

## Notes on Combating Corruption in Brazil and Operation *Lava Jato*

Gabriela Hardt

Substitute Federal Judge

13th Federal Court of Curitiba

I have often been invited to speak about the current state of the fight against corruption in Brazil. For the past three and a half years, I have been a privileged spectator of the path of Operation *Lava Jato*, the largest criminal investigation into corruption and money laundering that has ever happened in the history of my country. The criminal scheme discovered is so large that investigations today have not only spread to various cities around Brazil, but have also spilled beyond national boundaries. According to data obtained by the Federal Prosecutor's Office and freely available on their website, as of August 31, 2017, more than 30 countries have already requested documents from Brazilian officials to support their own investigations related to facts initially verified by the 13th Federal Court of Curitiba, and Brazil has already requested documents from 39 different countries in connection to the same.<sup>1</sup>

Corrupt practices date back to the formation of Brazilian society, and there have been several historical and sociological studies that have examined the issue. In recent years, however—especially after the initial discovery of corruption at Petrobrás, the country's largest state-owned company, involving the country's economic and political elite—it has become clear that corruption has become a daily concern for Brazilians. It is now usually the first topic covered on national newscasts. In 2015, one year after the first phase of Operation *Lava Jato* began, Datafolha<sup>2</sup> Research Institute surveys showed—for the first time in the survey's history—that Brazilians considered corruption to be the biggest problem in the country, ahead of other concerns such as health, violence, education, and unemployment.

Just as corrupt practices have existed since the formation of the country, it can also be said that many of the difficulties in the fight against corruption in Brazil have deep roots. As a rule, the Brazilian criminal system does not work well in complex cases, especially in cases involving white-collar crimes where, until recently, impunity often prevailed.

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<sup>1</sup> <http://lavajato.mpf.mp.br/atuacao-na-1a-instancia/resultados/a-lava-jato-em-numeros>

<sup>2</sup> <http://www1.folha.uol.com.br/poder/2015/11/1712475-pela-1-vez-corrupcao-e-vista-como-maior-problema-do-pais.shtml>

[The fact that] our legislation assumes that there will be unlimited resources for the most diverse decisions during the course of the criminal process, as well as the existence of three different appeals levels, complicates criminal proceedings—which usually take more than 10 years to reach a final verdict. As a result, it was very common to face cases in which, despite the heavy sentences imposed by the initial trial judge and upheld by first court of appeals, the defendants never actually served their sentences, because the statute of limitations had run out before the time the final ruling was issued.

A clear example of the ineffectiveness of the Brazilian criminal process, which was also processed by the 13<sup>th</sup> Federal Court of Curitiba, was the so-called “Operation Banestado”: a large police operation that began investigating crimes against the financial system and culminated [with an investigation] into the fraudulent overseas remittance of 2.5 billion *reais* (approximately 800 million dollars at current value). This investigation began in the late 1990s and the first criminal actions resulting from it were only distributed in 2003 and 2004.

Within an investigative context, Operation Banestado was one of the first prominent cases in Brazil where there was significant success in collecting evidence on crimes against the national financial system. Such success was due to a number of factors, but especially due to agreements signed by at a national level that allowed intense international legal cooperation between the bodies responsible for investigation, as well as the use of plea bargains—although plea bargains were not clearly defined by existing Brazilian legislation.

The bilateral agreements signed by Brazil during this period quickened criminal investigations related to supranational crimes, which no longer depended on the lengthy procedures of *letters rogatory* [letters of request]. In the early 2000s, Brazil ratified important treaties to combat transnational crimes, which not only brought Brazil into international efforts to combat certain types of crimes, but also introduced into national legislation several new investigative instruments already in use internationally. Two treaties of particular note are the *United Nations Convention against Transnational Organized Crime* and the *United Nations Convention against Corruption*.

With these new tools at their disposal, well-meaning and studious investigators and prosecutors have been able to form solid criminal cases [in connection to Operation Lava Jato, which have flooded criminal courts with paperwork and hearings. The first sentences were handed down just one year after the first indictments, which confirmed that the documents and

testimonies forming these cases contained evidence of several crimes.

