian Law through the new Anti-Money Laundering Law (Law 12.638, from 2012) and then, more comprehensively, in the new Criminal Organizations Law

[303] Cordini (249) 271

(Law 12.850, from 2013). As explained above, both statutes were approved with significant influence of anti-corruption International Law and contents produced by institutions committed with international anti-money laundering and anti-corruption guidelines, such as ENCCLA and DRCI.

The definite popularization of the awarded collaboration under the term *"delação"* (denouncement, accusation, incrimination) happened as *Car Wash* operation gained headlines. Indeed, in *Car Wash* operation alone 256 awarded collaboration agreements were celebrated out of which nothing less than 209 were originated by the task force in Curitiba, State of Paraná. The awarded collaboration agreements terms celebrated by the Federal Public Prosecution office in Paraná, which was ahead of the *Car Wash* operation task force, expressively mention as legal bases for its validity Article 26 from the Palermo Convention (UNTOC) and Article 37 of Merida Convention (UNCAC). The awarded collaboration agreements from the *Car Wash* operation task force in Paraná involved fines that mount to R$ 2,1 billion and recovered R$ 111,5 million as voluntary devolutions from defendants.

The indiscriminate use of the mechanism is not free from critique, though. Some argue that the mob frenzy over the successes of *"delação"* led Brazilian judicial institutions to elevate it to the status of a broad criminal policy, blocking any possibility of assessment of its pros and cons and, ultimately, of its fairness.[304] The awarded collaboration is one procedural tool amongst many others that need to be evaluated by those who formulate the criminal policy in its effectiveness to address the problem of corruption holistically, supressing its economic and social causes and not only remediating its consequences.[305] Some specific cases show that the uncritiqued incorporation of awarded collaboration to Brazilian criminal procedural law can lead to some distortions. One of the main collaborators to *Car Wash* operation was Alberto Youssef, a key financial operator for the scheme of money deviation from overpriced contracts between cartelized companies and Petrobras to political parties and corrupt directors of the Brazilian state-owned oil company. The awarded collaboration agreement dealt between the *Car Wash* task force and him was not the first he celebrated with Curitiba's law enforcement authorities. Few years before, he had taken part of another awarded collaboration agreement related to his action as an illegal currency exchange agent in another major corruption scandal involving cash evasion abroad from a State of Paraná privatized bank, known as the *Banestado*

[304] Fernando Andrade Fernandes and Ana Cristina Gomes, 'Acerca da experiência brasileira com o Instituto da Delação Premiada, expectativas político-criminais transmudadas em Políticas Públicas Criminais' 83 Revista Jurídica LEX 369-0

[305] Ibid

case. That first agreement set forth the collaborator commitment to not engage in another criminal activity. In some sense, the awarded collaboration agreement celebrated by Alberto Youssef with the *Car Wash* task force was the recognition of the failure of the awarded collaboration agreement he had signed during the *Banestado* case, which raises concerns over his loyalty with the prosecution institutions. Another case that can illustrate problems with the blind reliance of criminal prosecution with *"delação"* is related to the case of Nestor Cerveró, a former director of Petrobras. He was preventively arrested in the beginning of 2015 and started to negotiate with the Federal Public Prosecution office in Curitiba the terms of an awarded collaboration agreement. Fearing the results of his possible collaboration, Workers Party and Government Leader in Senate Delcídio Amaral contacted Cerveró's family to present a plan to bribe him and help him scape to Spain. It all became public as Bernardo Cerveró, Nestor's son, secretly recorded his whole conversation with the Senator on tape, which he gave to the Federal Public Prosecution office and, ultimately, was used as evidence for the cautionary arrest of the Senator by the Supreme Court. The situation demonstrates that investigations strongly based on *"delação"* can make criminal prosecution susceptible to a *"marketization"* in which the decision between collaborate with law enforcement authorities or protect peer criminals turns into a dangerous auction between judicial actors and criminal organizations to be won by who offers more advantages.[306]

Those potential or theoretical concerns are not the only ones surrounding the awarded collaboration obsession that encapsulated criminal prosecution in Brazil especially during the *Car Wash* operation. One of them affects one of the legal requirements for the awarded collaboration agreement, which is the voluntary decision to cooperate by the person under investigation (Article 4, paragraph 7, item IV of Law 12.850, from 2013). It is debatable if people under custody for a prolonged time can voluntarily decide to cooperate with the investigations, especially if in addition to their cautionary arrestment the Judiciary increments coercion measures such as accounts freezing, arrestment of other participants of the criminal organization and bench warrants to make people attend to hearings compulsorily with the presence of police agents. Although it is impossible to tell the influence cautionary arrests might have in the will of the collaborator, the possibility to remain preventively arrested for indefinite time was specifically negotiated by some collaborators with the *Car Wash* task force. That is another curiosity of some awarded collaboration agreements celebrated by *Car Wash*

[306] Marcelo Rodrigues da Silva, 'A colaboração premiada como terceira via do direito penal no enfrentamento à corrupção administrativa organizada' (2017) 3 Revista Brasileira de Direito Processual Penal 305

task force with many collaborators: the offer, by the prosecutors, of benefits that surpass the possibilities provisioned by Law 12.850, from 2013. Article 4 admits the possibilities of full pardon, reduction of the sentence time up to 2/3 of it, or the substitution of imprisonment for other modalities of penalties such as fines, social service rendering, and other rights constraints. Nevertheless, as seen, a collaborator negotiated the swap of cautionary arrestment for provisory home detention, other negotiated the immediate release of his estate property in benefit of his relatives and many others that agreed to pay significant fines or to help with values recovery were awarded with a "differentiated open regime" in which the collaborator had to serve time in an hybrid scheme of freedom with the obligation to return home during the night and on weekends. Although such hybrid regimes do not find correspondence in Brazilian legislation, the negotiation of unprecedented "prizes" with collaborators was not an exception during *Car Wash* operation, as shown by the comprehensive analysis carried out by Schertel Mendes in which 106 agreements were examined.[307] For the purposes of the discussion of this Chapter, the legality of such agreements is not the main focus. The striking aspect is the prevalence of a new approach of the criminal law system not as focused on retributing the offenses with incarceration but on the economic aspects of corruption and the recovery of distorted money.[308] More than that, the canonical status attributed to awarded collaboration represents the triumph of an alternative criminal law, less concentrated in retribution, and more inclined to a "leniency revolution" based on a principal-agent structure that resembles how economic theory and managerial trends invaded the whole international anti-corruption movement[309].

This relatively mild response to crimes that were confessed and involved huge amounts of money is coherent to the international anti-corruption regime tendency to detach the phenomenon from its criminal roots, qualifying it in economic terms and as a broader governance disfunction. Transparency International has considered some results of anti-corruption efforts in Brazil, as the ones presented by *Car Wash* operation, remarkable. The appreciation for the integration between *Car Wash* operation and the international anti-corruption trends is evidenced by the fact that the operation received the NGO's Anticorruption Award of 2016. The participation of Transparency International in Brazil's institutional efforts to fight corruption is extensive. As highlighted before, it has participated of joint projects, producing reports and technical proposals, attending to ENCCLA's meetings, and celebrating

[307] Francisco Schertel Mendes, *Leniency Policies in the Prosecution of Economic Crimes and Corruption* (Nomos Verlagsgesellschaft mbH & Co. KG 2021) 61
[308] Silva (306) 293
[309] Schertel Mendes (307) 148

agreements with Brazilian institutions, such as the Cooperation Agreement 2, from 2017, celebrated with the National Council of Justice to promote studies and research on the best international practices on judiciary management and corruption combat, judges and clerks training in anti-corruption and anti-money laundering themes, with international exchange, development of publicity campaigns to sensibilize the public opinion towards transparency of data, corruption and social control. Here, the last trait of the anti-corruption regime reaches its full potential: the engagement of society with its causes. Once that is probably the international anti-corruption agenda most impactful characteristic to Brazilian democracy, it will be addressed with more detail in the next Chapter.

Although it has taken place through different actors and ways, all the forms of interaction between the international anti-corruption movement and the Brazilian institutional framework analysed so far happened via formal mechanisms of importation of legislation, targets, guidelines, agreements, covenants provisions, and discourses. So, be through legal reforms carried on to increase State efficiency, as happened right afterwards the 1988 Constitution enactment, by means of monitoring, audit, institutional reforms that brought COAF, CGU, ENCCLA and DRCI to existence in the early 2000's, new legislation that incorporated FATF, MESICIC or UNODC standards with immediate outcomes in judicial adjudication as happened in 2010 decade, the penetration of the international anti-corruption principles and methods in Brazil is undeniable. Some consider the changes in Brazilian legislation and institutional settings to battle corruption based on international guidance the *"main transformation in the Brazilian State and society"* in the last decades, with the construction of a broad *"anti-corruption state of affairs"*.[310] Indeed, in the last years, Brazil's efforts to fully comply with international anti-corruption standards have generated favourable appraisal from important non-governmental anti-corruption organizations, with high scores and awards being granted by Amarribo Brasil, Global Integrity and Transparency International. In the next section we will address the expected results of such a robust influence over Brazilian democracy.

[310] Luciano Meneguetti Pereira, 'A Aplicação do Direito Internacional no Combate à Corrupção no Brasil: A Cooperação Jurídica Internacional e a Atuação do Ministério Público Federal na "Operação Lava Jato"' in Menezes W (ed) *Direito Internacional em Expansão* (vol VII Arraes Editora 2016) 87; Marcos Tourinho, 'Brazil in the global anticorruption regime' (2018) 61 Revista Brasileira de Política Internacional 15

3.4 The Struggle Against Corruption: The Last Step Towards Democracy Consolidation?

It seems like a common agreed diagnosis that the Brazilian democratic deficit is due to the inefficiency of the State agencies to fight corruption. The integration to international anti-corruption efforts is pointed out as a solution for that problem. Indicatively, Rose-Ackerman and Palifka have argued that international integration is of crucial importance if Brazil is holistically and efficiently to battle corruption.[311] Warf affirms that democratization in Latin America *"left something to be desired"* creating itself new opportunities for corruption as would be demonstrated by the Brazilian example, where every government since the transition to democracy has its own major corruption scandal to be remembered. His data, however, show that Brazil presents the second lowest - only higher that Trinidad & Tobago - percentage of people that declare having paid a bribe and the second highest percentage of respondents that declared it is socially acceptable to report bribes to the authorities - only lower than Costa Rica - in 2016, among 20 countries in South, Central America, Caribbean and Mexico.[312] The assumption that corruption in Latin America, and for extension, in Brazil, is uncontrollable, impeding *"the further deepening and consolidation of democracy"* or a *"prominent cause of low-quality democracy"* is appealing for some reason, regardless the achievements reached in those areas.[313] In that sense, Rehren points out that after the democratization wave that swept Latin America in the last decades of the twentieth century, democratic legitimacy was subject to erosion in the region because of corruption.[314] Fighting corruption effectively is perceived as the "unfinished" business in the transition from dictatorship to the definitive implementation of the *"Rule of Law"*.[315] As seen in Chapter I, one of the latest consensuses in the quality of democracy theories is that high quality democracies presuppose as one of its dimensions, effective mechanisms of control capable to hold representatives accountable before controlling agencies, bureaucracies, and ultimately the electorate. Anti-corruption efficiency is one of the ways to show that *"Rule of Law matters"* to democracy assessment.[316]

The triumph over corruption, in all its manifestations, is considered by many as the last challenge to be overcome by Brazilian democracy to its definitive consolidation. As Power and Taylor state *"as Brazilian democracy evolves past some of the simpler institutional threats of*

[311] Rose-Ackerman and Palifka (3) 89
[312] Warf (3) 25-6
[313] Bailey, 'Corruption and Democratic Governability' (3) 75; Morris and Blake (3) 4
[314] Rehren (3) 46
[315] Calleros-Alarcón (3) 46-7
[316] Guilhermo A O'Donnell, 'Why the rule of law matters' (2004) 15/4 Journal of democracy 36

its early transition, political corruption increasingly appears to be one of the main hurdles to achieving the promise of a consolidated and robust democratic polity".[317] Although Brazil has engaged in a major institutional overhauling to enhance the capacity of its accountability agencies to identify, process and punish corruption, some argue that the improvements perceived in the institutional arrangements employed in investigating corruption scandals were not followed by the Judiciary in terms of sanctioning political agents severely enough.[318] Likewise, Taylor detects the lack of sanctions and effective punishment of influent political actors and businessmen as a factor that inhibits the Brazilian accountability mechanisms and organisms to give their decisive contribution for the new democracy.[319] In other words, the missing part of the democratic puzzle was the consolidation of an efficient multileveled accountability net, able to identify and punish corruption. Although recognizing the institutional progresses made by Brazil in identifying and investigating corruption scandals, the absence of effective punishment for corruption actors is still pointed as a major problem. The efforts to adopt the international anti-corruption packages just seem never to be enough.

International anti-corruption regime found the force to fuel its worldwide spread when it detached itself from its criminal genesis to adopt a more comprehensive, interdisciplinary approach. The adoption of transparency, accountability, and investigatory mechanisms became a jewel of the managerial, good governance and efficiency packages. As Trubek and Santos warn, these developmental projects and steps often misrepresent the realities in which they want to intervene.[320] The idea that the missing part to Brazil full democratization was more efficiency in punishing corruption is very representative of these misrepresentations. It not only disregards all the reforms and efforts already made to empower accountability and control institutions, organisms and their achievements but is also irresponsive to the challenges and vocation of Brazilian constitutional democracy. Conceived internationally but intentionally focused on engaging with the popular, participatory element of domestic democracies, it does so only partially and indirectly through politically and interest driven legal elites willing to sponsor the efforts locally. Kennedy alerts that the anti-corruption agenda was put forth along with human rights as *"a universal vocabulary of political legitimacy"*, presenting itself as a supposedly technical, apolitical and neutral intervention to take countries to the development

[317] Power and Taylor, *Corruption and Democracy in Brazil the Struggle for Accountability* (3) 13
[318] Carson and Prado (3) 32
[319] Taylor, 'Corruption, Accountability Reforms, and Democracy in Brazil' (3) 167
[320] David M Trubek and Alvaro Santos, *The new law and economic development: a critical appraisal* (Cambridge University Press 2006) 17

and democratic promised land. Nevertheless, *"their criticism, strategies, and language all have consequences, allocate stakes, exercise power"*.[321] In Brazil, the institutional machinery considered necessary for the enforcement of human rights, corruption eradication and the presumably resultant democratic consolidation involved the empowerment of lower-level judicial elites. The means by which the discourse on those democratic deficiencies related to shortcomings in fighting corruption reached a pervasive semantic level that encapsulated the political mindset in Brazil and its repercussion for democracy will be discussed in the next Chapter.

For now, it is important to stress that while street rallies and banner waivers engage into public campaigns against corruption and mobilize themselves to pressure democratic institutions thinking of themselves as holders of their own destiny, all they are doing is to mimic, as puppets in a ventriloquist lap, discourses developed in summits, private meetings and conferences held at oceans of distance of them, of which them can`t even dream of participating.

[321] Kennedy D, *The dark sides of virtue: reassessing international humanitarianism* (Princeton University Press 2004) 328-9

Chapter 4

The Fight Against Corruption: From Societal Engagement to Social Poisoning

Introduction

Chapter 1 set out the argument that contemporary democracy is rooted in the inaugural and continuous interplay of two factors. It is about broad political participation, the fruition of civil and political liberties that robust the public sphere and the various means of manifestation of popular will as much as it is about access and inclusion to a variety of social, economic, cultural, and intersubjective rights. Democracy in the Global South depends on the institutionalization of polyarchal requirements as proposed by Dahl and measured by the Swedish V-Dem Index (Varieties of Democracy).[322] Yet it must encompass the adoption of universal, cosmopolitan, rights-based policies that produce wealth distribution, and racial and gender equality, as proposed by Campbell.[323] In other words, democracy evolves as society mobilizes itself to participate in elections, plebiscites, and referendums, to exercise pressure and make representatives accountable or to litigate for their rights in courts. Nevertheless, it also presupposes that more and more people ascend above sub-par living conditions, in which they are forced to deal with food insecurity, infant and childhood mortality, structural and institutionalized racial cleavages, or even the threat to disappear as people. As discussed in chapter 2, policies to fight poverty, the implementation of a public and comprehensive health care system as a right, the adoption of affirmative action in higher education recruitment criteria to diminish racial discrimination, and the enactment of measures to protect indigenous populations are often produced by inputs from international regimes. A whole set of Declarations, Covenants, additional protocols, multinational organizations' financial aid initiatives, institutional reform packages, reports, NGO's index, awards, and reports come to awaken legal and societal repercussions in the domestic realm. In the case of the human rights regimes addressed in Chapter 2, our pattern of measurement of democracy improvement/decrease was twofold. The capacity of those international regimes to positively influence political, and participatory enfranchisement was a sign of democracy enhancement,

[322] Dahl, *Polyarchy: participation and opposition* (69); Teorell and others (83)
[323] Campbell (12)

but this was not the sole criterion. The dimension of inclusion was also decisive to determine whether measures to fight hunger and poverty, provide health care assistance as a right, balance opportunities to access higher education public institutions for black people and to protect indigenous populations strengthen citizenship in Brazil. This Chapter is an attempt to evaluate the effects of the adoption of international anti-corruption regimes in Brazil according to the same analytical template.

As seen in the previous chapter, the integration of international anti-corruption initiatives and standards was pointed as a necessary step toward Brazil`s complete democratization. The idea of an intrinsic correlation between the fight against corruption and democratic consolidation is not a peculiar trait of the Brazilian context, though. As Gutterman and Lohaus argue, one of the main premises on which the international anti-corruption movement is set forth is that corruption *"undermines democracy"*.[324] Sousa and others also pinpoint that the international supporters of the good governance agenda assume that anti-corruption and democracy are indivisibly imbricated.[325] The fight against corruption became one of the main requirements for countries that were living through political transitions during the 1990s to be considered *"democratic"* and, thus, to get a passport for *"modernity"*, represented here as membership in the EU or OECD.[326]

However, a constant problem with anti-corruption measures is that of assessing their effectiveness. As Sampson stresses, anti-corruption packages demand analysis of their impact as much as any other public policy, which generates the creation of perception index and rankings that can be misleading.[327] Corruption is a phenomenon difficult to discern and identify and, thus, difficult to measure. In some cases, when the effectiveness of anti-corruption provisions is at its peak, the perception of corruption also raises while in others, complacent anti-corruption bodies can collaborate for a false perception of low corruption levels.

