
PARTICIPANTS' PAPERS

THE BRAZILIAN CRIMINAL JUSTICE RESPONSE TO CORRUPTION - THE LESSONS OF THE CAR WASH CASE

*Alexandre Collares Barbosa **

I. INTRODUCTION

This paper will focus on the Brazilian criminal justice response to corruption, encompassing its general structure, its function as well as its challenges, problems and possible solutions. As an example, this paper will present the Car Wash Case, for it is the most significant and successful case of the criminal response to large scale corruption in Brazilian history.

II. OVERVIEW OF THE BRAZILIAN CRIMINAL JUSTICE RESPONSE TO CORRUPTION

This topic will present a panoramic view on the Brazilian criminal justice response to corruption. The presentation will be based on topics organized by degree of abstraction, following a pattern from general to specific, so that the first topic will be a description of the Brazilian criminal judicial system as a whole. The second topic will present the Brazilian framework of anti-corruption responses and the last topic will focus on a concrete case (Car Wash Operation).

A. Brazilian Criminal Legal and Judicial Systems

The 1988 Constitution is the apex of the Brazilian legal system and establishes the main characteristics of the Brazilian criminal justice system, based on the rule of law and on the prevalence of Human Rights, including Fair Trial, right to counsel, right to appeal, and individual procedural guarantees and written rules on criminal and procedural matters. As a matter of fact, the Constitution encompasses all the fundamental rights specified by Article 14 of the International Covenant on Civil and Political Rights.

Also, the 1988 Constitution creates and defines the Judiciary and the Prosecution Services of Brazil, as independent and impartial institutions. In order to guarantee the impartiality and independence of judges and public prosecutors, there is a constitutional system of rules. First, its members can only become judges and public prosecutors after public contests. Second, they cannot be moved from one court to another, unless they want to. Third, their incomes cannot be reduced.

In a lower hierarchy level than the 1988 Constitution, and following the Civil Law tradition, there are the 1940 Penal Code and the 1941 Code of Criminal Proceedings as well as many sparse laws and regulations addressing penal law, crime definitions, criminal investigation, prosecution and adjudication in a more detailed manner.

The Brazilian criminal justice system is based on the separation of functions, so that one authority investigates and accuses and another judges. Because of that, the system is called accusatory. There are basically four different stages of the Brazilian criminal system of penal justice: investigation, prosecution, adjudication and execution. First, the investigative Police, also called the judiciary Police, the Public Prosecution Offices and other legally authorized agencies, such as the Financial Intelligence Unit, collect evidence about a fact that might be a crime. During this phase, the system is inquisitorial; usually the Head of Police presides over the investigation, while the Public Prosecutor oversees and demands adequate investigative measures if necessary. It is possible, however, for the Public Prosecutor to start and preside over a criminal investigation. Nonetheless, when an investigative measure implicates in the possible limitation of an individual right, the Judiciary intervenes, so that judicial warrants are necessary for interception of

* Federal Prosecutor (since 2006) in Foz do Iguaçu, Paraná, Brazil, and former Head of Federal Police (2003-2005) in Rio de Janeiro, Brazil.

communications, electronic surveillance, home searches and pre-indictment detentions, for example.

Second, if convinced by the evidence, the Public Prosecutor decides to prosecute; as a consequence, criminal procedure starts. The Judge then analyses the petition and the evidence so that he can decide whether the procedure should continue or not. If the Public Prosecutor decides to dismiss the case, there is a system of counter control. If the Judge agrees with the non-prosecution decision, the case is dismissed; however, if the judge disagrees, the General Prosecutor or a Superior Criminal Chamber of the Prosecution Service will have the final word.

Notice that the Brazilian Prosecution Service is autonomous, according to the 1988 Constitution. Indeed, the Prosecution Service is not part of the Executive branch, nor the Judiciary, nor the Legislative. Prosecutors are independent, and there is no hierarchy within the career members.

Third, the trial phase begins. The system is adversarial, and due process is guaranteed. As a rule, trials are presided over by a single Judge, but there are exceptions due to constitutional rules on competence.

After the first-degree sentence, a sometimes long and time-consuming phase of appeals and counter-appeals starts. In Brazil, even after the sentence is revised by a second degree Court, the defendant has extensive right to resort to Superior Courts, first to the “Superior Tribunal de Justiça” (STJ), and latter to the “Supremo Tribunal Federal” (STF), Brazil’s Supreme Court. As a consequence, in many cases, many years go by until a final decision is reached.

Also, according to the 1988 Constitution, a larger number of political agents and public officials in Brazil have special rules regarding competence. Sometimes, the system takes a great deal of time to decide by which Court a specific case will be judged. Also, sometimes after a long period of trial, judicial decisions are nullified by Superior Courts based on wrong competence.

Fourth, in a nutshell, the last stage is the judicial execution, when the due fulfilment of penalties is monitored.

