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The legislator's strategic toolkit. The systemic construction of the New World Order

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Crimini dei colletti bianchi e strategia globale contro la corruzione

Crimes des cols blancs et stratégie globale contre la corruption

White Collar Crimes and a Global Strategy against Corruption

Vanessa Chiari, Giovana Portolese, Massimiliano Ruzzeddu*

Riassunto

Lanciata nel 2004 dalla Politica Federale del Brasile, l'operazione chiamata *Lava Jato* è diventata una task force al servizio di diverse istituzioni brasiliane in collaborazione con le organizzazioni internazionali. Le indagini sui reati, inizialmente incentrate sul riciclaggio di denaro, sono state ampliate per andare a coprire i reati di corruzione dei pubblici ufficiali e dei politici. In ogni caso i risultati della *Lava Jato* si basano su una precedente strategia delle autorità brasiliane volta alla promozione dell'allineamento della cornice legislativa e istituzionale alle raccomandazioni internazionali per combattere la corruzione e i reati economici. L'articolo ha inizio analizzando le politiche pubbliche brasiliane adottate per identificare legalmente i reati dei colletti bianchi e indirizzarne le fasi critiche come la prevenzione, il monitoraggio, l'indagine e la loro persecuzione, nonché il recupero dei proventi. In secondo luogo, indaga le possibili deviazioni delle azioni implementate dal ramo Curitiba dell'Operazione *Lava Jato*, che erano principalmente guidate dalla pressione dell'opinione pubblica e dall'interferenza ideologica. Inoltre vigila sull'impatto economico delle azioni nazionali anticorruzione confrontando i risultati dell'operazione brasiliana *Lava Jato* con il suo equivalente italiano *Mani Pulite*. Sulla base delle esperienze italiana e brasiliana, lo studio propone misure legislative aggiuntive a livello globale, volte a neutralizzare l'interferenza dell'opinione pubblica locale e degli interessi politici, con lo scopo di ridurre i risultati economici negativi generati da un'indagine erronea del reato e la persecuzione dello stesso. Il presente documento delinea il concetto di reato e quello di vittima in un contesto globalizzato, in linea con il programma 2030 dell'ONU.

Résumé

Lancée en 2004 par la Police Fédérale du Brésil, l'opération appelée *Lava Jato* s'est transformée en une force opérationnelle au service de plusieurs institutions brésiliennes en coopération avec des organisations internationales. Les investigations criminelles, initialement axées sur le blanchiment d'argent, se sont étendues aux allégations de corruption de fonctionnaires et politiciens. Toutefois, les résultats de la *Lava Jato* se basent sur une stratégie précédente des autorités brésiliennes pour promouvoir l'harmonisation du cadre légal et institutionnel dans le combat contre la corruption et la criminalité économique. L'article commence par l'exploration des politiques publiques adoptées pour définir la criminalité des cols blancs et orienter les étapes cruciales de prévention, détection, investigation et poursuite des infractions commises, ainsi que le recouvrement du produit du crime. Ensuite, il donne une vue d'ensemble de l'impact économique des actions anticorruption nationales en comparant les développements de l'opération brésilienne *Lava Jato* à l'équivalente italienne *Mani Pulite*. Fondée sur les expériences italienne et brésilienne, cette étude propose des mesures législatives supplémentaires d'orientation globale visant à neutraliser l'interférence de l'opinion publique et des intérêts politiques, et à réduire les conséquences économiques négatives générées par les enquêtes judiciaires malavisées et l'absence de poursuites des infractions commises. Cette étude approfondit également le concept de criminalité et de victime au sein d'un contexte globalisé, conformément à l'Agenda 2030 de l'ONU.

Abstract

Launched in 2004 by the Federal Policy of Brazil, the operation named *Lava Jato* evolved to a task force among several Brazilian institutions in co-operation with international organizations. The criminal investigations, initially focused on money laundering, enlarged to cover allegations of corruption of public officials and politicians. However, the outputs of the *Lava Jato* builds on a previous strategy of the Brazilian authorities to promote the alignment of the legal and institutional framework to the international recommendations for combating corruption and economic crime. The article starts by exploring the Brazilian public policies adopted for legally typify white-collar crimes and address its critical stages such as the prevention, detection, investigation and prosecution of offense, and the recovery of the proceeds. Secondly, it investigates the possible deviations of the actions implemented by the Curitiba branch of the *Lava Jato* Operation, which were mainly driven by public opinion pressure and ideological interference. Further, it oversees the economic impact of national anti-

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corruption actions by comparing the developments of the Brazilian operation *Lava Jato* to its Italian equivalent *Mani Pulite*. Based on the Italian and Brazilian experiences, the study proposes additional global driven legislative measures directed to neutralize the interference of local public opinion and political interests, and aimed at reducing the negative economic outputs generated through misguided criminal investigation and the prosecution of offense. This paper also works out the concept of crime and victim in a globalized context, in line with UN Agenda 2030.

Key words: white collar crimes; corruption; Brazilian Lava Jato Operation; Italian Mani Pulite Operation; globalization.

1. Introduction.

The Lava Jato operation was launched in 2004 by Federal Policy of Brazil with the objective of investigating alleged money laundering crimes related to the financial transactions carried out by central persons of the clandestine foreign exchange market in Brazil. Atypical financial movements were detected by the Financial Activities Control Council of the Ministry of Finance (COAF/MF), which is the Brazilian Financial Intelligence Unit (FIU), structured within the country's domestic alignment initiatives with the global strategies Anti-Money Laundering and Combat Financing of Terrorism (AML/CFT).