The challenge posed by the necessity to legitimize anti-corruption efforts with results and the idea that the fight against corruption is a democratic cause comes together in the form of increasing public awareness of corruption. In Chapter 3, we saw three main features that

[324] Gutterman, E., Lohaus, M. What is the "Anti-corruption" Norm in Global Politics? in Kubbe, I., Engelbert, A. (eds) *Corruption and Norms. Political Corruption and Governance*. (Palgrave Macmillan 2018) 246
[325] Luis de Sousa, Peter Larmour and Barry Hindess, *Governments, NGOs and anti-corruption: the new integrity warriors* (Routledge 2009) 219
[326] Matilda Dahl, 'How do International Organizations Scrutinize Transforming States? The Case of Transparency International and the Baltic States' in Sousa Lsd, Larmour, P. J., and Hindess, B. (eds) *Governments, NGOs and Anti-Corruption: the New Integrity Warriors* (Routledge 2009)
[327] Sampson (32) 265

characterize the international anti-corruption regime. Firstly, corruption is depicted as a sophisticated and transnational phenomenon that cannot be fought without full compliance with international norms, agencies, and their investigation machinery. Second, corruption was progressively detached from its original definition as a criminological phenomenon, to be explained economically, through principal-agent/risk-reward syllogisms. Thus, investigation and punishment *ex post facto* were replaced by *a priori* adoption of good-governance and transparency provisions and mechanisms to freeze, seize and recover financial proceeds of corruption. Lastly, international norms, multinational organizations' reports and guidelines, and NGO activists invest in the idea of societal awareness as a crucial part of the anti-corruption movement.

Blake recognizes that most the Latin American countries engaged in institutional reforms aimed to reduce corruption during the 90s and 2000s. But he emphasizes that, although necessary, those initiatives were not sufficient to fight corruption, once one step forward in the direction of vertical societal accountability was needed to create social *"zero tolerance"* towards corruption and a culture of *"probity, accountability and transparency"*.[328]

In the first section of this Chapter, we will see how this part of the international anti-corruption regime was incorporated in Brazil and we will scrutinize its outcomes for democratic institutions and procedures. Review mechanism reports of the UN and Inter-American Conventions Against Corruption were analysed to show this mix of favourable appraisal of legal and institutional reforms and demands for more effectiveness and data on the use of its instruments by Brazilian law enforcement institutions. We will also see how the international anti-corruption focus on public awareness explains the push by Brazilian lower-level judicial authorities for a transition from horizontal to vertical electoral accountability. In this first approach, our focus is on demonstrating how the international pressure for practical outcomes and more societal mobilization towards the problem of corruption affected traditional democratic institutions, such as the Presidency, and influenced the ultimate democratic procedure, elections. Studies on argumentative analysis and case law will be assessed to show that under the idea of increasing public awareness of corruption, lower-level law enforcement authorities implemented their political agenda, which culminated with the end of the elected President's mandate and a decisive intervention in the 2018 general elections. Secondary sources of data and public opinion surveys are addressed to show the strategic alliance between

[328] Blake CH, 'Public Attitudes toward Corruption' in Blake CH and Morris SD (eds), *Corruption and Democracy in Latin America* (University of Pittsburgh Press 2009) 95-6

those authorities, their discourses, and campaigns with the media, and how this movement spread its effects to become a broad social and cultural obsession. Anti-corruption efforts did not only destabilized core political, participatory elements of Brazilian democracy but also colonized the public sphere, contributing not to *"enlighten the understanding of public affairs and control of the public agenda"*[329], but to obscure and dominate them. Finally, we will address ways in which the loose definition of corruption adopted and advocated by Transparency International had a grip on the Brazilian political scenario, not only generating the impoverishment of political debate but also overflowing its logic to different areas of public policies.

In the second section, this Chapter goes back to the fight against poverty, hunger, and conditional cash transfer programs to show how the *"clientelism"* theory gained territory as a version of the anti-corruption discourse. It prompted the idea of the existence of fraud in the cash transfer programs and the necessity of audits as the main issues to be addressed to improve those policies. The section also analyses the impacts of those views on the social index observed in Chapter 2 to evaluate if this approach brought inclusionary or exclusionary effects.

The third section is dedicated to the invasion of the anti-corruption logic into the right to health and the public health care system. It will be addressed how it contributed to the end of a primary assistance programme and, ultimately, to the concentration of the main public efforts during the 2020 pandemic. Amid the most dramatic sanitary emergency of the modern era, the Brazilian health care system was at the centre of investigations, arrests, and inquiries to detect and punish the misallocation of public resources, health care equipment, materials, and even vaccines.

The Chapter evolves to examine if and how ideas of favouritism, and manipulation of policies for political benefit were again brought to the fore to "criminalize" ethnic minorities, with the analysis of two notorious cases related to black people's inclusion in the educational system and market opportunities. It will be also explored how a new cycle of threats to indigenous populations was brought about, with unseen international repercussions related to the perpetration of genocide by the Brazilian State.

The Chapter proposes that Brazil's full commitment to international anti-corruption initiatives and standards did not bring the democratic outcomes expected by the technical literature or experts. On the contrary, it seems like it played a considerable role in major

[329] This is one of Dahl's polyarchal requirements. See Dahl and Shapiro, *On Democracy* (52)

political events related to the destabilization of core democratic institutions – the Presidency- and procedures – the general elections. Moreover, the penetration of anti-corruption discourses and practices into the Brazilian social fabric seems to have been deeper and more pervasive. It involves not only intervention in electoral democracy, but also the colonization of the whole public sphere by its rhetoric, and agenda. The international anti-corruption vocabulary might be a major underlying influence on recent setbacks in human rights achievements, becoming the language of a new cycle of exclusion and democratic impoverishment.

4.1 From *Mensalão* to *Car Wash*: Societal Engagement to Take Fight Against Corruption to the Centre of Political Life

Brazilian political history has been surrounded by the idea of corruption for a long time.[330] Daily accusations of public wealth deviation and mismanagement were haunting President Vargas when he *"left life to enter history"* in August of 1954. The main discourse against Juscelino Kubitschek`s developmental agenda was related to widespread corruption in infrastructure projects. In the 1960 general elections, conservative Jânio Quadros won the elections for President using a broom as his campaign symbol. According to his slogans and jingles, corruption and corrupts needed to be swept out of Brazil. During his brief tenure as President, the labour leader Joao Goulart, also known as Jango, also had to deal with accusations of corruption in his government, succumbing to the military coup in 1964. Months later, Juscelino Kubitschek, the heavy favourite in all polls for the elections set to 1965, lost his mandate as Senator owing to corruption charges, one of them being that he was bribed with an apartment in Ipanema beach, Rio de Janeiro. The general elections never took place and he ultimately had to go to exile. The first President elected directly by popular vote after the end of the military dictatorship won the elections calling himself the *"maharaja hunter"*, an allusion to his capacity to end favouritisms and privileges schemes. He ended up impeached by the Congress after his brother disclosed his involvement in a corruption scandal. The case of buying votes in Parliament to pass the Constitutional re-election amendment was related to one of the most important rules of the Brazilian electoral system, but it was treated as a minor incident. It was only when the practice of granting deputies and senators a monthly payment

[330] João Feres Júnior and Fábio Kerche, *Operação Lava Jato e a democracia brasileira* (Contracorrente 2018) 254-6

for continuous support for Executive proposals under the Workers Party government came public, that Brazilian society found *"the greatest corruption scandal of the history"*.[331]

The *Mensalão* (big monthly wage) case was discovered after an employee of the state-owned mail company was taped asking for bribes in the name of one Congressmen who was, up until that moment, a Workers Party's ally. In face of the Government's refusal to protect him from the investigation, he decided to disclose a much bigger scheme that was run in almost all state-owned companies. The *Mensalão* case consisted of overpriced contracts in those state-owned companies and kickbacks to political party leaders in Congress in exchange for political support for the Government's legislative initiatives. Most of the money was destined for illegal electoral campaign financing in a sophisticated money-laundering system that involved payments to political advertising companies in tax havens offshore. Discovered in 2005, the *Mensalão* scandal was the biggest criminal case ever ruled by the Brazilian Supreme Court by the end of 2012. In total, 40 people were formally charged with corruption, money laundering, embezzlement, illegal money evasion, and criminal organization. The group of defendants had 11 congressmen, 6 from multiple political parties that were supporting the government and 5 from the Workers Party itself, including the former President of the Deputies Chamber and the former Ministry Secretary of State and virtually President candidate for the Workers Party. Three Members of the Workers Party directional board were also charged, including the National Treasurer, the General Secretary, and the President. The lawsuit, registered as AP 470, had around 50.000 pages, more than 600 witnesses were heard in 42 different cities and only the final trial took the Supreme Court 5 months between the initial debates and the final ruling. In the end, 24 people were convicted. Some businessmen directly involved in the overpriced contracts and bank directors that facilitated money laundering for the scheme were sentenced to more than 25 years of imprisonment. The main political figures involved in the scandal were also sentenced to tough penalties. The former President of the Workers Party was convicted for corruption and criminal organization and sentenced to 6 years and 11 months in prison and a fine. The former National Treasurer was convicted for the same crimes and sentenced to 8 years and 11 months of jail and a fine. The former President of the Deputies Chamber was sentenced to 9 years and 4 months of imprisonment and a fine, and the former Ministry Secretary of State, pointed out by the Public Prosecutors as the head of the criminal organization, was convicted to 10 years and 10 months in prison and a fine.

[331] Ibid 257-8

When the case was disclosed, Brazil had just ratified the Inter-American Convention Against Corruption in July 2002, and the UN Convention Against Transnational Organized Crime in January 2004. The UN Convention Against Corruption was only ratified by Brazil in June of 2005, one month after the scandal had already erupted. The legislative framework to enable the adoption of some new investigative weapons by the Brazilian authorities was not in place, and the institutional experience with mutual legal assistance between Brazilian law enforcement authorities and international investigative agencies was only starting to step up. In sum, the discourse on the importance of intensified efforts to fight corruption had the perfect scenario to flourish but the machinery prescribed by the OECD, the FATF, the OAS, and Transparency International was not fully absorbed by judicial authorities and public prosecution agencies to be deployed yet. The *Mensalão* case had a great repercussion but was still insufficient to generate outcomes that could provide empirical evidence of Brazil's commitment to international standards in the fight against corruption. The third MESICIC (Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption) Report, issued in September 2011, when the investigations were almost concluded, can be seen as an example of this ongoing pressure by the international community for results in the fight against corruption. Data provided by Brazilian authorities to show the adoption of the measures to prevent favourable tax treatment for companies that violate anti-corruption laws, to prevent bribery of domestic and foreign officials, to tackle transnational bribery, or criminalize illicit enrichment were considered either incomplete or inexistent. In the cases of issues for in which legislative measures were already enforced, the absence or a small number of cases informed by Brazilian authorities were considered a problem for implementation assessment. Regarding illicit enrichment, the absence of legislation was accompanied by a recommendation regarding the necessity to gauge implementation of new legislation on fight against corruption. A constant in Recommendations 1.3 [35], 2.3 [121], and 3.4.2, and 4.4.2 was the necessity to promote *"the selection and development of procedures and indicators"* that could show results of the anti-corruption agenda.[332] The only peer review report of the UN Convention Against Corruption adoption by Brazil, produced by Mexico and Haiti experts that visited Brazil in 2011, also reinforces the idea that the legislation enacted by Brazil to comply with international anti-corruption standards had to be followed by observable data on its implementation. The report acknowledges the existence of an *"advanced anti-corruption legal system"* but states in items 2.3, related to the corruption criminalization provisions, the

[332] OAS (295)

necessity to develop *"its crime statistics system with a view to producing in a systematic manner consolidated statistical data in the whole anti-corruption criminal justice spectrum and for all stages of the relevant criminal proceedings"*. Item 3.3, on international legal assistance also stresses the importance *"to put in place – or improve - and render fully operational an information system, compiling in a systematic manner information on extradition and mutual legal assistance cases"*.[333] The *Mensalão* case ruling seems to have produced an impact on Transparency International CPI once between 2012 and 2014 Brazil reached its peak in the index, with the score oscillating between 43 and 42 in the period, which took Brazil to its historical highest ranking at position 69 among 180 countries. The TI analysis of corruption in the Americas in 2012 highlighted that *"the Mensalão case has shown that impunity does not prevail for cases of corruption. Sentences that added up to more than 250 years in prison were given to 25 out of the 37 individuals who were on trial, including prominent political figures"*.[334] The effects were yet quite temporary, once in 2015 Brazil`s CPI score was back to the same level of 2011 (38 points) and the country was in position 76 of the ranking, three behind where it was in 2011. International anti-corruption instances were asking Brazil to not only tell them what had been done to fight corruption, but they were also asking Brazil to show more palpable outcomes of the legislative packages introduced so far.

Some authors argue that there is a trend of continuity between the *Mensalão* ruling and the *Car Wash* operation.[335] According to them, the inquisitorial association between criminal prosecution authorities (police and public attorneys) and the judiciary that has traditionally labelled the black and the poor as "bandits" was, in those cases, aimed at the criminalization of politicians as the "corrupt". The argument seems accurate in more than just that sense. Judicial authorities and fractions of the press also appropriated the idea of continuity between one scandal and the other, justifying some different approaches that could take the results a little further. There was a sense, similar to the one found in the international anti-corruption movement that, despite the long and deep investigations, and the harsh penalties enforced by the Supreme Court, the *Mensalão* left something to desire. As Fontainha & Lima outline,

[333] UNODC (296)

[334] Transparency International, 'The Americas: Economies grow, democracies shrink. What does corruption have to do with it?' (Transparency International 5 December 2012) <https://blog.transparency.org/2012/12/05/the-americas-economies-grow-democracies-shrink-what-does-corruption-have-to-do-with-it/index.html> accessed 08 August 2022

[335] Roberto Kant de Lima and Glaucia Maria Pontes Mouzinho, 'Produção e reprodução da tradição inquisitorial no Brasil: Entre delações e confissões premiadas' (2016) 9/3 *Dilemas - Revista de Estudos de Conflito e Controle Social;* Pilau L and Azevedo R, 'Os impactos da Operação Lava Jato na Polícia Federal brasileira' in Júnior JF and Kerche F (eds) *Operação Lava Jato e a democracia brasileira* (Contracorrente 2018)

although *Mensalão* offered the political opposition the anti-corruption ethical banner the discourse was not strong enough to impede the Workers Party's wins in the 2006, 2010 or 2014 general elections.[336] In the authorized biography of the *Car Wash* main lower-level judge from the Federal Regional Court Section in Curitiba, Hasselmann clearly links the *Mensalão* to the *Car Wash* cases.[337] The author presents them as variations of the way the Workers Party governed and that while their main politician escaped prosecution in the first case, it was not going to happen in the second. The idea to use the social fatigue towards corruption created by the *Mensalão* case to fuel the *Car Wash* operation gained graphical representation in the press conference the *Car Wash* prosecution task force gave after filing the formal criminal charge against the Workers Party leader and former President of the Republic.

The very idea of giving a press conference to present a criminal charge is in itself part of the strategy drawn from the international anti-corruption experience, movement and norms. A mundane task for the prosecution office such as filing an accusation that is still to be supported by proof and evidence under the rights to a full defence, adversary system, and due process of law received full media coverage. Public prosecutors and lower-level judicial authorities were determined to take the commands to *"raise public awareness"* on corruption in Brazil - found in the UN Convention on Against Corruption (Article 13), World Bank and Transparency International guidelines - to its extreme. According to their view, horizontal accountability, promoted by controlling agencies such as the Federal Public Prosecution Office and the Judiciary, as seen in the *Mensalão* case, had to be deepened to the point it would be translated into vertical electoral accountability. Audits, investigations, sanctions, and fines applied by controlling agencies had to be followed by the public opinion desire to punish politicians and representatives labelled as corrupt with their vote. The idea that horizontal accountability is *"necessary but not sufficient"*, and the push for societal engagement in the fight against corruption had already been expressly advocated by Transparency International in a publication from 2010:

> While all forms of accountability are important to the integrity and quality of decision-making, this section examines particularly the role that "bottom up" accountability (vertical accountability, broadly understood) can play in anti-corruption strategies. It argues that human rights perspective can deepen the understanding of "vertical accountability" by

[336] Fernando Fontainha and Amanda Evelyn Cavalcanti de Lima, 'Judiciário e Crise Política no Brasil Hoje: Do Mensalão a Lava Jato' in Kerche F and Junior JF (2018), *Operação Lava Jato e a democracia brasileira* (Contracorrente 2018) 68

[337] Joyce Hasselmann, *Sérgio Moro – A história do homem por trás da operação que mudou o Brasil* (Universo dos Livros Editora 2016) 20-1

> emphasising the role that civil society and independent institutions can play in monitoring and influencing the behaviour of governments and government officials 'from bellow'.[338]

Here, we notice an entanglement between the two different elements of contemporary democracy, the universal and cosmopolitan element, represented by the idea of the fight against corruption as a proxy of democracy, and how it was brought to the scene to produce local, social mobilization for the cause. There is nothing peculiar about this association. Democracy would be, after all, a result of this exact interaction. As seen in chapter 2, the development of cash transfer programs to address the problem raised by the UN Millenium Development Goal n. 1 sparked a very favourable social mobilization for the entrenchment of those policies as rights. The adoption by the 1988 Constitution of the Alma Ata Convention lexicon on the right to health partially explains the appropriation of that right by the people and the high figures of litigation in courts for State provisions in that area. What is unprecedented in the case of anti-corruption international regimes is the intentionality to generate societal engagement as one of its mechanisms.

