https://doi.org/10.4322/dilemas.v17.n3.62681 **Articles**

Rewarded Cooperation Administered by the Public Prosecutor's Office and Their Impact on the Right to Defense in the Brazilian Justice System

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We intend to show the role of the Public Prosecutor's Office in the use of the rewarded cooperation, which has changed the understanding of the judicial process, legal evidence and the guarantees of the defendant. We approach the expansion of the power and action of the Public Prosecutor's Office through bibliographical, documentary and media research (2017-2018). We analyzed the practices of operators in making agreements, investigations and generating judicial evidence based on observation and interviews with members of the MPF and the Rio de Janeiro Court of Justice (2017-2019). The agreements legitimize the anticipation of the constitution of evidence for the investigative phase, making it impossible for the defendants cited to defend themselves.

Keywords: rewards cooperation, Lava Jato, public prosecutor's office; inquisitorial criminal justice system; Brazil

As colaborações premiadas do Ministério Público e seus impactos no direito de defesa na justiça brasileira Pretendemos mostrar o protagonismo do Ministério Público no uso de acordos de "colaboração premiada" que vem alterando o entendimento sobre o processo judicial, a prova jurídica e as garantias do réu. Abordamos a expansão do poder e da atuação do MP por meio de pesquisa bibliográfica, documental e na mídia (2017-2018). Analisamos as práticas dos operadores de fazerem acordos, investigações e de gerarem provas judiciais com base em observação e entrevistas com membros do MPF e do Tribunal de Justiça do Rio de Janeiro (2017-2019). Os acordos legitimam a antecipação da constituição da prova para fase investigativa, inviabilizando a defesa dos réus citados.

Palavras–chave: Colaboração Premiada; Lava Jato; Ministério Público; Sistema de Justiça Criminal Inquisitorial.

Introduction

The overarching objective of this article is to understand the recent changes in the Brazilian justice system and how they impact the defendant's right to defense. One of the assumptions assumed is that these changes are a consequence of the increasing power concentration achieved by the Public Prosecutor's Office (MP), which has resulted in imbalance in both the division of responsibilities in criminal proceedings and the division of powers of the Brazilian Republic. Within the scope of this paper, we will address a change that has thus far been the subject of very few investigations in legal socio-anthropological literature: the adoption and expansion of

the rewarded cooperation (*colaboração premiada*[1]) model in Brazil (LIMA; MOUZINHO, 2016; COSTA; MACHADO; ZACKSESKI, 2016; CASTELUCI, 2019; FARIA, 2021). The question is: how has this model inspired by the American plea-bargaining tradition been converted to fit the local culture?[2] How has the adoption of the cooperation rewards model affected legal understanding of the Brazilian judicial process, proof and the defendant's guaranteed rights?[3]

Reflecting on these aspects, we intend to contribute to the research agenda introduced by Roberto Kant de Lima (1989, 1995a, 1995b, 2009, 2013, 2018) regarding how the practices and discourses of Brazilian legal professionals continue to reproduce truth production procedures combined with inquisitorial scholastic methods that are perpetuated in modern day Brazil.

In order to describe the expanded power of the Public Prosecutor's Office, the role played by the Federal Prosecution Office in drafting these plea agreements with cooperation rewards and their consequences for the production of evidence and defense of the defendants, this paper has been divided into two parts. The first seeks to contextualize the main changes that have occurred in the Brazilian Public Prosecutor's Office (MP) in relation to its position in the division of powers, its relationship with the State and society, as well as its expansion over the last 30 years. Subsequently we address the MP's struggle to gain investigative powers (and, subsequently, the attempt to monopolize this activity) using a strategy of mobilizing society against corruption, as well as coordinating with international institutions engaged in the fight against "transnational organized crime". We therefore conducted a bibliographic study in 2017 and 2018, covering official documents, press reports and specialized blogs, and an inventory of public announcements made by members of the MP.[4] The second part of the paper focuses on rewarded cooperation agreements applied to "white collar" crimes based on the research developed with the Public Prosecutor's Office and the Rio de Janeiro State Appeals Court between 2017 and 2019.[5] We concentrate on how legal professionals understand and use this mechanism, and also on their actual practices to implement agreements, conduct investigations and generate judicial evidence. Throughout this article, we include updated data regarding the consequences of these understandings and practices in the legal and political spheres of Brazilian life.

Transformations of the Public Prosecutor's Office

Studies into the Brazilian justice system, especially the civil justice system, identified some time ago that, of the organizations that form the system, the Public Prosecutor's Office has undergone the greatest transformations in the re-democratization process (KERCHE, 1999; CASAGRANDE, 2008; ARANTES, 2002; MACHADO, 2016; MOUZINHO, 2019).

Historically, in the criminal sphere the Public Prosecutor's Office has played the role of accuser in the tripartite division of legal proceedings: investigation, accusation and trial. As the accuser, it has the responsibility to evaluate the evidence of probable cause brought by the police investigation and decide whether or not to press charges in court.

However, some authors, including Tereza Sadek (1997), Rogério Arantes (1999) and Hugo Nigro Mazzilli (1998), showed that with the sanctioning of the law that created the Public Interest Civil Action in 1985, the Public Prosecutor's Office shed its strictly criminal nature and began to file lawsuits that sought to guarantee collective rights. Initially these actions were concentrated in the areas of environment, consumer law, artistic and cultural heritage. Subsequently any situation involving the violation of collective rights began to be targeted.

This same movement involved the Public Prosecutor's Office beginning to act on politics and society by, for example, creating Consent Decrees (*Termos de Ajustamento de Condutas – TAC*). The Public Prosecutor's Office began to use this instrument to reach out-of-court agreements with public or private entities that were violating a certain right, forcing them to adjust their behavior and thus avoid a Public Interest Civil Action.

It is important to highlight this practice of agreements being negotiated in the criminal field, since it was only foreseen in legal doctrine from the 1988 Constitution onwards and came into effective use with the passing of law no. 9,099 of 1995, which establishes the creation of the small claim courts denominated the Special Civil and Criminal Courts (*Juizado Especial Civil* and *Juizado Especial Criminal*), within the Brazilian Judiciary. As a form of administration of social conflicts, these courts were designed to encourage access to justice, decriminalization and consensus between the parties (ALMEIDA, 2014).

