Chapter VI – Legal consequences and practical implications

1. Introduction

The use of cooperating defendants as an investigative tool is nowadays an ever-increasing reality in multiple jurisdictions.[1292] In the last decades, several countries have adopted reforms to permit the concession of benefits to offenders who assist public officials in the investigation against co-conspirators. Recently, this movement has shown special vitality in the realm of corporate wrongdoing, where some commentators speak of a 'leniency revolution'.[1293]

In Brazil, the large-scale use of leniency policies has drawn large attention in the massive investigations that since 2014 have inquired into a multitude of practices undertaken by some of the most prominent businessmen and politicians in Brazil.[1294] Collaboration agreements have generated prompt and visible outcomes, such as the payment of multi-million fines, the establishment of negotiated imprisonment penalties and the disclosure of long and detailed confessions. Although the arrangements negotiated by cooperating defendants and enforcement authorities have no clear legal basis, the Brazilian judiciary has validated the inventive practice of collaboration agreements, associating it with a new form of "consensual criminal justice" and applying principles and concepts from private contract law, such as the doctrines of "*res inter alios acta*", of "*venire contra factum proprium*", and of "*pacta sunt servanda*".[1295] The results obtained through collaboration agreements in the investigation of corporate and government crimes attracted worldwide attention.[1296] Since then, collaboration agreements

1292 Regarding the development of this tool in an international perspective see Part III.1.

1293 Spagnolo, 'Leniency and Whistleblowers in Antitrust'(n 30) 259.

1294 About the Car Wash Operation and its impact on Brazil's social and political scene, see Part II.2.

1295 See item I..4.c.

1296 See Transparency International, 'Brazil Carwash task force wins Transparency International anti-corruption award'(2016) <https://www.transparency.org/news/pressrelease/brazils_carwash_task_force_wins_transparency_international_anti_corruption>, accessed 26 September 2018.

have been praised as an essential tool for the prosecution of corporate wrongdoing and corruption schemes.[1297]

The widespread support for this development is somewhat understandable. Corporate crimes and corrupt practices, apart from causing individual losses, generate several invidious effects throughout society. The high potential damage is accompanied by the presence of enormous obstacles to effective prosecution, particularly in relation to leaders of legitimate organizations such as corporations and political parties. In this context, it is normal to point to the existence of a particularly severe form of dark figure in the realm of corporate and governmental crimes.[1298] These obstacles tend to create situations of impunity and generate unexplainable differences of treatment between different social groups, damaging the legitimacy of criminal law.[1299] Leniency policies appear in this context as a means not only to achieve a more effective system of enforcement, but also to recover its credibility in the prosecution of macro-delinquency.

Rejecting the common approach to the Brazilian rewarded collaboration regulation, Chapter V elaborated reasons for the development of a more skeptical view of the Brazilian practice of collaboration agreements. Drawing on the concepts from German law analyzed in Chapter IV, it affirmed that the Brazilian practice of collaboration agreements has converted a truth-finding tool into a mechanism for the consensual resolution of criminal cases and denounced the multiple violations of basic principles of Brazilian criminal law and procedure that this conversion engenders. Chapter V also rejected the use of concepts of private contract law to interpret the rewarded collaboration regulation, especially the *res inter alios acta* doctrine and the concept of *´pacta sunt servanda´*, widely used by the Brazilian judiciary to support the practice of collaboration agreements. Suggesting that collaboration agreements should be understood as complex public-private partnerships between enforcement authorities and cooperating defendants, Chapter V pointed out the several risks generated by this intricate process of privatization of investigative and prosecutorial activities.

Furthermore, based on the body of literature regarding the effects of leniency policies examined in Chapter III, Chapter V sustained that the idiosyncrasies of the Brazilian practice of collaboration agreements expands

1297 Kurtenbach and Nolte (n 16) 5.

1298 Jeßberger (n 1) 305.

1299 On this subject, see: Schünemann, 'Vom Unterschichts- Zum Oberschichtsstrafrecht: Ein Paradigmawechsel Im Moralischen Anspruch?' (n 18).

the possibilities for cooperators to abuse the principal-agent relationships and the informational asymmetry that characterize partnerships between public authorities and offenders. From the perspective that leniency policies design a delicate structure of incentives, Chapter V criticized the complete disregard for statutory boundaries shown by legal practitioners in the negotiation of collaboration agreements. Chapter V also argued that the early granting of benefits to cooperating defendants intensifies the risks associated with the use of leniency policies, increasing the chances of factual misrepresentation, concession of excessive advantages and reverse exploitation of the leniency system. The rejection of the "contractualist approach" to collaboration agreements has important implications for the Brazilian criminal justice system.

Section VI.2 deals with some consequences of the understanding that collaboration agreements are not simple bilateral transactions, but rather complex and durable public-private partnerships between law enforcement authorities and offenders, drawing some lessons from the Brazilian antitrust leniency program, analyzed in Chapter I, and from the German experience, examined in Chapter IV. Item VI.2.a rejects the Federal Supreme Court's position that third parties do not have the right to question in court the legality of collaboration agreements, asserting that this right represents an individual guarantee as well as a mechanism for protecting the public interest. Item VI.2.b argues that the granting of benefits in collaboration agreements must respect the *numerus clausus* principle. VI.2.c affirms that the guarantee of equal treatment is crucial for the sound and legitimate development of the rewarded collaboration regulation, requiring the design of transparent and objective criteria. VI.2.d criticizes the regime of early and broad publicity given to collaboration agreements and advocates more careful treatment of cooperating reports and shared evidence. VI.2.e rejects the system of advanced definition and enforcement of negotiated penalties, asserting that this model of transaction creates an unsolvable paradox for the Brazilian justice system. VI.2.f asserts the need to record and regulate the negotiation process for collaboration agreements.

Section VI.3 concludes the thesis by addressing an important question: how could the practice of collaboration agreements – despite all its eccentricities, contradictions and limitations – gain such widespread support in Brazilian society, particularly from the judiciary? Item VI.3.a suggests that the concept of 'governing through crime' offers a productive framework to understand the vigor of the practice of collaboration agreements. Item VI.3.b observes the enhancement of the powers of enforcement authorities brought by the practice of collaboration agreements and examines the con-

tradictions caused by it. Item VI.3.c critically analyzes the effectiveness discourse that justifies the practice of collaboration agreements and connects it with the concept of "leniency religion". Item VI.3.d asserts the existence of a symbiotic relationship between the practice of collaboration agreements and the recent Brazilian anti-corruption movement, putting forward the dynamics of 'governing through white-collar crime'.

2. *Consequences*

a. The right of third parties to question collaboration agreements in court: protection of individual rights and of the public interest

One conclusion of Chapter V is the rejection of Brazilian higher courts' position that collaboration agreements are pure bilateral transactions, which create rights and obligations solely for the signing agents, without affecting the legal interests of third parties.[1300]

The rewarded collaboration regulation constitutes, in Brazilian law, a tool connected to the state's commitment to search for truth and to the objective of increasing deterrence in scenarios of investigative emergencies.[1301] The conclusion of a collaboration agreement initiates a partnership between law enforcement authorities and offenders, with the purpose of creating an informational and evidentiary basis – to which the state would otherwise probably not have access – to hold third parties accountable. Thus, these transactions between law enforcement authorities and offenders obviously concern other defendants, whose individual rights will be directly affected by the state´s investigation.[1302]

The interpretation of collaboration agreements under the light of the *res inter alios acta* principle, as proposed by the Federal Supreme Court, is incoherent, since the crux of these agreements is establishing the criminal liability of third parties. On this point, the rewarded collaboration regulation is identical to other investigative measures listed in the Organized Crime Act, such as the interception of communications, infiltration by undercover agents and the lifting of banking confidentiality.

In Brazilian criminal procedure, the use of investigative tools is subject to strict judicial scrutiny and defendants can incidentally question the le-

1300 See item V.3.c
1301 See item V.2.a.
1302 See item V.3.a

gality of its use, including through a writ of *habeas corpus* directed to the higher courts.[1303] Because the Brazilian Federal Constitution provides that evidence obtained through illegal means cannot be admitted by courts,[1304] and the Brazilian Code of Criminal Procedure determines that all illicit evidence must be removed from trial,[1305] the right to question the legality of investigative measures is of paramount importance in Brazilian criminal procedure. On multiple occasions, Brazilian higher courts have applied the doctrine of the fruit of the poisonous tree, considering inadmissible evidence which, although faithfully produced, derived from the use of investigative methods that originally violated constitutional or statutory rules.[1306]

Despite representing a tool of investigation and deterrence, the rewarded collaboration regulation has received different treatment from Brazilian higher courts, which have repeatedly decided that defendants mentioned in collaboration agreements have no right to question the legality of these arrangements.[1307] Invoking the *res inter alios acta* principle, the Brazilian Federal Supreme Court affirmed that collaboration agreements can only be questioned by the signing agents (the cooperating defendant and the Public Prosecution Office), restricting the other accused's rights to cross-examine in trial the facts narrated by the cooperation report. Based on the same line of reasoning, the Court has decided that the cancellation of a collaboration agreement does not lead to the exclusion of the evidence provided by the cooperating defendant against other accused, understanding that the termination of the agreement only affects the signing parties.[1308]

Once established that collaboration agreements constitute public-private partnerships within the state prosecution apparatus, aimed at establishing the criminal liability of third parties, it becomes clear that this jurisprudential position is unacceptable. Collaboration agreements are not simple bi-

1303 There are various decisions from Brazilian courts that declare, in incidental proceedings filed by defendants, the illegality of wiretappings and dawn raids carried out without strict obedience of legal rules. In the jurisprudence of the Brazilian Federal Supreme Court, see STF, HC 108147 [2012], STF INQ 3732 [2016], STF RCL 24473 [2018].

1304 Brazilian Federal Constitution, art 5 LVI.

1305 Brazilian Code of Criminal Procedure, art 157.

1306 The Brazilian Federal Supreme Court, for instance, has applied this doctrine in many rulings. See e.g. STF, HC 69912 [1993].

1307 See item I.4.c.i.

1308 See STF, INQ 4483 QO [2017].

lateral transactions but give rise to complex relationships that necessarily affect multiple parties. The consensual arrangements reached in collaboration agreements are only possible if there is a third party who will be investigated and whose legal interests will be negatively affected by the agreement, as occurs with the use of other investigative tools at the disposal of law enforcement authorities. There is, therefore, no reason to treat judicial control of collaboration agreements in a different manner.