B. Legal Framework of Anti-Corruption Criminal Responses

The 1940 Penal Code, latter reformed in 1984, follows a finalist criminal law model and establishes criminal offences against the Public Administration, including embezzlement (article 312) and passive corruption/bribery (article 317), both with penalties from 2 to 12 years of imprisonment. In 2002, in accordance with article 16 of the United Nations Convention against Corruption (UNCAC), the Brazilian Penal Code was reformed to include a chapter on crimes against the foreign public administration, including bribery of foreign public officials in order to obtain illegal advantage in transnational commercial transactions (article 337-B).

Next, the 1998 Federal Law No. 9.613 (Anti-Money Laundering Law) has made it a crime to conceal or dissimulate the nature, the origin, the location, the availability or property of proceeds of crime. The penalty is imprisonment from 3 to 10 years; however, it can be increased from one to two thirds if the crime is committed repeatedly or by a criminal organization. After 2012, there is no list of specific predicate crimes, so any crime can be a predicate offence.

Besides, 2013 Federal Law No. 12.850 (Organized Crime Law) defines as crime the act of promoting, constituting, financing or integrating a criminal organization, either in person or through the actions of intermediaries. The penalty is imprisonment from 3 (three) to 8 (eight) years, and fine, regardless of the corresponding penalties related to other criminal offences committed. The punishment can be increased from 1/6 (one sixth) to 2/3 (two thirds), if a civil servant is involved as a co-conspirator, and the criminal organization relies in such a condition to commit the offence.

The 2013 Federal Law No. 12.850 also allows all special investigative techniques mentioned in article 50 of the UNCAC. Plea agreements, in particular, can lead to judicial forgiveness or up to 2/3 (two thirds) of penalty reduction.

C. The Car Wash Case

On 17 March 2014, in Curitiba, Paraná, Brazil's biggest corruption and money-laundering investigation began, when the Federal Prosecution Service and the Federal Police detected possible financial crimes lead by black-market money dealers. It started small. At first investigators detected a money-laundering scheme involving a former Federal Deputy, two companies based in Paraná, and a black-market money dealer. Since money-laundering took place in Paraná, investigation was anchored in the Money Laundering Specialized Federal Court of Curitiba, Paraná's capital.

After successful judicial warranted interception of communications, the investigation detected money-laundering schemes by three other black-market money dealers. As the work progressed, and more data was gathered, investigators found evidence of organized crime activity, illegal transnational capital flight, bribery of public officials, embezzlement and even drug traffic.

One of these black-market money dealers was Alberto Youssef, formerly investigated and arrested in the early 2000s for money-laundering. Investigation revealed that he was active in money-laundering again and that he bought a Land Rover Vehicle to Paulo Roberto Costa, former senior rank manager of Petrobras, Brazil's State Controlled Oil Corporation. Then, investigations developed and gained weight after Paulo Roberto Costa and Alberto Youssef signed plea agreements.

Investigations revealed a gigantic corruption scheme that took control of Petrobras, ranked as the world's 58th biggest company in the Fortune Global list. Several senior managers, appointed by three major Brazilian political parties, organized and maintained a large-scale corruption scheme involving big construction companies. As a matter of fact, during at least ten years, from 2004 to 2014, a criminal organization took hold of Petrobras. It is estimated that around 12 billion US dollars were diverted from Petrobras.

The criminal scheme was composed by four main groups: senior managers and Petrobras' personnel, contractors, such as ODEBRECHT, OAS and CAMARGO CORREA, black-market money dealers and political parties, all-purpose driven to illegally divert resources from Petrobras.

The main criminal scheme detected was composed of the following steps. First, contractor formed a cartel to choose which cartel company would win Petrobras' bids. Then the prices for the contracted services were artificially inflated, resulting in payments above the market price. In order to win the bids, the cartel companies would pay large bribes to Petrobras' senior managers involved in the scheme. Those managers then transferred part of the money to politicians and other public officials.

As investigations continued, it took an upward spiral, fed by countless plea agreements, solid evidence and substantial money recovery. Each plea revealed the money path as well as the motivation for the bribery. Further evidence was either delivered by the plea collaborators or gathered via international cooperation. As a consequence, Car Wash has revealed a widespread scheme of corruption.

From 2014 up to now, the Curitiba Task Force, composed of 14 Federal Public Prosecutors and a 50-person support group, has prosecuted 445 people. 50 different proceedings are finished, and 159 people were condemned, including powerful businessmen, and high ranking influential politicians, including a former President, former Governor, former Ministries and former Head of National Congress. If the penalties were added, the total would reach more than 2,249 years of imprisonment. During Car Wash's 65 phases, more than 1,200 search warrants and 300 detention warrants were issued. Through plea agreements and voluntary renunciations, Car Wash has recovered more than 3 billion dollars (US\$ 3.000.000.000,00). Finally, Car Wash generated more than 800 international cooperation requests.

Each of Car Wash's phases can be considered a case within itself, for the corruption schemes detected range from Petrobras, to large construction companies, and include state-controlled banks, power plants and even private companies that sold oil transportation ships and oil platforms.