This operation eventually evolved to become a task force with the participation of the Federal Public Ministry and with the support of judicial system. Criminal investigations, initially aimed at money laundering, were expanded to cover allegations of corruption among Petrobras officials, agents and political parties, and large Brazilian contractors who were overbilling works contracted by the state-owned company. In addition to corruption, other criminal conduct has been identified, such as: tax evasion, currency evasion, fraud in international trade operations. The actions carried out by the aforementioned task force included international cooperation mechanisms, which allowed the exchange of information among law enforcement agents, international legal assistance for the execution of warrants and the repatriation of assets placed abroad.

In this scenario, this article aims to answer the following research question: What were the main normative, political and economic impacts of Brazil's adherence to the international system to fight money laundering crimes, which go beyond national borders and the *Lava Jato* operation in Brazil?

The dialectical approach is adopted and the bibliographic review as a research technique. The work is divided into four parts. In the first one, the description of the global strategy Anti-Money Laundering and Combating the Financing of Terrorism and the insertion of Brazil in this scenario is presented. In the second part, some legal and political reflections related to Operation *Lava Jato* are discussed. Afterwards, the economic impact of the Brazilian *Lava Jato* operation in the third part and of the Italian *Mani Pulite* operation are analyzed and, finally, the conclusions of the work are presented in the fourth and ending part.

2. The International AML/CFT Scenario and the Alignment of Brazil.

The *Lava Jato* operation is part of a vast network of international agreements which in the last 20 years has been engaging the international community in the construction of standards and routines to deal with the detection, prevention and combat of transnational crime. This constellation of initiatives embodies a plurality of agendas that point to the progressive convergence of domestic regimes in the

global fight against money laundering, terrorism financing and other related crimes, such as the crime of corruption. The objective of this topic is twofold: on one side, present the evolution of the international scenario, in which several initiatives have been interconnecting among a number of international organizations and institutions (1); the aim is setting a global platform that combats transnational organized crime; on the other, understand how the insertion of Brazil in this affected developments of *Lava Jato* operation.

In this process of evolution in the international scene, a possible milestone might be the introduction of the definition of money laundering in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. Better known as the Vienna Convention, in addition to the concept of money laundering – this tool set the recommendation for the criminalization of drug trafficking in the domestic legislation of the signatory countries, as well as established mechanisms for coordinating national authorities for the exchange of information and international cooperation. Building upon this agreement, the field of action of the international community has been widening and interconnecting in order to encompass other themes and contents. For instance, in 2000, the United Nations Convention on Transnational Organized Crime (UNTOC), signed in Palermo, incorporated into the system the organized crime; furthermore, the Convention extended the number of predicate offenses for money laundering, established the obligation of banks and financial institutions to register suspicious transactions, and considered the creation of Financial Intelligence Units (FIUs) to implement the exchange of information.

Corruption in all its forms, in particular, only entered into the list of predicate offenses for money laundering in 2003, in Merida, in the United Nations Convention Against Corruption (UNCAC). Among the other positive results of this agreement, there is the introduction of the bases for the recovery of assets diverted abroad, the strengthening of the idea of creating and effective operationalization of FIUs and the adoption of reinforced standards to systematize the use of special investigative techniques.

This set of conventions forms the foundation for the construction of the global architecture to fight against Money Laundering (ML) and Terrorist Financing (FT). In parallel, other key pieces in the construction of this building have been added over time. The first of these, contemporary with the Vienna Convention, was the establishment of the Financial Action Task Force (FATF) in 1989, an intergovernmental institution, *whose main objective is establishing international standards and benchmarks for domestic reforms, in order to develop a comprehensive Anti-Money Laundering and Combating Financing of Terrorism (AML/CFT) and other related crimes strategy.* From 1990 on, the FATF's activities involved the establishment of recommendations, which cover “the criminal justice system, the financial sector, certain non-financial businesses and professions, transparency of legal persons and arrangements, and mechanisms of international cooperation” (International Monetary Fund, 2017). The latest version of these recommendations, as of 2012, added nine new recommendations to the pre-existing 40. Then, in 2013, the FATF adopted the common methodology for assessing technical compliance with its recommendations and the effectiveness of

AML/CFT systems, an essential tool for evaluating compliance with the international standards.

The work developed by the Organization for Economic Cooperation and Development (OECD) based on the recognition of complementarity between AML, anti-corruption and anti-tax-related crimes is another pillar in the construction of international standards. In 1997, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was signed, an important tool to guide the signatory countries' conduct in dealing with corruption in international business transactions by bribery of public servants. Subsequently, in 1998, the G7 Finance Ministers supported the integration of AML actions with the tax information exchange mechanisms, initiating a fruitful dialogue between the OECD and the FATF. These initiatives caused the issues of civil servants' corruption and tax crime to be included in the AML/CFT strategy; this boosted the cooperation of tax authorities with other law enforcement authorities in combating serious crimes against the integrity of the financial system. The reflection of this initiative was the insertion of tax crimes in the focus of the revised FATF recommendations (2012), definitively sealing the inclusion of these crimes in the list of predicate offenses of money laundering (2).