In fact, compared to traditional investigative measures, collaboration agreements and other leniency policies entail greater risks both for the public interest and for the defendant's rights and should, therefore, be under tighter, not looser, judicial control. Leniency policies such as the rewarded collaboration regulation create a scenario of partial privatization of official investigations, where information and evidence are accessed by law enforcement authorities only after a private agent – the cooperating defendant – has identified, selected, and organized the information he or she deems relevant and convenient to be presented. Through collaboration agreements, offenders become active agents of the state prosecution,[1309] fulfilling the role of a *longa manus* of law enforcement authorities in the collection of evidence and information against third parties.[1310]

Given the high informational asymmetry between law enforcement authorities and cooperators, this process of privatization creates considerable scope for the misrepresentation of facts, either by means of under-cooperation, when the cooperator partially omits the information, or by means of over-cooperation, when she exaggerates the narrative.[1311] In the field of corporate and government crimes, where the Brazilian practice of collaboration agreements has mainly been developed, these risks are even greater, since the distinction between serious crimes and regular business practices is an operation of high complexity.[1312] In a context where legislation uses broad and vague terms to define criminal behavior and offenses are largely carried out through ordinary business and administrative routines, the content of criminal rules becomes blurred and open,[1313] creating an array of opportunities for wrongful or biased reconstruction of facts.[1314] Furthermore, given the incentives for offenders and law enforcement authorities

1309 Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 26.
1310 First (n 609) 97.
1311 See item III.3.a.
1312 See sections II.3 and II.5
1313 See Hefendehl, (n 390) 64.
1314 See Forrester and Berghe (n 566) 159-178.

to quickly resolve criminal investigations through consensual arrangements that meet their interests but externalize costs for society and other individuals, broad and in-depth judicial control is necessary for sound implementation of the rewarded collaboration regulation.[1315]

Legal actions presented by third parties represent here both a channel for the protection of individual rights and a mechanism for ensuring that cooperation agreements abide by statutory provisions, preserving the system of incentives designed by the legislator.

b. The array of leniency benefits: a case for numerus clausus

Another consequence of the thesis discussed in the previous chapter concerns the benefits that can be offered to offenders who enter into collaboration agreements. The main incentives set forth by the Organized Crime Act are the granting of full immunity, through judicial pardon or dropping of charges by the Public Prosecution Office, the reduction of criminal sanctions by up to two thirds or the replacement of imprisonment penalties by penalties of rights restrictions.[1316]

However, based on the understanding that the provisions of the Organized Crime Act do not limit the parties' capacity to transact, the Brazilian practice of collaboration agreements has been marked by the establishment of new forms of benefits that lack statutory support, such as the design of "differentiated" detention regimes, the protection of assets acquired through criminal activities and the regulation of criminal prosecution against family members of the cooperator.[1317] According to this position, the boundaries of the parties' contractual freedom in the realm of collaboration agreements are set by general principles of law, and not defined strictly by the text of the Organized Crime Act.[1318] As a consequence, cooperating defendants and law enforcement authorities are largely free to

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1315 See V.4.d. Defending a broad judicial control, see Fred Didier Jr. and Daniela Bomfim, 'Colaboração Premiada (Lei n. 12850/2013): natureza jurídica e controle da validade por demanda autônoma – um diálogo com o Direito Processual Civil' (2016) 7 Civil Procedure Review 135, 173-179

1316 Brazilian Organized Crime Act 2013, art 4. See item I.3.b.i.

1317 See item I.4.a.i.

1318 Defending this position, see ENCCLA (185) 7; and Mendonça (n 36). The Brazilian Federal Supreme Court has endorsed this position. See e.g. STF, INQ 4405 AgR [2018]; and STF, HC 127483 [2015].

devise new forms of benefits, as long as some generic guidelines are respected.

This understanding is unsound and leads to perverse outcomes for the Brazilian criminal justice system. Collaboration agreements, like any other leniency policy, always have a "dark side".[1319] Granting benefits enhances the profits obtained from criminal behavior and creates an "amnesty effect",[1320] which may end up stimulating the commitment of crimes.[1321] The concession of excessive benefits creates an easy escape for cooperating defendants and may lead to unjustified scenarios of impunity.[1322] Therefore, the establishment of clear boundaries, which limit the scope for reducing the penalty level,[1323] is an essential element of leniency policies.[1324]

The statutory provisions of the Brazilian rewarded collaboration regulation express, therefore, a necessary and extremely delicate balance between the gains and costs of the use of cooperating defendants. The devising, through collaboration agreements, of new forms of benefits not provided for by law, disrupts this balance and tends to create opportunities that are excessively favorable to cooperating defendants. The short Brazilian experience with collaboration agreements shows how the development of a flexible system of negotiation beyond its statutory limits can lead to consensual innovations that completely change, in an uncontrolled manner, the system of incentives set by the legislation.

A clear example is the design, through collaboration arrangements, of new forms of detention regime, which are completely different from the ones established in Brazilian criminal legislation.[1325] The so-called "differentiated closed regime", "differentiated semi-open regime" and "differentiated open regime" create the possibility for offenders to serve long imprisonment sentences in their private residence, without spending a single day in a prison or official institution. The tailor-made approach has led to the design of a new "differentiated" detention regime for every single collaboration agreement, creating a personal set of rights and restrictions for each cooperating defendant.

While favoring the conclusion of collaboration agreements with defendants, the design of these new detention regimes increases the amnesty ef-

1319 Acconcia and others (n 29) 1118. See item III.3.b.
1320 Harrington Jr. (n 29) 217. Ver item III.3.b.
1321 Motta and Polo (n 29) 349.
1322 Marvão and Spagnolo (n 32) 91.
1323 Wils (n 520) 348.
1324 Spagnolo (n 30) 293.
1325 See item I.4.a.i.

fect of the rewarded collaboration regulation to unithinkable levels, creating favorable situations for cooperators that are totally disconnected from the provisions of the Organized Crime Act and Brazilian substantive criminal law. The same occurs with other consensual innovations brought about by the practice of collaboration agreements: the granting of protection to personal assets of cooperating defendants, even when acquired from the proceeds of criminal activities.[1326] Although the Brazilian criminal legislation prescribes that assets related to or acquired through criminal practices must be seized and the Organized Crime Act does not provide for any exception to this rule, collaboration agreements have permitted defendants to retain high valued, illegally acquired assets, a consensual innovation that has been expressly endorsed by the Federal Supreme Court.[1327]

The development of a flexible model of agreements clearly simplifies the activities of law enforcement authorities. The appeal of this model is understandable: through the design of new benefits, law enforcement authorities can constantly create new incentives for defendants to cooperate against former co-conspirators, boosting the use of the rewarded collaboration regulation. Leniency policies are highly attractive for enforcement agencies when compared to other investigatory measures, since they outsource to private agents – the offenders – the process of collecting, screening and organizing information and evidence, enormously reducing the uncertainties and difficulties that exist in the reconstruction of past events, especially in the complex arena of corporate and political life.[1328] The reduction of costs brought by this outsourcing process stimulates the use of leniency policies in comparison to other investigative tools, and the achievement of fast results encourages the employment of elastic and generous negotiation standards.[1329]

However, any new benefit created through the practice of collaboration agreements represents an increase in the amnesty effect of the rewarded collaboration regulation and, consequently, a weakening of the deterrent effect of Brazilian criminal law. Although the consensually designed advantages favor both parties of the consensual arrangement, with defendants receiving extraordinary advantages and public authorities achieving

1326 See STF, Collaboration Agreement of A.Y. [2014], clause 7 para 3.
1327 As noted in item I.4.a.i. See STF, HC 127483 [2015].
1328 See item III.3.c
1329 Marvão and Spagnolo (n 32) 92.

fast outcomes, they impair the public interest in maintaining an adequate level of penalties.

The consensual development of new benefits in collaboration agreements has, therefore, profound repercussions throughout the system of justice. Such innovations not only allow for arrangements that are far more advantageous than is provided for by statutory provisions, but also create incentives for potential cooperators to seek even greater benefits in future transactions. In a negotiation forum with no strict borders, every benefit is imaginable and contractual creativity will certainly flourish. It is, therefore, little surprise that the Brazilian practice has devised bold innovations, such as a "success fee" for the cooperating defendant.[1330]

The granting of benefits not foreseen in the Organized Crime Act undermines the public interest in maximizing deterrence and, at the same time, makes the justice system extremely unsystematic and random. A successful leniency policy depends both on the design of incentives for offenders to cooperate as well as on the setting of fixed boundaries. Limiting the possibilities of negotiation to the boundaries of the Organized Crime Act is essential for the rewarded collaboration regulation to achieve its goal: to create incentives for potential cooperators in an organized and predictable way, while preserving an adequate penalty level for those responsible for serious crimes. The statutory array of benefits appears here not as a mere catalog of options, but rather as an exhaustive and closed list of potential transactions.[1331] In other words, it is a clear case for the application of the *numerus clausus* principle, as occurs in other fields of law, where consensual arrangements must observe a fixed number of standardized forms.[1332]

1330 See STF, Collaboration Agreement of A.Y. [2014], para 4.

1331 Along the same lines: JJ Gomes Canutilho and Nuno Brandão, 'Colaboração premiada e auxílio judiciário em matéria penal: a ordem pública como obstáculo à cooperação com a operação Lava Jato' (2016) 146 Revista de Legislação e Jurisprudência 29; Bottino (n 36).

1332 Regarding this subject, see: Thomas W Merrill and Henry E Smith, 'Optimal standardization in the law of property: the numerus clausus principle' (2000) 110 Yale Law Journal 1; Christina Mulligan, 'A Numerus Clausus Principle for Intellectual Property' (2013) 80 Tennessee Law Review 235; Avihay Dorfman, 'Property and Collective Undertaking: The Principle of Numerus Clausus' (2011) 61 University of Toronto Law Journal 467.

c. The guarantee of equal treatment and the bazaar of punishment

Collaboration agreements, like other leniency policies, are based on consensual exchanges between private agents and public officials. The negotiation of these agreements is underpinned by strategic and pragmatic considerations of law enforcement authorities, with the purpose of achieving more effective results in the prosecution of criminal organizations. Such strategies involve numerous decisions of a discretionary nature, concerning, among other issues, which offenders may have access to the leniency policy, what kind of evidence they must produce and what benefits they may obtain.