The Car Wash case is an ongoing investigation. There are currently three tasks forces: Curitiba, Rio de Janeiro (since 2016) and São Paulo (since 2017), as well as a Special Group in Brasilia (since 2015) to investigate and prosecute high ranking politicians who can only be tried by the Superior Courts (STF or STJ).

Therefore, Car Wash's success can be traced to an adequate and efficient use of interception of communications, detentions, removal from office, undercover operations, bank and digital data analysis, security camera videos, and handwriting analysis.

Especially, Car Wash's success rested in detailed and trustworthy plea agreements by cooperating defendants. In each agreement, there was a careful analysis of costs and social benefits that would result from the agreement of collaboration. Agreements were only made when the benefits significantly outweighed the social costs. In order to celebrate agreements, Federal Prosecution Service always required the collaborator to indicate to where the laundered assets were taken. Also, the collaborator had to agree on the repatriation of such assets. They also had to provide evidence of their declarations. The plea agreements have been the fundamental investigative measure, for they have provided continuous expansion of investigations as well as immediate recovery of money.

Finally, Car Wash's success depended on large scale cooperation, both internally, as seen in the example of the task forces among different public institutions, and internationally, via diligent transnational cooperation. It is noteworthy that a considerable amount of evidence gathered through international cooperation helped not only the Car Wash Case in Brazil but were also the spark for the expansion of investigations overseas, since the implicated Brazilian construction companies also operated overseas, to where they had exported their corrupt strategies.

III. MAJOR PROBLEMS AND SOLUTIONS

This topic will present two major problems and solutions regarding Brazilian criminal responses to corruption, as a means to accomplish the 16.5 Goal of the United Nations' 2030 Agenda for Sustainable Development, i.e., "substantially reduce corruption and bribery in all their forms".

A. Widespread Corruption

The Car Wash Case revealed a widespread net of corruption in Brazil. As seen in the last topic, many top public officials and important businessmen were involved; thus, the effort to maintain ongoing investigation, prosecution and trial is gigantic, demanding great sacrifices from the investigative Police, Federal Prosecution Service, Judiciary, and other public officials.

Beyond the Car Wash Case, there is a myriad of investigations and criminal procedures all over Brazil, both in Federal Justice and State Justices. The degree of corruption reached very high levels; as a consequence, the work to change that scenario is extraordinarily high. On the one hand, bribery, embezzlement, fraud in bids, and social security fraud abound. On the other hand, the work force to cope with that demand is limited.

The solution to that equation is threefold.

1. Internal and External Cooperation

First, cooperation is key. In the internal level, cooperation within institutions is essential, for forming, maintaining and aiding special anti-corruption groups are vital steps. Then, different public institutions must work together in order to achieve the greater good. And finally, given the transnational scope of corruption and money-laundering, efficient and quick international cooperation is necessary.

2. Creativity and Innovation

Second, creativity and innovation are important tools to achieve higher efficiency. As an example, during the Car Wash Case, numerous plea agreements generated a large data base. In order to organize all that information, Information Technology solutions were crafted, so that information revealed by a certain collaborator could be combined with another to create a meaningful investigative hypothesis or even evidence. Besides, all the agreements must be supervised; thus, The Federal Public Service developed a system, called SIMCO, to monitor the fulfilment of the plea agreements' clauses by the collaborators.

Another very important technological tool, active since 2010, is the electronic based platform, called EPROC, for criminal procedures used by Federal Justice in Paraná, for paper-based procedures generate time loss and inefficiency. The system presents all the steps of a given criminal procedure in an easy and interactive way, and facilitates the task of keeping all parts informed of a given decision in a matter of

seconds; indeed, it is a very useful tool, especially in cases with a multitude of defendants.

3. Persistent Strategy

Third, permanent evolution of the criminal responses to corruption is essential, so since 2003 the Brazilian government has instituted the National Strategy to Tackle Corruption and Money Laundering, also known as ENCCLA. By bringing together different agencies and public bodies, every year ENCCLA proposes new legislation, creates better strategies against corruption, shares capacity-building knowledge, and coordinates law enforcement agencies.

B. Necessity to Upgrade Brazilian Law

In order to enhance its criminal responses to corruption and comply with international conventions, such as the United Nations Convention on Transnational Organized Crime (UNTOC) and the United Nations Convention Against Corruption (UNCAC), the Brazilian legal framework against corruption must be upgraded.

Following the Federal Prosecution Service initiative called the “Ten Measures Against Corruption”, there are currently three bills to be voted on by the Brazilian National Congress. The main points, especially in the bill proposed by Justice Minister Sergio Moro (Bill n.º 882/2019), are to establish illicit enrichment as a criminal offence and to allow extended confiscation, in accordance with article 20 and article 31, paragraphs 5-8, of UNCAC, respectively.

IV. CONCLUSION

In compliance with most of the UNCAC articles, Brazil has taken decisive steps towards a more effective criminal response to corruption, as illustrated by the Car Wash Case. However, there is still a long way to consolidate its anti-corruption victories. Currently it is key to finally upgrade its related penal legal framework, so that Brazilian authorities will have the appropriate legal tools to impede impunity and to tackle corruption more effectively.