Regardless of the initial efficiency of the investigations and the course of the first criminal proceedings in the first instance, we know that after more than 680 people were denounced in this operation, just a dozen or so are serving sentences for crimes they committed. In recent years, there have been several decisions in the higher courts releasing property seized as part of the operation due to the statute of limitations despite in face of several convictions in the case. The delays in the trial of countless appeals, especially when they reached the Higher Courts, which already deal with an insane workload,<sup>3</sup> and the requirement of a final decision to commence the execution of the sentence, culminated in the recognition of the extinction of punishment without penalty compliance for the majority of its agents.

It should be noted here that the recognition of statute of limitations in Brazil has the effect of also erasing the secondary effects of the criminal convictions, including the loss of property obtained with the benefit of the crime.

Another factor that has always hindered the effective fight against the crime of corruption in Brazil is the existence of numerous public officials with privileged forum, that is, individuals who can only be investigated and judged by the [higher-level] courts. It is estimated that in Brazil more than forty-thousand people have this prerogative, and generally the large-scale corruption schemes involve people who hold power and thus possess privileged forum.

In the case of the Supreme Court of Brazil—the highest court in the country—which has jurisdiction over a wide variety of cases, the intense workload and special jurisdiction over criminal charges involving high authorities, including the president, ministers of state and members of the national congress, worked, as a rule, as a strong shield against the effective accountability of such people. According to a study recently presented by the Association of Brazilian Magistrates, between 1988 and 2007, no political agent was convicted by the Supreme Court.

The largest milestone prior to Operation Lava Jato, in terms of holding high-level figures accountable for crimes related to the exercise of power, which served as an example of the possibility of improving the Brazilian criminal system, was Criminal Action 470, also known in

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<sup>3</sup> Segundo dados do Relatório Justiça em Números divulgado pelo Conselho Nacional de Justiça na última semana, somente o Superior Tribunal de Justiça, composto de 33 Ministros e que atua como terceira instância nas ações criminais em geral, recebeu no último ano 334.411 novos casos para julgamento. Vide <http://www.cnj.jus.br/files/conteudo/arquivo/2017/09/904f097f215cf19a2838166729516b79.pdf>

Brazil as the *Mensalão*. In this case, the Supreme Federal Court condemned politicians directly linked to the sitting government, including a former presidential chief of staff, several congressmen and other political leaders, and bank directors; and these individuals have in fact served their sentences, especially for corruption and money laundering crimes.

However, [the *Mensalão* case also] highlights the complexity and difficulty of [prosecuting and judging] a case such as this in a higher court, even though it was a success. Although the indictment was filed in 2005, it was accepted by the Supreme Federal Court plenary only in 2007. After years of processing, it was finally judged in 2012, due largely to a great effort made at the time by the rapporteur [the justice assigned to lead the case]. The final judgment took 53 sessions, which almost paralyzed the work of the Court during this period, with sessions lasting four and a half months. This in a case where only 40 people were indicted, and 25 of them convicted.

Compare this with the current data from Operation Lava Jato in Brazil: Since 2014, in the initial trial courts,<sup>4</sup> 282 people have been indicted in relation to 67 criminal cases; and sentences have already been handed down in 34 of these cases. For cases under the jurisdiction of the Supreme Federal Court, although 450 people were investigated, accusations have been received in only 5 criminal actions; and three and a half years into the investigations, no conviction has yet been issued.

Operation Lava Jato initially began as one more investigation into crimes against the national financial system and money laundering. The evidence that emerged suggested new directions for investigations, which led to the discovery of a major corruption scheme that was disseminated in the most diverse spheres of public administration in the country. As said by Justice Teori Zavascki, the original rapporteur for the case in the Supreme Court, “*cada vez que se puxa uma pena aparece uma galinha inteira.*”

At the end of the initial investigative phase, by mere chance, investigators found that an operator of the Brazilian black exchange market—a man who had already been convicted in Operation Banestado—was involved with a former director of Petrobrás. Given this connection, part of the investigations were directed to review several large state contracts. Investigators collected evidence indicating certain discrepancies in the value [of these contracts], and soon the conclusion of the first plea agreements in the operation showed the existence of a great criminal

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<sup>4</sup> segundo dados divulgados no site criado pelo Ministério Público Federal "<http://lavajato.mpf.mp.br/>"

scheme.