In this context, one of the risks arising is that the subjective criteria and the idiosyncratic aspects inherent to a process of negotiation jeopardize the guarantees of equal treatment and transparency by the criminal justice system. Collaboration agreements create durable partnerships between law enforcement authorities and defendants directed at establishing the criminal liability of third parties. The outcomes of such partnerships are uncertain and will appear only in a distant future, after the completion of a complex process of fact-finding. Given the various obstacles that will be faced together, an intrinsic feature of collaboration agreements is the establishment of a bond of mutual confidence between public officials and defendants. As in other joint ventures, a relation of trust is essential for a successful undertaking. Reconciling the personal nature of these relationships with the duties of impartiality and objectivity of public authorities is a difficult task that can raise serious problems. [1333]

In the absence of clear rules regarding the type of assistance that defendants must provide and the corresponding benefits that they can obtain through leniency policies, reductions in penalties may vary widely between similar cases, without any legitimate reason. The lack of precise guidelines creates opportunities for arbitrary decisions within the justice system, with leniency benefits being based not on the objective value of the cooperation, but on the personal preferences and biases of law enforcement officials.[1334] Wide discretionary powers in the selection of cooperators and in the definition of the benefits compromise basic principles of

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1333 Moss (n 1103) 308 e 309.

1334 Ian Weinstein cites evidence suggesting that, in the American experience, the granting of benefits correlates with characteristics such as race and gender, and not with the value of the provided assistance. Weinstein, 'Regulating the Market for Snitches' (n 3) 611.

criminal law and, at the same time, jeopardize the obtainment of secure results in criminal investigations.[1335]

The guarantee of equal treatment represents a central pillar of the Brazilian criminal justice system and there is no reason to understand that the development of the rewarded collaboration regulation should occur in complete disregard of this constitutional requirement. Advantageous treatment conferred upon cooperating defendants is only legitimate if founded on objective circumstances and transparent criteria that permit the differentiation between the cooperator's situation from the condition of other accused.[1336] The codification of leniency policies, with the purpose of establishing the rules for the cooperation system in a public, universal and transparent manner, is a crucial element for achieving the aspired objectives.[1337] At this point, the comparison between the antitrust leniency program, provided for in the Brazilian Competition Act, and the rewarded collaboration regulation, established by the Organized Crime Act, shows significant differences.

The Brazilian antitrust leniency program grants full immunity, both in the administrative and the criminal spheres, to the first offender who informs on the cartel, prohibiting the concession of benefits to other accused. By adopting a "winner-takes-it-all" model, the program creates a race between the offenders to be the first to blow the whistle on the illegal conduct and, therefore, be the only one to obtain leniency benefits. In cases in which the leniency application is submitted before the Brazilian competition authority becomes aware of the infringement, there is only one benefit to be obtained by the cooperator: full immunity from the penalties applicable to cartel activities, both in the administrative and criminal spheres.[1338] In other situations, when the competition authority was already aware of the infringement, the cooperator will be entitled to criminal immunity, but in the administrative sphere the benefit will be limited to a penalty reduction of one to two thirds.[1339]

The rewarded collaboration regulation, on the other hand, adopts a system of "quid-pro-quo" transactions, in which the benefits granted to offenders are defined in each individual case based on a range of abstract criteria, such as the personality of the cooperating offender, the circum-

1335 Colombo (n 383).
1336 Wils (n 378) 233.
1337 Spagnolo (n 30) 263.
1338 Brazilian Competition Act 2011, art 86 § 4 para I.
1339 Brazilian Competition Act 2011, art 86 § 4 II.

stances and social repercussion of the criminal act and the effectiveness of the cooperation. There is no clear rule defining in advance the benefit to which the cooperator will be entitled. Nor is there any limit to the number of actors who can benefit from the leniency policy in the same investigation. The level of uncertainty and indetermination has been hugely increased by the Brazilian practice of collaboration agreements, with legal practitioners using the system of "quid-pro-quo" negotiations to develop a flexible system of transactions, creating several benefits not provided for by law and designing a customized agreement for every cooperator. This tailor-made approach has made the system of cooperation even more obscure and unpredictable, with each agreement containing unique provisions that render an objective comparison almost impossible.

Although both systems of negotiations are subject to the risks intrinsic to leniency policies, there is a clear difference in the model of exchanges under the Competition Act and the Organized Crime Act. In the antitrust leniency program, the offender seeks to meet objective criteria to achieve a predetermined benefit. The negotiation forum is narrow, since the benefits and the conditions for its concession are directly provided for by the statutory text. This is clearly a very different model of negotiation when compared to the practice of collaboration agreements, in which defendants cannot foresee the requirements of a successful cooperation or the applicable benefits, and public officials are totally free to decide when, with whom and on what they will transact. The disparity between the two systems can be understood as "a difference between a store that offers fixed discounts and an oriental bazaar where deft haggling constitutes a virtue".[1340]

Law enforcement authorities, however, are not merchants of penalties and benefits, who can arbitrarily dispose of criminal punishment. The development of leniency policies must respect the guarantee of equal treatment, through the design of transparent criteria for the negotiation and granting of benefits and through a solid, coherent and specific explanation for the different situations created for cooperating defendants. In this regard, an interesting decision of the European Court of First Instance altered the benefits granted by the European Commission to a cooperating defendant in a cartel investigation, asserting that the appraisal of the relevance of the cooperation was based on "random factors", in a violation of

1340 Damaška (n 668) 1030.

the principle of equal treatment.[1341] Preferential treatment based on random or fortuitous factors represents a breach of this guarantee and should be repaired through strict judicial control.

d. Disclosure and confidentiality: cooperators as the monopolists of truth

Confidentiality represents a central issue in the rewarded collaboration regulation. Several provisions of the Organized Crime Act regulate the issue, establishing duties of secrecy and setting access restrictions to the material provided by the cooperator. A specific rule provides that the confidentiality of a collaboration agreement lasts until the formal beginning of the criminal process, with the judicial acceptance of the charges presented by the Public Prosecution Office.[1342]

Despite these statutory provisions, the Brazilian practice of rewarded collaboration regulation has received enormous media coverage, with the content of collaboration agreements being widely publicized from the outset of the investigations.[1343] On several occasions, elements obtained through agreements were disclosed to the public at very early stages of the official inquiry, even before the opening of a formal proceeding. Over recent years, cooperating reports and wide collections of evidence provided by cooperating defendants – containing detailed confessions, tapped phone calls and recorded meetings, internal corporate documents and hundreds of hours of videotaped depositions – became a major and a common source for media coverage.[1344] Given that a large portion of the reported conducts involved the Brazilian political and economic elites, including world-renowned executives and high-ranking politicians, collaboration agreements generated huge public interest and gained massive exposure in the press.

As in other cases of detachment between the statutory provisions of the rewarded collaboration regulation and the "law in action", the Brazilian

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1341 See Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless v Commission* [2001] ECR II – 3757.

1342 Brazilian Organized Crime Act 2013, art 7 § 3.

1343 Marcus André Melo, examining the impacts of Operation Car Wash, notes: "Media coverage of the scandal hit citizens with an informational tsunami. (…) In Brazil, the detailed testimonies of plea-bargain witnesses received huge publicity." See Melo (n 14) 60.

1344 Mello and Spektor, 'Brazil: the costs of multiparty presidentialism' (n 321) 113-114.

judiciary opted to support the consensual innovations developed by legal practitioners. Using the consolidated understanding that collaboration agreements are bilateral transactions which do not affect third parties, it was easy for courts to interpret the regime of wide publicity as a legitimate decision by the two contracting parties. The position that confidentiality rules exist for the benefit of cooperators and law enforcement authorities, and not to protect defendants accused through the collaboration agreements, allowed the exposure of the provided evidence at very early stages of the investigation and blocked legal challenges raised by other defendants.[1345]

The wide and early publicity given to collaboration agreements was also justified on the grounds that the seriousness of the investigated conduct precluded the confidential processing of the collected evidence and information. Based on the understanding that the investigation of public corruption should be as transparent as possible, law enforcement authorities and courts adopted an explicit attitude of broad disclosure. On multiple occasions, the Federal Supreme Court determined, at the request of the Public Prosecution Office, a premature end to the secrecy of collaboration agreements, stating that basic constitutional principles required Brazilian society to become aware of the content of the investigations.[1346]

This position of wide and early publicity of collaboration agreements ignores that the purpose of the confidentiality regime established in the Criminal Organization Act is not only to guarantee the investigation's success and the cooperator's privacy, but also to protect third parties under investigation, who will be affected by the partnership between law enforcement authorities and cooperating defendants. Given that collaboration agreements entail a partial privatization of the official investigation, with cooperating defendants engaging actively in functions such as the collection and screening of evidence, the premature disclosure of agreements generates serious risks.

Unlike other investigative tools, the state's access to evidence and information through collaboration agreements does not occur directly, being mediated by private agents – the cooperators – who took part in the criminal behavior. Enforcement authorities will only access the shared material after cooperating defendants have selected and organized it. The rewarded collaboration regulation, like other leniency policies, gives offenders a cen-

1345 For a similar view, see the following decision: STJ, APn 843 AgRg [2016].

1346 See e.g. STF, PET 6149 [2016]; STF, PET 6122 [2016]; STF, PET 6150 [2016]; STF, PET 6121 [2016]; PET 5254 [2015].

tral role in the process of reconstruction of past conduct. In view of the large informational asymmetry between authorities and offenders, this empowered position can be easily misused, leading to biased selection of evidence and an erroneous account of events.[1347]

This is particularly true in the field of corporate and governmental crimes, where criminal strategies are implemented through ordinary bureaucratic routines, criminal legislation employs vague and sweeping concepts and the distinction between criminal behavior and regular conduct is often a legal conundrum. The prosecution of this type of crime requires the gathering of evidence related to a large number of ostensibly legal acts, carried out by many agents over a long period of time, such as meetings, payment orders and commercial policies.[1348] Selecting and organizing this complex factual framework to differentiate legal conducts from serious wrongdoings is obviously an extremely delicate activity, with small distortions or omissions causing major impacts on the establishment of criminal liability.

Leniency policies allow cooperators to play a key role in connecting the related facts to the investigated crimes and, more important, to produce a coherent narrative that explains and gives a criminal meaning to an enormous spectrum of acts. In the prosecution of white-collar crimes, collaboration agreements present, often for the first time, a narrative that relates various scattered facts and reports them in an organized manner, indicating their alleged illegal nature. Given the informational asymmetry between public authorities and cooperators, the latter will always have, at early stages of the investigation, control over the selection of the shared material and the development of the investigatory narrative.

In this context, cooperators are the first to determine which conducts will be presented and how they should be portrayed, reconstructing complex events in the light of their own interests. The early disclosure of collaboration agreements permits the wide dissemination of this self-interested version before any independent check on its veracity. Although the establishment of any criminal liability is still very distant, the release of a cooperation report, which comes with a layer of apparent credibility, is enough to bolster or cement a narrative in the public debate. Criminal investigations generate an immediate negative stigma and their side effects can represent a social death in some arenas. While producing enormous damages to the other accused, the early disclosure of agreements allows co-

1347 See item III.3.a.

1348 In this regard, see chapter II. See also Bannenberg (n 17) 108.

operators to be the first to propagate their view of the facts through an organized report, an issue of paramount importance in legitimate enterprises. In a scenario of blurred lines and factual uncertainty, the cooperator becomes the main storyteller, monopolizing the investigative narrative during a crucial period.