For Rogério Arantes (2002), one of the pioneers in the study of the Public Prosecutor's Office, the creation of the Public Interest Civil Action and its subsequent expansion was the main catalyst for the judicialization of political conflicts and the politicization of the judicial system. He and other authors such as Vianna (2008), have shown how the MP gradually secured a privileged position and, when strategically placed between the State and society, stood on the side of society and then presented progressive agendas aligned to the re-democratization of Brazil.

On the return to democracy, the Public Prosecutor's Office played an important role in the constituent process and in the 1988 Constitution, whereupon it was granted functional and administrative autonomy, no longer subject to the executive power or any interference from the other powers. The arm wrestling between powers that we are currently witnessing in Brazil is the result of this contradiction that has accompanied the development of the Public Prosecutor's Office

since 1988. It is in this sense that the Public Prosecutor's Office, with its expanded scope has even been seen as a "fourth power" (ARANTES, 1999).

Thus, at a time of democratic enthusiasm, an ambiguous institution was created: one that accuses and defends, acting as both prosecuting entity and litigant at the same time. The institution began to act independently, not only to defend the interests of the State but also to defend the interests of society, despite its members not having been chosen or elected by society for such purpose.

Obviously, in a democracy, society is represented by means of free elections held by secret ballot. In Brazil, state and federal public prosecutors,[6] and even the Attorney General, who is appointed by the President of the Republic, are not elected, unlike in the United States. So, to defend society, how can the Public Prosecutor's Office purport to represent it? The commitment to represent society can be interpreted as voluntary on the part of these agents. But, moreover, as Gláucia Mouzinho (2019) has clearly exposed, the answer lies in the fact that, for the legal professionals at the Public Prosecutor's Office, Brazilian society as a whole, and not only parts of it, is disadvantaged and, therefore, requires guardianship. Along the same lines, some authors have interpreted the expanded role of the Public Prosecutor's Office, understanding it as the "superego of the orphan society", a term coined in another context (MAUS, 2002), but which would currently apply to the MP, which sees itself as responsible for the morals of society (COSTA, 2017). This idea is corroborated by the views given by prosecutors throughout the country in a 2017 survey (ISMAEL; RIBEIRO; AGUIAR, 2017): the majority of the respondents believe that the Public Prosecutor's Office should act to promote citizenship and awareness in Brazilian society.

The perception that society is kept in a disadvantaged position in terms of its citizenship led the MPF to focus on combating misconduct in public office and political corruption back in the 1990s (MOUZINHO, 2019). Later, the Public Prosecutor's Office also began to turn its attention to raising and transforming awareness, undertaking a forceful moral crusade for the criminalization of corruption that ended up spreading through the entire judiciary and a large part of Brazilian Society (RAMOS JÚNIOR, 2019).

More recent studies bring new elements to interpret the transformations of the Public Prosecutor's Office (MP) in general and of the Federal Public Prosecutor's Office (MPF) in particular. In her analysis of how the MPF has evolved during the post-redemocratisation period, Londero (2021) focuses on the development of the office's institutional capacities, both externally and internally, with the administration of the federal attorneys general being prioritised in a top-down manner. For the author, these accumulated improvements in the MPF's institutional

capacity would explain its growing autonomy and capacity to mobilise, as well as the significant boost in the institution's anti-corruption drive. (LONDERO, 2021: 306-314).

Authors such as Engelmann (2010, 2020) and Engelmann and Menuzzi (2020) assert that the success of different categories of legal professionals in the construction of positions of state power in Brazil since the end of the military regime is in line with the legitimisation of models of law and international cooperation. By looking at the international connections of the Brazilian Federal Public Prosecutor's Office (MPF), the authors demonstrate how the promotion of anti-corruption legal models have resulted from corporate cooperation strategies. For the authors, the MPF's ability to take on a central role in the network of anti-corruption agencies, which constitute clusters of international cooperation autonomous from government channels, reveals a complex phenomenon whereby the legal elites are anchored in the internationalised legal space.

In the same vein, Cornelius (2024) recalls that in the 2000s, the MPF began to focus on fighting corruption through criminal law, adopting the narrative of taking a stand against the "criminal elite". For the author, this new approach to "anti-elite crime" was developed in response to the prevailing doctrinal perspectives of criminal defence lawyers who had been working in this area for a long time and held academic positions at renowned universities. The MPF's line of reasoning will win over the media, popular support and international legitimacy, referencing the legal ideas of American law that postulate fewer guarantees and more punishment for corruption. Examining and comparing discursive disputes between defence lawyers and MPF representatives over global ideas about corruption, the author interprets the inability of the *garantista*[7] lawyers to locally challenge these global arguments as a "form of globalisation by stealth", showing how local dynamics allow global ideas to remain unchallenged in local fields. In the case of Brazilian law, this is revealed by the fact that not only the prosecutors, but also *garantista* lawyers have started to defend accountability for corruption and a "fair" criminal justice system, thus helping to legitimise the imperialist lines of reasoning of the global north on corruption.

The Public Prosecutor's Office and the Investigation of Corruption

In Brazil, over the course of the 1990s, corruption was primarily tackled by the Public Prosecutor's Office through actions in the civil and administrative spheres: with public interest civil actions and using the law on misconduct in public office. By the end of the decade, criminal actions began to be filed as part of that effort. This shift, according to Arantes (2009), was fundamental in increasing the incrimination of corruption and, during the repression of the 'auditors mafia'[8] in the city of São Paulo (MEMÓRIA GLOBO, 2021), gave rise to the so-called *Task Forces*,

inspired by the American model. In these proactive and cohesive actions, the Public Prosecutor's Office began to effectively coordinate police operations[9].

On the other hand, investigative authority was a gap in the attributes of the Public Prosecutor's Office defined in the 1988 Constitution, although for decades this activity has been the subject of disputes between the institutions that form the Brazilian criminal justice system. Initially, to justify the expansion of their investigative power, representatives of the Public Prosecutor's Office borrowed a notion from the US legal system, that of *implied powers* – created in 1819, by the US Supreme Court, when it judged the case of MacCulloch vs. Marland (RANGEL, 2003; FARIA, 2021). They argued that this was a rule of interpretation already incorporated into the Brazilian legal field, according to which when granting a certain entity a function (or core activity), the authority also implicitly bestows upon that organization the means necessary for such purpose. This idea is summarized in the sentence: *where the entity can do the most, it can also do the least*. They then conclude: if the Public Prosecutor's Office is the owner of the public criminal action – an activity considered as "the most" – then it can also "the least", which in this case would be conducting the criminal investigation.