To briefly summarize, this the exposed scheme was as follows: the political parties that formed the governing coalition had recommended people to high-ranking positions on the state-owned [company's] board of directors; the nominees, once in place [at the company], diverted resources and funds back to these political parties and party leaders, but they also took a portion of the diverted funds. These kickbacks were done using administrative procedures that appeared lawful even as they agreed to inflated contracts worth billions, signed with some of the largest companies in Brazil. [These companies] also acted in the form of cartels, dividing between themselves the major works and contracts. A percentage of these contracted amounts were transferred, through money laundering and/or currency evasion, or mere payment in kind, to the political parties, their leaders and the godchildren appointed to fill the positions.

After initial consternation over the significant size of the criminal scheme involving Petrobras, investigations continued to move forward, and new evidence from leaders of major contractors and new accusation demonstrated that the scheme was not exclusive to contracts entered into with state-owned Petrobras.

Thus, before the anniversary of the start of the first phase of Operation Lava Jato, it was concluded that this was not a case of tackling a simple corruption scheme, but instead this was—as has been consistently stated in the decisions handed down by Federal Judge Sérgio Moro—an issue of “systemic corruption,” which has tarnished the image of Brazil and the self-esteem of Brazilians. In other words, it had become clear that corrupt practices had become a normal part of the public procurement process in Brazil. It was found that bribery fees were paid based on pre-established rates before the amount to be contracted was confirmed, and that this was the rule of the game. There was also pre-defined payment distribution between civil servants, intermediaries responsible for payments (called operators or *doleiros*), and the political groups, which were responsible for maintaining the officials in their respective management positions at the state-owned companies and government agencies.

Operation Lava Jato is still an ongoing investigation, since new evidence is emerging every day and new denunciations are being presented in courts across the country. While it is not possible to conclude what its final balance will be, especially in regards to changing culture in the fight against corruption in the country, it is an example of a successful investigation.

I affirm this in particular because more than US \$ 700 million amounts have already been

repatriated abroad, and assets have been blocked in amounts that exceed 3.2 billion reais (approximately US \$ 1.03 billion), being the most effective operation in the recovery of assets in history.

Three and a half years since its beginning, one can also see that this success stems from several paradigm shifts for the Brazilian criminal process.

One of the first significant initiatives from the beginning of the operation was the establishment of task forces by the Federal Police and the Public Prosecutor's Office, with professionals who had gained extensive experience in previous operations. These professionals had enough knowledge to know the paths they should take during the course of the investigation, given that some of them had already worked on similar investigations in the past, such as Operation Banestado, which made it possible to avoid repeating previous mistakes.

Likewise essential to its success was the initial conduct of the case by Federal Judge Sérgio Moro, who in 2014 already had more than 12 years of experience trying complex criminal cases, being one of the greatest scholars of money laundering in Brazil. His decisions, despite receiving frequent criticism, especially from defendants and their lawyers, were always delivered with the depth of reasoning and agility necessary to allow for the continuity of the investigation.

Additionally, by decision of the Federal Regional Court of the 4th Region, to which the 13th Federal Court of Curitiba is bound, considering the importance of the case, Judge Sérgio Moro was assigned to act exclusively in cases related to the Operation, as well as in other courts that received investigations resulting from the evidence initially identified in Curitiba. A great scholar of the Maxi Palermo Trial, the case where they managed to arrest, for the first time, the great mafia bosses in Italy, Judge Sérgio Moro always had the idea that if it is not possible to adequately attend to all the cases that are brought before the court one must prioritize the most serious cases.