Here again the Brazilian experience with the antitrust leniency program can provide some useful guidance. The regulation of the competition authority establishes a structured regime of confidentiality, which designs a progressive disclosure of the leniency content according to the phases of the proceeding, with a large portion of the shared material remaining confidential until the final judgment of the case.[1349] Furthermore, the publicity of the cooperation occurs mainly through official documents that analyze and classify the provided evidence and information, and not through the cooperation report drafted by the beneficiary of the leniency. This careful treatment of the disclosure of leniency evidence is similar to the position adopted by other competition authorities, which devise restrictive regulations on the public's access to the shared material.[1350]

The confidentiality of leniency policies such as the rewarded collaboration regulation is a matter of high complexity, affecting multiple competing interests.[1351] Besides guaranteeing the investigation's success and protecting the cooperator, confidentiality rules also safeguard the rights of the other accused, who will carry the burden of the indictment. Furthermore, the victims of the committed crimes have a right to compensation that often depends on access to leniency documents. Lastly, there is a public interest in the accurate and timely disclosure of conduct investigated in criminal proceedings. Under these circumstances, the posture of general and early publicity, as adopted in the Brazilian practice of collaboration agreements, represents an easy – and mistaken – answer to a complicated question.

1349 See Resolution 21/2018 (11 September 2018) <http://www.cade.gov.br/assuntos/normas-e-legislacao/resolucao/resolucao-no-21-de-12-de-setembro-de-2018.pdf/view> accessed 13 March 2019.

1350 See Antônio Caruso, 'Leniency programmes and protection of confidentiality: the experience of the European Commission' (2010) 1 Journal of European Competition Law & Practice 453.

1351 As recognized by the European Court of Justice in its famous decision on the Pfleiderer case. See Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161. For further analysis, see Gaëtane Goddin, 'The Pfleiderer Judgment on Transparency: The National Sequel of the Access to Document Saga' (2012) 3 Journal of European Competition Law & Practice 40.

e. Advanced enforcement of penalties and the paradox of investigating what has already been determined

The rewarded collaboration regulation introduced a new negotiation forum between law enforcement authorities and defendants to the Brazilian criminal justice system. The practice of collaboration agreements expanded this negotiation forum beyond its statutory boundaries, creating multiple important innovations through consensual arrangements concluded by procedural participants.[1352] A striking novelty brought by the Brazilian practice of rewarded collaboration was the introduction of the possibility for cooperating defendants to serve negotiated imprisonment penalties in advance, before the judicial verdict and sentence.[1353]

This model of transaction transforms collaboration agreements into mechanisms for the consensual resolution of criminal cases, insofar as it determines beforehand the outcome of an official investigation, with the definition and the enforcement of imprisonment penalties being carried out at the initial phases of a criminal proceeding. Through these agreements, the imposition of punishment to a cooperating defendant arises from a consensual solution negotiated with law enforcement authorities at the beginning of the investigation, and not by a decision rendered by a court after the conclusion of the regular legal proceeding.

This expansion of the negotiation forum is unacceptable, since it simultaneously contradicts constitutional principles of Brazilian criminal procedure and the rationale of leniency policies.

The definition and serving of imprisonment penalties based solely on consensual arrangements leads to a clear violation of the due process guarantee, since it allows the punishment of cooperating defendants to be fixed and served before the investigatory phase has been concluded and their guilt has been determined.[1354] This also leads to a breach of the system of separation of functions established in Brazilian criminal law, which grants solely to judicial bodies the power – at the end of the criminal proceeding – to render a verdict and define the sentence.[1355]

Collaboration agreements are fact-finding tools to be used within regular proceedings, rather than an alternative path to define consensually the outcome of criminal cases. The introduction of the rewarded collaboration

1352 See item I.4.a
1353 See item I.4.a.iv.
1354 See item V.3.b.
1355 See item V.3.c.

regulation by the Organized Crime Act does not represent the adoption of a new consensual justice system, nor does it replace the traditional structure of law enforcement in the Brazilian legal system.[1356] Thus, the conclusion of a collaboration agreement between law enforcement authorities and a cooperating defendant cannot be treated as a functional equivalent to a judicial verdict and may not produce the same legal effects.

Clauses that allow penalties to be served in advance, sometimes even before the formal opening of a criminal proceeding, are therefore completely unacceptable. These provisions, in addition to contradicting the most basic constitutional guarantees, create a paradoxical situation, since the criminal proceeding against the cooperating defendant must, according to Brazilian law, continue. Although the penalties defined in the agreement are already being served, the investigation of the offenses that would result in such penalties will continue and, at the end of the process, the cooperator may be acquitted or sentenced to a lower penalty than the one established in the agreement.

Legal practitioners sought to solve this inexplicable situation through another consensual innovation. Through specific clauses of collaboration agreements, cooperators exempted the Brazilian state from any liability if, at the end of the criminal procedure, they were not convicted or sentenced to penalties lower than the ones established and already carried out based on the agreements.[1357] The risk of the undue expansion of the negotiation forum designed by the rewarded collaboration regulation appears here in its entirety. Introduced in the Brazilian law to enhance the collection of evidence in the prosecution of criminal organizations, collaboration agreements have become a mechanism for the consensual imposition of criminal punishment before the official investigation has been completed or even opened. Rather than facilitating the distinction between guilty and innocent, which is one of the essential duties of any system of justice,[1358] the practice of collaboration agreements in Brazil has made this distinction

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1356 See item V.3.b.

1357 See STF, Collaboration Agreeement of J.S.O.M [2016], clause 5 para 1 item "e".

1358 Regarding the importance of the principle of individual culpability, see Heger, 'Die Internationalen Menschenrechte und das Strafrecht Einige Anmerkungen zur Rechtslage in Deutschland und Brasilien' (n 1260) 1092-1093. As Bernd Schunemann emphatically asserts: "Criminal law separates citizens from delinquent, free men from the ones who will be kept in a cage like creatures" . See: Schünemann, 'Die Zukunft Des Strafverfahrens – Abschied Vom Rechtsstaat?' (n 695) 945.

even more obscure, engendering a truly unique situation: the possibility that a defendant who has served negotiated imprisonment penalties is acquitted at the end of the proceeding, having already signed a waiver exempting the Brazilian state from any liability.

In addition to violating basic constitutional guarantees, the use of collaboration agreements to define and impose imprisonment penalties upon cooperators contradicts the rationale of leniency policies. Collaboration agreements form a partnership between law enforcement authorities and offenders to investigate wrongdoings carried out by third parties. From the perspective of the public interest, the benefits granted to a cooperator are only justified if the partnership leads to an actual decrease of investigative emergencies and enhances the state's capacity to prosecute and punish other individuals. As these positive effects can only be assessed at the end of the proceedings, the granting of benefits in advance is counterproductive. When a collaboration agreement is concluded, the informational asymmetry between law enforcement authorities and the cooperator is at its peak, creating several opportunities for misrepresentation[1359] and exploitation[1360] leading to indefensible situations, as the Brazilian experience itself indicates.

In several cases, the progress of investigations showed that the cooperation provided by defendants who already had received benefits was useless or flawed, forcing the revision of agreements. In one situation, the Federal Public Prosecution Office, after the end of the investigation phase, noted that the cooperating defendant had "received his reward immediately, based on the promise of effective cooperation, which didn´t occur" and asked for the rescission of the agreement and imposition of new penalties on the cooperator.[1361] In another, the Federal Police, after examining the collection of evidence submitted by a defendant, concluded that the cooperation was ineffective and incapable of proving the commitment of any crime by other individuals.[1362] In a third situation, cooperators who signed an agreement in which the Federal Public Prosecution Office had agreed to not press any charges were put under pre-trial detention and had their

1359 See item III.3.a.

1360 See item III.3.d.

1361 See the motion presented by the Federal Public Prosecution Office, in 1/09/2016, in the following proceeding: JFDF, AP 42543-76.2016.4.01.3400 [2016].

1362 See the analysis report provided by the Brazilian Federal Police: STF, INQ 4367 RAPJ 76 DICOR/PF [2017].

benefits suspended, after the emergence of evidence pointing to several omissions and distortions in the cooperation report.[1363]

The Brazilian antitrust leniency program shows that the development of a successful leniency policy does not depend on the violation of due process through the advanced enforcement of negotiated penalties. In the antitrust leniency program, which also confers immunity from criminal prosecution, the granting of benefits to cooperators is only implemented after the normal completion of the fact-finding process, when the Administrative Court of the Brazilian competition authority will decide on the guilt or innocence of all defendants, assessing simultaneously the correctness and veracity of the report presented by the leniency beneficiary. In this system, the conclusion of a leniency agreement is not equivalent to a conviction, nor is it possible to speak of early enforcement of the negotiated penalties.

f. Preparatory acts, the control of the negotiation process and the duty to register

Another important implication of the conclusions expounded in Chapter V concerns control over the course of the negotiation that precedes the conclusion of a collaboration agreement. Due to an express provision of the Organized Crime Act, judicial bodies are prohibited from engaging in the negotiation of collaboration agreements, which leaves the contracting parties basically free of any oversight at the negotiation table[1364]. The process of interaction and communication between law enforcement authorities and offenders before the signing of a written agreement is informal in nature and is conducted under a heavy veil of secrecy. In order to achieve a common understanding, public officials and defendants meet several times and debate the terms of the arrangement and the final version of the cooperating reports over several months.

In this context, when the conclusion of a collaboration agreement is revealed, various important questions arise. When did the first contact between the parties occur? Who originally proposed the negotiation of the agreement: the cooperating defendant or the enforcement authorities? How was the negotiation developed and which were the original versions of the cooperation reports? Did other negotiations with potential coopera-

1363 See STF, AC 4352 [2017].
1364 Organized Crimes Act, art. 4, § 6º.

tors occur simultaneously? The Brazilian judiciary has devoted little attention to these issues and generally rejected scrutiny of the preparatory acts of collaboration agreements, denying other defendants permission to access and question the details of the negotiation process.[1365]

From the perspective provided by Chapter V, this position emerges as clearly unacceptable. Once it is defined that collaboration agreements are mechanisms that entail a partial privatization within the system of criminal justice, outsourcing investigative and prosecutorial activities to private agents (the offenders), it becomes clear that the preparatory acts to the conclusion of an agreement constitute a central point of the criminal investigation and cannot, therefore, be exempt from a thorough inquiry.