Still in the process of building international standards and principles, it is worth mentioning the confluence of the actions taken by the national FIUs around an informal international network for cooperation and exchange of information, influenced by FATF recommendations, in addition to the resolutions of the UN Security Council, and the declarations of political will of the G7 and G20 (3). The strategy gave rise to the Egmont Group, which bases its actions on the principles of trust and

flexibility, guaranteeing the protection and confidentiality of information circulating among FIUs. The Egmont Group system requires quick provision of requested information, spontaneous exchange of information and confidential use of information.

In addition, the transfer of the information for other purposes is only admitted with the prior consent of the FIU that provided it. FIUs operate in two dimensions: international, involving the symmetrical exchange of information between FIUs or between FIUs and international organizations and/or foreign crime agencies, such as Interpol and the European Anti-Fraud Office (OLAF). The internal one, in which the FIUs serve to optimize AML/CFT coordination of actions and exchange of information with other domestic law enforcement agencies. The extent of these dimensions depends on the provisions of domestic law, and a fundamental principle is the weighting between the right to privacy and the need for information to be used by other institutions.

The AML/CFT international fight must be seen as a dynamic movement that continues to expand the sphere of international coordination of activities, encompassing a growing number of initiatives and international institutions and bodies. The main result in the last two decades has been the creation of a set of standard criteria to define any conduct as a 'crime' and start international cooperation among states.

In this sense, another pillar has been inserted into the system, with the commitment of the International Monetary Fund (IMF) to integrate AML/CFT assessments into its work routine and disseminate capacity building actions. The participation of the IMF has also been significant in the mutual evaluation processes performed since

the introduction by the FATF in 2013 of the common methodology for verifying the effectiveness of AML/CFT Systems.

The World Bank Group's engagement with the United Nations Office on Drugs and Crime (UNODC) in the Stolen Assets Recovery Initiative (StAR), which began in 2007, has significantly broadened the anti-corruption landscape. Evidence shows that in white collar crimes, the possibility of blocking and/or recovering diverted assets is an inhibiting factor for criminal practice, not to mention the plea bargaining's role in having sentenced criminals return the assets (World Bank Group, United Nations Office of Drugs and Crime, 2011, p. 6). The StAR strategy focuses on helping developing countries recover their assets that were illegally transferred abroad. Another positive aspect of the initiative is its alignment with the commitments made at the Doha Declaration on Financing for Development (United Nations, 2018), which focused on the mobilization of domestic financial resources to promote development. In this perspective, the StAR approach addresses the corruption problem in order to involve Illicit Financial Flows (IFFs), an emerging issue in the United Nations (UN) Addis Ababa Agenda (United Nations, 2015), which later reflected on the adoption of the UN 2030 Agenda for Sustainable Development. In this context, the need to reduce or even eradicate IFFs and also all forms of corruption and bribery was targeted amongst the key actions under the so-called UN Sustainable Development Goal 16 (SDG-16).

The experience accumulated in the StAR mechanism reveals that the recovery of assets abroad is a deterrent for criminal activities, increases socially available financial resources, and encourages, together with other moral and financial

considerations, the respect of the law. Concerning the recovery of assets related to the IFFs, requesting country's interests are generally different from the receiving country. As a matter of fact, the recovery of assets is based upon Merida Convention (UNCAC), which do not state any reward for the country that returns an asset; consequently, the only way to have those country return illegal assets, is to base upon their international reputation (World Bank Group, United Nations Office of Drugs and Crimes, 2011, p. 6).

In general, the countries that receive IFFs are global financial centers (World Bank Group, United Nations Office of Drugs and Crimes, 2011, p. 7), and lack of transparency in their financial policies might generate a negative impact on the attractiveness of licit investments. Therefore, just basing upon the reputational issue, international nongovernmental organizations such as Transparency International (TI) and Tax Justice Network (TJN) have advocated a paradigm shift in assessing the integrity of any country's financial system, and a possible correlation with corruption in other countries. Traditionally, the indices for measuring the phenomenon of corruption re based upon the perception of the misuse of public power for private benefit (Transparency International, 2017).

Now, this new proposal focuses on the question: "What are the drivers of corruption - and where?" (Cobham, Jansky, 2017, p. 5) thus, the point is to assess how much the opacity of a country's financial system (Tax Justice Network, 2018a) contributes to the FFIs. The TJN, when comparing the indexes (CPI x FSI) (Tax Justice Network, 2018b), suggests that countries such as Switzerland, USA, Germany, Japan and Netherlands, which perform very well in the corruption perception

index, fail to comply with the transparency rules; this might cause corrupt flows elsewhere” (Cobham, Jansky, 2017, p. 5).

The insertion of the FFIs into the debate on AML/CFT and anti-corruption measures raises the question of overlapping the channels used to hide the financial result of the criminal practice and to cover up certain financial transactions. Cobham & Yansk, identified four main groups of IFFs: “1 – Market/regulatory abuse, 2- tax abuse, 3 - abuse of power, including the theft of state funds, 4 – proceed of crimes” (Cobham, Jansky, 2017, p. 7); as a matter of fact, IFF phenomena are not only related to the capital typologies, but also to the transaction channels. Thanks to this broader view of the phenomenon, there has been growing pressure in the international fora (UN, OECD, EU) to broaden the focus of AML/CFT measures to encompass the aggressive rate-voidance practices used by multinational companies. For the time being, the speech and language are still very diplomatic, but to have the problem acknowledged in the political sphere and then convert it into concrete actions, the pressure is high.