Intentions do not materialise themselves without agents. To embody the transit from a plethora of technocratic mechanisms to a social feeling, it was necessary to rely on a judicial actor that knew the *Mensalão* case and was well versed in the newest international trends on anti-corruption. In the huge *Mensalão* trial, some Supreme Court Justices had the assistance of lower-level judges specialized in criminal law to prepare the case and their opinions. The judge that later would be ahead of the *Car Wash* lawsuits in Curitiba was one of them.[339] He had also taken part in the International Visitors Program of the US Department of State, promoted to provide training in the combat of money laundering and was one of the main lecturers at the summit "Illicit Financial Crimes", held in October 2009, in Rio de Janeiro.[340] The summit brought together judges, prosecutors, and law enforcement authorities from Brazil and the United States and it was lauded by the Brazilian participants as *"geared towards practical skills, not theory"*, which led them to request *"additional training on the collection of evidence, interrogation and interviewing courtroom skills, and the task force model"*.[341] In an article published in 2004, entitled *"Considerations on the Mani Pulite Operation"*, the judge affirms that the conditions for the success of the "*Mani Pulite"* operation in Italy were the progressive

[338] ICHRP, 'Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities' (34) 46

[339] Vladimir Netto, *Lava Jato: O juiz Sergio Moro e os bastidores da operação que abalou o Brasil* (Primeira Pessoa 2016) 44

[340] Hasselman (337) 28

[341] Wikileaks, 'Brazil: Illicit Finance Conference Uses the T Word, Successfully' (30 October 2009) <https://wikileaks.org/plusd/cables/09BRASILIA1282_a.html> accessed 28 August 2021

de-legitimization of a corrupt political system and the legitimation of the *"Giudici raggazzini"*, young lower-level judges recognized as strictly technical and intolerant against corruption.[342] He also makes positive remarks on the use, by Italian authorities, of cautionary arrests, to show to defendants the *"seriousness of the offences and the effectiveness of the prosecution"* and on their alliance with the press.[343] In the conclusion, he points out that publicity and public opinion support are crucial for the fight against corruption and that Brazil had the *"institutional conditions needed for a similar judicial action"*.[344] That same judge had already been ahead of the *Banestado* case, in which fraudulent accounts in the Bank of the State of Parana were used for money laundering and money evasion abroad by illegal currency exchange agents. One of those agents was Alberto Youssef, who celebrated an awarded collaboration agreement in the *Banestado* case and was caught doing illegal currency exchange and money laundering operations again in 2014. The difference between the two cases was that, while in the *Banestado* the operations were very concentrated in bank accounts in the border city of Foz do Iguacu, in the State of Parana, in the second, Alberto Youssef was working for political parties involved in overpriced contracts, and corruption schemes in the massive state-owned Brazilian oil company, Petrobras.

In sum, the investigations discovered a complex system of corruption that worked according to the following logic. Directors appointed by political parties headed three key departments of Petrobras. Those directors were responsible for granting overpriced contracts to a cartelized group of contractors and collecting kickbacks, which were, then, laundered by their financial operators and redistributed to the directors themselves or political parties' leaders. The *Car Wash* case was huge, and the infamous corruption scandal erupted from within Petrobras, the pride of the Workers Party's developmental agenda. The company`s capacity for oil prospection in deep waters and the recently discovered oil base in the pre-salt layer of the Ocean were an important part of the emancipatory propaganda of the Workers Party government. Not without a reason, the president of Petrobras' administrative board was ultimately elected twice to the Presidency of the Republic. The gravity and complexity of the criminal net discovered demanded law enforcement authorities specialized in those transnational criminal organizations. The political repercussions of the investigations provided a reason to make the anti-corruption movement bigger than the case itself. The *Car Wash* task

[342] Sergio Fernando Moro, 'Considerações sobre a operação mani pulite' (2004) 26 Revista do Centro de Estudos Judiciários (CEJ) 58
[343] Ibid 59
[344] Ibid 61

force in Curitiba concentrated the main investigative efforts and the figures are symptomatic of the size of the operation: 553 people were criminally charged, there were 295 cautionary arrestments and 211 bench warrants, and 209 awarded collaboration agreements were celebrated between defendants and the prosecution authorities, 174 people were convicted, 723 international mutual legal assistance requests were issued, R$ 4,3 billion were recovered and destined to the public treasure or Petrobras itself.[345] The deployment of the investigative methods put forth by international anti-corruption agencies and norms, such as the awarded collaboration agreements and the international mutual legal assistance to locate, freeze, seize, and recover assets was accompanied by intense propaganda of all investigative initiatives and outcomes. All the warrants, arrests, and diligence mentioned above were divided into 79 different operations spread over time, and the media covered every single action as if they were episodes of a police-politics thriller. Fontainha and Lima call those judicial actions *"political-judicial incidents"* once strict judicial/procedural acts were combined with publicity and advertising with clear political repercussions.[346] The authors cite as examples of that type of hybrid criminal litigation the celebration of awarded collaboration agreements and their content leaking to the press, the show business media coverage of a simple bench warrant order, and the aforementioned press conference after the filing of a criminal charge. The *Car Wash* case offered a platform over which judicial and prosecution authorities could build up the idea of societal awareness of corruption and draw public opinion support to the investigations.

In 2015, with the investigations already in course, the Federal Public Prosecution office decided to promote two broad campaigns in the fight against corruption. The *#CorrupcaoNao,* focused on the internet and social media, was a joint initiative with the Ibero-American Public Prosecution Association (AIAMP) and other 20 National Public Prosecution offices, aimed to spread the simple idea of rejection of any kind of corruption, from day-to-day situations such as by-passing a queue or bribing a traffic officer to major deviations of public funds. The other campaign was much more audacious and targeted changes in the Brazilian legislation. Called *"10 Medidas Contra a Corrupção"* (10 Measures Against Corruption), the campaign targeted the approval of a package of legislative reforms that would increase the effectiveness in the investigation and punishment of corruption. The campaign was launched in March 2015 based on *"the experience of the Car Wash prosecution task force in Curitiba"*. Measures 1 and 2, for

[345] MPF, 'Caso Lava Jato' (Ministério Público Federal) <https://www.mpf.mp.br/grandes-casos/lava-jato> accessed 7 September 2022
[346] Fontainha and Lima (336) 69

instance, related to the protection of whistle-blowers and criminalization of illicit enrichment of public agents, respectively, were aligned with recommendations from international anti-corruption agencies, specially the MESICIC reports. Measures 3, 4, and 9 encompassed the elevation of corruption to the status of a heinous crime, many limitations to the constitutional right to *Habeas Corpus* and the utilization of cautionary arrestment as a coercion means to obtain the devolution of distorted funds.

Despite their disputable constitutionality, the *"10 Measures Against Corruption"* received major investments with the production of booklets, t-shirts, banners, billboards, a magazine, car stickers and celebrity support. Once the Public Prosecution office does not possess the legitimacy to propose legislative bills to the National Congress, all that investment was necessary to raise public awareness and, especially draw signatures. According to the Constitutional rule (Article 61, Paragraph 2), the bill of popular initiative can only be accepted by the Chamber of Deputies if it is *"subscribed by at least one per cent of the national electorate, distributed throughout at least five states, with not less than three-tenths of one per cent of the voters in each of them."* In practical terms, the constitutional rule requires almost 1.5 million signatures in a bill. Considering the additional requirement of a minimum standard of regional distribution of them, it demands a level of national mass mobilization quite difficult to achieve. After the enactment of the 1988 Constitution, only four bills proposed by the popular initiative were approved by Congress. In March 2016, the Federal Public Prosecution Office had collected 2.028.263 signatures after one year of the campaign that involved 1.016 institutions such as churches, universities, associations, companies and NGOs mobilizing volunteers across the country around the idea of the fight against corruption. The campaigns were fuelled by the constant participation of the Curitiba *Car Wash* prosecution task force in seminars, awards and think tanks in which the proposals were legitimized by the results the operation was delivering in homoeopathic doses. The discourses were always in the sense that the *Car Wash* achievements were the result of this massive public opinion mobilization against corruption. In October 2015, the XXXII National Summit of Federal Prosecutors in Fortaleza had as theme "Societal Control in the Net of Corruption Fight".[347] During the ceremony that celebrated the delivery of the *"10 Measures Against Corruption"* bills to the Congress, the Chief Prosecutor of the *Car Wash* task force emphasized that *"today we say enough of*

[347] Netto (339) 290

corruption not only with words but with concrete action…the walk to the National Congress is a civic one and we want to make clear that the main role was played by society".

Indeed, the campaigns to raise awareness about corruption marched in step with operations that enforced judicial decisions that were uncovering, layer by layer, a massive corruption network involving big companies, influential businessmen and the core of the Workers Party government. By that moment, a lower-level judge from a Section of the Regional Federal Court in Curitiba was putting on their knees the owners of multinational juggernauts contractors and political figures close to the centre of power in Brasilia. In November 2014, in an operation called *"Juízo Final"* (Last Judgement or Doomsday), executives of big contractors such as OAS, Engevix, UTC, Quiroz Galvao and Mendes Jr were provisory arrested. In April 2015, operation *"A Origem"* (The Origin) culminated with the arrests of former deputies Pedro Correa, Luiz Argôlo, and André Vargas. The latest had been an influential member of the Workers Party and Vice-President of the Deputies Chamber. Five days after that, the National Treasurer of the Workers Party, his wife, and his daughter were also arrested, and he revealed that most of the money grafted was destined for the 2010 electoral campaign. In June of that year, operation *"Erga Omnes"* took to prison the presidents of Odebrecht and Andrade Gutierrez, two multinational Brazilian contractors that combined had more than 300.000 employees around the world.[348] The indiscriminate use of temporary arrests and cautionary imprisonments confronts the Supreme Court's established case law that limits those types of drastic measures stressing principles of human dignity and the right to freedom. There are many decisions from the Brazilian Supreme Court pointing out that generic claims on the imprisonment convenience for the criminal investigation, or the public order are not sufficient reasons to arrest someone before an unappealing decision finds one guilty. In that set of rulings, the Brazilian Supreme Court rejects even assessments on the gravity of the crime supposedly committed by the defendant, or its social repercussion as grounds for provisory or cautionary arrests, as provisioned by the American Convention on Human Rights[349]. The link between those provisory arrests, their length and the following celebration of awarded collaboration agreements also drew attention from the Supreme Court. In 2015, the STF acknowledged the importance of encouraging defendants to collaborate with criminal prosecution through penalty mitigation agreements, according to the Palermo (UN Convention

[348] Walfrido Warde, *O espetáculo da corrupção: Como um sistema corrupto e o modo de combatê-lo estão destruindo o país* (Leya 2018) 45

[349] E.g. STF [2004] HC 84.662, STF [2006] HC 86.915, STF [2006] HC 88.025, STF [2007] HC 90.074, STF [2008] HC 91.386, etc.

Against Transnational Organized Crime) and Merida Conventions (UN Convention Against Corruption) provisions. But, in the same ruling, it stated that it is illegitimate, for its unconstitutionality, the adoption of personal cautionary measures, especially temporary or provisory arrests, as means to obtain the collaboration or confession from the person under investigation.[350] The multitude of bench warrants issued by *Car Wash* judicial authorities used to take people under custody for a simple hearing or deposition, also led to a reaction from the Supreme Court. On March 4th, 2016, 15 heavily armed men of the Federal Police elite troupe in a tactical operations command van were responsible for the enforcement of a bench warrant against the former President of the Republic and main historical leader of the Workers Party. The operation was broadcast from helicopters surrounding his apartment early that morning. He was ultimately taken to depose in the Sao Paulo central airport and released hours after that, but the sense that evidence was mounting against him remained. In 2018, the STF ultimately struck down the legislation that allowed bench warrants to force the defendants to depose considering it incompatible with the defendants' fundamental rights.[351]

The succession of arrests, seizures of assets, bench warrants, and awarded collaboration agreements were interpreted by the public opinion as a bold, technically sound, and heroic effort from a new generation of public prosecutors and judges willing to take the fight against corruption to the very last consequences. In contrast, allegations of human rights violations and due process of law contradictions by the *Car Wash* task force were seen as reactions from politically compromised organizations and institutions. That social consensus on the necessity to bring corrupt politicians to Justice was fostered by the way the media covered the scandal. In a study that comprised 9.820 texts produced by the three main newspapers and the main TV news program in Brazil between 2014 and 2017, including articles, editorials, headlines, columns, and reports, Junior and others found that 20% of all media coverage in that period was dedicated to the *Car Wash* case.[352] Specifically focusing on editorials, in which the vehicles express their institutional opinion to the public, the number of pieces that analysed *Car Wash* would correspond, on average, to one editorial every 3 days in each newspaper (*Estadão*, *Folha de São Paulo*, and *O Globo*) along the three years observed or one whole year with one editorial per day, every day, only on *Car Wash* case. A similar figure was found when the analysis focused on headlines, which show an informational storm around the subject. The

[350] STF [2015] HC 127.186

[351] STF [2018] ADPF 395; STF [2018] ADPF 444

[352] João Feres Júnior, Eduardo Barbarela and Natasha Bachini, 'Lava Jato e a Mídia' in Júnior JF and Kerche F (eds) *Operação Lava Jato e a democracia brasileira* (Contracorrente 2018)

authors propose the occurrence of a form of mutualism between the press and the judicial authorities. The former can communicate to the public opinion but lacks the power to make their preferences prevail, the latter has the power to enforce decisions, but lacks channels to communicate their intentions.[353] The synergy between lower-level prosecutors, judicial authorities and media around the *Car Wash* case found in the anti-corruption discourse a point of convergence. The main characters behind the case were valuable sources of information to journalists who would praise their achievements and fearless conduction of the case. The judge from the 13ª Federal Criminal Court in the Regional Federal Section of Curitiba, Parana was elected the "Personality of the Year" in 2015, by the *"Faz Diferenca"* (Makes a Difference) award, sponsored by the *O Globo* newspaper, which belongs to the biggest communication network in Brazil.[354] He was also granted with the *"Brazilian of the Year"* prize, offered in 2016 by the *Editora Tres,* a publisher responsible for one of the main Brazilian weekly political magazines. The media anointment was not limited nationally, in the same year, he went to New York to receive the honour of being nominated one of the 100 most influential people of the world, according to the Time Magazine. Also in 2016, the *Car Wash* taskforce received the Anti-Corruption Award from the Transparency International.

The most dramatic episode of the alliance between the *Car Wash* authorities and media to mobilize public opinion also happened in March 2016 and had major political repercussions. Tape recordings of intercepted phone calls caught a conversation between the President and the former President of the Republic about a possible appointment of the later to Ministry Secretary of State. Assuming that it was a plot to grant the former President jurisdictional privilege and take the case out of the 13ª Criminal Court of the Federal Regional Section in Curitiba, the judge almost immediately released the content to the press stating the prevalence of publicity over the defendant's right to privacy or procedural secrecy, once it was more important for the people to know *"what politics do in the shadows".*[355]As the media broadcasted the audio file during the afternoon of that March 16th, thousands of millions took the streets to protest the government and ask for the President's impeachment. An impeachment procedure had been accepted by the President of the Deputies Chamber in December 2015 in a clear personal retaliation against the government for the fact the *Car Wash* investigations found connections between one of Petrobras' departments and him. The charge against the President was based on budgetary manoeuvres made by the government to delay payments to

[353] Ibid
[354] Netto (339) 177-9
[355] Fontainha and Lima (336) 75

state-owned banks in order to improve fiscal balances and make-up public debt, in a sort of informal loan that would violate the Fiscal Responsibility Statute (Law 101). Identical operations had been made by all Presidents since 1994 and it had never been considered an offence before. The allegations were very technical, and the procedure had been dormant for more than three months until on March 17th, one day after the leaking of the taped conversation between the two Workers Party's leaders and protests, the impeachment committee was finally installed in the Deputies Chamber. The influence of that event in the impeachment procedure is undeniable. The judge's biographer called his action as the *"Moro's Check Mate"* concluding that after that decision the impeachment of the President was unavoidable and that *"it was created the collective feeling that would speed up the impeachment process"*.[356] Regarding March rallies, Netto remarks that

> (…) the people on the streets were shouting against corruption, the President Dilma, the former President Lula and the Workers Party. But it was not a manifestation in favour of any political party, since Senator Aécio Neves and São Paulo Governor Geraldo Alckmin, both from the Brazilian Social Democracy Party, were hostilely received in Paulista Avenue. The greatest honours of the day were to Sergio Moro, the Public Prosecution office, and the Federal Police.[357]

Later that month, the Supreme Court unanimously ruled the judge's decision to publicize the audio recordings unconstitutional once he lacked jurisdiction to decide on investigations that involved the President of the Republic, who has jurisdictional privilege during the mandate. The decision was also overruled as illegal once the judge disregarded legal provisions that forbid the publication of intercepted conversations, especially when they have no connection to the criminal investigation, as it was the case. In that ruling, the leading Supreme Court Justice affirmed *"at this point, we have to acknowledge, the practical effects of the undue divulgation of the intercepted phone calls taped are irreversible"*.[358]

Even considering that the government was struggling with economic recession, the anti-corruption discourse was an element of destabilization and de-legitimization of the whole political spectrum, profoundly affecting governability and becoming an important, if not determinant, underlying cause of the 2016 Presidential impeachment. It is important to note that the formal charges against the President did not involve any corruption accusation but controversial budgetary allocation. In an argumentation analysis of the votes given by the Deputies during the impeachment admissibility trial, Soares and Recuero found that the

[356] Hasselman (337) 22-3; 55
[357] Netto (339) 361
[358] STF [2016] Rcl 23.457 MC

discussions were totally distanced from the occurrence or the President's responsibility for financial mismanagement.[359] In the list of the twelve prevailing concepts in the manifestations of the congress representatives in that session, from both groups, those who voted in favour and against the impeachment, the most recurrent words were "vote", "Brazil", "president", "people", "Dilma", "impeachment", and "respect". The most common word with the highest semantic value used by those who endorsed the premature end of the President mandate was "corruption", repeated 43 times.

According to Teorell and others, the very first formative component of democracy is the *"decisiveness of elections"*, which is defined as the capacity of the elected officials to effectively exercise power after the elections.[360] Any disruption of tenure led by the opposing and defeated opposition represents an obvious threat to that first basic element of any democratic system. For all the facts summarized above, it is fair to assert that the Brazilian National Congress blatantly ignored the result of the 2014 general elections two years later. The Congress impeached the President strongly influenced by the successive operations, cautionary arrests, freezing of accounts abroad, awarded collaboration agreements and media coverage of the *Car Wash* corruption scandal. The impeachment of President Dilma Roussef happened due to a multitude of different factors, one of which, maybe the most decisive, was the massive anti-corruption campaign put forward by the law enforcement authorities ahead of *Car Wash*.

It is possible to affirm that the anti-corruption agenda propelled the *Car Wash* case, used it as a successful demonstration of its necessity and effectiveness, but was progressively gaining terrain to affirm itself as more than just the case. It was becoming an ideal, a whole new political vocabulary that entered the scene deposing an elected President from her mandate but was going to stick to the public sphere for much longer. It would also have great political electoral repercussions. The anti-corruption movement that played an important role in removing the Workers Party from government, was about to be decisive for the coming 2018 general elections.