Leniency policies, such as the rewarded collaboration regulation, hugely enhance the importance of the pre-trial investigative phase, which becomes the fulcrum of the development of criminal prosecutions. It is in the negotiation process between cooperators and enforcement authorities that defining questions of an investigation will receive, at least initially, an answer. What crimes were committed? Who were the co-conspirators? What evidence substantiates the accusations? All these fundamental issues will be settled through close communication between public officials and defendants behind closed doors, without interference from a supervisor, mediator or any third party.

In this light, the negotiation process of a collaboration agreement appears as the polar opposite of the ideal of a public, transparent and fully documented trial, coordinated and monitored by an independent judicial body. The confidential bargaining process defines not only the legal situation of the cooperating defendant, but also the direction of the investigation against the other accused. The cooperator's version will have to be proven in trial afterwards, but once the investigative train has left the station it is obvious how difficult it is to change its route or slow its pace.

A closer look reveals two driving forces in the negotiation of consensual arrangements within criminal proceedings: the first is the enormous difference between the bargaining power of the two contracting parties; the second is the capacity of both parties to gain huge benefits through consensual solutions that externalize costs for other individuals or for society. In such circumstances, to approach these negotiations as if they were simple private transactions, in which agents have wide freedom to bargain informally, is a grave mistake with profound consequences. The informal nature of the process of negotiation and the lack of external oversight open

1365 As noted by Souza (n 132) 12.

an enormous window of opportunity for arbitrary practices and questionable maneuvers.

This subject did not go unnoticed by the German Federal Constitutional Court in in its decision on the constitutionality of negotiated judgments in criminal proceedings. Asserting that publicity was a key element for society's confidence in criminal prosecution, the German Federal Constitutional Court repeatedly stressed the importance of transparency and documentation rules for the development of a legitimate practice of negotiated solutions.[1366] According to the court, the principle of publicity, as an expression of the constitutional notion of democracy, must allow the effective control of the resolution of criminal cases by agents not directly involved in the criminal procedure, inhibiting the introduction of authoritarian and arbitrary elements into the justice system.[1367]

Within this framework, the German Federal Constitutional Court asserted that robust monitoring of the negotiation practice within criminal procedure only occurs when society has access to all information related to the establishment and adequacy of a negotiated solution.[1368] The duty of public authorities to document and accurately register the development of a negotiation with an accused party represents, thus, more than a mere formality, comprising a true constitutional guarantee.[1369] In this context, the court concluded that an infringement of this guarantee generally entails the illegality of a negotiated solution.[1370]

From this perspective, the tolerant position of the Brazilian judiciary towards the highly informal nature of the negotiation of collaboration agreements is intolerable. Viewed correctly, the preparatory acts of collaboration agreements appear not as a simple bargaining process between private parties, but as fundamental stages of criminal prosecution against other agents. They must, therefore, be formally documented and precisely recorded, in order to enable a future assessment of the negotiation process by the judiciary and by society. Collaboration agreements transform defendants into a *longa manus* of law enforcement authorities, and it is of paramount importance to record when and how this partnership was established.

1366 See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, paras 76 80, 81, 89, 90, among others.
1367 ibid para 88.
1368 ibid para 89.
1369 ibid para 96.
1370 ibid para 97.

Here again the Brazilian antitrust leniency program, which foresees a series of rules to ensure a minimum standard of formality and transparency, can provide some useful insights. As occurs in other leniency programs around the word, a central element of the Brazilian program is the marker system, which intends to guarantee an objective and transparent definition of the leniency beneficiaries.[1371] According to this system, after receiving a leniency application, the Brazilian Antitrust Authority analyzes it and, if the statutory requirements are fulfilled, the applicant receives a formal document (the "marker") that proves that the application was submitted on that exact date and time, guaranteeing the place of the applicant in the "leniency race".[1372] If another agent has already submitted a leniency application regarding that conduct, the applicant will be put in a "waiting line" and will receive a document registering the date and time she sought contact with the Antitrust Authority.[1373] If the Antitrust Authority is already aware of the reported conduct, the applicant will be informed and may receive a marker for partial leniency.[1374] In any case, the Antitrust Authority will always indicate a deadline for the submission of the relevant evidence and for the conclusion of the negotiations.[1375] If for any reason the negotiation with the first applicant is unsuccessful, the next applicant in the waiting line will normally be contacted to negotiate a possible leniency agreement.[1376]

These kind of provisions have a lasting positive effect on the development of a sound policy regarding partnerships between law enforcement authorities and cooperating defenders. Firstly, they create a formal register of the preparatory acts that precede a leniency agreement, allowing for an effective control of the negotiation process in the future. They also make the negotiation process more objective and standardized, reducing the possibility of arbitrary and capricious negotiations. In view of some unwel-

1371 On the subject, see OECD, 'Use of markers in leniency programs', Working Party No. 3 on Co-operation and Enforcement, <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2014)9&doclanguage=en>, accessed 4 March 2019.
1372 CADE (n 161) 26.
1373 ibid 28.
1374 ibid. 29.
1375 ibid. 31.
1376 ibid. 29.

come occurrences in the practice of collaboration agreements,[1377] the need for the adoption of similar rules in the criminal realm is more than clear.

3. *Governing through white-collar crime: collaboration agreements and the fight against corruption*

a. Collaboration agreements, the anti-corruption movement and the dynamic of "governing through crime"

The rewarded collaboration regulation, provided for in the Organized Crime Act, and the antitrust leniency program, established in the Competition Act, are often described as equivalent legal institutions with great similarities, two species of the same genus.[1378] The practical development of each regulation reveals, however, enormous differences, since the antitrust leniency program was developed in accordance with the statutory rules, while the rewarded collaboration regulation has unfolded in a free bargaining zone. How could the Brazilian criminal justice system, traditionally founded on the concepts of strict legality, compulsory prosecution and search for truth, give rise to such an inventive practice of collaboration agreements, which appears extreme even by the standards of U.S. criminal procedure?

The framework of 'governing through crime' offers an interesting perspective to understand the idiosyncrasies and the unique characteristics of the inventive practice of collaboration agreements and its wide acceptance

1377 In a case with great repercussions in Brazilian society, it was revealed that the cooperating defendants apparently had received informal assistance from a federal prosecutor in order to negotiate and conclude their collaboration agreements. The defendants and the prosecutor were later indicted by the Federal Public Prosecution Office. According to the charges, "a federal prosecutor, member of the Car Wash Operation task force, was the strategist of the collaboration agreements." See the charges presented by the Federal Public Prosecution Office in the following proceeding: JFDF, AP 1011826-93.2018.4.01.3400 [2018], 24.

1378 Vinicius Gomes de Vasconcellos affirms that the collaboration agreement and the antitrust leniency agreement are "siblings". See Vasconcellos, *Colaboração Premiada No Processo Penal* (n 36) 31. In the same vein: Dino, 'A colaboração premiada na improbidade administrativa: possibilidade e repercussão probatória'(n 425) 533.

by the Brazilian judiciary.[1379] The pattern of "governing through crime" is nowadays well known as a concept that depicts the use of criminal law as a strategic instrument to legitimate the exercise of public authority in the pursuit of determined political goals.[1380] Employed at first to describe how the "war on crime" became a central force in American political order and affected different aspects of U.S. public and private life, the concept has also been used to analyze the development of international criminal justice as a strategic tool in the realm of global governance.[1381] In the field of corporate criminality and macro-delinquency, it has been noted that the model of "governing through crime" allows public authorities to generate enormous social impact, and achieve multiple objectives, through selective prosecution – occasional but extremely mediatized – of the highest business circles.[1382]

Some characteristics of the dynamics of "governing through crime" are quite straightforward in the recent Brazilian large-scale investigations of government and corporate criminality, which presented the main development field of the practice of collaboration agreements. While scrutinizing since 2014 the wrongdoings of the country's economic and political elite, the investigations aimed avowedly at a far more ambitious objective: the combat and eradication of so-called "systemic corruption".[1383] In this context, the prosecution of some of the country's most prominent politicians

1379 On the concept of 'governing through crime', see Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press 2009).

1380 ibid 4-5.

1381 See Mark Findlay, *Governing through Globalised Crime: Futures for International Criminal Justice* (Routledge 2013). For an interesting analysis of concerns of legitimacy, fairness and due process regarding the modern regulation of transnational bribery law, see Kevin E. Davis, *Between Impunity and Imperialism:The Regulation of Transnational Bribery* (Oxford 2019).

1382 Hefendehl 'Außerstrafrechtliche und strafrechtliche Instrumentarien zur Eindämmung der Wirtschaftskriminalität' (n 12) 830-831.

1383 According to a report of the Office of the Federal Prosecutor General: "As of 2014, the Federal Public Prosecution Office begun to investigate the biggest corruption scheme in the Brazilian history (…) The investigation revealed the systemic corruption entrenched in the Brazilian political and economic system that spread among other countries". See: Ministério Público Federal, 'Relatório de resultados do Procurador-Geral da República: diálogo, unidade, transparência, profissionalismo, efetividade: 2015-2016' (2017) Gabinete do Procurador-Geral da República 13 <http://bibliotecadigital.mpf.mp.br/bdmpf/handle/11549/109606> accessed 29 September 2019. See also: Sérgio F Moro, 'Preventing systemic corruption in Brazil' (2018) 147 Daedalus 57; Deltan Dal-

and businessmen was portrayed not only as a response to individual wrongdoings, but as a wider movement to end the problems of impunity in the Brazilian justice system and change for better Brazilian society and democracy.[1384]

Based on the diagnosis that corrupt practices had become entrenched in political parties, business corporations and public organs, law enforcement authorities promoted and supported a broad range of initiatives dedicated to transform the "vicious circle of public and private corruption".[1385] In

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lagnol and Roberto Pozzobon, 'Ações e Reações No Esforço Contra a Corrupção No Brasil' in Maria Cristina Pinotti (ed), *Corrupção: Lava Jato e Mãos Limpas* (Portfolio-Penguin 2019). In the same vein, Ana Frazão and Ângelo Carvalho refer to corruption as a "structural problem of Brazilian society". Ana Frazão e Ângelo Carvalho 'Corrupção, cultura e compliance: o papel das normas jurídicas na construção de uma cultura de respeito ao ordenamento' *in* Ana Frazão and Ricardo Villas Bôas Cuevas (eds), *Compliance: perspectivas e desafios dos programas de conformidade* (Fórum 2018) 146.