The Public Prosecutor's Office was only given an investigative role when the Proposed Constitutional Amendment (PEC) 37/2011, to limit investigative powers to the Brazilian federal and civil police, was defeated in a vote. The PEC was seen by the MP as retaliation for the systematic work that they had been developing to the disapproval of some factions of political power. Aware that without public pressure the Legislature would end up restricting this prerogative, the Public Prosecutor's Office took action. Work began on publicizing the results of their efforts, especially in the fight against corruption, which were only achievable thanks to the investigative powers in dispute. Within the various state Public Prosecutor's Offices and related associations (AMPERJ, 2018), events, lectures, publicity material and other measures were promoted to raise public awareness of the importance of this prerogative.

The dispute was resolved against a backdrop of intense civil society participation. In the demonstrations that took hold of Brazil in 2013, one of the recurring banners referred to rejection of PEC 37, or as it became known at the time, the "PEC of Impunity" or "PEC of Corruption". Public opinion held that this political maneuver would serve to undermine the ability to punish corrupt politicians, since corruption cases are primarily conducted by the Public Prosecutor's Office.[10] When put to the vote, the matter was rejected by the overwhelming majority of federal deputies who signaled that this was in line with public opinion expressed in the protests that took to the streets around the country.

Regardless of the favorable outcome for the Public Prosecutor's Office in the dispute over investigative capacity, it is clear that in addition to the enormous discretionary power acquired by the Public Prosecutor's Office, the institution is also capable of exerting pressure so that segments of society act to meet its demands. Therefore, its role has not been limited to taking on social demands and implementing standards to defend "democratic order". Moreover, the Public Prosecutor's Office sees itself as qualified to steer society and politics in the direction it sees fit (RAMOS JUNIOR, 2019).

In December 2015, the dispute between the Federal Public Prosecution Office and the Federal Police gained further exposure with the filing of the Direct Action of Unconstitutionality (ADI 5.508).

Throughout this lawsuit, the arguments presented by its main actors (Federal Public Prosecution Office, Federal Attorney General, Federal Police and their unions, and the Federal Supreme Court) revolved primarily around the proper classification of rewarded cooperation: whether it constituted an investigative technique or a means of proof. If the former were chosen, the Federal Police would be qualified to strike the deals. On the other hand, by giving the Federal Public Prosecution Office the exclusive right to "negotiate" with the collaborator about the shortening or termination of the procedural process – including the choice of the length and type of sentence, as well as the regime under which they would be served – the judges were stripped of one of their main functions. According to Casteluci (2019, p. 134-144), it was this circumstance that proved fundamental to understanding the refusal to maintain the monopoly and the consequent dismissal of the suit by the Supreme Court in June 2018. To centralize all the roles of the criminal prosecution system – investigator, prosecutor and judge – in the Public Prosecutor's Office was considered inadmissible in a democratic state of law, as it risked violating the constitutional principle of equality of arms between the parties.

Still according to Casteluci (2019), another hegemonic offensive by the members of this institution was the intention to participate directly in the political sphere. This is revealed in the Direct Action of Unconstitutionality (ADI) no. 5.985, which is still at the trial stage, filed in August 2018 by the National Association of Federal Prosecutors. This action opens the possibility for prosecutors to run for election without resigning from their posts, which goes against the Constitution that forbids members of the Public Prosecutor's Office to engage in party political activities. Thus, the fight against corruption was an important vehicle for the Public Prosecutor's Office in its struggle for political power.

Still against the backdrop of the public protests of 2013, the Anti-corruption Law was enacted, which establishes provisions regarding plea bargaining or leniency agreements. The Administrative Council for Economic Defense (CADE) Law, which deals with money laundering, was amended,

modifying the form of plea bargains. This amendment has since allowed individuals and legal entities to cooperate in criminal investigations by pleading guilty in exchange for more lenient sentences in cartel cases. Lastly, and most importantly for the purpose of this paper, the law on criminal organization was created, which foresees rewarded cooperation[11].

Rewarded Cooperation and Operation Car Wash

In the international context of the so-called fight against organized crime, several countries have adopted the mechanism of rewarded cooperation, that is, offering rewards in the form of more lenient sentences to certain defendants who agree to cooperate with the investigation, describing how the criminal organization they belong to works and giving testimony against their accomplices. It has primarily been inspired by the already established US plea bargaining model, although with substantial differences in accordance with the culture and legal system of the country in question (LANGER, 2004).

In Brazilian legislation, these agreements, which were previously few and far between (CARDOSO, 2015), are now provided for in detail in law 12,850 of 8 August 2013. This law provides on the crimes of criminal organization and regulates rewarded cooperation, considered a means of obtaining proof in order to support the investigation of such crimes. For actors in the Brazilian criminal justice system, several other definitions are given to this mechanism, including that of it being a special investigation method (FARIA, 2021) – a definition that resulted from debates about which institutions were responsible for the investigation.

As is known, cooperation rewards came to the fore in Brazil with the *Operação Lava Jato* or "Operation Car Wash" and have since been widely used in cases involving alleged corruption, revealing the participation of investigated and accused parties who hold privileged political and social positions. According to the Federal Public Prosecution Office website, Operation Car Wash was kickstarted by the rewarded cooperation of the dollar exchange dealer Alberto Youssef, executed within the scope of *Operation Banestado*, still in 2003 (MPF, 2014)[12]. It further states that the upshot of that cooperation was more than 20 other agreements and has established an unprecedented level of intense cooperation with other countries. Eleven years later, Youssef was arrested again, investigations were opened into the crimes against Petrobras, and Operation Car Wash itself was launched.