The former President of the Republic was being investigated for supposedly receiving a beachfront apartment in Guarujá and a country house in Atibaia as bribes from contractors. Less than one year after the impeachment of President Dilma Roussef, the judge from the 13ª Federal Criminal Court in the Regional Federal Section of Curitiba convicted him for

[359] Felipe Soares and Raquel Recuero, 'A Argumentação dos Deputados na Votação do Processo de Impeachment de Dilma Rousseff' (2018) 1 Estudos em Comunicação 72
[360] Teorell and others (83)

corruption and money laundering and laid a sentence of 9 years and 6 months in prison. The fact elicited one of the most enthusiastic endorsements from Transparency International. The chair of the TI Board José Ugaz affirmed, at the time, that the decision was *"a significative sign that the Rule of Law is working and that there is no impunity, even for the powerful"*.[361] The arbitrary bench warrant that made a special force of the Federal Police take the defendant to depose under custody broadcasted live was a distant incident to be forgotten. The leak to the press of a defendant's private conversation for political purposes had been already censored by the Supreme Court. The doubts on the reasons why a lower-level regional federal judge in the Southern State of Parana would have jurisdiction over a corruption case related to a public mandate exercised in Brasilia, by someone who had ever lived in Sao Paulo, where the contractors headquarters and the real estates indicated as proceeds of bribe were, seemed just like a minor technicality. Besides that, the links between those charges and Petrobras were not very clear, not to mention the fact that the state-owned company site is in Rio de Janeiro and most of the overpriced contracts were related to the construction of oil refineries and other works thousands of miles away from Parana. The tactics to take legal action against someone to the best battlefield, where the probability of favourable decisions is higher is called "*forum shopping*" and is considered one of the manifestations of what the literature identifies as *"lawfare"*.[362] Despite of the existence of such intentionality by the public prosecutors, it is hard to think of a singular judge in Brazil that, by that point, gathered so many attributes to push the anti-corruption banner forward and use the case for it. The judge of the 13ª Federal Criminal Court in the Regional Federal Section of Curitiba, Parana, had ruled the *Banestado* case, in which he met the key collaborator and only link between his jurisdiction and the *Car Wash* case. He was recognized as one of the most experienced and well-trained judicial authority in Brazil in anti-transnational financial crimes norms and procedures, such as international corruption and money laundering regimes. He had personally participated of the *Mensalão* trial and shared the sense of disappointment in face of the incapacity of the scandal to change the political scenario. He was an admirer of *Mani Pulite* and Italian judge Giovanni Falcone and had manifested the will to promote a similar judicial saga against corruption in Brazil.

[361] Transparency International, 'The Conviction of Former Brazilian President Lula for Corruption Shows the Strength of the Judiciary' (TI 13 July 2017) <https://www.transparency.org/en/press/the-conviction-of-former-brazilian-president-lula-for-corruption-shows-the> accessed 1 December 2021

[362] Cristiano Zanin Martins, Valeska Teixeira Zanin Martins and Rafael Valim, *Lawfare: uma introdução* (Editora Contracorrente 2019) 95-9

In 2018, the former President of Republic was about to be imprisoned after an ordinary appeal court upheld the controversial verdict that sentenced him to more than 9 years in prison. He appealed to the Supreme Court invoking the presumption of innocence clause and the right to exhaust all the appealing possibilities before starting to serve his sentence. The Court session was preceded by huge public manifestations in at least 23 State Capitals of Brazil, with millions of people going to the streets to defend the politician arrestment. In that same day, a tweet from the National Army General Villas Boas said that the Army shared the *"nation's repudiation to impunity"*, being very aware of its *"institutional mission"*. The Supreme Court decided by a very tight split decision - 6 Justices against 5 for the possibility of imprisonment even with pending appealing to Superior Courts -, that his immediate imprisonment, even with appealing still being processed by the Superior Court of Justice and the Supreme Court itself, did not offend the Constitution.[363] The decision of April 3rd, 2018 ultimately resulted in the former President´s arrest and ultimately impeded him to participate in person of 2018 general elections, although he was pointed by polls as frontrunner for the Presidency even after his arrest. In August of the same year, ignoring an *interim* measure issued by the UN Office of the High Commissioner for Human Rights (OHCHR) to guarantee his participation in the general elections for which he was a heavy favourite, the Superior Electoral Court rejected the registration of the former President's candidacy. The Electoral Court decided to rule Luiz Inácio Lula da Silva out of the elections based on his conviction for crimes against the public administration, first imposed by the 13ª Federal Criminal Court in the Regional Federal Section of Curitiba, Parana, and upheld by a collegiate panel of judges in the Federal Regional Court of Porto Alegre.

With its main historical leader out of contention, the Workers Party appointed the former Ministry of Education and former mayor of São Paulo as its candidate. Under heavy accusations of being responsible for the *Mensalão* and *Car Wash* corruption scandals, PT was striving to send its candidate to the second vote turnout. Six days before the elections, the 13ª Federal Criminal Court in the Regional Federal Section of Curitiba released parts of Antônio Palocci's deposition to the press. Palocci was a former Workers Party congressional representative, Ministry of Economy under Lula's government and Ministry Secretary of State under Dilma Roussef's presidency and in the tape broadcasted by all TV channels in the election week, he affirmed that both former Presidents had knowledge of the Petrobras corruption scheme. He had been in "provisory" imprisonment for more than 1 year and 6

[363] STF [2018] HC 152.752

months and had celebrated two different collaboration agreements with law enforcement authorities before he was sentenced for more than 12 years of prison by the 13ª Federal Criminal Court's judge in Curitiba. After his conviction, he decided to celebrate a third awarded collaboration agreement and gave a deposition in which he confirmed all the investigatory threads followed by the public prosecutors. Parts of that statement were released and broadcasted on TV days before the general elections. The goal to translate horizontal into vertical accountability was about to be achieved. A far-right retired captain of the Brazilian army with a strong discourse on *"no tolerance"* against corruption was elected President and his Party jumped from 1 to 52 representatives in the Deputies Chamber, the Workers Party lost 2 seats in the Senate and 13 seats in the Deputies Chamber. The judge of the 13ª Federal Criminal Court in the Regional Federal Section of Curitiba, Parana, resigned and was appointed the new President's Ministry of Justice with the mission to push forward the anti-corruption agenda.

Imported to produce democratic leverage, the international anti-corruption agenda, with its new investigative mechanisms and the ideal of social engagement in the fight against corruption, had direct impact on Brazilian core democratic institutions and procedures. It was an important underlying cause for the premature end of a President's mandate, and a major factor in the 2018 general elections outcome. It could be argued that such events, yet traumatic were steps towards more accountability, the consolidation of the *Rule of Law* and, thus, some sort of democracy growing pains. The fact that almost all decisions that ultimately resulted in the exclusion of the former President from the general elections have been recently overturned shows that the anti-corruption discourse was probably just the means for an episodic anti-democratic intervention in Brazil. In November 2019, the Supreme Court overturned its understanding of the presumption of innocence clause once again. In the ruling of ADCs 43, 44 and 54, for a tight split decision - 6 Justices against 5 for the opposite thesis - the Court affirmed the constitutionality of the Criminal Procedural Code requirement for specific reasoned decision for the imprisonment of a convict person when pending any type of appealing, which ultimately led to the former President's release. More recently, the Supreme Court declared that the 13ª Federal Criminal Court in the Regional Federal Section of Curitiba, Parana had no jurisdiction to decide the criminal charges on corruption and money laundering against the former President, once the links between the facts imputed to him and the corruption schemes found in Petrobras were very blurry and uncertain.[364] The Supreme Court also decided

[364] STF [2021] AgR HC 193.726

that the 13ª Federal Criminal Court's judge was biased and could not rule the cases against the former President, once there is evidence that he worked in cooperation with the prosecution authorities, violating his impartiality and due process of law clauses.[365] The Supreme Court also decided to exclude the content of Antonio Palloci's awarded collaboration agreements from all charges against the former President once it was included as evidence by the judge himself after the end of the probatory phase on the eve of the 2018 elections[366].

Those decisions nullified all convictions that prevented the former President from exercising his political rights but are far from removing anti-corruption from the centre of Brazilian's political stage. The way the international anti-corruption agenda was massively incorporated in Brazil gave it a grip over the whole public sphere that goes beyond a singular case. As Freixo and Machado argue, street protests and public spaces occupation mobs that started in 2013 with a diffuse claim for lower public transport fares, and more jobs were mixed with conservative agendas and religious groups that supported ideas such as nationalism, anti-politics, anti-democracy, anti-comunism. However, they found a common *ethos* in the anti-corruption discourse, personified by the heroism shown by *Car Wash* prosecution and judicial authorities.[367]

The fight against corruption penetrated the social fabric to create profound roots in the popular imaginary. The societal engagement in fight against corruption, championed by the international anti-corruption norms, agencies and guidelines became a social poison. The fight against corruption became an obsession with its heroes and villains. The *Car Wash* public prosecutors were literally in the billboards, the face of the 13ª Federal Criminal Court's judge from Curitiba, Parana stamped protesters' shirts, banners and even a gigantic inflatable superhero set up in front of the National Congress. The history of the operation became a book and then, a series on Netflix with two seasons of 8 episodes each, called *"O Mecanismo"* (The Mechanism).[368] Fight against corruption was and has been everywhere, especially in the minds of Brazilians.

The National Confederation of the Industry (CNI), the main syndicate of industrials and company owners in Brazil, produces an annual public survey on the main problems the Country faced in the year to end and the priorities for the year to come. In 2013, the main

[365] STF [2021] HC 164.493
[366] STF [2020] HC 163.943
[367] Adriano de Freixo and Rosana Pinheiro Machado, *Brasil em transe: Bolsonarismo, nova direita e desdemocratização* (Oficina Raquel 2019)
[368] Netto (339)

problems were health care, pointed in 59% of the responses, public security/violence, found in 39% of the answers, followed by drugs and education, cited in 33% and 31% of the questionnaires, respectively. Corruption came in fifth, mentioned in 27% of the responses.[369] In 2014, first year of *Car Wash* operation, corruption was identified as the third gravest problem in Brazil, being pointed in 62% of the answers, only behind drugs and violence.[370] In 2015, second year of *Car Wash,* when the cinematographic sequence of arrests, awarded collaboration agreements, money freezing, seizure and recovery peaked, corruption reached the top of the ranking, being named in 65% of the answers as the most important problem in Brazil. It was followed by drugs, violence, and justice system inefficiency/impunity, all of which can be considered problems linked to corruption itself.[371] In 2016, year of the impeachment and the conviction of the former President of the Republic, corruption was perceived as the second worst problem in Brazil, being pointed in 32% of the answers along health care. Both issues were behind unemployment, named as the worst problem in 43% of the responses[372]. After that, corruption never left the top 3 concerns of the public in Brazil. In 2017, it repeated the second position as the worst problem to be faced, pointed in 55% of the questionnaires, only 1% less than unemployment.[373] In 2018, it was identified as the third worst problem in Brazil, being present in 40% of the questionnaires.[374] As Netto considers, the *"electrifying succession of events"* during *Car Wash* operation meant that *"from March 2014 to March 2016 it went from the prosecution of a renowned thief to the rules of the exercise of power in Brazil"*.[375]

The fight against corruption absolutely dominated the political debate, emptying it of deeper discussion and transforming elections into a wide police inquiry in which every elector votes as if they were a law enforcement authority. Anderson and Heywood had already alerted to a similar reduction of the political scene to a moral contest in East European Countries such as Ukraine, Czechia, Bulgaria, and Slovakia.[376] According to the authors, the persistent idea of

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[369] CNI, *Pesquisa CNI-Ibope: Problemas e Prioridades do Brasil para 2014* (Confederação Nacional da Indústria 2014)
[370] CNI, *Retratos da Sociedade Brasileira: problemas e prioridades* (Confederação Nacional da Indústria 2015)
[371] CNI, *Retratos da Sociedade Brasileira: problemas e prioridades para 2016* (Confederação Nacional da Indústria 2016)
[372] CNI, *Retratos da Sociedade Brasileira: problemas e prioridades* (Confederação Nacional da Indústria 2017)
[373] CNI, *Retratos da Sociedade Brasileira* (Confederação Nacional da Indústria 2018)
[374] Ibid
[375] Netto (339) 15
[376] Anderson S and Heywood PM, 'Anti-corruption as a risk to democracy: on the unintended consequences of international anti-corruption campaigns' in Sousa Lsd, Larmour, P. J., and Hindess, B. (eds) *Governments, NGOs and Anti-Corruption: the New Integrity Warriors* (Routledge 2008) 41-2

corruption, and fight against corruption led to wide political distrust, which created a scenario of "protest-vote" democracies, prone to the rise of "anti-system" radicals and populists. Although that description resembles the incidents summarized above, the presence of corruption and fight against corruption in the Brazilian public sphere seems to be even more profound. The subtle change Transparency International made to its definition of corruption helped to the overflow of the anti-corruption language to other issues and policies evaluation. To curb critiques that its efforts were mainly concentrated on corruption in the public administration while there was a certain complacency towards corruption in the private sector, Transparency International slightly changed its corruption concept. What was once the *"the abuse of public office for private gain"*, became the *"misuse of entrusted power for private benefit"*, which loosens the terms to encompass any type of misallocation of resources, favouritism, not only for a bribe or financial profit, but also for familiar or political reasons.[377] In the next three sections of this chapter, we will address how the obsession on audits, controls, and this open rhetoric on the necessity to prevent the concession of undue benefits and privileges for political allies or in exchange for political support have colonized and dominated the policies on human rights addressed in chapter 2, bringing about a new cycle of exclusion and democratic decay.

4.2 The Fight Against Poverty and Hunger and Conditional Cash Transfer Programs: Fraud and "Tooth-Comb" Operation

The international anti-corruption regime was imported to Brazil as means to definitive democratic consolidation. Nevertheless, the triumph of its mechanisms, and logics drastically interfered in politics to the point it interrupted a legitimate mandate and unbalanced general elections. As argued above, this means harm to core democratic institutions and procedures on its own right. But, as underlined before, democracy is about free, fair, periodic and competitive elections, but not only. There is a myriad of social, cultural, and economic rights that work as conditions of possibility of democracy itself. Democracy, in that sense, presupposes the increasing capacity of the people to effectively participate of the life of the society. Citizenship involves being acknowledged, being heard, making behaviour and informed opinion accepted and meaningful for the collective destinies, and that can only be achieved through inclusion. In Chapter 2, we analyzed how conditional cash transfer programs aimed to aid people in

[377] Steven Sampson, 'Anti-corruption: Who Cares?' in Arvidsson, S. (eds) *Challenges in Managing Sustainable Business* (Palgrave Macmillan 2018) 286

situations of extreme poverty and famine contributed to Brazil's appraisal as one of the most successful international cases of fight against hunger and misery. It does not mean that the conditional cash transfer programs were free from critique. The main argument against it relies on the idea of clientelism, a form of political corruption. This type of reasoning is found in studies such as the one by Manzetti and Wilson in which they seek for correlations between government effectiveness, corruption perception and government support implying a tendency from the poor and uneducated to support corrupt governments since they are treated as clients of social benefits.[378]

In an ethnographic study carried on a small town in the State of Ceará, Eiró explores the political use of CCT programs in local elections. He intends to identify how *"brokers persist in diverting public goods for private purposes"* or the *"use of public resources for electoral purposes",* which resembles TI vocabulary on corruption.[379] Although his study shows compelling evidence of political packing of the local social assistance service and pressures for electoral support by some of the social agents, the clientelism cycle was inhibited by political opposition monitoring, a Federal Police operation to guarantee the rightfulness of the program registration system, and federal officers' supervision, especially from the General Comptroller Office (CGU). The attempt to divert the federal cash transfer programs also faced personnel resistance from some social agents and drew social reaction that ultimately resulted in the electoral defeat of the incumbent's mayor candidate.[380] His study demonstrates that descriptions that devalue political participation from the poor are not quite accurate. In fact, the clientelism critique to conditional cash transfer programs is biased by an *apriori* discrimination against the poor as the corrupt, or the bandit. If the poor tend to support political parties that are for the improvement of conditional cash transfer programs, it means nothing more than political mobilization around candidates that better represent their interests. That is exactly what the Federation of Industries of the State of Sao Paulo (FIESP) does before every Presidential election. The difference is that what for the former is labelled as "clientelism", or "political corruption", for the latter is simply advertised as "political support".

The idea that the *"Bolsa Família"* was plagued by distortions was present in the opposition discourse during the 2018 general elections campaign. The challenging candidate

[378] Luigi Manzetti L and Carole J Wilson, 'Why Do Corrupt Governments Maintain Public Support?' (2007) 40/8 Comparative political studies

[379] Flavio Eiró, 'Anti-poverty Programs and Vote-Buying Strategies: Lessons from Northeast Brazil' in I. Kubbe, & A. Engelbert (eds.) *Corruption and Norms: Why Informal Rules Matter* (Springer International Publishing 2017) 136

[380] Ibid 140

affirmed in an interview given between the first and second vote turnouts *"the way to find resources to do many things is to combat fraud, fight corruption, even within the Bolsa Família. We believe that a third, approximately 30% are benefits granted without any criteria. People that don't need to receive this.*[381] In November 2018, speaking as President-elect, he affirmed that every social program was going to be submitted to an audit from the first day of his administration.[382] The priority on audits aimed to identify frauds in the program was not a novelty of his discourse. In November 2016, the government of President Michel Temer carried on a *"tooth-comb"* operation that blocked 654.000 benefits and cancelled 469.000 transfers.[383] The coverage of the program shrunk steadily from that moment until it reached its lowest figure in the decade in July 2017, with 12.640.740 families registered. After that, the number increased again until the government elected in 2018 implemented another round of audits and cuts. If in December 2018 14.142.764 families were reached by *"Bolsa Família"*, in March 2020 that number was 13.058.228 households, the second lowest coverage figure since October 2011 when the program surpassed the 13.000.000 households for the first time in history. The total public expense with the program also fell from R$ 2.641.616.078,00 in December 2018 to R$ 2.505.415.999,00 in March 2020. If we consider that the government decided to add an extra benefit, correspondent to another month of allowance, to each family, the reduction in total expenses experimented reveals a considerable limitation to the cash transfer program.