1384 The recent anti-corruption investigations gave rise to high hopes for the enhancement of several aspects of Brazilian society. According to Luis Roberto Barroso: "The country has already changed and nothing will be as before. The immense demand for integrity, idealism and patriotism that exists today in Brazilian society is an inescapable reality. A seed has been planted. The train has already left the station. There are many images to illustrate the rebirth of the country over new foundations, both in public and in private ethics". See: Luis Roberto Barroso, 'Thirty Years of the Brazilian Constitution: The Republic That Is Yet to Be' (2018) SSRN Electronic Journal 1, 22. On the same note, Sergio Moro: "Hopefully, it will be possible to look back some years from now and say that Lava Jato made the national economy, the rule of law, and democracy stronger in Brazil". See Moro (n 31) 166.

1385 According to the Federal Public Prosecution Office: "In Brazil, we see a vicious circle of public and private corruption. There is a warped and rationalizing culture in which, on one side, many accept the corruption as a way to do business while, on the other hand, public agents accept corruption because they were employed to ´guarantee a kickback from the one who put them there´ or because they want to ´ensure their participation in the 'scheme'" (…) To break the vicious circle that still exists in Brazil, the Federal Public Ministry (Federal Prosecution Office – MPF) is proposing some legislative changes". See: Ministério Público Federal, '10 medidas contra a corrupção - sumário executivo' 1 <http://www.dezmedidas.mpf.mp.br/campanha/documentos/executive_summary_english_version.pdf>, accessed 17 July 2019. Armando Castro and Shaz Ansari note these efforts of Brazilian law enforcement authorities: "In our case, the agents involved in investigations decided to actively shape their context. Although they were able to investigate and arrest corrupt officials, they also attempted to try to change the law and norms in their favor. They openly campaigned to change laws and norms by collecting more than 2 million signatures for their proposals". See: Castro and Ansari (n 116) 8.

this context, in 2016 an ambitious legislative proposal drafted by the Federal Public Prosecution Office attempted to set profound changes to Brazilian criminal, administrative and electoral law.[1386] Among the proposed measures were the introduction of integrity tests for public servants, the inclusion of corruption in the list of heinous crimes, the restriction of the defendants' right to appeal, the establishment of new possibilities of pre-trial detention, and the enhancement of liability of political parties, with the provision of severe penalties – including the elimination of the party – for conducts of irregular campaign financing.[1387]

All these initiatives were highly publicized and received intense media coverage.[1388] Robust marketing strategies, that relied on professional interface with the press, on the development of websites and on the use of social media, were conducted to promote the anti-corruption movement.[1389] Through an active campaign coordinated by the Federal Public Prosecution Office, the 2016 legislative proposal against corruption garnered more than two million signatures before being examined by Congress.[1390]

Consequently, the prosecution of corruption and white-collar criminality has become, in recent years, an omnipresent issue in Brazilian public life, with multiple voices demanding a tougher response to the wrongdoings of political and economic elites.[1391] This process bears numerous hallmarks of the pattern of "governing through crime", which depicts the en-

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1386 For a general (and mainly critical) analysis of this attempt, see: Alaor Leite and Adriano Teixeira, *Crime e Política* (FGV Editora 2017).

1387 These proposals were dubbed "Ten Measures against Corruption". For a description, see: Ministério Público Federal (n 1386).

1388 A 2017 report of the Office of the Federal Prosecutor General highlighted this professional interaction with the media: "The website of the Car Wash Operation (www.lavajato.mpf.mp.br) contains the result of the activities of the members of the Institution. (…) The site has received more than 3 million visits. The professional interaction with the national and international press must be noted. In the last 24 months, the Institution has been inquired to answer 7.423 questionings of press media, radio and television networks, blogs and websites." See Ministério Público Federal, 'Relatório de Resultados´ (n 136), 13.

1389 Castro and Ansari (n 116) 8.

1390 Criticizing the lack of solid foundations of some of these proposals, Luis Greco observed that "the collection of signatures does not render arguments unnecessary" see Luís Greco, 'Reflexões Provisórias Sobre o Crime de Enriquecimento Ilícito' in Alaor Leite and Adriano Teixeira (eds), *Crime e política: corrupção, financiamento irregular de partidos políticos, caixa dois eleitoral e enriquecimento ilícito.* (FGV Editora 2017) 283.

1391 A 2019 report of Transparency International noted: "With Operation Carwash emerging and gaining strength since 2014, corruption has become a central is-

forcement of criminal law as a permanent combat or even as a war between enforcement authorities and powerful opponents.[1392] Under these circumstances, law enforcement authorities gain a central position as guardians of the public interest, constantly using the media to speak out against impunity and alert society to the risks and losses caused by certain types of crimes.[1393] The public pressure produced imposes a heavy burden upon the judiciary and erodes the power of courts, which are put in a defensive position and have to constantly prove their commitment to the fight against crime,[1394] causing multiple impacts on the system of criminal justice, such as the increase in the level of criminal punishment and the disregard for legal nuances.[1395]

b. Under the law, above the law

This dynamics of 'governing through white-collar criminality' has led to a scenario where corruption and corporate crime have become centerpieces of Brazilian political and civil order, altering jurisprudential developments and shaping the legislative debate. Instead of relying on the fear of violent crime, this dynamic draws on the anger, frustration and resentment caused by the wrongdoings of economic and political elites to galvanize public opinion and gain massive support from different sectors of society.[1396] In this highly attractive narrative, law enforcement authorities are the protagonists of a permanent fight against business cartels, corruption networks

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sue for Brazilians". See: Maxime Agator, 'Iraq: Overview of Corruption and Anti-Corruption' (2013) 374 U4 Expert Answer 1. For a strong defense of this response, see: Maria Cristina Pinotti, 'Corrupção, Instituições e Estagnação Econômica: Brasil e Itália' *in* Maria Cristina Pinotti (ed), *Corrupção: Lava Jato e Mãos Limpas* (Portfolio-Penguin 2019). Decisions of the Brazilian Federal Supreme Court also reveal this trend. See e.g. STF, AP 996 [2018] (Celso de Mello J) and STF, ADI 5874 MC [2018].

1392 Jonathan Simon, ´Governing Through Crime Metaphors´, (2002) 67 Brooklyn Law Review 1035.

1393 ibid 43.

1394 ibid 35-36 and 168.

1395 Hefendehl, 'Außerstrafrechtliche Und Strafrechtliche Instrumentarien Zur Eindämmung Der Wirtschaftskriminalität' (n 12) 831-832.

1396 Jonathan Simon notes that the notion of a "war on crime" has a remarkable capacity to mobilize society, "striking a common chord of dread and despair" in different groups. See See Simon, ´Governing Through Crime Metaphors´ (1393) 1064.

and spurious pacts between corporations and political parties. Elected representatives, high-ranking public officials and businessmen represent the main antagonists, fulfilling the role of the inadmissible beneficiaries of an intrinsically fraudulent apparatus. Prosecution of governmental and corporate crimes becomes a central aspect of public life and is viewed as an essential tool for improving society's standard of living.[1397]

Throughout this process, the inventive practice of collaboration agreements and its consensual innovations have played a central role. Collaboration agreements concluded with high-ranking politicians and prominent executives have provided endless material confirming the assumption of a political system overrun by spurious interests.[1398] The conversion of collaboration agreements into mechanisms of consensual resolution has replaced the long and tortuous course of factual determination with individual confessions, instantly and widely publicized. The complex distinction between criminal behavior and regular conduct, between offenders and innocents, has been overridden by a simple and loud message of widespread corruption. The application of the *res inter alios acta* principle has blocked any possibility for a serious and timely inquiry into the regularity of collaboration agreements and the veracity of cooperation reports.

In this context, it is clear that the objectives of recent large-scale investigations into macro-delinquency and of the inventive practice of collaboration agreements go far beyond the detection of serious wrongdoing and the imposition of criminal punishment. To achieve this end, the negotiation of collaboration agreements could and should have been developed in a very different manner, much more similar to the Brazilian antitrust leniency program and less detached from the rules established by the Organized Crime Act. As in other notorious investigations of white-collar crimes, the recent large-scale inquiries into Brazilian macro-delinquency have actually aimed at a far more ambitious goal: to restore, in a moment of severe social crisis, the trust of the general public, through the delivery of outcomes of symbolic nature.[1399]

The success of this effort requires the punishment of the organization's top brass, since the prosecution of individuals in low and mid-level pos-

1397 For such a position, see: Pinotti (n 1392) 53-76.

1398 See items II.2 and II.4.

1399 Analysing the symbolic function of economic criminal law and its role in the restoration of trust in capital markets in moments of crisis, see: Hefendehl, 'Enron, Worldcom Und Die Folgen: Das Wirtschaftsstrafrecht Zwischen Erfordernissen Kriminalpolitischen Erwartungen Und Dogmatischen Erfordernissen' (n 390) 19-21.

itions is not enough to provide a persuasive answer to the social frustration caused by economic and political turmoil. In times of crisis, the strength of the symbolic message hinges on the imposition of severe penalties on the same individuals that profited the most during the years of prosperity.[1400] The punishment of high-ranking figures conveys the message of active and functional public power and reaffirms the ideal that all individuals, regardless of their social position and personal wealth, are subject to the law and can be brought to justice.

The establishment of criminal liability of these individuals faces, however, numerous difficulties.[1401] Corporate and government crimes are normally implemented through bureaucratic routines, inserted in the ordinary functioning of regular organizations, and often there is no clear difference between regular conduct and illegal practices.[1402] Furthermore, the execution of complex criminal strategies occurs through separate acts committed by several agents at different times and different places.[1403] Due to the structural complexity of legitimate organizations, it can be very difficult to associate the commitment of serious wrongdoings with the individual behavior of the organization's top brass.[1404]

In the clash between the need to hold high-ranking figures accountable and the difficulty in establishing their criminal conduct, the loosening of traditional standards of criminal law and standard pillars of criminal procedure constitutes an obvious path.[1405] Corruption networks assume here the same role that terrorist and mafia organizations have played elsewhere: they provide a palatable justification to empower public authorities and relax individual safeguards in an alleged war between society and dangerous enemies.[1406] The inventive practice of collaboration agreements appears here not as an isolated event, but as part of a wider legal movement to expand the powers of law enforcement authorities and to enable greater flexibility within the apparatus of state prosecution. One can only note the subtle irony engendered by this movement: in order to attest that powerful

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1400 ibid, 22.
1401 See section II.3.
1402 See item II.3.b.
1403 Shapiro (n 366) 354.
1404 Wheeler and Rothman (n 370).
1405 For a similar critique, but regarding the use by the Brazilian Federal Supreme Court of the theory of dominion of the act ("Tatherrschat") in the investigation of corruption, see: Greco and Leite (n 17) 290-292.
1406 Observing this scenario in relation to terrorism and organized crime, see: Hörnle (n 803) 333 and 351-353.

politicians and businessmen are under the law, it must release state authorities from multiple legal constraints and place them above substantive and procedural legality.

c. Investigative achievements, failures and the effectiveness discourse: collaboration religion?