In relation to the international scenario outlined, it is possible to affirm that Brazil broadly aligned with the AML/CFT international measures; as a matter of fact, Brazil is not only a signatory to the conventions, took part in the aforementioned initiatives, but also maintained a broad network of multilateral and bilateral cooperation agreements and legal assistance among states (4). The two Brazilian reference institutions that are in charge of monitoring and swapping financial information legal assistance, as well as of implementing the AML/CFT domestic strategy are: The Financial Activities Control Council (COAF) created in 1998 (5), within the Ministry of Finance. COAF acts as a

Brazilian FIU and is integrated into the FATF, either directly or through Brazil’s participation in the Latin American Financial Action Group (GAFILAT); furthermore, COAF being is linked to the Egmont Group FIU network. The second Brazilian domestic reference is the National Strategy for Fighting Corruption and Money Laundering (ENCCLA), created in 2003 under the supervision of the Ministry of Justice. The function of ENCCLA is to articulate, coordinate and align the actions of more than 70 public sectors (6) that have direct and indirect attributions in AML/CFT actions, with the collaboration of civil society.

Brazil integration in international initiatives, guided legislative and institutional changes as well as the internalization of minimum standards for the organization of a domestic AML/CFT strategy. In addition, these international initiatives provided a holistic vision for the design of national public policies and gave Brazil access to a wide network of financial information exchange and asset recovery. These foundations were essential both in the formation of the *Lava Jato* task force and in conducting the investigations. Without them, the results achieved in the operation (7) and the achievement of the 567 requests for international legal cooperation in criminal, civil and extradition matters involving 53 different countries would not have been achievable (Giacomet, 2018).

3. Legal and political impacts of *Lava Jato* Operation.

Another important pillar of the *Lava Jato* operation was the legislative changes in the criminal sphere implemented to bring the Brazilian regime into line with international standards in the fight against money laundering, terrorist financing and related crimes. On this subject, it is important to cope with

some of these changes by taking into consideration their political consequences. Considering that the crimes investigated by the Lava Jato operation, involved corruption, money laundering and conspiracy, we are now going to analyze only those specific changes.

The crimes of money laundering were typified in Brazil in 1998, through Law 9,613, sanctioned by former President Fernando Henrique Cardoso. This Law states that crimes against public administration, including corruption, may be related to money laundering. For this reason, the broad changes of this norm, promoted by Law 12,683 of 2012, which abolished the exhaustive list of predicate offenses, did not affect this relation with the crimes of active and passive corruption.

In this line, it is important to emphasize that the legal definitions of crimes of active corruption (practiced by the third briber) and of passive corruption (practiced by the public official or corrupted political agent), have been the same since the original wording of the Brazilian Penal Code of 1940. In November 2003, Law 10,763 entered into force, which increased the sentences of imprisonment for both offenses to the limits of 2 to 12 years. This law was sanctioned by former president Luiz Inácio Lula da Silva. There was, however, no change in the legal definition of the crimes that remained valid (8).

It would be a mistake to neglect the problems in the application of criminal law and the resulting distortions, although it is acknowledged that there is a certain degree of standardization. This is because the selective application of norms provokes, as a side effect, the concealment of a wide criminal illegality that remains unpunished. The state repression apparatus chooses those who will be criminalized and those who will be spared from the

alleged offenders. Thus, the existence of the penal system, in the way it was conceived, ends up serving as a mechanism for maintaining the structural inequalities of society (Pavarini, 2000, p. 352).

With this caveat, it can be observed that the most controversial situations, at the normative level, involved Law 12,850, of 2013, sanctioned by former President Dilma Rousseff. This law focused on the criminal organization (9) by establishing a series of new procedural and investigative procedures in the Brazilian legal system (10). The main focus of the Law was the fight against money laundering and drug trafficking.

It is important to note that, in addition to Brazil's adherence to international control systems, these normative changes are also justified by the need for expanding the sense of insecurity present in societies, including Brazil. This social panic is fostered by the mass media that exploit criminal actions fostering fear in contemporary societies. On the other hand, the sense of insecurity of the citizens demands for more repressive actions. Thus, the logic of positive special prevention, with a focus on the social reintegration of the offender, is replaced by the logic of their incapacitation through an ideology of fighting the enemy (Pavarini, 2007, p. 16).

Thus, although Law 12,850/2013 is appreciable in several respects, the different treatments among suspected, are the consequence of the criminal justice system in the process of secondary criminalization. *It* is at this point that the dimensions of politics and ideology distort the main purpose of the criminal law. To clarify and express this criticism, some measures taken in connection with the *Lava Jato* operation will be mentioned.

Brazilian law is very clear about the information secrecy obtained through telephone interceptions

authorized by the judicial authority. However, in the course of *Lava Jato* Operation, Judge Sérgio Moro, responsible for authorizing the requests of the task force of said Operation in Curitiba, decided to innovate outside the legal and constitutional dictates. One of its innovations was the intentional transfer of information obtained through telephone interceptions, obtained outside the authorized period, to the main broadcasting companies, especially Rede Globo de Comunicações. The most striking example of this new set of rules, was a conversation between then-President of the Republic Dilma Rousseff, and her predecessor Luiz Inacio Lula da Silva. In this conversation, Dilma Rousseff combined the delivery of a term of office to former President Lula that would occupy the Chief of Staff of his government. Without any support from the Federal Supreme Court, mass media achieved the tapes of this conversation and publicly diffused it.

The scandal was so big that the President, although democratically elected, had no choice but resign.