From March 2020, the historical series is disrupted by the COVID-19 pandemic. Under pressure to aid families that were rapidly losing any income capacity, the number of beneficiaries arose sharply to reach 14.524.150 families in March 2021, when the amount transferred got to R$ 2.708.579.778,00.[384] Nevertheless, as pointed in Chapter 2, CCT programs were never intended to replace families' income or were able to remedy poverty by themselves but were effective as complementary policies to wage valorization and other social benefits. The unemployment rate that was at 10,6% of the population in the first three months of 2016 steeped up to 14,7% in the first trimester of 2021, the worst figure ever recorded. The minimum wage also reached its lowest value in dollar in one decade. Unemployment, wage stagnation, and the constant rounds of audits that always resulted in the reduction of CCT

[381] Talita Fernandes, 'Bolsonaro diz que há fraude em 30% do Bolsa Família' (*Folha de São Paulo 8 October* 2018) <https://www1.folha.uol.com.br/poder/2018/10/bolsonaro-diz-que-ha-fraude-em-30-do-bolsa-familia.shtml> accessed 28 November 2020

[382] Agência Brasil, 'Presidente eleito diz que programas sociais passarão por auditoria' (Agência Brasil 24 November 2018) <https://agenciabrasil.ebc.com.br/politica/noticia/2018-11/bolsonaro-diz-que-programas-sociais-passarao-por-auditoria> accessed 28 November 2020

[383] Ministério da Cidadania, 'Programa Bolsa Família - quantidade de famílias e valores' (até outubro/2021) (184)

[384] Ibid

programs coverage brought another cycle of general impoverishment. The percentage of people in extreme poverty grew from 4.7% of the population in 2014 to 5.7% in 2020, and the poor variated from 23.8% to 24.1% in the same period.[385] The number of families that are considered as having *"zero income"* almost doubled in four years, jumping from 1.589.978 in May 2016 to 3.087.802 in January 2020.[386] According to a study produced by FGV – Fundação Getúlio Vargas, in 2021, Brazil recorded 62.930.194 people living below the US$ 5,5/day poverty line, which corresponds to 29.62% of the population, the worst figure ever recorded.[387] With a great proportion of the population facing food insecurity, after years of favourable remarks on its efforts to eradicate famine, it is estimated that Brazil will be reinserted in the World Food Programme HungerMAp.

Those figures are profoundly affected by the COVID-19 pandemic, but some of the setbacks discussed in this topic are related to periods before March 2020, when the first cases were recorded in Brazil. They reflect a critical approach to conditional cash transfer programmes, especially the *"Bolsa Família"*, often detracted as a source of political clientelism, frauds, public resources misplacement, and corruption. Instead of a discourse on the improvement in the programme targeting or coverage, the discourse and practice until the pandemic was dominated by the necessity of audits, data crossing, and tooth-comb operations that have always resulted in the reduction of recipient families. This represents the colonization of the fight against poverty and hunger by the vocabulary and semantics of fight against corruption with clear exclusionary outcomes. Exclusion in the form of food insecurity and poverty consists in the privation of the minimum level of individual capability, undermining citizenship, and hampering democracy.

4.3 Right to Health Care: The End of "Mais Médicos", and the police (and not policy) response to the COVID-19 pandemic

In Chapter 2, the creation and consolidation of a public, comprehensive, and decentralized health care system was associated to the reception, by the Brazilian constitutional and judicial system, of the international organizations claim for a right to health. The internationalization of that perception of health as a right by the population and the elaboration

[385] IBGE, *Síntese de Indicadores Sociais: uma análise das condições de vida da população brasileira* (Instituto Brasileiro de Geografia e Estatística IBGE 2021)
<https://biblioteca.ibge.gov.br/visualizacao/livros/liv101760.pdf> accessed 5 May 2022 61
[386] Ministério da Cidadania, 'Programa Bolsa Família - quantidade de famílias e valores' (até outubro/2021) (184)
[387] Marcelo Neri, *Mapa da Nova Pobreza* (FGV - Fundação Getúlio Vargas 2022)

of different procedures to litigate or participate in the health care system management were highlighted as citizenship enhancing experiences, as evidence of inclusion, and therefore as democratic advances.

One of the most striking examples of how internationally developed policies were affecting the reception of the right to health by the Brazilian population was the program *"Mais Médicos Para o Brasil"* (More Doctors to Brazil). It was a joint initiative, coordinated by the Pan American Health Organization - PAHO, the regional chapter of the WHO, to supply vacancies, especially in primary assistance, in regions difficult to access in the countryside and poorer areas of the Brazilian territory, where the reason doctors/1.000 residents is far below the national average. The program reached 18.337 doctors out of whom, in December 2014, 11.185 were Cubans spread throughout 73% of the Brazilian cities.[388] During the 2018 general elections campaign, the far-right candidate that ultimately won the contest affirmed he was going to *"expel"* the Cuban doctors from Brazil through the introduction of an exam to revalidate their diplomas in Brazil. In his own words *"Together we can make Brazil better for all and not only to a small group that has seized power and has mugged us for more than 20 years taking us to a path we don't want. It is time to put an end to São Paulo Foro. We will kick Cubans out of Brazil with the Revalida"*.[389] In a tweet from November 27 of 2018, President-elect announced that the continuity of the program was going to be conditioned to the revalidation of foreign doctors' diplomas, and to a change in the way the program was financed, once in his words, *"the biggest part was destined to the dictatorship"* in Cuba.[390] The financial agreement intermediated by the PAHO involved a bursary scheme offered to Cuban doctors that was already in place in more than 67 different Countries. The bursary value corresponded to 25% of the amount paid by the Brazilian government with the 75% left being shared between the PAHO and the Cuban government. This was portrayed by the President-elect as a wicked agreement to distort Brazilian public funds to finance a dictatorship in Cuba and to privilege foreign doctors in detriment of the Brazilian professionals. The capacity or incapacity of the program to take primary assistance to distant and economically

[388] Governo Federal, 'Mais Médicos Resultado para o País' <http://maismedicos.gov.br/resultados-para-o-pais> accessed 27 May 2021

[389] Gabriel Tibaldo and Wellington Roberto, 'Bolsonaro diz que vai usar Revalida para 'expulsar' médicos cubanos do Brasil' (*G1 News Web Site*, 22 August 2018) <https://g1.globo.com/sp/presidente-prudente-regiao/noticia/2018/08/22/bolsonaro-diz-que-vai-usar-revalida-para-expulsar-medicos-cubanos-do-brasil.ghtml> accessed 27 May 2021

[390] Bolsonaro JM, 'Após Cuba irresponsavelmente retirar-se do Mais Médicos por não aceitar dar liberdade e salário integral aos seus cidadãos, quase 100% das vagas já foram preenchidas por brasileiros. Está claro que o acordo do PT era pretexto para financiar a ditadura membro do foro de São Paulo' (Twitter 27 November 2018) <https://twitter.com/jairbolsonaro/status/1067495309431980033> accessed 22 May 2022

underdeveloped cities in the North and Northeast regions was never in the horizon of the critique. It was always surrounded by the idea of a plot to the misuse of public budget for international ideological alliances and political benefit. It was translated, once more, into the vocabulary of anti-corruption and ultimately led to Cuba withdrawing from the agreement. It immediately resulted in the resignation of Cuban doctors that were linked to the program, generating 8.517 vacancies that were offered to Brazilian doctors in two consecutive public calls sponsored by the Brazilian government in 2018. According to preliminary data provided by the Ministry of Health, 29% of the Brazilian doctors selected to replace the Cubans did not attend to the health care facility they were ascribed to. In addition to that, some declinations encouraged the Brazilian government to launch another public call to fill approximately 2.500 vacancies in May 2019. In August 2019, the Brazilian government issued a Presidential Decree replacing the *"Mais Médicos para o Brasil"* by a different program called *"Médicos pelo Brasil"* (Doctors for Brazil). On the day he signed the Decree, the President of the Republic affirmed that with the introduction of Cuban doctors in Brazil's poor and rural communities, the *"Mais Médicos para o Brasil"* had as a goal *"form guerrilla nucleus in Brazil"*[391]. In 2020, the Federal Account Court (TCU) carried an audit on the new program and laid a decision considering that the new program lacks a detailed diagnosis of the problem from the point of view of the policy recipient, did not considered any alternatives, unintended effect or disadvantages of the program, adopted an insufficient indicator of the policy adequacy, does not contemplate a plan of implementation of the program with the criteria of distribution of doctors, among other findings.[392] Although the number of doctors under the new *"Médicos pelo Brasil"* program had shrunk from the 18.337 to 15.003 in October 2019, data on the impact of the changes in primary assistance caused by the program disruption are still nebulous, especially if considered that the COVID-19 pandemic brought up figures out of the charts in many health care categories and figures. The aspect that cannot escape our observation is the employment of the broad idea of misplacement of public resources to political benefit, or the strong rhetoric on the presence of cronyism, the concession of privileged access to international allies, the use of a health care program to dissimulate a political coup attempt as the language behind the public policy shift. It means the contamination of an issue that should be assessed

[391] Julia Lindner and Daniel Weterman, 'Mais Médicos formava "núcleos de guerrilha", diz Bolsonaro' (Terra News Web Portal 1 August 2019) <https://www.terra.com.br/vida-e-estilo/saude/bolsonaro-diz-que-mais-medicos-tinha-objetivo-de-formar-nucleos-de-guerrilha,7ed4229d8ed1383a3fd685880d2b0998mqcwe5cr.html> accessed 27 May 2021

[392] TCU [2020] Acórdão 994/2020

through health indicators, such as vaccination rates, infant mortality, maternity mortality, or hospitalizations by allegations of different manifestations of corruption.

When it comes to health care, or public health assistance, few events can have such a huge impact as the COVID-19 pandemic. Suffice it to say that 2020 was the deadliest year of Brazil's history with 1.4 million deaths registered, of which 194.976 were caused by the SARS-CoV-2. This regrettable record will probably be surpassed by 2021, when a further 412.880 people died in Brazil due to complications related to the COVID-19 disease, not to mention the catastrophic number of hospitalizations and the sky rocketed figures related to expenses with tests, sedatives, anaesthetics, and other materials required in diagnosis and treatment.

Nevertheless, it is fair to say that none of those figures were able to mobilize the Brazilian institutions during the COVID-19 pandemic the same way that the fight against corruption did. Since the first case registered on February 26th, 2020, the Brazilian government tried to downsize the importance of the disease and refused to determine any national measure to mitigate contamination, such as mandatory use of masks, social distancing, or lockdowns. The Ministry of Health itself was changed twice during the pandemic, showing an erratic response to the sanitary crisis that afflicted the Country. The federal government has concentrated its efforts and discourses on the idea that the resources that have been decentralized to States' management have been equally embezzled or grafted. The Federal Police website adverts that there have been more than *"100 operations to repress the misuse and deviation of federal funds destined to the combat to COVID-19"*, investigating contracts that mount approximately R$ 3.2 billion. In less than 2 years, they executed 175 provisory arrest warrants, 1536 search and seizure orders in 205 municipalities in all 26 States.[393] One of the operations targeted the Governor of the State of Rio de Janeiro, suspect of being the chief of a corruption scheme that involved the fraudulent hire of a non-profitable social organization to manage campaign hospitals that would be built to receive COVID-19 patients. The Governor was preventively removed from office by a judicial decision in August 2018 that took as evidence the content of an awarded collaboration agreement. He is the defendant in a formal criminal procedure, accused of corruption and criminal organization before the 7th Federal Criminal Court of the Regional Section in Rio de Janeiro. In April 2021 he was impeached and lost his mandate based on the accusations of mismanagement of resources during the COVID-

[393] MJSP - Ministério da Justiça e Segurança Pública, 'Polícia Federal completa mais de 100 operações contra fraudes relacionadas às ações de enfrentamento à pandemia' (*Polícia Federal Web Site*, 2021) <https://www.gov.br/pf/pt-br/assuntos/noticias/2021/07/policia-federal-completa-mais-de-100-operacoes-contra-fraudes-relacionadas-as-acoes-de-enfrentamento-a-pandemia> accessed 14 November 2021

19 pandemic. The opposition discourse has also been encapsulated by the idea of fight against corruption. The government negligence to adopt any national measure to effectively prevent the spread of the SARS-CoV-2 makes Brazil figurate amongst the worst outcomes of the pandemic in the world. It is the third-place country in terms of total cases, with more than 34 million people diagnosed with COVID-19, second in total of deaths, with more than 688 thousand lives lost during the pandemic, and the tenth worst deaths/1 million people rate behind Countries with very small populations such as Gibraltar, San Marino, and Montenegro. It figures in 120º place in the list of COVID-19 tests/1 million residents, and by July 2021, only 46% of the population had received partial vaccination and 17% were fully immunized.[394] All those data and evidence of government inefficiency were very poorly communicated to the public opinion and did not shake public support for the President until a Parliamentary Investigatory Committee (CPI) was installed by the Senate to investigate government action during the pandemic and a scheme of bribe in the acquisition of vaccines became public.

Discourses on management inefficiency, one of the world's worst death tolls, anti-scientific and anti-vaccine behaviour from the government were not able to engage with public opinion with the same intensity as a corruption scandal can reach. The incapacity to articulate a public, comprehensive, and decentralized health care system to effectively fight the most devastating sanitary crisis of the last hundred years has been easily outshone by the idea of corruption detection, prosecution, and punishment. The ways by which the population can participate and reclaim the right to health have been absorbed by a never-ending debate on the fight against corruption in health policy management. Health care has ceased to be a matter of citizenship-enhancing policies to be preferably discussed in police inquiries terms by actors from both ends of the political spectrum. The results of this engulfment of any public debate on the right to health by the anti-corruption rhetoric are hard to evaluate in data, but it has definitely not helped the development of a better response to the COVID-19 pandemic.

The broad idea of *"administrative rationalization"*, the need to avoid the *"waste"* of public resources with *"unfruitful"* meetings, and to stop the threat of a *"political coordination"* to impose a *"Bolivarian"* agenda through communitarian councils are in the message that follows Presidential Decree 9.759, enacted on April 11th, 2019. The Decree brought a general ban on participative councils, and a series of limitations for the operation and creation of new bodies of direct communitarian participation in the Federal Public Administration. The Decree

[394] Ritchie H and others, *Coronavirus Pandemic (COVID-19)* (OurWorldinData.org 2020) <https://ourworldindata.org/coronavirus> accessed 13 May 2022

put in jeopardy the functioning of important councils such as the National Council of Sustainable Rural Development, the National Education Council, the National Council for the Rights of Children the National Council for the Rights of Women, and, ultimately, the National Health Council, and the local Health Councils, created by Law 8.080, through which healthcare management in Brazil became notoriously participative. The Supreme Court issued a cautionary measure to withdraw effects from the Decree provision that allowed the extinction or interference in Councils previously created by laws[395]. The decision safeguarded all the issue-specific bodies of popular participation in the public administration that had legal *status*, but the logic of translating participative councils as a waste of public funds, or as a misuse of power for some sort of political manipulation was the rationale of Presidential Decree 9.759. The effects of such official discourses on local health councils are still to be determined, but it seems obvious that it does not foster further political participation.

For all the stated above, there are signs that the overspread of the *"zero tolerance against corruption"* obsession to the understanding and realization of the right to health brought about discouragement to political mobilization, and social participation, the rejection of inclusionary programmes and policies, and an overall incapacity to properly respond to the COVID-19 pandemic.

4.4 Ethnic Minorities Rights: Affirmative Action as Undue Privilege for Black Students and Workers, Mining Activity in Demarcated Areas, and Indigenous Genocide

In this last section, we will consider again how variations of the anti-corruption agenda invaded policies that were adopted in Brazil to reverse a scenario of structural racism that has prevented people from ethnic minorities to access high public education institutions and market positions. We will also assess how it has come to play a role in threats to the demarcation of indigenous reserves, and the preservation of the original communities that live within those areas.

As seen on Chapter 2, after Brazil finally admitted its racism before the international community, Brazilian high education public universities engaged in a broad movement to secure admission vacancies to ethnic minorities, especially for black people. That initiative prompted a series of institutional unfolding, such as the Supreme Court decision to assure the constitutionality of those affirmative policies and the enactment of statutes that put the "quotas"

[395] STF [2019] ADI 6121 MC

in force not only in the educational system, but also to personnel recruitment exams to public offices. Although a radical change in social dynamics to grant better opportunities for poor black people takes time, it is already possible to witness signs of those transformations in the Brazilian academic environment as results of those policies.[396] The chances of more inclusion for ethnic minorities also depend on the continuity of such programs, which has been recently challenged in Brazil. When participating of one of the most traditional Brazilian political interviews TV shows before the 2018 elections, the victorious far-right candidate declared that he had no personal debt with the black community, once he *"had never enslaved anyone in his life"*, and that *"no black is better than me, and I am no better than any black"*. He also affirmed that access to publicly funded universities and public offices should be granted exclusively on merit and asked, *"why don't they study since back in the basic education to have a strong base and follow their careers in a situation of equality?"* He also affirmed that he could not end the "quotas" policies by himself, once he would depend on the Congress to change the Laws to do that, but he would at least propose the reduction of the percentage of positions or vacancies reserved to ethnic minorities.[397] The measures adopted to include people from ethnic minorities to the educational system and job market were not discussed on their capacity to effectively produce the changes they are intended to. No indicator, statistic figures, nor any other kind of empirical evidence was brought to the debate to assess the efficiency or adequacy of the affirmative action adopted in Brazil. On the contrary, the very idea of imposing inverse discriminations to overcome historic processes of racial inequality that deprives black people from opportunities of higher education and better jobs was translated as a form of deviation, undue privilege, absence of merit. The discourse depicts the racial quotas policy as a way to misallocate the public funded university vacancies or the public office positions to favour ethnic minorities in despise of candidates from different ethnical background.