From that moment on, rewarded cooperation would be disseminated as a unique investigative method (FARIA, 2021). It uncovered a major corruption scheme in the oil company, which had been in operation for many years, involving the payment of bribes to company directors and employees and the financing of political parties. Its greatest advantage, from the legal

professionals' point of view, was to support the unearthing of highly damaging and low-profile white-collar crimes, ensuring speed and continuity for the investigation.[13]

The high-profile coverage of Operation Car Wash was partly due to the interaction between the members of these investigations and the traditional Brazilian media, which uncritically limited itself to reproducing what was said by the operators involved in the operation (DUARTE, 2020). Despite the vaunted success, there was substantial criticism of the methods employed in what was considered the largest anti-corruption operation in Brazil, with widespread international recognition (MARQUES, 2020; PRONER *et al*., 2017; STRECK, 2019; SERRANO, 2020; ZANIN MARTINS; ZANIN MARTINS; VALIM, 2020; CHAVES, 2022). Criticism of the operation's political bias intensified when the judge accepted the post of Justice Minister in the government that came to power following the conviction and imprisonment of its main political opponent. But it was a series of reports known as *Vaza-Jato*,[14] produced based on archives of conversations between the prosecutors and the judge of the task force, that called into question the legitimacy of the operation (LIMA *et al*, 2019; DUARTE, 2020). In the records obtained from the cell phone of the lead prosecutor of Operation Car Wash, the journalists highlighted the bias of the politically motivated prosecutors, as well as the persecution of former president Luiz Inácio Lula Da Silva. The fragility of the evidence against the leader of the PT (*Partido dos Trabalhadores*) also came to light, as recognized by the prosecutor in charge of the Deltan Dallagnol task force. The revelation that the operation was in fact coordinated by Judge Moro, who directed the actions and anticipated the results, made headline news across the board. Moreover, the discovery of this set of illegalities brought to light inquisitorial practices that remain prevalent in Brazilian criminal proceedings. Such is the case in the practice of giving the judge a leading role in the fact-finding proceedings to ascertain the 'real truth' (*verdade real*)[15], that is the truth beyond reasonable doubt, which has been widely adopted by Brazilian courts. This contradicts the prescription of the adversarial system adopted in the 1988 Constitution, which establishes the judge's impartiality and equidistance from the parties (RIBEIRO, 2019; LIMA *et al*., 2019). The debate on whether these practices are normal ended with the decision of the Federal Supreme Court (STF), which concluded that Judge Moro was biased in his judgment of the Operation Car Wash cases in habeas corpus action 164.493 – Paraná (CONJUR). In addition to this decision, the Superior Court of Justice (STJ) annulled several of the former judge's decisions, deeming him incompetent to act in cases that were, according to Brazilian procedural law, beyond his authority (BÄCHTOLD, 2022) and (BRASIL DE FATO, 2022).

Vaza Jato revealed that, in addition to the voluntarism of the *Lava-Jato* prosecutors in their moral crusade against corruption, illegalities were committed in the conduct of the cases, with the

main actors executing a project aimed at personal political projection (BBC NEWS, 2023)[16]. This discovery had an impact on the subsequent annulment of the judgments.

Unlike how the investigations were conducted, very little has been revealed until recently about the behind-the-scenes process of securing rewarded cooperation. For example, it is not known how the information obtained by illegal means in rewarded cooperation – an inquisitorial practice also observed in the routine criminal justice procedures – was legalized in the agreements (VARGAS, 2012). Indeed, bearing in mind the number of such cooperation agreements made, few collaborators have come out publicly, possibly due to the secrecy required, as we will see below. But it has been reported that some agreements were obtained through torture or coercion, forged proof and attempted extortion (TV GGN, and TV 247). One Supreme Court Justice has been particularly critical of these task forces, including the one that was conducted in Rio de Janeiro. We will look at this in more detail below.

Rewarded Cooperation Agreements in Rio de Janeiro

The rewarded cooperation of Dalton Avancini of the CAMARGO CORRÊA construction company, obtained as part of Operation Car Wash in Curitiba on 1 September 2015, was the first contribution from the operation sent to the federal courts in Rio de Janeiro (MPF, 2016a; 2016b). The Federal Supreme Court ordered the remittance of the information filed by the Lava-Jato Task Force in Curitiba, which indicated irregularities in contracts for the construction of the Angra 3 Nuclear Power Plant. This operation became known as Operation Radioactivity. While this criminal action was being brought before the 7th Federal Court in Rio de Janeiro, the Federal Public Prosecution Office in Rio began to deepen its investigations, creating a task force in 2016 to investigate alleged crimes of corruption, misappropriation of funds and bid rigging and contract fraud at Eletronuclear, a subsidiary of Eletrobrás. After Eletrobrás, other investigations were launched targeting various sectors of the state (Operations Unfair Play; 40 Degrees; Cadeia Velha; Ponto Final; Fatura Exposta; Ratatouille and others), involving the government itself, politicians, construction companies, catering services, public transport, among others. In Rio de Janeiro alone, since Operation Radioactivity, which inaugurated the Lava-Jato investigations in the city, up to a recent date there had been fifty-six operations and one hundred and eighty rewarded cooperation agreements. These figures do not include terminated or withdrawn agreements, which could make the number even higher. The work of the Lava-Jato Task Force in Rio de Janeiro was concluded on 31 March 2021 (MPF, 2016c).

These agreements were drawn up exclusively by the Federal Public Prosecutor's Office and the collaborator, in the presence of their lawyer. The majorities were concluded in the preliminary phase of the prosecution (or criminal investigation phase), generally giving rise to these Operations, without the participation of any judge and in confidentiality (FARIA, 2021). Although they may be drawn up at any stage of the criminal prosecution and even after the conviction – during execution of the sentence – in the case at hand, they have been most visible during the initial stage of criminal investigation, known as the *bargaining stage (fase das tratativas)*.

It should be noted that at this stage the parties only negotiate the proof to be presented by the collaborators and the respective counterproposal of the Public Prosecutor's Office in relation to the punishment. In this sense, the process differs from those in other legal systems (such as the US system), where even changing the type of sentence or being absolved of the crime can be negotiated. Furthermore, the judge has the additional role of auditor of the regularity of the acts, even during the phase in which it is decided which proof will be deemed valid for the trial.

On the other hand, the "consensus" that might characterize this deal – struck between members of the Public Prosecutor's Office, the collaborators and their lawyers – is limited to the discussion of three aspects.[17] The first concerns the effectiveness of the evidence presented. This is evaluated in terms of its potential to uncover the hierarchical structure and functioning of the criminal scheme, as well as its capacity to substantiate the accusation against the collaborator and accomplices involved. The second aspect refers to the sentences to be served, considering the possible benefits to be gained in exchange for cooperation. The third and final element refers to the amount of money that may be repatriated or returned by the defendants. All of these will entail obligations imposed on collaborators should the agreement be implemented. Other ancillary obligations may also be imposed, such as: appearing in court or before the Public Prosecutor's Office, whenever summoned; the obligation not to lie or appeal, even in the event of nullities, among other requirements that will constitute the clauses of these agreements.