Although that conversation took place several months before and Lula was not yet the object of legal prosecution at that time, mass media used the audio to give the impression to the public that Dilma Rousseff's intention was to grant him the legal immunity related to that office.

Thus, although the Operation had unfolded in different municipalities, such as Brasília, Curitiba and Rio de Janeiro, it was the actions of the Curitiba task force that had the greatest media repercussion. Such television coverage eventually influenced the country's political course, especially the impeachment of former President Dilma Rousseff. What is most interesting is the perception that the most important politicians involved in corruption scandals not only supported Dilma Rousseff

impeachment process but also assumed the leadership of the Federal Executive Branch through the rise of their political group. Thus, the political-mediatic use of the Operation, through members of the task force, removed a politically awkward president, but without any involvement in scandals of corruption or attempts to obstruct justice, by a political group trained in this type of maneuver. The political bias of members of the Operation put the Country in the hands of a group of people investigated for various crimes of corruption.

In this respect, the criticality re-emerges of the intrinsic selectivity of the criminal justice system, which promotes an abyssal inequality of treatment according to the different interests at stake. From this scope, criminality is no longer an ontological quality of certain behaviors and of certain individuals, but is a label attributed to certain individuals by means of a double selection: "firstly, the selection of the assets protected from criminal deeds and the definition of the criminal deeds on these goods, described in the penal typologies; secondly, the selection of individuals who are target of stigma for perpetrating that kind of deeds" (Baratta, 2002, p. 161).

Another controversial institute, introduced by Law 12,850/2013, was the *plea bargain* agreement. Such an institute appears in article 4 of the said Law, providing that: "the judge may, at the request of the parties, grant judicial pardon, reduce by two thirds (2/3) the custodial sentence or replace it with restrictive of the rights of those who have collaborated effectively and voluntarily with the investigation" and with the criminal process "provided that at least one of the results listed in the device, including the recovery of defaulted values and the identification of other co-authors and your crimes".

In the context of the *Lava Jato* Operation, a series of preventive imprisonment were enacted during the investigations. Some of them, without there being a more detailed analysis on the necessity of ordering the precautionary measure, extending for an extended period of time that, in some cases, exceeded a year. At that time, the key collaborations were negotiated between the defense teams and the task force.

Several defendants opted for the award-winning collaboration in exchange for a significant reduction in sentence or total exemption from it. As a general rule, the main beneficiaries of the *plea bargain* agreement were those with the greatest economic advantages, such as the directors of Petrobras.

While recognizing the importance of the institute of *plea bargain* agreement for understanding how to structure a highly complex criminal organization, some boundaries need to be established in order to avoid distortions. The art. 4, paragraph 6, of Law 12,850/2013, establishes that “the judge will not participate in the negotiations between the parties for the formalization of the collaboration agreement, which will take place between the police officer, the investigated and the defender, with the manifestation of the Public Prosecution Service or, as the case may be, between the Public Prosecutor's Office and the investigated or accused and its defender”.

In Brazilian law, therefore, negotiation on *plea bargain* agreement occurs between the police authority and the investigated or between the Prosecutor's Office and the investigated, and is subsequently approved by the magistrate. However, there are no minimum legal parameters for the conduct of this type of negotiation that even admits the complete exemption of the deprivation of

liberty provided for by law for the employee. Considering that the focus of the *Lava Jato* Operation was mostly focused the participation of political parties, the executives of companies that obtained the greatest economic advantages from acts of corruption were generously benefited from expressive reductions in sentences and exemptions in exchange for the agents, with less participation in said economic advantages. This lack of legal parameters, coupled with the lack of impartiality and common sense of some responsible for the operation *Lava Jato*, have generated deep distortions in the institute of the *plea bargain* agreement.

In addition, art. 4, paragraph 16 of the aforementioned Law, establishes that “no conviction shall be pronounced on the basis only of the statements of collaborating agent”. This norm was not respected by the magistrate responsible for judging corruption cases involving *Lava Jato* in Curitiba.

Thus, while it is recognized that international cooperation in the fight against money laundering and corruption is a step towards criminal prosecution and the prevention of such offenses, many improvements will need to be made at the regulatory level in order to preventing abuses of power, distortions of legal institutes and the political use of these mechanisms as a form of persecution of the enemy on occasion.

4. The Economic Impact of *Lava Jato* and *Mani Pulite*.

The close correlation between corruption and its economic impact is difficult to establish. The first difficulty stems from the methodological and operational challenge in conducting a qualitative assessment of corruption (United Nations, 2010). The reason is essentially one: corruption, consisting

of a variety of illegal thus not valid behavior and therefore hidden from the public, escapes the control of authorities and hinders scientific analysis. In addition, another limiting factor is the strict and objective definition of the phenomenon of corruption, which stems mainly from the asymmetry in the criminalization of offenses of corruption and the possible inconsistency between domestic legislation and international standards. In this sense, the following questions arise: What kind of conduct does the phenomenon of corruption cover? Only the practice of bribery of public servants? Or should also include the exchange of favors, the recommendations, the tax evasion, and the more recently discourse of the international community regarding the tax avoidance of multinationals? To these reflections is added the empirical evidence that cultural and institutional aspects influence the practice of corruption (Gonçalves, 2017, p. 24), because in a corrupt society, most of these practices are not perceived as a deviation from behavior (Enste, Heldman, 2017, p. 27). For example, in a country where family and community ties prevail over citizenship (Bansfield, 1958) ties, asking a politician or a bureaucrat for a favor can be considered as an appropriate rule of conduct.