The fact that affirmative action in access to public funded universities and public office in Brazil is set in stone, not only by a Supreme Court decision, but mainly by Laws 12.711, from 2012, and 12.990, from 2014, has been a hurdle for the implementation of counter policies. Nevertheless, some attempts of regress have been made. In June 2020, the Ministry of Education issued a normative order abrogating a previous norm that had extended the affirmative action rules to graduate programs in all federal public universities. The decision

[396] Adriano Souza Senkevics AS and Ursula Mattioli Mello, 'O perfil discente das universidades federais mudou pós-Lei de Cotas?' (2021) 49/172 Cadernos de Pesquisa 184

[397] Roda Viva, 'O Roda Viva recebe o candidato à Presidência da República pelo Partido Social Liberal (PSL), Jair Bolsonaro, que fala sobre seus planos para a presidência, caso venha a ser eleito.' (YouTube 31 July 2018) <https://www.youtube.com/watch?v=lDL59dkeTi0&t=1s> accessed 21 May 2022

generated a strong reaction in Parliament, with some congress representatives discussing the possibility of passing a Bill to guarantee the "quotas" for postgraduate degrees, and Parties filing a constitutional action to strike down the decision, which was ultimately overturned by the Government itself. In October 2020, a federal public attorney filed a class action against one of the biggest Brazilian retail companies because of a trainee program launched exclusively for black people. In the petition, he not only postulates the cancelation of the program but a R$ 10 million fine for collective damage[398]. One of his reasoning was that the company had undisclosed marketing and political interests in promoting the trainee program. According to his claim, behind the advertised concern with racial inequality, was the company desire to assume a political cause and, thus, a marketing niche, which would only become clear if one could *"follow the money"*. Again, the rhetoric on dissimulation, or the distortion of goals for private benefit underpinned a judicial action promoted by a state agent against a private company that had the initiative to offer inclusion opportunities for historically deprived people. The practical outcomes of those backlash measures have been limited, especially because, as said, affirmative action is well placed in Brazilian legislation and case-law. But the fact is that, even sporadically, the discourse on undue privilege to black people, the existence of vailed political or economic interest behind quotas policies has risen to influence state action. That discourse is a variation of the broad anti-corruption agenda and its need for blind objectiveness and meritocracy for every opportunity offered with public or private funds. Its capacity to penetrate state action towards affirmative action cannot be underestimated in its potential to generate exclusionary effects.

The situation is considerably different if we consider the protection of indigenous populations. As seen on Chapter 2, pushed by various decisions from International Human Rights Courts and Commissions, Brazil accelerated the processes of indigenous land demarcation, which is a crucial step to guarantee that inside those reserved areas, the indigenous populations can live in their environment with minimum intervention from others, particularly farmers and miners. After the rise in the number and area destined to indigenous reserves, since 2016, not even one more reserve has been homologated by the Brazilian government. If that alone would be a reason for concern, it is important to outline that the executive handled a message to the Brazilian Congress with the 34 priorities for 2021 that includes Draft Bill 191, from 2020, an initiative proposed in March 2020 by the Executive

[398] TRT 10 [2020] ACPCiv 0000790-37.2020.5.10.0015

itself to regulate the economic exploitation of natural resources inside indigenous reservations. By economic exploitation the Bill refers to mining activities and the use of water resources to produce energy. The government is also pushing for the approval of Draft Bill 490, from 2007, which changes the procedure for the demarcation of indigenous reserves. The Draft Bill diminishes the authority of *FUNAI* (*Fundação Nacional do Índio*), - the administrative agency that works for the protection of indigenous populations -, limits exclusive possession and fruition rights over the lands demarcated to indigenous populations, affecting the procedures in course, and nullifying previous decisions that were not taken according to the new requirements. The approval of such measures not only represent a major setback for populations that await decisions on the demarcation of their areas, but could jeopardize areas that are already reserved for indigenous populations, such as the *Raposa Serra do Sol*. The case ultimately decided by the Supreme Court is a milestone in terms of indigenous rights in Brazilian history, not only because the demarcation adopted a continuous approach, but because the Supreme Court affirmed the constitutionality of the whole procedure and its adequacy with international human rights provisions. At the same time, it is a target of critiques from the government, specifically Augusto Heleno, a former general of the Brazilian Army who is currently the Ministry-Chief of the Institutional Security Cabinet (GSI). Speaking as President-elect in November 2018, the far-right President of Brazil affirmed that *"if it is up to me, there will be no more demarcation of indigenous land"*. In the same interview he suggested that the areas demarcated were *"superdimensioned"*. His position became clearer in August 2019, when in a Facebook live he was accompanied by Ministry Augusto Heleno, who said:

> These demarcations, they all deserve to be reviewed, once there is evidence, within FUNAI, allegations of fraudulent demarcations of indigenous lands. There are demarcations that were forged, very increased in their extension, by people interested in profit from it. This needs to be studied. The very *Raposa Serra do Sol* report has been under doubts and it is practically proven it is a fraudulent report. Thus, all these demarcations must be revised, to verify if they really correspond to the truth.[399]

The line of thinking that inspires the decision to stop all the demarcation procedures is very much influenced by the broad idea that there are undercover interests at play in the demarcation of indigenous lands. That is, it is believed that the bureaucracy responsible for identifying and certifying those areas is involved in frauds, forges, and other types of misbehaviour to benefit those shady interests. In sum, the main ideas that invaded the Brazilian

[399] Jair Messias Bolsonaro, 'Live de Quinta-feira - 19:00' (Facebook 29 August 2019) <https://pt-br.facebook.com/jairmessias.bolsonaro/videos/-live-de-quinta-feira-1900-29082019-fatos-da-semana-link-no-youtube-httpsyoutube/481394389360908/> accessed 2 June 2022

government indigenist policy are corruption and anti-corruption. And under the vocabulary of checks, controls, audits, fraud detection triumphs a lenient approach towards farming and mining activities in indigenous reserves. The intense traffic of people in and out indigenous reserves motivated the APIB (Articulation of Brazil's Indigenous Peoples) to file a constitutional lawsuit before the Supreme Court to compel the Brazilian government to adopt measures to avoid COVID contamination in indigenous populations. The Supreme Court justice ahead of the case determined the installation of a situation room with government and indigenous representatives to discuss the measures that needed to be taken to avoid the disastrous effects the disease could cause to indigenous populations. The first meeting ended with the indigenous representative leaving the room under allegations that General Augusto Heleno made threats and was verbally aggressive to them[400]. The threat of vanishing through territorial encroachment caused by alarming rates of forest destruction in the last couple of years, and the death toll COVID-19 caused among indigenous populations motivated many organizations to file accusations of crimes against humanity by the Brazilian President before the International Criminal Court. It is hard to think of one subject in which the broad idea of corruption and fight against corruption counter measures had such dramatic impacts as in the case of the policies related to the preservation of indigenous populations rights. The perception that the demarcation of indigenous lands has been tainted by fraudulent reports, unscrupulous interests and so forth motivated the adoption of an anti-indigenous governmental prejudice with serious repercussions for those population's lives, not to mention their inclusion in the Brazilian society.

Conclusion

It is fair to assert that the positive impact of full compliance with the international anti-corruption regime on democratic consolidation in Brazil has fallen short of the expectations expressed in specialized literature. In fact, as seen in this Chapter, the institutional machinery imported from international norms, protocols, guidelines, and toolkits, epitomized in the *Car Wash* outcomes had a decisive role in the destabilization of core democratic institutions and procedures. It was an underlying cause for the controversial impeachment of an elected President and had direct consequences for the 2018 general elections. The push to translate horizontal accountability into vertical electoral accountability led to an unprecedented

[400] STF [2020] ADPF 709 MC

sequence of cautionary arrests, bench warrants, and the release of investigatory material to the press with a considerable influence over the Presidents impeachment process. The leaking of an illegal taping of a President's private communications, the pressure by the public opinion that made the Supreme Court oscillate its understanding on the presumption of innocence constitutional clause, and its repercussions for the 2018 general elections, are all signs of a *"state of exception"* installed in Brazil during the 2010 decade.[401] This would be enough evidence of serious democratic repercussions of the international anti-corruption arsenal in Brazil, once the domestic, participatory, electoral element of democracy was directly affected and subverted. Even if we had adopted a minimalist/electoralist definition of democracy of the likes of Huntington or Przeworski, we would have to agree that a turnover of power happened in Brazil without free, fair, competitive, and periodic elections, but through the activation of an exceptional constitutional device that found public opinion support under the anti-corruption saga.

However, as seen, more than that, polyarchal conditions such as freedom of press, and manifestation, access to alternative sources of information that could give "the people", "the nation", an *"enlightened understanding of public affairs"* were severely contaminated by the anti-corruption discourse. The broad and massive exploitation of investigative measures by the media contributed decisively to discredit the whole political spectrum. A comprehensive investigation such as *Car Wash,* that involved politicians from all parties and political orientation and a sequence of arrests, convictions, removal from offices on the grounds of corruption crimes culminated not only with the ineligibility of the former President of Republic, but also collaborated to taint allies and traditional oppositions. Political scepticism and broad social discontentment fuelled by massive anti-corruption propaganda paved the way for the victory of a conservative auto-proclaimed outsider populist with support in Parliament to implement his agenda. The appropriation of the international anti-corruption agenda by Brazilian legal elites to put forward a punitive approach that created an adversarial discourse that divides the "we (the people)" from "them (the corrupt politicians)", and delegitimizes social policies is undeniable.[402] In this Chapter, we tried to describe the actors, their motives and processes, as well as the means by which the international consensus on the necessity to fight corruption infiltrated the imaginary of Brazilian society, illustrating it with figures

[401] Emilio Peluso Neder Meyer, 'Judges and Courts Destabilizing Constitutionalism: The Brazilian Judiciary Branch's Political and Authoritarian Character' (2018) 19/4 German law journal 728

[402] Fabiano Engelmann, 'The 'Fight against Corruption' in Brazil from the 2000s: A Political Crusade through Judicial Activism' (2020) 47 Journal of law and society

collected from primary and secondary sources. Following Vieira`s warn, we do not propose the triumph of the anti-corruption movement as the single cause to the political crisis witnessed in Brazil between 2013 and 2018. However, we propose that, through mechanisms and strategies propelled by the international anti-corruption industry, law enforcement and judicial authorities promoted more than an institutional clash caused by defects on the constitutional design that allows the exchange of some "hardballs" between the branches of power.[403] As Vieira himself concedes, the fight against corruption was the banner under which diffuse social dissent and even anti-democratic tendencies found a dwell.[404] This social mobilization around the subject propitiated a favourable environment for an anti-corruption crusade by judicial and semi-judicial corporate associations, with the active engagement of public prosecutors in think tanks, and even evangelical churches to preach the "anti-corruption gospel".[405]

Corruption and its combat became more than just a matter of "judicial activism" or "juristocracy", as proposed by Meyer.[406] Reciprocal corruption accusations, support for cinematographic investigations, and theatrical meetings held by Inquiry Committees in Parliament are not only symptoms of a flawed coalition presidentialism prescribed by the Constitution, as suggested by Vieira.[407] They became the only language through which Brazilian political institutions, parties, and the electorate actually communicate with each other. Schertel Mendes originally proposes that ideas such as intolerance towards *"systemic corruption"*, and the need to put an end to the impunity of economic and political elites involved in *white-collar* crimes had a far reach for Brazilian governance institutions.[408] He draws similarities between what Simon argues on how the ideas of crime and war on crime became the way through which power is exercised in America, *"from the President of the United States to the classroom teacher"*[409], to the way corruption and fight against corruption became the dominant political-legal vocabulary in Brazil .

The push for societal awareness and engagement in the anti-corruption cause had deeper repercussions for Brazilian democracy. It not only generated the emptiness of the

[403] Oscar Vilhena Vieira, 'Clash of powers: Did operation car wash trigger a constitutional crisis in Brazil?' (2021) 71/1 The University of Toronto law journal
[404] Ibid 174
[405] Engelmann (402)
[406] Meyer (401)
[407] Vieira (403)
[408] Schertel Mendes (307) 302-16
[409] Jonathan Simon, *Governing through crime: how the war on crime transformed American democracy and created a culture of fear* (Oxford University Press 2007)

political debate of other issues that are not related to corruption accusations but overflowed to become the language of state intervention in many other areas, producing setbacks in access and inclusion to human rights. Here, we can witness an interesting dynamic that might not be peculiar to Brazil, neither to the way international anti-corruption agenda was implemented. An international regime, produced as a tool of "good governance", "development", and "accountability", that tries to pose itself as a condition for the fruition of human rights, colonizes and dominates the local, electoral, popular, participatory element of democracy to repel other international human rights regimes that integrate the cosmopolitan, transnational, rights-based element of democracy, bringing about exclusion. Policies adopted to fight poverty, such as the conditional cash transfer programs, have been under severe scrutiny for being prone to deviations and corruption. As discussed in Chapter 3, the shift in the international anti-corruption movement approach, dislocating it from its pure criminological roots to translate it into managerial terms, theories, and concepts, has loosen up the very idea of corruption to depict it as any form of *"abuse of power"* for a *"benefit"*. That comprehensive and elastic definition underpins critiques that describe conditional cash transfer programs as sources of political clientelism. The *"clientelism"* critique has been usually recollected to justify cuts, adjustments, and ultimately the end of *Bolsa Família* and its replacement by *Auxílio Brasil in which different benefits were created to "incentive individual efforts and productive emancipation".* Since Temer administration, many audits have been carried out to detect frauds, and benefit graft, which had been accompanied by coverage decline and the rise of poverty, inequality, and food insecurity until the COVID-19 pandemic struck and data were distorted by the necessity to implement emergency financial aid for a great portion of the population.

The anti-corruption dominance over different issues is also clear in the right to health and the public health care system in Brazil. It has influenced the disruption of a program of primary assistance once the cooperation of Cuban doctors was described as a political plot to deviate the program for ideological purposes. More than that, it has catalysed the efforts during the COVID-19 pandemic, with corruption accusations involving the misuse, embezzlement, and bribe in the acquisition of instruments, medicine and vaccines being the main discourse from actors that are in both ends of the political spectrum. An adapted discourse that portraits affirmative action for the access of ethnic minorities to higher education public funded universities and the job market as a form of deviation of opportunities, or undue privilege for black people has also been behind some attempts to abrogate or impede initiatives in favour of

black people. As seen, the indigenist governmental policy has also been colonized by the idea of corruption, fraud in the elaboration of land demarcation reports, and so forth.

It is possible to argue that anti-corruption has become a catalysing sign through which many different rights and policies are discussed in Brazil, which represents a democratic decay that goes beyond an episodic political intervention as the one promoted by the anti-corruption advocates. Corruption and anti-corruption have been a dominant dynamo that has trapped Brazilian democracy in an infinite loop that always starts and ends in the same point. The democratic impoverishment experimented in Brazil has also reached human rights regimes, generating historical setbacks in all areas considered in this study. The local, popular and participatory element of democracy was not only infiltrated and distorted by anti-corruption obsession, but its engulfment also led to a process of continuous intervention against policies and measures largely supported by the cosmopolitan, universalist, and rights-based element of democracy. It is possible to argue that anti-corruption has become the language, the vocabulary of a new cycle of exclusion in Brazil, which reverses the only means through which democracy can thrive, inclusion, access to human rights, and emancipation.

Conclusion

Introduction

Brazil underwent a democratic turn in the mid-1980s, which culminated in the promulgation of a new Constitution in 1988. The constituent moment that resulted in the new Constitution was marked by unprecedented levels of popular participation, and societal mobilization, but it also featured the entrenchment of incumbents' positions, privileges, and interests. In order to avoid descriptions of the new Constitution as an elitist pact, or as a continuity of the previous regime, Brazilian constitutionalism embraced the idea that the 1988 Constitution draws its democratic legitimacy from the free election of the constituent assembly members and the mechanisms of popular direct participation in its works.[410] In other words, ideas of constitutional continuity, and sceptical elitist accounts of the new Constitution were seen as tainting its democratic pedigree, and, thus, they should be strongly resisted, and rejected. The constitutional narrative depicting the 1988 Constitution as a revolution is very influential for Brazil's prevailing understanding of democracy. The 1988 Constitution is deemed as democratic because it was formed by the manifestation of the *"general will"*, the materialization of the *"nation"*, an act of *"we the people"*. Such association has similarities with a development also found in late XX Century democracy theory. To set them apart from sceptical, minimalist, electoral, *"low intensity"* democracy proposals, a group of authors concerned with the value of the *demos* for democracy and the different dimensions of citizenship started to conceive theoretical approaches and empirical tools to gauge the *"quality of democracy"*.[411]

The prevailing idea of democracy as the manifestation of the popular will through free, fair, and periodic elections disregards that this very political template was part of an international movement that presented it as the rational, inescapable, mandatory course of civilization.[412] Around that idea of democracy, foreign policy discourses were built, financial aid programs were carried on, and wars were waged.[413] The force of such evidence would push for the conclusion that contemporary democracy would have been founded and constituted by more than only popular mobilization, or the autonomous manifestation of a given *"people"* or *"nation"*. The procedures (elections, plebiscites, referendums) and institutions (parliaments,

[410] Silva (37); Paixão (42); Barbosa (44); Cláudio P S Neto and Daniel Sarmento (39)

[411] Beetham, *Democracy and Human Rights* (71); Teorell and others (83); O'Donnell and others, *The Quality of Democracy: theory and applications* (10); Rueschmeyer (207); Buhlmann and others (79); Geissel and others (106); Campbell (12)

[412] Marks (9); Slaughter (9); Fukuyama (60); Guilhot (9)

[413] Beetham, *Democracy: A Beginner's Guide* (9)

representatives) through which the *demos* participate of decision-making would work side by side with stimulus, inputs, agendas, and movements that appeal to universal and cosmopolitan values, often vocalized through a rights-based lexicon developed transnationally.

Proof of that would be the infiltration of international human rights regimes, developmental/good-governance packages, environmental targets in some of *"quality of democracy"* theories and tools. Testimony of that is given by another body of literature, dominated by internationalists, that identify the surge of a *"global constitutionalism"* represented not only by the presence, in the supranational realm, of classic constitutionalism principles, but also materialized by the pulverization of certain rights, institutional frameworks idealized in international forums to different constitutions worldwide. The dissemination of those globalized constitutional traits would happen through plural and entangled legal regimes that find equally different and diversified sources of legitimacy.[414] This research fits exactly in the double-blind side of these two bodies of literature on democracy and global constitutionalism. In the inadvertent absorption of international human rights by *"quality of democracy"* theories and measurement mechanisms and in pluralist global legal regimes capacity to spread and communicate common legal features to multiple different legal systems, we see one and only phenomena: the existence and prominence of a cosmopolitan/universalist/rights-based element out of which contemporary democracy came about and goes on.