Another relevant change in behavior is already evident in the first phase of the investigations was the treatment given to the case at the appellate level. These courts were able to understand the complexity of the facts and the importance of giving a different response from the ordinarily given for cases of corruption.

Among these issues is the understanding that the requirements for injunctions are not only met when there is a violent crime or drug trafficking—as was usually the case in Brazil—but also when “systemic” crime is discovered, which clearly affects the public and economic

order of the country.<sup>5</sup>

It is also important to bear in mind the fundamental change in the jurisprudence of the Supreme Federal Court in February 2016 regarding the possibility of executing the sentence if the appeals court upholds the judgement of the initial trial court. The previous understanding that demanded the exhaustion of all appeals in a country where the laws allow an endless number of appeals at four different judicial levels, contributed to the reality that impunity prevails in this type of criminality.

Another important factor for the success of the Operation was the implementation of the plea bargain agreements, established by Law 12,850/2013. The instrument already existed in the Brazilian system, but its contours were not clear until the passage of this law in 2013. Without the use of this instrument, it is difficult to fully resolve cases involving criminal offenses committed by complex criminal organizations. In many cases, it is only with the help of those who choose to collaborate that it is possible to unveil a [criminal organization's] true *modus operandi*.

Finally, in the process of the criminal actions of the Operation, it is also relevant to note the importance of speed and public transparency, given that the federal justice of the 4th Region has adopted an electronic tracking system. All steps, requests, and decisions (after the end of the investigative phase) become public and may be viewed immediately by any interested party, and in particular by the specialized press.

In a true democracy, public opinion, freedom of the press, and the transparency of the acts of public administration are fundamental for combating and avoiding acts of corruption. Without the reporting done by press and without the immense popular support for the police investigation, it would not have been possible to overcome the various obstacles that appeared along the way.

Obviously, Operation Lava Jato is still an ongoing investigation, and has been and continues to be criticized. But some of the results of the cases already tried are unprecedented in Brazil. We have had several corruption scandals in our history. However, never before have top executives of the country's largest companies been arrested, tried, and convicted. Several sitting

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<sup>5</sup> Segundo o artigo 312 do Código de Processo Penal brasileiro *A prisão preventiva poderá ser decretada como garantia da ordem pública, da ordem econômica, por conveniência da instrução criminal, ou para assegurar a aplicação da lei penal, quando houver prova da existência do crime e indício suficiente de autoria.*

congressmen are under investigation and face prosecution before the Supreme Court; and proceedings pending in the lower court include a former president of the Chamber of Deputies, former cabinet ministers, a former governor, and several former congressmen.

At any rate, in the same week that I write this article highlighting the merits of Operation Lava Jato, we continue to face new scandals. On September 5, 2017, we faced the shocking image of the seizure of more than R\$ 51 million (approximately US\$ 16.5 million) in cash hidden in boxes and suitcases: illicit funds received by a renowned politician linked to the current government and who has held relevant positions in the two previous governments.

All of this demonstrates the shift in Brazilian criminal prosecution, making crime riskier for those who think about practicing it. [Yet this shift,] even though it is an absolutely necessary point, is not enough for an effective cultural change in the country.

We have recently seen a coordinated attempt by members of the Public Prosecutor's Office to propose legislative reforms, supported by more than 2 million signatures, to better prevent and repress this type of crime—which nonetheless culminated in the passage in the Chamber of Deputies of a complete distortion of the initial proposal, which instead sought to maintain the status quo. There are several bills underway in the National Congress that seek to reverse the progress already made in Operation Lava Jato, as well as to retaliate against the actions of investigators, prosecutors, and judges.

It is obvious that, when fighting powerful forces, you must expect them to use every means at their disposal to keep the power they have conquered. However, I continue to closely follow the hard work of well-intentioned and well-prepared people who have faced new battles in the last three and a half years. For all this, I hope and trust that this crisis presented by the dissemination of the results of the Lava Jato investigations serves as a real window of opportunity so that we can have a stronger and more reliable country.