These problematic aspects have favored the use of indirect methods to measure the dimensions of corruption, whether based on perceived corruption criteria, the use of secondary statistical data, or constructed from sampling or official data reported in criminal justice systems (11). In all cases, the result is that the application of these methods does not allow for the true representation of the real size of corruption crimes. Gonçalves in a paper presented to the Institute of Economics of the Federal University of Rio de Janeiro no. 23/2017

(Gonçalves, 2017, p. 23), adds that this difficulty in measuring the practice of corruption undermines the scientific evaluation of the relationship between corruption and the economic performance of national and corporate economies.

In addition to the question of the limitation in establishing a direct link between corruption and its economic effects, from a theoretical point of view, the analysis of the economic impact of corruption is ambivalent (Enste, Heldman, 2017, p. 23), opposing two theories that correlate state bureaucracy with economic performance. One of them understands that corruption has a “sand in the wheel” effect, reducing the economic efficiency of both countries and companies; while the other sees corruption as a grease-in-the-wheel lubricating effect, favoring economic actors with a greater competitive advantage who, through bribery of corrupt public agents, circumvents the inefficiencies of public policies (Gonçalves, 2017, pp. 17-18). And in the absence of a reliable source of data and appropriate and accurate methodology, the research of Lisciandra and Millemaci (2017), which reduces the authors' performance to simulate the effects of corruption on the production of wealth, is emblematic.

In this sense, Gonçalves' work (2017) is remarkable, since it performs a thorough review of the empirical results about the effects of corruption (“grease vs. sand in the wheel”) on the economic growth of countries and companies, considering three different and complementary approaches: A macroeconomic, from aggregates and indicators of performance of countries, such as income, investment, employment, productivity, etc. Another microeconomic one, based on performance indicators of companies such as billing, profit, employment, innovation, productivity. And a third

meso-economic approach, which employs both preceding indicators, correlating them with the level of governance, the quality of institutions, and the political regime.

In a close synthesis, the conclusions of Gonçalves research can be thus arranged. In the macroeconomic perspective, the complexity of the economic growth process and the variety of statistical and econometric methods employed limit the scope of more robust scientific evaluation. The microeconomic approach reveals a great deal of heterogeneity, depending on economic sectors and countries, and it is not possible to establish a trend regarding the positive or negative effect of corruption on the performance of countries and companies. According to the author's evaluation, the papers analyzed under the meso-economic approach suggest a positive relationship between corruption and economic growth in countries with low degrees of political freedom and institutions of lower quality. And, on the other side, a negative relationship between corruption and investment,

fueled by low levels of governance and respect for the rule of law (Gonçalves, 2017, p. 19). These results may serve to further reflection on the contraposition of the economic impact of the *Lava Jato* operation in Brazil and the *Mani Pulite* operation in Italy.

Another interesting counterpoint, in spite of being conditioned by the perspective of the “sand in the wheel” theory, is presented by Enste & Heldman. In the report of the Cologne Institute for Economic Research, the authors justify their position on the grounds that, in addition to ethical issues linked to corruption, the economic advantages derived from bribery of public agents tend to be minimized in complex bureaucratic processes. Based on the analysis of empirical studies, and aware of the influence that endogenous and causal factors have on the measurement of the effects of corruption on the economy, scholars evaluate the main consequences of corruption on a group of seven variables, according to the following table (Enste, Heldman, 2017, p. 24):

Consequence	Effect of corruption
Total Investment	Strong
FDI and Capital Inflows	Strong
Foreign Trade and Foreign Aid	None
Gross Domestic Product	Unclear due to problems with endogeneity and choice of variables
Inequality	Unclear direction of causality and impact of other influences
Government Expenditures and Services	Unclear, depends on dataset
Shadow Economy and Crime	Unclear direction of causality

Table 3: *What are the main consequences of corruption?*

As in other works, the analysis of the empirical results does not always correspond to the theoretical arguments that corruption has economic effects. However, in spite of these limits, it is worth mentioning a possible dialogue between the conclusions of Enste & Heldman's research and the results of Gonçalves. Both point out the

differences in the impact of corruption on the economy due to the stage of development of the countries and the quality of institutions. In terms of foreign direct investment (FDI) and capital flows, the two studies show a more significant impact of corruption in developed countries than in developing countries (Enste, Heldman, 2017, p. 25;

Gonçalves, 2017, p. 19). From the point of view of economic growth, both corroborate the theoretical argument that corruption has an impact on the economy. Research concludes that corruption functions as “grease in the wheels” in countries with weak institutions, and as “sand in the wheel” in countries with strong political institutions.

Enste & Heldman (2017) further add the perspective of sustainable development in analyzing the effects of corruption on economic growth, stating the negative correlation between corruption and sustainable development. This correlation is also supported by Dib, which, in a theoretical paper based on the evidence prepared by the Federation of Industries of the State of São Paulo (FIESP), identifies seven obstacles to sustainable economic growth caused by corruption: increased cost of economic projects, uncertainty (political, juridical, social and economic), reduction of public revenues, reduction in tax collection, inefficiency in the allocation of resources and deformation of social and development policies.

Thus, in spite of the lack of general theories about macroeconomic and microeconomic performance determinants due to corruption, which discourages generalization and prevents direct measurement between corruption and economic performance, the fact that corruption negatively affects the economy of a country nation is accepted by both literature and public opinion. In practice, corruption reveals a situation where political groups, civil servants and entrepreneurs manage public cash flows that end up in the hands of a small group of private individuals. This implies the impoverishment of the community, both directly, because it is deprived of economic resources, and indirectly, by virtue of decisions that allow the dysfunctional allocation of productive resources.