The presence of that foundational and constitutive element of democracy and its importance for the measurement of the quality of democracy in the Global South had two important influences on this research. First, processes of democratic advances and setbacks must consider not one nor the other democracy components alone, but the ways by which they interact. International human rights regimes can prompt institutional reforms, legislative initiatives, litigation, and case-law in the domestic field in one case, societal mobilization, transnational NGOs can provoke international commissions and courts to impose constraints on a State to impel them to act in another. Second, democracy and citizenship in the Global South must take into consideration political enfranchisement and eventual implications of legal interventions in terms of participation in decision-making, but it cannot settle with that. In scenarios of great economic inequality, deprivation, and sub-human living conditions, democracy is also and mainly a matter of inclusion. Inclusion, in the form of access to rights,

[414] Tully (28); Krisch (18); Thornhill, *The Sociology of Law and the Global Transformation of Democracy* (27)

citizens articulating themselves to grasp policies as rights, attainment of social, economic, recognition rights by the poor, the vulnerable, the marginalized, the black, and the indigenous is at the centre of democracy assessment in all previous Chapters. In this aspect resides part of the originality of our effort. Two apparently distinct sets of literature on *"quality of democracy"* and *"global constitutionalism"*, political participation and legal pluralism, elections, public liberties, and rights are articulated here. These theoretical references are connected to propose an understanding of contemporary democracy that combines both theoretical trends to bring inclusion, social, economic, and intersubjective rights to the core of democracy evaluation in parts of the world where they mean the most. The dual-factor democracy assessment proposed here gains importance as the rising authoritarian populism threats to democracy operate trying to dissect it, setting apart the popular, mob, mass element from the universalist/cosmopolitan rights-based one. It is a "divide to conquer" strategy witnessed in different degrees in the UK, US, Russia, Poland, Hungary, Turkey, Venezuela, and Brazil. This strategy appeals to *"antiglobalism"* and insulation of the *"people"*, the *"nation"* from international influences as a means, in a second step, to sabotage social, economic, civil, and political rights domestically.

Using an analytical framework composed by the different modes international rights regimes and local policies, legislation, and Courts have interacted under the 1988 Constitution, we sought to explore if and how this dynamic has produced political enfranchisement and inclusion. We also considered whether, conversely, it caused setbacks to political rights, democratic processes, institutions, and, ultimately, exclusion. For the purposes of this research, whenever was possible to identify signs of political mobilization, popular participation in decision making, litigation, and inclusion, we identified democratic consolidation. If the integration of international regimes and political/judicial actors collaborate to destabilize elections results, electoral competitiveness or to generate increasing exclusion, we signalled the occurrence of democracy decay.

5.1 International Human Rights, Enfranchisement, and Inclusion

The first human rights regime analysed was the international agenda for the fight against poverty and the implementation of conditional cash transfer programmes in Brazil. From the turn to the XXI Century, the idea of fight against poverty and hunger combat catalysed a good part of United Nations declarations, becoming the very first Millennium

Development Goal, prompting initiatives as the creation of Food & Agriculture Organization HungerMap. In Brazil, the rhetorical force of the Vienna Declaration and Program Action from 1993 generated a constitutional amendment exclusively to add the word *"food"* to the list of social rights provided by Article 6th of the 1988 Constitution. More practically, many conditional cash transfer programs and public funds were created to tackle poverty and famine, resulting in the *Bolsa Familia,* cited in UN reports and publications as a successful policy. Data show that the combination of social security programs, such as the *Bolsa Familia* and the BPC, with the consistent increase in the minimum wage and employment rate improvement, resulted in a considerable move of good portions of the population up in the income *per capita* bands. The association of those policies brought about the rise of approximately 30 million Brazilians above the line of poverty, which was immediately acknowledged by the removal of the Country from the FAO's HungerMap list. International human rights associated to the fight against poverty put State representatives from the Executive and Legislative in action, with several constitutional, legal, and empirical outcomes again legitimized by international favourable appraisal. Moreover, this cycle of legitimization elevated the concession of a basic minimum income to the vulnerable to a *"canonical"* status, a policy that no political force can afford to prescind without facing electoral consequences. Accusations of CCT program manipulations and political clientelism even prompted an initiative to constitutionalize the basic income as a social right in a constitutional amendment draft already approved in the Senate. The ascension of a considerable portion of the population from below the line of extreme deprivation and food insecurity to the conditional of an important political factor is a striking sign of enfranchisement. More than that, the consolidation of food security, and minimum income allowances as constitutional social rights is a guarantee of inclusion and sustainable democratic advancement for the future.

Similarly, in the case of the health care system, the prevalent interpretation of the *right to health* clause found in Article 196 of the 1988 Constitution has always been aligned with the 1978 Alma-Ata Declaration on the right to health care. The realization of health as a right, though, coincides with the creation, and consolidation of SUS, the national public health care system, created under the principles of universal comprehensiveness of coverage, management decentralization, and popular participation. Many of SUS policies and programmes have been designed and executed through joint initiatives between Brazilian Ministry of Health and local authorities and the WHO/PAHO, such as the *"More Doctors"*, which outcomes in terms of primary assistance figures have been exalted by PAHO publications. Another aspect worth mentioning is the significant litigation on the right to health constitutional cause, the case-law

on the matter developed by the Supreme Court and the many other Judiciary effort to rationalize it nationwide. The increasing importance of the local health councils in discussing budget allocation, priorities, and local management of the programme also highlights the incorporation of the right to health, as proposed by the international human rights movement, by the Brazilian public sphere. The undeniable participatory feature of SUS, the relevant figures of litigation around the subject, and data that show overall improvement of health care indicators are signs that the imbricated concert of international/national policies and initiatives on the matter was able to produce social participation, popular engagement in the form of lawsuits to hold representatives accountable for the right to health enactment, and inclusion in the form of increasing access to health care.

In the case of ethnic minorities access to publicly funded high education institutions, the initiative to comply with the standards set by the International Convention on the Elimination of All Forms of Racial Discrimination came from some Brazilian universities. After the 2001 Durban World Conference Against Racism and the push for affirmative action policies in the Durban Declaration and Programme of Action, the implementation of *"quotas"* for black students access to public funded universities ramped up in Brazil. The integration happened through a transnational net that brought together Brazilian federal and state universities, black people's rights social movements, think tanks, and international NGOs. State action occurred in a later stage, through Supreme Courts' ruling in ADPF 186, in which the Court stablished the constitutionality of affirmative action to facilitate ethnic minorities entrance in public funded Universities. The Legislative also came forward with the enactment of Laws n.12.288, from 2010, and n.12.990, from 2014, that created the Racial Equality Statue, and institutionalized racial *"quotas"* in public selection exams for federal offices. The adoption of such measures contributed decisively to expand black people representation in superior education environment, as well as in strategic public administration offices, which materializes the first steps to stop a cycle of racial inequality and social segregation initiated with slavery and not fully addressed until present days. The early figures on the effects of affirmative action policies point to a scenario of diversification of the public sphere that certainly enriched Brazilian democracy after the 1988 Constitution.

Likewise, the discussion regarding the protection of indigenous populations has been dominated by the transnational integration of indigenous tribes' representatives, international anthropologists, international commissions, and courts. As early as 1985, Brazil had already been convicted by the Inter-American Commission on Humans Rights for violations of Yanomami's rights. After the 1988 Constitution, the number and area of demarcated

indigenous reserves grew considerably, reflecting in an increase of indigenous populations overall above the average general population growth in the same period. International Courts and Human Rights Comissions kept on pressing Brazil for more action, which was reflected on the Supreme Court ruling on Pet n. 3388. The procedure had the effective participation of indigenous peoples as *amicus curiae* and resulted in the demarcation of Raposa Serra do Sol indigenous reserve. The ruling mentions the international constraints on Brazilian indigenist policies and adopts the idea of continuous demarcation in opposition to demarcation in *"islands"* or *"clusters"*. By the other hand, it rejects the recognition of original populations as *"peoples"* and insists on an idea of territorial sovereignty very much attached to public international law dogmas. The ruling dubious tendencies show the controversial action of Brazil on the matter, with some setbacks still being recognized by the Inter-American Court of Human Rights as off very recently. Nevertheless, electorate growth in Northern states where the indigenous share of the general population is the largest signs in the direction of political enfranchisement. Another evidence in that sense was the creation of an indigenous front of candidates in the last election, resulting in the first indigenous women to ever be elected to the Chamber of Deputies, and the postulation of another indigenous leader to the Vice-Presidency in 2018 elections. Effective participation of indigenous peoples in Supreme Court sessions, and hearings also shows an increasing sense of their rights appropriation, as well as litigation before international commissions and courts. Beyond that, populational growth and indigenous reserves expansion mean the preservation of their lives and modes of living, and inclusion to the ultimate rationale of not be extinguished as a people.

In the last two aspects observed – ethnic minorities access to superior education and indigenous populations protection – integration between Brazilian policies, institutional and legal unfolding and international human rights happened in a slightly different manner. Transnational nets of cooperation, litigation, and dialogue were stablished between Brazilian universities, indigenous representatives and international courts, agencies, and organizations before the Brazilian State entered action. Even after statutes were approved, case-law was stablished, administrative procedures for the demarcation of reserves were finished, the cycle of legitimization has been incomplete or interrupted, with the international human rights movements, and institutions still pushing for more reforms, and more protection. However, even from this varied form of integration, international human rights have produced the enrichment of the public sphere, more political participation, and specially inclusion and access to rights. Therefore, bearing in mind the differences from what was observed in the case of fight against poverty and CCT programmes, or the health care system, it is possible to affirm

that also in ethnic minorities rights to education and indigenous populations rights, there has been democracy improvements after the 1988 Constitution.

5.2 Democracy Deficit and Fight Against Corruption: Opening the Pandora Box

Chapter 2 highlights the strength of human rights as a source of legitimacy. Policies are adopted, programmes of action are conceived and implemented, institutional, constitutional, and legal reforms are carried out in the name of human rights. In many cases, the human rights agenda couples with the *"popular"*, *"national"*, political element of democracy and the society and its representatives in Congress work to concretize international exigencies. In others, Courts of law - be them international or constitutional - lay down rulings, other actors, such as transnational NGOs, branches of decentralized administration, and local governments enter the scene to force compliance to international human rights standards despite of the occurrence or not of popular mobilization. The democratic character of these reforms does not come from broad participation, or *"self-government"* procedures, but from the persuasive force of human rights alone.

The analysis of how the compelling force of international human rights has been used to prompt new forms of criminalization worldwide is at the beginning of Chapter 3. As seen, in many different areas, such as women's rights, racial discrimination, and trafficking in persons, the international agenda on the protection of victims is often represented by the expansion of a transnational criminal law. A whole set of new criminal laws has been pushed forward borrowing its legitimacy from the international human rights movement, in a legitimization strategy that links institutional and legislative reform packages to human rights. As seen, there have been attempts to liaise the international anti-corruption regime to human rights. Although the connections between fight against corruption and the safeguard of human rights are very oblique, lacking stronger empirical evidence and legal plausibility, the construction of a discourse in that sense shows how important it is for those partial international legal agendas to be embedded in a broader movement that provides it with legitimacy. We propose that the international anti-corruption regime found its best fit in the international developmental/good-governance/accountability discourse. Originally created from American foreign policy interest in disseminating the criminalization of bribery of foreign officials by their OECD counterparts, fight against corruption gained momentum as a global trend in the early 90s. Embraced by multinational organisms such as the World Bank, and fuelled by the

recently created Transparency International, the international anti-corruption movement departed from its criminological roots to adopt a principal/agent, rent-seeking vocabulary that explains corruption, its origins, and forms of combat as a matter of public management.

Brazil boarded the bandwagon through three consecutive cycles of constitutional, legal, and institutional reforms. The first one, in the early 90s, targeted the inclusion of efficiency as a constitutional principle (Amendment n. 19), the enactment of Laws related to public service career structure (Law n. 8112, from 1990), definition and prosecution of acts of administrative improbity (Law 8.492, from 1992), public procurement and public bidding procedures rules (Law n. 8.666, from 1993), and the institution of the Federal Account Court (Law n. 8.443, from 1992). The second one came at the brinks of the turn to the XXI Century, with the creation of Financial Activities Control Council (COAF) - the Brazilian intelligence unit for monitoring possible money laundering activity (Law n. 9.613, from 1998), the criminalization of bribery of foreign officials (Law 10.467, from 2002), and the institutionalization of the Federal General Comptroller Office (Law n. 10.683, from 2003), and the creation of ENCCLA (National Strategy to Combat Corruption and Money Laundering) in 2004, inaugurating an innovative mode of governance in which more than 88 state agencies, offices, and social society institutions collaborate informally to promote compliance with international standards on fight against corruption and money laundering. Lastly, at the beginning of the 2010 decade, another cycle of new laws were enacted to regulate the right to information provisioned by Article 5, item XXXIII of the 1988 Constitution (Law 12.527, from 2011), to discipline the legal persons responsibilities for acts of corruption against the Public Administration (Law 12.846, from 2013, also known as the Anti-Corruption Law), and to internalize the investigative toolkit offered by UN Convention Against Transnational Organized Crime and UN Convention Against Corruption (Law 12.683, from 2012, known as new Anti-Money Laundering Law, and Law 12.850, from 2013). The deployment of such arsenal of new legal instruments, institutional cooperation, and efforts generated escalating figures in terms of awarded collaboration agreements, arrests, international mutual legal assistances, assets seizure and freezing abroad, and money recovered. The results of the aggressive implementation of the international anti-corruption agenda seemed very promising, receiving prompt recognition from important non-governmental anti-corruption organizations, with high scores and awards being granted by Amarribo Brasil, Global Integrity and Transparency International. Moreover, the strict obedience paid by Brazil to international anti-corruption standards was pointed by

some authors as the last step to democratic consolidation.[415] In other words, a deficient *"Rule of Law"* lenient to corrupt politicians and businessman would be the last trench to be overcome towards full democracy.

Despite the blind faith in the good-governance/accountability/anti-corruption agenda showed by Brazil in engaging in legal and institutional overhauling to comply with the international guidelines, toolkits, and reports, mechanisms of peer review kept pushing for palpable outcomes of those reforms. That pressure found lower level judicial, quasi-judicial authorities, enjoying high levels of functional independence, empowered by a myriad of new investigative and prosecutorial methods, techniques, and tools, willing to promote an anti-corruption crusade. Following the steps of similar movements in other parts of the world (e.g. Italian *"mani pulite"* operation), and incentives to promote social awareness against corruption found in the UN Convention Against Transnational Organized Crime and UN Convention Against Corruption, those judicial actors operated in cooperation with the media to put forth an unprecedented social mobilization around zero tolerance against corruption. We have been proposing that the interaction between international legal regimes and the local, political community is constitutive of contemporary democracy. The dynamics of international human rights igniting or being actioned by social movements, legislative representatives, or by *"the people"* has been at the core of our analysis. The difference witnessed in the case of the international anti-corruption regime is an intentionality to promote a transition of the anti-corruption discourse from horizontal institutional accountability to a matter of vertical electoral accountability. International anti-corruption norms, protocols, guidelines, reports, index were deployed to their full potential, an effort epitomized by the so-called operation *Car Wash*. The combination of cautionary measures and awarded collaboration agreements, all leaked to spectacular media coverage had an undeniable contribution for the destabilization of President Dilma Roussef's second term, being an underlying influence for 2016 impeachment. Moreover, criminal convictions in an environment of strong social commotion led to decisions regarding candidacy registration, and a broader sense of lack of trust in the political spectrum decisive for the 2018 elections outcome. The engulfment of the participatory, popular element of democracy by the international anti-corruption rationale generated direct repercussions to core democratic institutions, such as the Presidential term in office, and procedures, once the electoral scenario was directly shaken by judicial intervention.

[415] e.g Power and Taylor, *Corruption and Democracy in Brazil the Struggle for Accountability* (3); Taylor, 'Corruption, Accountability Reforms, and Democracy in Brazil' (3)

Above all that, we propose that an overflow of the anti-corruption agenda populated the whole Brazilian public sphere, being adopted as the dominant vocabulary to address issues only indirectly related to corruption. The colonization of the public sphere by the anti-corruption obsession also led to setbacks in the human rights regimes previously analysed. The fight against poverty and famine and the management of the CCT programs was absorbed by the prevalence of fraud detection and audits in detriment of improvements in coverage and targeting. Primary assistance health care programs such as *"More Doctors"* were discontinued under allegations of political manipulation, and councils for popular participation were deemed as undue intervention in health care administration. Attempts were made to abrogate administrative rules related to affirmative action for access to post-degree courses in federal universities because *"quotas"* policies were under attack, considered by the official discourse as a form of distortion of public funds and opportunities in favour of minorities. The procedures for indigenous reserves demarcations were abandoned and mining activities in existent reserves were fostered under generic allegations that indigenous reserves represent undue privileges for indigenous populations and waste of natural resources that could be explored for the benefit of nations wealth.

We stand by the conclusion that there is no democratic *"promised land"* waiting for those who walk the path of faith in the international anti-corruption regime. At least in the case of Brazil, global governance bodies' guidelines, multinational organisms' toolkits and goals, United Nations conventions investigatory methods and review mechanisms' reports, transnational NGO's directives and assessment mechanisms, and their push for societal engagement against corruption found judicial and quasi-judicial actors keen on promoting a social and political *"revolution"*. Equipped with the machinery to put forth that agenda, heavily supported by media coverage and enjoying functional immunity to deploy their arsenal, those actors initiated an anti-corruption crusade that overcame legal circles to become a way a society understands itself. The triumph of the anti-corruption discourse generated not only serious political/electoral consequences, but its "*misuse of entrusted power for private benefit"* rationale invaded and colonized discussions in the most diversified areas. Proof of that is that during the COVID-19 pandemic, both incumbents and opposition best efforts were related to the investigation of medical care resources deviations and money grafts, with a series of Federal Police operations and a Parliamentary Enquiry Committee being installed to conduct investigations. Anti-corruption became the vocabulary under which different social discontentment were catalysed, being followed not by more political participation and inclusion, but by political alienation and a cycle of exclusion with the return of poverty and

famine, and indigenous people's endangerment. It is important to clarify that in face of so many different intervening variables, such as economic stagnation, unemployment, the COVID-19 impacts on public debt, health care figures, and economy, we don`t have elements to imply a direct causality between the adoption of international anti-corruption standards and the occurrence of political crisis, social rights deprivation, soaring inequality, and democratic deterioration.