When the collaborator fails to comply with any of the conditions imposed in the agreement, the prosecution will consider the agreement terminated and will then charge the collaborator. If, for example, the evidence is rejected, that is, if the collaborator is considered to have lied, the agreement is rescinded by the Public Prosecutor's Office, and the collaborator is charged with the crime to which he confessed, in addition to the crime of false accusation. Thus, under no circumstances does the Prosecution negotiate the truth as occurs in American plea bargaining, although it does apply the penalty in advance (and without the process), as shall be explained below.

Rewarded Cooperation as Means of Proof[18]

Having underlined these unique characteristics, we will now show how rewarded cooperation has actually been used as proof obtained in the preliminary investigation. But first, it must be made clear that proof is important to the Brazilian legal system because our legal field (be it criminal, civil, etc.) holds the belief that it is through proof that we reach the truth, and discovery of the truth is intrinsic to the justice system fulfilling its purpose. This importance is represented, not least, when the judge himself or herself is afforded the opportunity to determine the production of 'real proof' (*prova real*), even if against the volition of the parties (GRINOVER, 1999). Furthermore, in Brazil it is believed that any evidence (indications of probable cause) is only actually called "evidence" when it is brought by the parties involved in the suit, which step is only produced in the judicial phase (trial). In other words, until the advent of rewarded cooperation, the legal field asserted that the investigative phase did not involve proof.[19] This was because no formal charge had been pressed, that is, no charge had been accepted by the judge and also because the parties involved in the suit (defense and prosecution) had manifested no opinion about such charge (TOURINHO FILHO, 2010).

The hypothesis to be developed in the second part of this paper is that rewarded cooperation changes the understanding of judicial evidence in the Brazilian legal system. We will try to show that, as it is applied, rewarded cooperation legitimizes the advance constitution of evidence for the investigative phase. Moreover, it renders the collaborator's defense infeasible and hinders the accomplices' defense, preventing it from controlling and manifesting a position on the gathered evidence of participation of those accused in the cooperation. This results in increased State powers of punishment and the defendants' right to defense being violated or rendered infeasible.

In this paper, the elements presented to develop the arguments are drawn from part of the data found in a field study (FARIA, 2021) conducted between October 2017 and January 2019 with the federal criminal courts of Rio de Janeiro. In addition to following more than two hundred preliminary hearings and trials held at one of the lower criminal courts of this judicial district, interviews were conducted and analyzed with nine representatives of the Federal Public Prosecutor's Office in Rio de Janeiro, including fifteen prosecutors who worked on the rewarded cooperation agreements in the Operation Car Wash procedures in Rio de Janeiro. This analysis was complemented by the examination of doctrinal and documentary material relating to this instrument.

Rewarded Cooperation as a Criminal Investigation Method

As a criminal investigation method under the charge of the Public Prosecutor's Office, rewarded cooperation constitutes an administrative, inquisitive and confidential act and corresponds to the investigative stage entitled the Criminal Investigative Procedure – PIC. At this stage, agreements are drawn up at the Public Prosecutor's Office, in the same way as the Police Investigation – IP[20] is carried out at police stations, but without the requirement of formalities and registration at *cartórios*.[21]

Despite the similarity between these two prosecutorial instruments, they differ in relation to evidence.[22] In rewarded cooperation agreements, the procedure is also engaged by the collaborator's confession to his criminal participation and his information about the other participants. This is different to the police investigation because the collaborator is required to present proof in relation to both his confession and the information about alleged accomplices. According to members of the MPF, should such *corroborating proof (prova de corroboração)* fail to be produced, the agreement will definitely not be made.

They explicitly refer to the production of evidence, even at this stage, to classify the material requested from the collaborator to corroborate his statements. On the other hand, such *corroborating proof* often appears flimsy. For example, a simple record of a meeting in the collaborator's diary may be accepted as evidence, as long as it is considered useful for the discovery of the *real truth* and reinforces and legitimizes the direction of travel established in the investigation. This functional and pragmatic character of the cooperation is revealed parallel and in contrast to the caution to be taken in relation to the veracity of the information as recommended by the "Good Practices Manual" that consolidates the guidelines for striking these agreements.

It is also worth noting that, besides the information (and evidence) offered by collaborators being convenient for the investigation (its proposition or continuity), such attributes generate competition between the collaborators who fight among themselves to deliver the information first. This means, therefore, that not all those who present evidence will successfully obtain an agreement with the prosecution.

This advantage for the prosecution's investigation is accentuated in cases of the collaborator waiving or withdrawing cooperation, when the agreement is not concluded or is rescinded. This is because in such cases the information and evidence have been provided, but the Public Prosecutor's Office is not obliged to make its counterproposal (the "sentencing benefits"[23]). Thus, although the collaborator withdraws from the deal without receiving any benefit, the Public Prosecutor's Office loses nothing.[24] This suggests that there are no clear parameters

regarding the circumstances under which these pacts will or must be entered into by the Public Prosecutor's Office with collaborators, or even that limit their freedom of action in these cases. It also indicates an abolishment of the equality of the parties; one of the fundamental principles of the democratic legal system.

The offer of a cooperation reward then hopefully triggers a domino effect. In the Brazilian case this has meant reaching all the members of the criminal chain. Hence, we have witnessed a succession of people being *ratted out* and collaborator-informants at all levels, involved in countless plea bargaining agreements involving rewarded cooperation.

However, it seems that this differs from how things develop elsewhere where cooperation is also rewarded, such as, in the US system, where the plea bargaining process is usually applied to members from the center of the criminal organization structure. This is the informant who knows how, when and by whom the bribe is delivered, just as he knows who is in charge of this structure. In this system, those at the top of the criminal organization do not benefit from cooperation agreements. On the contrary, they are given much harsher sentences, precisely because of their dominant position in the organization (FERREIRA, 2013). So, whereas in the US tradition the small fish are hit to get to the shark, in Brazil, the Operation Car Wash procedures have shown the relevance of a popular Brazilian saying: "anything caught in the net is a fish." (FARIA, 2021).