In relation to Brazil and Italy, countries where corruption is a historical problem, it is not uncommon to find journalistic recompilation works such as those by Barbacetto et al. (2012) and Baptista (2017), who clearly attribute part of the economic problems to corruption, respectively in Italy and in Brazil. The problem, as already widely explored, is to find a reliable and adequate scientific methodology for measuring this loss and quantifying it.

As for Italy, the scientific uncertainty of the correlation between corruption and economic performance is evident when one considers the historical series of gross domestic product (GDP) growth in recent decades (12). As can be seen, there is no regularity in the long-term trend that can be attributed to corruption: while corruption is a historical phenomenon that depends on cultural and remote influences over time (Ginsborf, 2003, p. 179), the GDP suffers very wide variations for reasons attributable to the context oil shock of 1973, rather for internal dynamics.

In this sense, the economic dynamics that followed the famous 1992 *Mani Pulite* case (also known as *Tangentopoli*) are very interesting. The historical data show that in 1993 there was a negative performance of the GDP, and it is reasonable to conclude that it was due to the Tangentopoli Operation, which caused the Italian currency to depreciate, as a result of the negative image of the country in the international sphere, as well as in the difficulties faced in complying with the macroeconomic parameters established by the European Union. This case, however, confirms the scientificity lack of the empirical results, since it only shows an indirect interference of the corruption in the economy, because the negative result was more because of the negative image than by the corruption itself. It is

also important to note that as early as 1994 Italian GDP began to recover and continues to trend in successive years, despite judicial scandals and, according to the media, corruption in Italy is far from being eliminated. The insignificant variation of Italian GDP in relation to corruption would corroborate the conclusions of Italian GDP variations that would confirm the conclusions of Enste & Heldman (2017, p. 25; Gonçalves, 2017, p. 19) and Gonçalves that corruption would act as “grease in the wheels” in countries with weak political institutions.

In Brazil, the inference that the *Lava Jato* Operation would have negatively impacted the economy was disseminated in the journalistic field and was the object of empirical analysis in several works, namely focusing on the performance of the engineering and construction (E&C) and oil and gas sectors. The only references to the impact of *Lava Jato* on Brazilian GDP are due to evaluations conducted by two consultancies, Tendências Consultoria and GO Associados, which respectively estimated the fall in GDP to be around 3.8% and 3.6% in 2015 and 1.8% and 1.2% in 2016 (Oliveira, 2016). The forecast is criticized by Pinheiro (2016), because it is built on data from the “retraction of investments in Petrobras, whose impact on GDP is then enhanced by various multipliers”. Once again, the difficulty in measuring the direct economic effects of corruption, due to the use of indirect methodology, appears, and it is not possible to correlate the impact of corruption on GDP with the level of maturity of Brazilian political institutions.

Under more scientific approach, it is worthy to highlight two of the most consistent studies regarding the analysis of the corruption phenomenon in Brazil and its co-relation with the *Lava Jato* Operation. The first of them, widely

commented above, is the Gonçalves’ one, who after a comprehensive review of economic literature on the impact of corruption in the economic growth of countries and companies, confirmed the hypothesis that corruption in the E&C sector in Brazil operated the effect “grease in the wheels”, increasing the economic performance of contractors engaged in acts of corruption. The second one, builds on a list of political corruption scandals in Brazil broadcasted by the media and analyzes the dynamics in the structure of political corruption networks in the country. Although this study did not address the possible economic impacts of political corruption in the economy, it demonstrated the modular structure of the network and the strong linkage among different corruption scandals. This allowed the identification of a number of agents which arguably were central nodes of the corruption network in Brazil, which could boost further research on the corruption phenomenon in the country.

From all of the above, the only conclusion that can be drawn regarding corruption and its economic consequences, both in the global experience and in those in Brazil and Italy, is that although the fight against corruption is a State and civil society duty, available scientific data for the measurement of the phenomenon are still scarce to guide the formulation of consistent public policies.

5. Conclusions.

As shown in this work, several important advances have been made in the area of international cooperation in combating money laundering crime, along with the crimes that precede it. In this process of evolution on the international scene, the definition of money laundering introduced in 1988 in the United Nations Convention against Illicit

Traffic in Narcotic Drugs and Psychotropic Substances represented a milestone in this mechanism for controlling transnational illicit acts. The ensemble of conventions that followed formed the foundation for building the global architecture to fight against crimes that lead to the use of Money Laundering (ML) and Terrorist Financing (FT) instruments. In parallel, other key pieces in the construction of this building have been added over time, among them is the constitution of the Financial Action Task Force (FATF) in 1989.

However, one cannot fail to consider that the whole mechanism of formal social control, which is based on the support of the criminal justice system, naturally tends to undergo political influences, sponsored by the economic interests that control the management of nations and of international organizations. This influence of political, economic and ideological interests allows the adoption of selective measures within the justice system. In this way, individuals and distinct interest groups receive differentiated, more beneficial or more harmful treatments, depending on the interests at stake.