Nevertheless, the fact that such undesirable consequences accompanied the triumph of anti-corruption efforts in Brazil is striking evidence that the causality between the adoption of the legal packages and democracy, proposed by their advocates in specialized literature and Transparency International publications, is absent. A simple glance at some of the most notorious *"democracymeters"* mentioned in Chapter 1 is enough to corroborate our findings. After full deployment of international anti-corruption packages and the major political repercussions it generated in Brazil during the 2010-decade, some *"quality of democracy"* indices show a considerable democratic backsliding. Freedom House's Global Freedom Score registers a sustained fall since 2017 - the year that reflected the evaluation for 2016, when the Presidential impeachment occurred -, from 79/100 points to 73/100 in 2022.[416] The Economist Intelligence Unit Democracy Index also shows a retraction from 7.38 points in 2014 – the year *Car Wash* operation started – to 6.86 in 2021, which represents Brazil moving down within the "flawed democracy" band, approaching the "hybrid regime" classification (Scores below 6.01). International IDEA – Global State of Democracy highlights that *"the countries that have declined the most (measured in terms of the average across all 16 sub attributes of democracy and that were democracies at the start of the decline) in the past 10 years are: Turkey, Nicaragua, Serbia, Poland and Brazil."*[417] Varieties of Democracy (V-Dem) index records a drop from 0.79 in 2010 to 0.51 in 2020, the fourth worst process in autocratization in the World in the decade according to the Swedish institute.

More than only a flawed causality between the adoption of the anti-corruption international agenda and democracy consolidation, it is plausible to argue that, at the very least in a semantic level, some traits the international anti-corruption discourse possesses make it

[416] Freedom House, 'Freedom in the world 2021' (Freedom House) <https://freedomhouse.org/country/brazil/freedom-world/2021> accessed 2 November 2022

[417] IDEA, 'The Global State of Democracy 2021: Building Resilience in a Pandemic Era' (International Institute for Democracy and Electoral Assistance 2021) <https://www.idea.int/democracytracker/sites/default/files/2022-11/GSOD21.pdf> accessed 21 November 2022 6

prone to strategic appropriation and adoption by domestic legal elites and political forces. The focus on societal engagement and the need to catechize the population in search of electoral vertical accountability, expressively found in the UN Convention Against Corruption, World Bank guidelines and Transparency International publications, certainly draws attention of judicial/prosecutorial actors, and minoritarian political radicals in search for an *ethos* or a common moral banner under which they could disguise their authoritarian interests. The *"econometric"* jargon adopted to present corruption as more than just a criminal phenomenon, but as a public management malaise, and a hurdle to democracy and development, allure those who saw orthodox neoliberal economic and institutional reform prescriptions succumb to the 2008-2009 world financial crisis. Looking at the full picture portraited in this research, it is possible to affirm that however present in contemporary democracy since democracy itself became a political consensus around the globe, international legal regimes backed up by cosmopolitan, universalist values such as human rights, development, science, or religion don't always come to the domestic scene to produce more democracy and inclusion. The means by which it is absorbed, the stakeholders directly involved in the process of integration – Legislative, Judiciary, social movements, decentralized administration -, the way it connects with the local, political, participatory dynamics, all play a decisive role in its outcomes. In some cases, the two constitutive elements of contemporary democracy couple to produce emancipation, citizenship enhancement, a sense of rights attainment, in sum, inclusion and democracy consolidation. In others, the interaction is conflictual, the hegemonic tendency of the *"we the people"* tries to cast out the foreign influence. Conversely, in the case of the fight against corruption, the external, international element has the assumption to colonize the public sphere, and control political debate, policies planning, execution, and assessment monopolizing the predominant vocabulary through which problems are discussed and solutions are found. In this contingent scenario, we confirm our hypothesis that this last description corresponds to how international anti-corruption regimes conditioned the way Brazilian society sees itself in the mirror, which paid an undeniable contribution for the debacle of one of the most promising democratic experiments in the World.

5.3 Fighting Corruption for all the Wrong Reasons

As already discussed, one of the most successful moves made by the international anti-corruption movement was to detach corruption from its criminological origins to root it in the

developmental and managerial agendas. The UNDP Global Thematic Programme on Anti-Corruption for Development Effectiveness summarizes the consensus on the capacity of anti-corruption measures to foster development and economic growth and to improve State's capacity to better invest resources in needy areas. Kahn shows that while developed countries invariably rank higher in index that measure the presence of strong accountability/corruption combat institutions, the difference in those indices between developing countries that register high economic growth rates and those that have lagged behind is marginal or irrelevant, which suggests that the purported causality is weak, or might be reverse.[418] In other words, although World Bank reports, Transparency International material, UNDP programmes are filled with syllogistic conclusions of the likes of *"since"* corruption is efficiently tackled *"then"* development and economic growth can happen, empirical evidence in that sense is not as strong, with a more historically accurate hypothesis being that once Countries experiment sustained development and economic growth, strong accountability/anti-corruption institutions are consolidated.

This is an aspect that deserves further investigation, but some specific cases seem to corroborate Khan's suggestion and to replicate effects felt in Brazil. Indeed, the anti-corruption movement has stormed the political sphere in other parts of the Globe, which has not exactly been followed by economic growth or development. In South Korea, a sequence of scandals that goes from trading in influence of a Christian-shamanistic guru to the acceptance of bribery for the approval of a merge between two subsidiaries of the Samsung conglomerate led to streets rallies and, ultimately, to the impeachment of former President Park Geun-hye and her conviction to 24 years of prison in the turn from 2016 to 2017. Samsung's *de facto* boss Lee Jae-Yong was also involved in the case, being sentenced to 2 years and a half in prison in a plot that not only shook South Korean politics, but also its most important multinational companies. The Asian Country registered a GDP growth rate of 2.8% in 2015, 2.9% in 2016, and 3.2% in 2017. After the anti-corruption intervention, South Korea economic growth rate fell back to 2.9% in 2018, and 2% in 2019. In South Africa, in October of 2017, the Constitutional Court upheld a decision to reinstate 783 corruption charges against former president Jacob Zuma. In December of 2017, the High Court of Pretoria decided that the appointment of Shaun Abrahams for National Director of Public Prosecutions (NDPP) was invalid because former president Zuma was acting in conflict of interest. The decision led to

[418] Khan (259)

large street manifestation for Zuma's resignation, which ultimately happened in February of 2018, and to the installation of a Commission of Inquiry into Allegations of State Capture with broad media coverage. South Africa GDP growth rate was 1.2% in 2015, 0.4% in 2016, and 1.4% in 2017. After the sequence of judicial decisions and public protests that hammered the government and the ANC headquarters, South Africa growth rate fell to 0.8%, and down to 0.2% in 2019. The positive impact expected from the triumph of the anti-corruption packages implementation in economic development has also fallen short of those expectations in Brazil. The Country was already facing economic depression in 2013 and 2014, with a negative oscillation in the GDP growth rate of 3% to 0.5%. In 2015 and 2016, when *Car Wash* operation was at the epicentre of all political developments that culminated with President Dilma Roussef's impeachment and the criminal conviction of many Workers Party leaders and former government officials, Brazil featured one of the worst economic depressions of its history, with consecutive falls of -3.5% and -3.3% in the GDP growth rate. Warde points out that big Brazilian contractor companies were severely hit by the investigations, with more than 290.000 of closing employment positions only between Camargo Correa, Andrade Gutierrez, Odebrecht, Queiroz Galvao, and OAS, mounting to economic losses of approximately R$ 187 billion.[419] Brazilian economic performance improved between 2017 and 2019 with GDP growth rates of 1.3%, 1.8%, and 1.4% in the three years span, which is still far from representing a recovery or a scenario of prosperity.

If the corelation between law enforcement institutions empowerment to fight corruption and economic growth or development seems problematic, the idea that efficient corruption combat can be a *"game changer"* in terms of public investments in areas of need is also very disputable. In Brazil, for instance, the turbulent year of 2016 ended with the approval of constitutional amendment 95, which determined measures to control public debt by stablishing expenditure caps on social security, education, and health care. In health care, for instance, Brazil registered a *per capita*/expenditure of USD 1.482.26 in 2019, which is below the two worst performances among OECD Countries (Latvia – USD 1.991/per capita and Romania – USD 1.924/per capita), indicating need for more investment. Although the nominal value of public expenditures with health care increased from R$ 231 billion in 2015 to R$ 290 billion in 2019, those expenses have oscillated down from 4% of GDP in 2017 to 3.9% in 2019, while the average of OECD Countries in the same period is to spend 6.1% of their GDP with public

[419] Warde (348) 36-46

health care.[420] In education, the effects have been more drastic, with a steady nominal reduction of Ministry of Education budget being observed since 2017, from R$ 154 billion to R$ 137 billion in 2020, with an even sharper decrease in expenditure from R$ 141 billion to R$ 116 billion in 2020.[421] The lauded success of anti-corruption operations in the middle 2010s did not result in any improvement in State's capacity to invest in areas of such crucial importance for social development. In fact, assume that efficient corruption combat is key to improve State's performance in areas such as education and health is to misplace expectations with what the triumph of anti-corruption efforts can deliver, to say the least. *Car Wash*, which is the most successful anti-corruption operation in Brazilian history in terms of assets and money recovery, currently estimates that in the most optimistic scenario it will bring R$ 14.7 billion back to public treasure.[422] Those results, already diluted across almost 7 years of investigations, cases, convictions, awarded collaboration agreements and so forth, are clearly shy of any possibility to reverse the current scenario of disinvestment in the Brazilian welfare system. If concretised in the near future, the estimate total of assets and money to be recovered by *Car Wash* will correspond to less than 10% of the Ministry of Education budget for the year of 2019 alone, or approximately 5% of public expenditures with health care in that year, before the COVID-19 pandemic. This assertion does not intend to devalue the merits, or the efficiency of the mechanisms activated to localize, freeze, seize, and recover funds that had been grafted, deviated, and hidden in tax havens overseas. Its importance is to align expectations toward what the international anti-corruption machinery can realistically achieve. As the recent developments in Brazil and other countries suggest, full compliance with the international anti-corruption regime does not guarantee economic growth and development nor improves public investments in areas that claim for more State intervention.

The type of bond between law enforcement authorities and media to generate public engagement in the anti-corruption crusade witnessed in Brazil can generate another undesirable side effect. As Vannucci warns when analysing the outcomes of Italian *"mani pulite",* the exposition of corruption can generate some sense of institutional saturation in pushing forward

[420] IPEA, 'Contas de saúde na perspectiva da contabilidade internacional: conta SHA para o Brasil, 2015 a 2019' (Instituto de Pesquisa Econômica Aplicada 2022) <https://www.ipea.gov.br/portal/images/stories/PDFs/livros/livros/220202_livro_contas_de_saude.pdf > accessed 21 November 2022

[421] Educação Tp, *Anuário Brasileiro da Educação Básica* (Todos pela Educação 2021) <https://todospelaeducacao.org.br/wordpress/wpcontent/uploads/2021/07/Anuario_21final.pdf> accessed 28 November 2022

[422] MPF (344)

the efforts, leading to high levels of corruption.[423] In Brazil, zero tolerance against corruption was a decisive banner in the 2018 general elections, culminating with *Car Wash* leading lower-level judge appointment as Ministry of Justice by the new elected President under the promise of expanding institutional and legal reforms to increment the so-called national integrity system. However, investigations of a scheme of fraudulent personnel recruitment for public offices and salary kickbacks to illicit enrichment and militia activities' financing in Rio de Janeiro implied the President and his family, ending up with the former judge and Ministry of Justice's resignation in April of 2020. Even before that, investigatory bodies such as the Federal Prosecution office, the Brazilian Intelligence Agency (ABIN), the Department of Assets Recovery and International Mutual Legal Assistance of the Ministry of Justice (DRCI), and the Ministry of Justice itself were all packed with President's cronies, which has depleted the anti-corruption efforts. Conflict of interests of the former Secretary of Communication for being partner of publicity agencies that had contracts with the government, former Ministry of Environment involvement with illegal wood extractors in natural reserves, the President's son trafficking in influence before the Ministry of Regional Development in favour of mining companies, bribing attempts in public procurement to acquire COVID-19 vaccines in the Ministry of Health during the pandemic, Ministry of Education funds distortions to benefit evangelical pastors and their political allies with promised bribes in gold bars are some cases that have investigations pending, in some of them the Police Officers ahead of investigations were fired or removed. Brazil might be a curious case in which the triumph of the anti-corruption movement led to corruption impunity. The situation has drawn attention from the international community with the recent adoption of an unprecedented measure by the OECD to install a working group to continuous monitoring of anti-corruption setbacks in Brazil.

As highlighted by United Nations, the UN Convention Against Corruption has 186 State Parties and corruption, in its most varied forms, is considered a crime in almost every corner of the World. Obviously, part of that can be attributed to the success of the international anti-corruption movement. It is important to consider, though, that even before the rise of the international anti-corruption discourse corruption was a criminal offence in many societies because it is morally wrong. The idea that bribery, cronyism, trafficking in influence, illicit enrichment are corrupt acts that demand censorship in the form of criminal sanctions is

[423] Albert P. Vannucci, 'The Controversial Legacy of 'Mani Pulite': A Critical Analysis of Italian Corruption and Anti-Corruption Policies' (2009) 1/2 Bulletin of Italian Politics 233

underpinned by the idea that they are threats or attacks to moral values such as honesty, probity, and equality of opportunities. Moral values that are sensible and dear to societies tend to be protected by law, and that involves the criminalization of behaviours that menace them. This seems to be enough to justify or legitimize continuous initiatives to investigate, prosecute, and punish acts of corruption, without further expectations of positive political, economic, and social outcomes. When fight against corruption is pushed forward for the wrong reasons it can leave a sense of unfulfilled promises that can, paradoxically, create opportunities for the widespread of unchecked corruption.

5.4 Closing the Pandora Box Without Trapping Hope Inside

Vieira presents the resilience of certain spurious agreements found in Brazilian politics as evidence that, although the *Car Wash* experiment does explain President Dilma Roussef's impeachment and broad political distrust, it has not been able to provoke a deep crisis in Brazilian constitutionalism. Temer entrenchment would proof that Brazilian *"coalition presidentialism"* consecrates patrimonialism in the core of the 1988 Constitution.[424] Patrimonialism has been repeatedly used as a key element to understand Brazilian society since Faoro presented the weak differentiation between public and private and the appropriation of the state by political elites as a social characteristic inherited from Portuguese colonialism.[425] Souza challenges that sociological tradition affirming that the *"patrimonialism"* theory serves well interests to depict the Brazilian people as incapable of discerning their private business from the public good, intrinsically corrupt, and unqualified to manage the state. Behind the *"patrimonialism"* social theory would be an economic elite that has always concentrated the wealth, either produced for exportation or profited from the presence of multinational capital. That elite would be associated to a middle class integrated to systems of European values such as Christianity and education, in an on-going anti-popular pact that stigmatizes the poor.[426] The stigmatization of the poor, the black, the indigenous, the northeastern people as the "lazy", the "mischievous", the "wicked", or the "bandit" finds in the anti-corruption discourse a new language to call the Brazilian society out as prone to *"misuse entrusted power for private benefit"*.

[424] Vieira (403)
[425] Souza (34)
[426] Ibid 42-60

Only a society that does not trust itself huge portions of the population can be convinced to offer political support systematically to projects that, ultimately, undermine their chances of emancipation, citizenship, enfranchisement, and inclusion. The 1988 democratic constitutional project is to *"build a free, fair and solidary society"*, *"to guarantee national development"*, *"to eradicate poverty and marginalization and to reduce social and regional inequalities"*, and *"to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination"* (Article 3). To achieve such an ambitious project, the Constitution established a myriad of means and channels of social participation, as well as it committed to a comprehensive body of civil, political, social, economic, and cultural rights, and integration to international human rights instruments. To different extents and through different processes, in the fight against poverty, right to health care, access of ethnic minorities to superior education, and protection of indigenous populations, the dialectic relationship between general will, popular representatives and Supreme Court case-law on international human rights, international courts decisions, policies, initiatives was leaning toward the fulfilment of those objectives. Brazilian democracy thrived as it generated more participation and inclusion in all those areas. This dynamic suffered a disruption in the middle 2010 decade, which causes are still to be fully explored. It is hard to measure the exact contribution the economic crisis experimented in 2015 and 2016 had on the political events that followed. Nevertheless, this research made clear that one factor in that disruption, both in practical and semantic levels, was the triumph of an anti-corruption discourse induced, propelled, and awarded by the international anti-corruption regime. The fight against corruption was one, if not the main, vocabulary of a new cycle of alienation and exclusion for which the inflamed masses offered their support.

One way to move forward is to re-confine the fight against corruption to its place, praising the achievements accomplished, strengthening accountability institutions to assure they can work independently and responsibly, but bearing in mind the pitfalls in the path, and keeping a realistic expectation of what can be achieved through a robust integrity system. This research was an effort to describe how international legal regimes are part of, contribute to consolidate or dismantle democracy. A better understanding of these relationships can certainly help to close the Pandora box, with a special care to not trap hope inside. Hope that Brazil can find the correct balance of the elements out of which its democracy was founded and can advance to a society with more equality. Looking at the challenges of Latin American constitutionalism, Gargarella asks *"what are the needs of our time? What is the main legal drama of the present time? How could the Constitution react in face of that drama? We*

maintained that the main drama confronted by the entire region, since its independence, was the drama of inequality".[427]

Analysing Brazilian recent history, Benvindo explains the current scenario of democracy backsliding in Brazil by the presence of high levels of inequality and a persistent authoritarian mindset that still inform and shape Brazilian understanding of the Rule of Law.[428] We agree to his claim by proposing that the prevailing institutional mindset is authoritarian precisely because it leans toward producing and reproducing inequality, and exclusion. Although he acknowledges that *"Operation Car Wash and also other probes before it yielded a tectonic shift in the 'institutional equilibrium' that had until then prevailed in the relationship between the political and judicial realms"*[429], we believe he misses the mechanisms by which the success of anti-corruption efforts paid a decisive contribution to reinforce the authoritarian mindset/inequality that is at the core of his diagnosis for our democratic shortcomings.

Brazilian society has struggled to identify its real drama, failing to offer a clear, straightforward response to Gargarella's provocative question. The trouble to find our constitutionalism main challenge can be attributed to an understanding of the Rule of Law that is essentially authoritarian and that reproduces inequality, as proposed by Benvindo. Social obsession with corruption and a misplaced trust in the anti-corruption international regimes, agenda, discourses, and correlate domestic initiatives and efforts have decisively contributed to make that self-perception more clouded. The public sphere encapsulation by corruption/fight against corruption has clouded Brazilian society view of its own problems and task ahead. The image in the mirror is nebulous, blurred, and distorted. We hope to have offered an innovative breeze that can bring some clarity to the picture.

[427] Gargarella (170) 196
[428] Benvindo (17)
[429] Ibid 202

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