Confronted with critical analyses, the supporters of the Brazilian practice of collaboration agreements, besides resorting to the misleading association with the ideal of consensual justice, normally point out to an undisputed fact: through the design of bold consensual arrangements with offenders, law enforcement authorities have achieved fast and visible outcomes in the prosecution of macro-delinquency.[1407] Over recent years, collaboration agreements have indeed played a major role in the prosecution and punishment of high-ranked politicians and businessmen, that stands in sharp contrast to the slow pace and image of impunity associated with the normal functioning of Brazilian criminal justice, especially in the field of government and corporate criminality.

Although there are several important concerns regarding the recent investigations of macro-delinquency in Brazil, one aspect should disturb even the biggest enthusiast for effective criminal solutions: the propensity of the Brazilian practice of collaboration agreements to mislead official investigations, generate erroneous results, produce severe losses and put law enforcement authorities in unexplainable, if not embarrassing, positions.

In 2015, the Brazilian Federal Supreme Court, based on evidence brought by a cooperating defendant, determined the preventive detention of one of Brazil's most prominent bankers, who was allegedly involved in a witness tampering scheme.[1408] The main piece of evidence was a meeting secretly recorded by the cooperator in which the banker, who was not present, was cited as a purported financier of the alleged scheme. In spite of the lack of more substantial evidence, he remained almost one month in preventive custody and almost four months under house arrest. The investigation caused billions of losses in the stock market, forced some major business divestments and even affected the value of the Brazilian curren-

1407 See e.g. Sarmento (n 35) 452; Kurtenbach and Nolte (n 16) 5.
1408 See STF, AC 4036 [2015].

cy.[1409] In 2017, after the conclusion of the investigations, the Federal Public Prosecution Office asked for the acquittal of the banker, alleging that the collected evidence was insufficient for his conviction.[1410] The judicial decision acquitted him and asserted that the evidence provided by the cooperator was dubious and open to multiple interpretations, including that the cooperator wanted to extort financial compensation from the banker. [1411]

In 2016, a cooperator provided evidence that allegedly indicated the existence of a sophisticated plot to obstruct the progress of criminal investigations related to the corruption of public officials.[1412] Given that the cooperator had secretly recorded private conversations with several high-ranked politicians, such as a former President of the Republic and a former President of the Senate, the investigation attracted massive media attention and had substantial political consequences, including the resignation of two Brazilian government ministers.[1413] The conclusion of the official investigations showed once again a different scenario than that presented previously by the cooperator. In 2017, an extensive report of the Brazilian Federal Police rejected the version that the accused had committed any crime, affirmed that the cooperator had tried to instigate criminal behavior and suggested that, due to the inefficacy of the collaboration agreement, no benefits should be granted to the cooperator.[1414] Not long after that, the

1409 For a description of the arrest and its financial impacts, see Donna Bowater, 'The arrest of a 'genius' leaves Brazil's banks fighting for reputation' *The Telegraph* (London, 12 December 2015) <https://www.telegraph.co.uk/finance/globalbusiness/12047673/The-arrest-of-a-genius-leaves-Brazils-banks-fighting-for-reputation.html> accessed 19 September 2018; Vinod Sreeharsha, 'Brazil's 'better than Goldman' bank slowly rebounds from scandal' VInod Sreeharsha, 'Brazil's 'better than Goldman' bank slowly rebounds from scandal' (2016) *The New York Times* (New York, 5 September 2016) <https://www.nytimes.com/2016/09/06/business/dealbook/brazils-better-than-goldman-bank-slowly-rebounds-from-scandal.html> accessed 20 February 2019.

1410 See the allegations presented by the Federal Public Prosecution Office in the following proceeding: JFDF, AP 42543-76.2016.4.01.3400 [2016].

1411 See the verdict of 12/6/2018 in the following proceeding JFDF, AP 42543-76.2016.4.01.3400 [2016].

1412 See STF, Collaboration Agreeement of J.S.O.M [2016].

1413 See Simon Romero, 'Recording spurs anticorruption minister to resign in Brazil' *The New York Times* (New York, 30 may 2016) <https://www.nytimes.com/2016/05/31/world/americas/brazil-fabiano-silveira-resign.html> accessed 20 February 2019.

1414 See the analysis report provided by the Brazilian Federal Police: STF, INQ 4367 RAPJ 76 DICOR/PF [2017]

Federal Prosecution Office suggested the closure of the investigations without pressing any formal charges, which was accepted by the Federal Supreme Court.[1415]

The most controversial case of the Brazilian practice of collaboration agreements occurred in 2017.[1416] After signing the first agreement in which the Federal Public Prosecution Office agreed to no press any charges, businessmen-turned-cooperators provided material that supposedly proved the involvement of almost two thousand politicians in corruption schemes. A central piece of evidence was a secretly recorded meeting between one cooperator and the President of the Republic, in which negotiations were allegedly made to buy the silence of another defendant.[1417] The disclosure of the agreement naturally had enormous impacts on Brazilian political life and presented an ostensible investigative achievement that, for a moment, appeared to vindicate the idiosyncrasies of the practice of collaboration agreements.

However, four months after the disclosure of the agreement, a major and unexpected plot twist occurred: the development of the investigations revealed the existence of a recording of private conversations between the cooperators that had not been previously submitted to the law enforcement authorities.[1418] Apparently made by accident and lasting several hours, the unintended recording seemingly indicated the existence of important omissions and distortions in the cooperation report, causing a major shift in the investigations, with serious repercussions for several agents. The cooperators had their benefits suspended and were put under preventive custody, which lasted several months.[1419] In a concomitant investigation, they were also accused of engaging in insider trading at the time of the disclosure of the collaboration agreement, allegedly using the privileged information on the agreement to maneuver the stock market and

1415 See STF, INQ 4367 [2017].

1416 See STF, PET 7003 [2017].

1417 See Dom Phillips, 'Brazil President Endorsed Businessman's Bribes in Secret Tape, Newspaper Says' *The New York Times* (New York, 17 may 2017) <https://www.nytimes.com/2017/05/17/world/americas/brazil-michel-temer-joesley-batista-corruption.html> accessed 18 February 2019.

1418 See 'Brazilian tycoon arrested after lawyers send prosecutors the wrong tape' *BBC News* (London, 10 September 2017) <https://www.bbc.com/news/world-latin-america-41222400> accessed 17 September 2018.

1419 See David Meyer, 'JBS's Batista brothers arrested as Brazil corruption probes spiral' (2017) *Fortune* (New York, 14 September 2017) <https://fortune.com/2017/09/14/jbs-batista-brazil-temer-corruption-insider-trading/> accessed 17 September 2018.

avoid losses.[1420] After an inquiry into the negotiation process of the collaboration, two of the cooperators' lawyers were later charged by the Public Prosecution Office with corruption.[1421] In 2018, the business conglomerate owned by the cooperators filed, alleging professional malpractice, a civil law suit seeking compensatory and punitive damages from the international network of law firms that negotiated the collaboration agreement.[1422]

These and other events indicate that the picture of effectiveness painted by enthusiasts of collaboration agreements seems quite controversial. If, on the one hand, the practice of agreements has led to fast and visible results regarding the prosecution and punishment of corporate and government crimes, on the other it has led to remarkable mistakes and caused enormous social losses. But comparison between the much-vaunted investigatory achievements and the downplayed failures is a misleading path to properly assess the effectiveness of a leniency policy, which always engenders a complex dynamic with multiple, long-lasting and often contradictory impacts.[1423]

The enhancement of deterrence, a central goal of any leniency policy, can only be assessed through a much more detailed empirical study, which analyzes in a comprehensive manner the multifaceted effects of the development of the practice of collaboration agreements.[1424] In the Brazilian reality, this study would necessarily consider the different consensual innovations designed by legal practitioners, which allow for greater benefits and much milder sentences for cooperators than provided for in the statutory regulation of the Organized Crime Act. To date, there has been no known attempt to develop such a study.

Put under a more thorough examination, it becomes clear that the alleged effectiveness of the practice of collaboration agreements has no con-

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1420 See Andres Schipani and Joe Leahy, 'Brazil prosecutors charge JBS owners with insider trading' *Financial Times* (London, 10 October 2017) <https://www.ft.com/content/8079516d-1a47-3e5d-a8d7-0aa488a39832> accessed 18 September 2018.

1421 See the charges presented by the Federal Public Prosecution Office in the following proceeding: JFDF, AP 1011826-93.2018.4.01.3400 [2018].

1422 'J&F sues law firms Trench, Rossi & Watanabe and Baker & Mackenzie' *Valor International* (São Paulo, 12 April 2018) <https://www.valor.com.br/international/news/5445917/jf-sues-law-firms-trench-rossi-watanabe-and-baker-mackenzie> accessed 12 May 2019.

1423 On the expectations and risks associated with the use of leniency policies, see chapter III.

1424 See Marvão and Spagnolo (n 32) 116. See also Stephan and Nikpay (n 527) 546.

nection to a straightforward increase in overall deterrence, relying on a set of convictions – limited but with enormous media coverage – of high-ranked businessmen and prominent politicians. In other words, the effectiveness discourse stems from a narrow, selective and self-interested approach rather than from an objective, wide-ranging and detached analysis. In this respect, the standard approach to the Brazilian practice of collaboration agreements is by no means different from the deferential treatment normally given to leniency policies in competition law. As Caron Y. Beaton-Wells has precisely described, this approach – inward-looking, short-sighted, uncritical, overconfident and universalist – bears several hallmarks of a religious belief.[1425]

Once the effectiveness discourse is deconstructed, the real backbone of the practice of collaboration agreements emerges more clearly: the enormous strength of the symbolic message that spreads through society when prominent individuals are prosecuted and eventually sentenced to harsh imprisonment penalties. The Brazilian experience clearly demonstrates the communicative power of this message. In a society entangled in a long-lasting public security crisis and simultaneously confronted with its worst ever economic recession, the ideal of a sweeping and severe investigation of 'systemic corruption' and macro-delinquency arose not just as a response to wrongful individual behavior, but to perform the much more ambitious function of recovering the impaired trust of society in the political and economic system.

The imposition of severe imprisonment penalties on a few members of the elite – presumably responsible for the deplorable state of affairs – creates compelling images with a tremendous impact on society, spreading a vigorous message of an effective fight against impunity.[1426] In this scenario, high-ranked politicians and businessmen must be portrayed as very powerful public enemies, who ought to be subdued at any cost.[1427] Once this battle is won, society can move forward with high hopes for a bright new dawn.