This problem had already been diagnosed by critical criminology in the 1980s. In Brazil, the *Lava Jato* Operation used the whole international cooperation apparatus to combat money laundering and corruption crimes involving political parties, state enterprises and private companies. However, it ended up interfering in the political and economic direction of the country, possibly unfavorably to national interests. This intervention was made especially by measures of dubious legality or even illegal, in addition to the use of mass media groups as diffusers of tendentious versions of the facts. In addition, the plea bargain, incorporated in Brazilian legislation, needs to be improved in the sense that some limits are established in negotiations with

employees. This is because Brazil adopts the civil law system, which has strict law in its main source of criminal law.

Thus, while it is recognized that international cooperation in the fight against money laundering and corruption is a step towards criminal prosecution and the prevention of such offenses, many improvements will need to be made at the regulatory level in order to prevent abuses of power, distortions of legal institutes and the political use of such mechanisms.

With regard to the economy, as had already happened in the Italian *Mani Pulite* and in the Brazilian *Lava Jato* operations, it is not possible to be said that there is strong scientific evidence that these operations have had a direct negative impact on the economy, as scientific studies on the subject are not only scarce but also based on indirect data. It is possible that the improvement of external control mechanisms of the institutions that integrate the criminal justice system can contribute to reduce the acts of abuse of power and the ideological bias of the agents. In addition, measures to curb media manipulation of information might be useful by avoiding indirect economic spillovers due to the negative image of the country's integrity and the efficiency to combat corruption and money laundering crimes.

Notes.

(1) In order to mention some of them: United Nations (UN), Financial Action Task Force (FATF), Organization for Economic Cooperation and Development (OECD), World Bank Group (WBG), International Monetary Fund (IMF), Egmont Group.

(2) Information available at: <http://www.oecd.org/corruption/anti-bribery/>

(3) Information available at <https://www.egmontgroup.org>

(4) The network of conventions and treaties signed by Brazil is available at: <http://www.justica.gov.br/sua-protecao/cooperacao-internacional/cooperacao-juridica-internacional-em-materia-penal/acordos-internacionais>

(5) Federal Law 9,613, 3rd March 1998, available at: https://www.planalto.gov.br/ccivil_03/Leis/L9613.htm, articles 14 to 17.

(6) The list of ENCCLA's integrating institutions are available at: <http://enccla.camara.leg.br/quem-somos/gestao>

(7) Lava Jato Operation data, adjourned up to August 2017, is available at: <http://www.pf.gov.br/imprensa/lava-jato/numeros-da-operacao-lava-jato>

(8) The crime of passive corruption, provided for in art. 317 of the Criminal Code, is practiced by the public official and consists of "requesting or receiving, for himself or for another, directly or indirectly, even if outside the function or before assuming it, but because of it, improper advantage, or accept promise of such an advantage". If there is no public function or "causal relationship between it and the fact imputed, one can not speak of a crime of passive corruption, and there may be, residually, any other crime". As for the undue advantage element, it is important to emphasize that it was not necessarily defined as an asset advantage, and may be of a different nature, as long as it is unlawful. It suffices, for its configuration, that "it is enough to corrupt the official venal" and that the action "translates trade of the function, that is, there must be public service merchandise". (Bitencourt, 2012, pp. 113-114). Active corruption, in turn, provided for in art. 333, of the Penal Code, consists of "offering or promising an undue advantage to a public official, in order to determine him to practice, omit or delay an ex officio act". It is required for the configuration of the crime that "the act whose action or omission is intended to be understood in the specific functional assignments of the public servant targeted". Thus, if the act not intended by the individual is not "within the competence of the official, any other crime, but certainly not that of active corruption, may be identified." (Bitencourt, 2012, p 248).

(9) Article 1, para. (1) of Law 12,850 of 2013 defines as criminal organization "the association of four (4) or more persons structurally ordered and characterized by the division of tasks, albeit informally, in order to obtain, directly or indirectly, an advantage of any nature, through the practice of criminal offenses whose maximum penalties are more than four (4) years, or that are of a transnational nature".

(10) Among the investigative procedures adopted by this norm, the interception of telephone communications and the award-winning collaboration are highlighted in this article. The interception of telephone communications had already been regulated by Law 9,292 of 1996, which regulated Article 5, XII, of the Constitution of the Republic. This article defines as a fundamental right of every citizen the inviolability of the secrecy of "correspondence and telegraphic communications, data and telephone communications, except in the latter case, by court order, in the cases and in the form established by law for purposes of criminal investigation or criminal procedural instruction". In this way, the inviolability of communications is a fundamental right. Law 9,292 of 1996, in its article 8, established that "interception of telephone communication, of any nature, will occur in separate files, appended to the records of the police investigation or criminal proceeding, preserving the confidentiality of the proceedings, recordings and transcripts". Thus, the confidentiality of communications is preserved even if there is judicial authorization for the interception of telephone communication. In addition, article 10 of the same Law, criminalized the conduct consisting of "interception of telephone communications, information technology or telematics, or break the secrecy of justice, without judicial authorization or for purposes not authorized by law," and penalty of imprisonment of two to four years, and fine.

(11) For further debate on the methodologies applied for qualitative assessment of corruption at an international level: United Nations, *Quantitative approaches to assess and describe corruption and the role of UNODC in supporting*

countries in performing such assessments, Background paper prepared by the Secretariat, 2009. Available at: http://www.unodc.org/res/cld/bibliography/quantitative-approaches-to-assess-and-describe-corruption-and-the-role-of-unodc-in-supporting-countries-in-performing-such-assessments_html/Pape_measurement_corruption_CRP2.pdf
(12) Available at: <http://seriestoriche.istat.it>, point n.4.

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