An Inquisitorial and Confidential Procedure

The inquisitorial method of gathering information in a confession given by the collaborator deserves to be highlighted. It is the product of the obligation of the accused to reveal everything of interest to the MPF and not only the information relating to the crime of which he is accused. In order to accommodate all this information and facilitate its work, the MPF has created a method to organize it in the form of attachments to the cooperation agreement. These are documents that individualize each crime and/or each accomplice reported by the collaborator. This is a practical way to allow each narrated fact that implicates accomplices to be recorded, certified with evidence and stored. At any time, this can lead to a further investigation and cooperation. As well as generating a host of additional charges and lawsuits, the attachments will give rise to as many cooperation agreements as there are investigated or accused persons willing to obtain them. These attachments, as will be seen below, also inaugurated a peculiar form of charge: the charge without a lawsuit.

In practice, the attachments – which are not provided for in Law No. 12,850 of 2013, but are regulated in the internal rules of the Public Prosecutor's Office (CNMP, 2018)[25] – are part of the body of evidence that leads the prosecution and judge to form their respective beliefs regarding

the crimes. They allow the operators to understand the roles played by all the participants and the link between them. The validity of the main case is initially judged, before deciding on the other criminal activities contained in the attachments. This division of the rewarded cooperation agreement – into as many attachments as there are crimes – results in several consequences, including: a) each crime linked to an individual identified by the collaborator must be recorded in a separate attachment in order to maintain the required confidentiality about the identities of those involved and to support their individualized investigation; b) each attachment (with the collaborator's statement) may give rise to charges, also separate from the other criminal facts identified by the collaborator and the corresponding judicial process, even if the collaborator acts in all of them as a witness; c) each attachment may result in several legal proceedings in different instances and institutions, depending on the nature of the offense (criminal, tax, administrative) or the status of the accused (with or without jurisdictional prerogative). All this constitutes, in the words of Santoro (2020, p. 81), a new maximized framework for criminal process in Brazil: the *maxis processos*[26]. The purpose of this separation is to eliminate the accused's right to know, in full, the facts alleged against him, since he will only have access to the documents and evidence raised individually and exclusively against him. The rest of the information provided by the collaborator – insofar as it touches on allegations related to other offenders – will not be known to him. This is a way of ensuring and perpetuating the secrecy of the charges, undermining the right to an adversarial hearing, hitherto in force in Brazilian criminal proceedings.

The confidentiality applied to the agreement follows the same principle as the criminal investigation procedures conducted through the police investigation (*inquérito policial*). This inquisitorial characteristic is specifically maintained in Brazilian criminal procedures and not even the re-democratization of the country has managed to produce relevant changes to procedural traditions, institutional structures and rationales that guide the Brazilian criminal justice system. Hence a legally grounded inquisitorial tradition has been maintained, which guides all administrative and procedural acts, in all instances of the judicial system (LIMA, 1989). Confidentiality is justified either as a way of preserving the moral integrity of the accused, or to ensure the success of the investigation, or both. However, as will be exposed in due course, in the rewarded cooperation agreements, confidentiality has only served to ensure the success of the investigation.

The Anticipation of Guilt in Rewarded Cooperation Agreements

It is important to stress that the evidence gathered and produced in the investigation phase will be used in the Public Prosecution's accusation to help to form the judge's conviction, who will ratify

such agreements. Thus, with the material and the *corroborating proof* from the collaborators that confirm its validity, the MPF uses this evidence in its indictment. The truth built up from this body of information is unlikely to be deconstructed by the defense in the courtroom, which represents their only opportunity to respond. Sometimes, as we seen in the field research, even in the judicial phase the defense is unable to access the information raised by the prosecution (FARIA, 2021).

Just like in the daily work of the Brazilian criminal justice system that maintains an inquisitorial character, presuming guilt before formal charges are pressed (MISSE, 2010; FERREIRA, 2013; LIMA; MOUZINHO, 2016), the criminal procedure initiated by the rewarded cooperation agreement also does not exempt the collaborator from guilt. This is even the case when one of the benefits offered is the non-filing of the charge, or a pardon by the judge being granted, as provided for in the 2013 law. Cooperation, like the inquisitorial confession, on the contrary, confirms the guilt and legitimizes the procedures used to obtain the *real truth*, which is, after all, the sole objective of the Brazilian criminal system.

This pre-court condemnation of the crime with advance stipulation of the punishment, practiced before judicial proceedings are even opened, is commonplace among the representatives of the Public Prosecutor's Office. Despite being guided by the principle which establishes the possibility of evidence and the arguments of the litigating parties being presented and dismissed in court (*princípio do contraditório*), some attorneys have been updating principle by anticipating the penalty and assuming the responsibility, that is not theirs, of imposing it this. Therefore, the representatives of the Public Prosecutor's Office have failed to follow Brazilian legislation with regard to the functional authority of the judge, since in the criminal procedure, it is the judge who can legitimately impose the sentence and define the regime under which it must be served.

Thus, the agreement between the Public Prosecutor's Office, the collaborator and his defense may directly result in a conviction and sentence, even before judicial proceedings are opened, which goes against the operation of the Brazilian justice system which foresees guaranteed rights for the accused.

The Loss of Guarantees for the Collaborator and Those He Incriminates

As already stated, rewarded cooperation as a method of investigation seems to be efficient, economical and advantageous to the Public Prosecutor's Office because the collaborator, as well as providing information, must also present the evidence to prove what he claims to be true. Furthermore, unlike in standard proceedings – and contrary to the right to remain silent and not produce evidence against oneself, established in the Federal Constitution of 1988 – he cannot lie

at the risk of breaching the agreement. What is more, in addition to sharing his knowledge about the criminal practice to which he was party, the collaborator must tell the prosecution "everything he knows", even if those facts have nothing to do with the crime committed or with the criminal organization under investigation. This requirement is legally binding, as it is included in a clause in the agreement prepared by the prosecution. Thus, any omission of facts known by the collaborator is equivalent to lying, and grounds for termination of the agreement by the MPF. This would mean the collaborator losing the "benefits" agreed upon or obtained until then, while the Public Prosecutor's Office may still use the evidence collected, even to ensure a harsher sentence for the now former collaborator (FARIA, 2021). Hence, lying, erstwhile used as a defense technique anchored in the constitutionally guaranteed right to remain silent, now has legal materiality, and has become an extremely unfavorable option to the suspect/accused.