1425 Beaton-Wells (n 33) 129 and 165-169. See also: Beaton-Wells (n 448).

1426 For a good analysis of this point, see Hefendehl, 'Außerstrafrechtliche Und Strafrechtliche Instrumentarien Zur Eindämmung Der Wirtschaftskriminalität' (n 12) 830 and 846-847.

1427 Roland Hefendehl speaks of a "criminal law of the enemy" in the field of economic criminal law . See Hefendehl, 'Corporate Governance Und Business Ethics: Scheinberuhigung Oder Alternativen Bei Der Bekämpfung Der Wirtschaftskriminalität?' (n 541) 120.

d. The symbiotic relationship between collaboration agreements and the Brazilian anti-corruption movement

When compared to other investigate tools used in the prosecution of corporate crimes, leniency policies display a central advantage in the context of "governing through crime": they generate evidence that is effortlessly explainable for a mass audience. The Brazilian practice of collaboration agreements generated hundreds of hours of videotaped depositions. Secretly recorded meetings showed the intimate relationships between the political and economic elites. Internal spreadsheets listed names, suspicious pseudonyms and huge amounts of money. The material provided by cooperators was highly visual and easy to communicate, spawning a body of cultural products – such as books, movies and TV series – which, together with the daily media coverage, disseminated and entrenched the idea that corruption was the nation's central problem.[1428]

The judicial support for the early exposure of collaboration agreements, contradicting the confidentiality regime established by the Organized Crime Act, was essential for the development of this dynamic.[1429] The prompt disclosure of cooperating reports and the provided evidence had immediate effects on Brazilian political and economic life, even though some reports never led to a criminal conviction and a few proved to be deceptive and even fanciful.

The development of package deals, which established a single penalty for all the wrongdoings confessed by the cooperator, stimulated the admission of a multitude of conducts.[1430] Given that the overall punishment was already defined, the incentive for cooperators was to include in their report as much conduct as possible. The constant conception of new benefits allowed the design of consensual arrangements that were much more attractive than the system of agreements provided for in the Organized

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1428 As noted by Armando Castro and Shaz Ansari: "The press coverage of the Car Wash operation has received by far the largest corruption coverage in recent Brazilian history. Car Wash's general popularity was greatly increased during the campaign, and the whole country became aware of the investigation and some of the main suspects. In 2015, corruption began to be perceived as the most significant problem in Brazil, indicating a change of priorities concerning key issues for the Brazilian people". See Castro and Ansari (n 116) 7.

1429 See item V.2.e

1430 On the development of package deals in the practice of collaboration agreements, see item I.4.a.iii.

Crime Act.[1431] The motto "when in doubt, confess" never seemed so appropriate.[1432]

The field of corporate and government criminality represented fertile soil for the proliferation of collaboration agreements, especially in the realm of campaign finance, where problems of corruption and the appearance of corruption are ubiquitous.[1433] In a scenario where criminal legislation is vague and comprehensive and the distinction between regular activities and criminal behavior depends strongly on circumstantial evidence and subjective elements, the use of consensual arrangements as hedging mechanisms thrived.[1434] The lack of any effective judicial control and the disregard for basic principles of Brazilian criminal procedure, such as compulsory prosecution and strict legality, fostered and consolidated this type of transaction. The combination of these elements guaranteed a constant positive feedback loop for criminal investigations and turned the prosecution of macro-delinquency and corruption into a never-ending story.

In this light, the bold practice of collaboration agreements reveals a symbiotic relationship with the recent anti-corruption movement in Brazil. The early disclosure of confessions and material brought by agreements ensured constant fuel for the movement, while the widespread popularity and enormous social appeal of the anti-corruption cause outflanked any attempt to judicially control the consensual innovations developed by law enforcement authorities and cooperating defendants.[1435] Generous and flexible collaboration agreements incessantly – and instantaneously – revealed an image of systemic corruption; the diagnosis of systemic corruption justified the necessity of generous and flexible agreements.

1431 See item I.4.a.i

1432 Ian Forrester and Pascal Berghe, analyzing the European antitrust leniency policy, state that: "'When in doubt, confess' could be the motto of the leniency policy". See Forrester and Berghe (n 566) 172.

1433 Recognizing these problems, see.: Samuel Issacharoff and Pamela S Karlan, 'The hydraulics of campaign finance reform,' 77 Texas Law Review 1705.

1434 On the use of collaboration agreements as hedging mechanisms, see V.4.b.

1435 As noted by Simon, "The judiciary in an era of crime is on the defensive and anxious to demonstrate that it is not a source of criminal risk to victims".. See Simon, ´Governing Through Crime´ (1380) 68.

4. Conclusion: a prosperous life for consensual mechanisms in Brazilian criminal justice

It has been noted that the dynamic of 'governing through crime' has redesigned the American urban environment, replacing old neighborhoods with new landscapes in the pursuit of safer streets.[1436] Similarly, the process of 'governing through white-collar crime' has profoundly reshaped the Brazilian political and corporate environment, in an extensive and omnipresent quest for honesty and integrity. Leniency policies have played a major role throughout this process, generating a constant positive feedback loop for criminal investigations and underpinning the diagnosis of systemic corruption. In the complex context of relationships between economic and political power, the flexible and indiscriminate use of collaboration agreements has constructed a perpetual-motion machine of accusations, with major repercussions on Brazilian public life.

In the 2018 general elections, the combat of "systemic corruption" became a central topic of political debate.[1437] Faced for years with a solid narrative of widespread corruption within Brazil's elite, the electorate decided for a massive change in political representation. Traditional political parties suffered major defeats and a wide anti-establishment movement proved to be extremely successful.[1438] Seat turnover in the two houses of

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1436 Simon, ´Governing Through Crime Metaphors´, (n 1393) 1068.

1437 The international press has noted this aspect of the 2018 Brazilian elections. According to a report, the massive corruption investigations had direct electoral impacts: "The effect on public opinion has been devastating: According to Gallup, just 17 percent of Brazilians have confidence in their national government, a decline from 51 percent just a decade ago. During the first round, 47 politicians charged with corruption or who were currently under investigation were defeated in re-election bids."
See José R. Cárdenas, 'The sad decline of Brazil's political establishment' *Foreign Policy* (Washington, 19 October 2018) <https://foreignpolicy.com/2018/10/19/brazil-bolsonaro/> accessed 2 May 2019. See also RJ Reinhart, 'Brazilians face confidence crisis ahead of election' Gallup News (Washington, 27 September 2018) <https://news.gallup.com/poll/243161/brazilians-face-confidence-crisis-ahead-key-election.aspx?> accessed 3 June 2019.

1438 Regarding the recent debacle of the Brazilian political elite, see Kenneth Raposa, 'Brazil's elite have fallen to pieces' Forbes (New York, 14 September 2017) <https://www.forbes.com/sites/kenrapoza/2017/09/14/brazils-elite-have-fallen-to-pieces/> accessed 4 October 2018; Anthony Faiola and Marina Lopes, 'In Brazil's election, the traditional political class is wiped out' *The Washington Post* (Washington, 8 October 2018) <https://www.washingtonpost.com/world/the_americas/in-brazils-election-the-traditional-political-class-is-wiped-out/2018/

Congress reached its highest rate in recent decades.[1439] Candidates seen as political outsiders obtained major victories in electoral disputes for governmental and legislative positions. The promise of a tougher response on crime, particularly on corruption and white-collar criminality, was a major driving force of this sweeping change in Brazilian politics.

Given the symbiotic relationship between the bold practice of collaboration agreements and the anti-corruption movement, one can only expect consensual innovations to become more and more commonplace in Brazilian criminal law. Multiple signals already point in this direction: after experimenting with the benefits of resolving complex criminal investigations through collaboration agreements, legal practitioners nowadays seem to be constantly expanding the negotiation forum within criminal procedure through *contra* or *praeter legem* transactions, particularly in the field of white-collar criminality. Furthermore, recent legislative proposals seek to endorse the enlargement of the scope for consensual solutions within Brazilian criminal procedure.[1440] Since inter-party negotiations have become associated not only with the ideal of speedier justice but also with the objective of prosecuting powerful defendants, consensual solutions appear to be at the beginning of a long and prosperous life in Brazilian criminal law.

If this forecast is right, the rewarded collaboration regulation may prove to be just a 'gateway drug' in the realm of consensual solutions within Brazilian system of criminal justice.[1441] In view of the immediate and dazzling results brought by consensual mechanisms, the defense of basic pil-

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10/08/17d00ee8-ca8f-11e8-ad0a-0e01efba3cc1_story.html> accessed 4 June 2019.

1439 See 'Eleições: Senado tem a maior renovação da sua história' *Agência Senado* (Brasília, 8 October 2018) <https://www12.senado.leg.br/noticias/materias/2018/10/08/eleicoes-senado-tem-a-maior-renovacao-da-sua-historia> accessed 4 May 2019; 'Câmara tem renovação de quase 50% na nova legislatura' *Câmara dos Deputados* (Brasília, 23 January 2019) <https://www.camara.leg.br/noticias/550932-camara-tem-renovacao-de-quase-50-na-nova-legislatura/> accessed 3 October 2019.

1440 In February 2019, the Brazilian government submitted a legislative proposal to the Congress to enhance the prosecution of corruption, organized crime and violent offenses. The proposed measures contained two new forms of consensual mechanisms for resolution of criminal cases.

1441 According to Martin Heger and Robert Pest, the introduction of section § 153a in the German Code of Criminal Procedure, which established possibilities for the consensual resolution of cases of minor offenses, is often described as a 'gateway drug' ("Einstiegsdroge") for the practice of negotiated judgments. See Heger and Pest (n 37) 449. See item IV.2.b.

lars of Brazilian criminal procedure – such as compulsory prosecution, strict legality and separation of functions – seems outdated and obsolete. Amidst self-interested legal practitioners and with public opinion eager for further expedite outcomes, collaboration agreements could very well represent the perfect Trojan horse and lead to the dissemination of a party-driven model of criminal process within a system of official investigation.[1442]

This dynamic of 'Americanization' of Brazilian criminal procedure could have far-reaching consequences and comparative legal analysis can offer a useful toolkit to monitor these developments. Given the high incentives for legal practitioners to resolve criminal cases through settlements that externalize costs, and without any effective constraint coming from courts committed to the dynamics of 'governing through white-collar criminality', legal scholarship has a very important task to fulfill, critically assessing judicial practice, raising red flags in cases of 'legal counterfeits'[1443] and proposing a more accurate, equitable and transparent model of negotiation within Brazilian criminal justice.

1442 Analyzing the American model of plea bargaining as a Trojan horse of the party-driven system, see Langer (n 28) 35-39.

1443 On legal transplants and legal counterfeits, see Greco and Leite (n 17) 292. See also item V.3.d.