Another disadvantage for the defense, not only of the collaborator, but also of those he or she has incriminated, is the imposition of confidentiality on the agreement. In this case, the confidentiality serves exclusively to guarantee the success of the investigation, and has nothing to do with preserving the dignity of the person under investigation. This was clear from the first Operation Car Wash activities, when we witnessed information being leaked to mass media and social media outlets, which reproduced telephone conversations; arrests and coercive behavior carried out live, as well as statements from collaborators when they were entering into an agreement with representatives of the Public Prosecutor's Office. Law no. 12,850 of 2013, in opposition to the actions of the MP, states that the rights of collaborators are to have their name, qualification, image and other personal information preserved and not to have their identity revealed by the media, or to be photographed or filmed, without their prior written consent.

Even after the agreement has been ratified by the judge, the cooperation should remain confidential. The ratification of the agreement would be, at least in theory, the appropriate time to examine the information gathered, and to offer the parties the opportunity to reject or confirm it. What the research has verified is that, in practice, the discussion about the admission or rejection of this proof does not even occur at this stage, as can be seen by the countless writs of *habeas corpus* filed by defense lawyers, seeking the annulment of these hearings (FARIA, 2021)[27].

Also according to law 12,850, the confidentiality of the agreements only expires after the indictment has been received by the judge. The preservation of confidentiality until the indictment has been filed, making it impossible for the defense of the incriminated accomplices to participate in this crucial moment of evidence production was reviewed by the Federal Supreme Court (STF) in 2016.[28] This review established that the defense of the accused would be guaranteed access to evidence in

the investigation phase, provided that it such evidence has already been produced and formally incorporated into the investigative procedure. This instruction has been interpreted by attorneys in the Public Prosecutor's Office to imply that the confidentiality of the investigation is only lifted in relation to the attachment corresponding to the crime of the accused. This means that the defense does not have access to the entire criminal investigation, but only to those parts concerning his client. Hence, the defense of the accused is afforded only a partial view of what the prosecution knows. More recently, the *Vaza Jato* revelations led the Federal Supreme Court to shift the closing arguments of the defendant accused in the rewarded cooperation to the end of the process, allowing him to speak after the collaborator, thus guaranteeing his right to a full defense (DUARTE, 2020

When the "incentive" of "sentencing benefits" is not enough, the threat of arrest or prosecution – of the collaborator himself or of his family members or friends – may also be employed.

In general, the coercive nature of negotiation practices in criminal justice is highlighted in the literature, especially by critics of plea bargaining. For some authors, it results from the unequal power conferred on the prosecution (LANGBEIN, 1978; MA, 2002; CASSIDY, 2011). More precisely, the prosecution's negotiating power stems from its discretion, as it may choose not to press charges, even if presented with sufficient evidence (MA, 2002). Unlike in the US system, if pressing charges were legally compulsory in the Brazilian context, then from where would the Public Prosecutor's Office derive its bargaining power to propose the agreement?

As we saw previously, there is evidence that arrest or the threat of arrest is used as a strategy by the Public Prosecutor's Office to obtain the cooperation of those involved in white-collar crimes. Several critics consider this strategy comparable to the torture dealt by judges in the distant past to obtain a confession: the queen of proof (LANGBEIN,1978; VARGAS, 2012). It is also not unlike the police, when they make use of torture to uncover crimes. It can be argued in this case that the difference is only one of the degree of torture and not of type.

The threat of arrest is a strategy that gives leeway to the orientation adopted in courts, issued by the STF itself. That court has considered the agreement as a *legal transaction,* since such a construction does not allow the use of coercion or any event that alters the volition of those who are entering into it, where the threat or maintenance of arrest constitute circumstances that influence the collaborator's volition. However, this orientation has not caused any disruption in the system. It continues to operate, admitting both those who defend the possibility of striking an agreement even when the collaborator is under arrest (with the justification that mental freedom does not equate to freedom of movement), and some who claim that the consensual or voluntary nature of the agreement disappears under such circumstances.

Thus, the information obtained, often under duress, from the collaborator-come-accuser not only gives rise to the continuation of other investigations, but is also constructed as evidence, produced in secrecy and without the effective participation of the defense of those being cited. That is, "worse than the Inquisition" (FARIA, 2021).

The introduction of these agreements has therefore brought nothing new to the inquisitorial characteristics of Brazilian criminal procedure, since they are based on confession, on the *real truth,* with a prominent role now given to the informer and their information, with arrest and psychological torture used as punishment.

Concluding Remarks

We have concentrated on the prominent role played by the Public Prosecutor's Office and its shift in focus towards the repression of white-collar crime in Brazil in recent years. Having described the MP's initiatives that resulted in the 2013 Law, we propose the hypothesis that this law has triggered a significant change in the justice system regarding the category of proof, with grave consequences for the defendants' right to defense.

Given the way in which rewarded cooperation agreements are made, we have observed, in the case of Rio de Janeiro, that since the evidence has already been collected in the initial phase of the investigation (and, importantly, produced by the offender-collaborator himself), the court hearing, at most, is only intended to confirm the guilt of the collaborator and, above all, to apply criminal responsibility to the individuals identified and accused as part of the agreement.

What we have seen in the application of cooperation rewards, in the cases examined, is that if at this point there is any bargaining between the parties, the subject of that bargaining is exclusively the sentence for the collaborator, which often means "getting out of prison as soon as possible or not even entering it" (FARIA, 2021, p. 365), whereas, certain of the success of its efforts, the Public Prosecutor's Office benefits from the ability to sustain its charges, reduce its investigative workload and open new investigations, as well as obtaining the cooperation of other accomplices.

The methods introduced by Operation Car Wash, such as the production of attachments and the extinction of various procedural guarantees (still in force by the Constitution), such as: the presumption of innocence, the right to an adversarial hearing, the right to appeal and the right not to take evidence against oneself, among others, constitute inquisitorial practices par excellence. Similarly, the threat of arrest, imprisonment without trial, involving family members and illegal coercive conduct are also practices remarkably close to torture.

Unlike the American plea bargaining model in which the criminal fact is negotiated so as to obtain a more serious disqualification of the crime and a more lenient sentence, here the search for the *real truth* remains and it is obtained through confession, the incrimination of accomplices and the production of evidence by the collaborator. Thus, as we have tried to show, reiterating previous findings (LIMA; MOUZINHO, 2016) that the argument that rewarded cooperation is comparable to plea bargaining in North American criminal justice is not sustainable, since the former is applied based on specific inquisitorial characteristics of the Brazilian justice system.

We have seen a broadening of the functions of the Public Prosecutor's Office in the Brazilian criminal process and its substantial freedom to decide who should be investigated, who deserves to be a collaborator, who enters the criminal legal system and who will "benefit" from more lenient penal treatment. Thus, the citizenship deficit is widened by a perpetual unequal treatment of individuals subject to the authority of the courts, now also involving a party-political bias. Those who had hoped for a modernization of the Brazilian justice system have been met with a vastly different reality. Instead, they have found an institution that places itself above the legal system and the foundations of our democracy, together with a use of the law and the criminal justice system that has always suffered from a terrible reverence of the inquisitorial tradition and, more recently, has been held hostage by the political actions of its operators.

Notes

[1] Translator's Note: *colaboração premiada* - a leniency program which rewards a suspect or defendant for cooperating and turning state's proof to incriminate accomplices in the crime. The term rewarded cooperation or cooperation rewards is adopted in this article.

[2] Although we are aware of the profound differences between Brazilian legal culture and common law culture, we choose to translate legal terms to facilitate understanding for the English-speaking reader. At the same time, to mark this difference we retain the original term.

[3] TN: In the Brazilian legal system there is no degree of proof hierarchy, and the judge may order the inclusion of clear and convincing evidence. It is necessary to make this distinction clear, even though in this article we use both terms 'proof' and 'evidence'.

[4] This research resulted in Eduardo Ramos Júnior's master's dissertation entitled "The Public Prosecutor's Office and the Ten Measures to Combat Corruption".

[5] This research resulted in Vera Faria's doctoral thesis entitled "Changing the tyres with the car in motion! An empirical study of rewarded cooperation in the Rio de Janeiro state justice system".

[6] According to Article 128 of the Federal Constitution, the Public Prosecutor's Office (MP) comprises the Federal Public Prosecutor's Office (MPF) and the State Public Prosecutors' Offices.

[7] TN: *Garantismo* is a theory of constitutional guarantees or warrants developed by Luigi Ferrajoli, that has no equivalent term in common law.

[8] '*A máfia dos fiscais*' – The name given by the Brazilian news media to the event that revealed a corruption scheme among São Paulo local government inspectors, including the mayor himself at the time.

[9] In its daily engagements, the Public Prosecutor's Office does not usually act in a concerted manner with the police in the investigation (MISSE, 2010; VARGAS; NASCIMENTO, 2010; MACHADO, 2016; MOUZINHO, 2019).

[10] This understanding was largely due to the information provided by the traditional Brazilian media, which would later play a leading role in supporting the *Lava-Jato* operations in terms of shaping public opinion.

[11] The Anti-Corruption Law established the liability of legal entities for acts committed against the Public Administration. The CADE Law, on the other hand, modified the Brazilian Antitrust System. Finally, the Organized Crimes Law addressed such crime and regulated *cooperation*.

[12] The portal entitled *FEDERAL PP FIGHTS AGAINST CORRUPTION* was created by the Office of the Attorney General in December 2014, with the aim of becoming "one more tool for citizens to identify and take active action against corruption."

[13] In early 2021, the Federal Attorney General announced the end of the work of the original *Lava Jato* group (Curitiba). This measure was adopted during the administration of President Jair Bolsonaro, who had benefitted from the upshot of the Operation in the October 2018 elections.

[14] *Vaza Jato* (meaning Jet Leak) was the name given by the press to a series of reports by *The Intercept Brasil*, based on information leaked by a hacker, which reproduced the daily and frequent conversations between judges and prosecutors, agreeing strategies and adopting illegal measures.

[15] In the process of producing the truth in Brazilian legal tradition, the objective is to ascertain the 'real truth' and not that which is produced through debate between the parties.

[16] Former judge Sérgio Moro and former prosecutor Deltan Dallagnol were elected senator and federal deputy, respectively, in the 2022 elections. The latter was removed from office for violating the Clean Record Law.

[17] This consensus refers to acceptance by the parties, prosecution and defence, of an agreement whereby the accused accepts the charge and waives his defence in exchange for sentencing benefits.

[18] Brazilian legal jurists establish a distinction between *meios de prova* (means of proof) and *meios de obtenção de provas* (means of obtaining proof). While the former are procedures executed in the judicial phase (constituting the accusatorial process), the latter occur in the investigative phase (PRADO, 2014, among others)

[19] In the field research, however, the interviewees sometimes referred to rewarded cooperation as a *meio de prova*, and sometimes defined it as a *meio de obtenção de prova* (Faria, 2021).

[20] The Police Investigation is similar to the criminal discovery process, but without the participation or with a mitigated participation of the defence as it is considered that there are still no formal charges.

[21] The *cartório* (notary public office) is a structure that keeps and administers Police Investigation Reports and other documents that are granted public faith, i.e., that are recognized as trustworthy because police precinct clerks prepare them.

[22] Empirical studies that have analyzed the investigation phase executed by the civil police have shown that, in practice, the police produce evidence and proceed, indeed, to determine possible guilt through the Police Investigation Report (MISSE, 2010).

[23] When the collaborator confesses to his crimes and uncovers the criminal practices of the accomplices, the Public Prosecutor's Office, in return, offers him or her more lenient sentences (in kind and length) or a more favourable regime for serving the sentence (house arrest, for example).

[24] Until recently, these "sentencing benefits" often even lacked any legal grounding and were stipulated in the agreements for the judge's appreciation.

[25] According to Joint Guideline no. 01/2018, it is responsibility of the defense to present both the request for rewarded cooperation and the attachments with a detailed description of the criminal facts. Furthermore, each attachment generates a statement by the collaborator.

[26] In addition to the privileged social position of those being investigated, the author emphasizes the use of "more technologically advanced and hidden means of obtaining information, capable of breaking into the privacy of those being investigated, with the consequent spectacularization of the case."

[27] For example, Habeas Corpus no. 153.843/RJ ordered the repetition of all the procedural acts performed, as well as setting a time scale for the defense lawyers to analyze the information produced by the collaborators.

[28] Binding Precedent no. 14 of 2016.

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