CRIMINAL LAW BETWEEN EFFICIENCY AND GUARANTEES: REFLECTIONS OF THE CRIMINAL POLICY FOR THE CONTROL OF CORRUPTION FOR THE BRAZILIAN CRIMINAL SYSTEM

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Abstract

This article draws a critical analysis of the repressive and symbolic criminal policy of control of public corruption in Brazil and its consequences to the democratic criminal system and to the human rights.

Keywords

Corruption; Human rights; Criminal policy, Brazilian criminal law.

Summary

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Introduction

The reflection about the unsettling relationship between efficiency and guarantees in the criminal arena—specifically as it relates to political-criminal considerations regarding the control of corruption—is a thorny subject given that it refers to the expansion of Criminal Law, which is one of the most intense political-criminal debates of recent times. The big discussion now is centered around the limits of criminal policy in the postmodern era, and therefore, in the capability of criminal intervention to deal with all the questioning posed by today's society; this without losing sight of the respect for fundamental individual rights and the axiologic power characteristic of the State as a democratic state governed by the rule of law.[2]

The relationship between criminal law and human rights has always been ambiguous, revealing a contradictory tension between two poles. This antinomy lies in the essence of the *Ius Puniendi*, which affect the fundamental rights of the individual, starting with its freedom. On the other hand, the criminal justice system also plays a role in the protection of the fundamental rights, through the incrimination of behaviors, within a context of a double movement, positively affirming the values and assigning a criminal sense to their transgression. The search for balance between the stakeholders (social security and individual rights) is thus revealed as one of the most serious difficulty to be able to set the content and legitimacy of criminal intervention. Therefore, it is always subject to revision.

This gives rise to the reflection about the limits to rationality in Criminal Law, based on the creation of the implications of recognizing the fundamental rights over its content. This

[2] The Brazilian difficulties in consolidating the democratic regime and guaranteeing fundamental rights were mentioned in the 2011 report by Human Rights Watch in the following terms: «*Brazil has consolidated its place as one of the most influential democracies in regional affairs and global in recent years, but still maintains significant human rights challenges. Facing high levels of violent crime, some Brazilian police officers employ abusive practices instead of seeking sound surveillance policies. The conditions of detention in the country are often inhumane and torture remains a serious problem. Forced labor persists in some states despite federal efforts to eradicate it. Indigenous and landless peasants face threats and violence, especially in rural conflicts over land distribution."* (HUMAN RIGHTS WATCH, World Report 2011, http://www.hrw.org/en/americas/brazil). The latest 2019 Human Rights Watch report has seen no positive changes in this scenario: "*Jair Bolsonaro, a member of the National Congress who supported the practice of torture and other abuses, and made openly racist, homophobic and misogynistic statements, won the presidential elections in October. Political violence and threats against journalists marked the election. The violence hit a new record in Brazil, with nearly 64,000 homicides in 2017. The police only solve a small percentage of these homicides. Extrajudicial killings by the police fuel the wave of violence. The fragile state control of many prisons facilitates recruitment by criminal factions. Domestic violence continues to be widespread; Thousands of cases each year are not adequately investigated.*" (https://www.hrw.org/pt/world-report/2019/country-chapters/326447).

issue is highlighted now, precisely due to the astonishment caused by the directions that the criminal policy seems to take when dealing with particularly relevant issues, such as corruption, which frequently enjoys wide popular support and political thrust of ideological spectrum.

1. Corruption, Political Crisis and Brazilian Criminal Justice System

During the first decade of the 21st century, Brazil experienced significant socio-economic progress, which back then was seen in the international arena as one of the great promises of the world economy. Despite its economic expansion, in a paradoxical way, the difficulties of the Brazilian state to consolidate transparency and the good management in the Public Administration arena still attracted attention, harming the concretization of the fundamental rights and guarantees materially characteristic of a democratic state governed by the rule of law. A general outlook of optimism prevailed, leading to the belief that the noted problems could gradually be overcome in an ever more developed society.

However, stemming from the verification of a systemic corruption scheme, which became public knowledge through the *Mensalão* case (criminal trial 470/STF), even in that first decade of the year 2000, the collapse of the social hope of Brazilian democratic development as well as the withdrawal of the permanent and intrinsically failed condition of "country of the future" began. The so called "trial of the century", held before the Supreme Court, gained special attention due to the political importance of those involved, public servants and private citizens, and due to the seriousness of the alleged crimes,[3] exposing the frailty of the Brazilian System, as it allowed corrupt practices capable of inflicting enormous damage in the social, economic and political arenas.

In this unprecedented case until then in the country's history, the society was able to closely follow the discussions between the Brazilian Supreme Court Judges, broadcast and commented in real time by the media, allowing for a better understanding of the content and objectives of the application of Criminal Law. The country experienced relief once the trial ended and those responsible of the crimes revealed were sentenced, with the imposition of the

[3] In Criminal Trial 470, important figures in Brazilian politics were convicted of corruption, money laundering and criminal organization, especially in the sphere of the Executive and Legislative Powers, among which the Minister of the Civil House, the President and treasurer of the Workers' Party, then a government party, and some deputies, as well as a former director of the Bank of Brazil.

applicable penalties. It seemed like the journey towards democratic development had been restored, supposedly in a more robust way, given the demonstration of a presumed capacity of the State to face and control corruption.

It happened that after a short while, Brazil found itself again in a scandalous case of institutional corruption, practiced in one of its main state owned companies, involving in general a large number of private entities and public and civil servants. They belonged to diverse political parties, amongst which high representatives and ex-representatives of the Legislative and Executive branch stood out. Given the exceptional seriousness of the crimes and the political-social relevance of those allegedly involved, this case—named by the Brazilian Federal Police *Lava Jato* Operation—quickly reached the national political arena, leading to a situation of non-governability and thus, crisis. Parallel to the political crisis, and to great extent because of it, a serious economic crisis had to be dealt with. It had disastrous effects, of unprecedented proportions, tying Brazil's image with democratic instability and corruption. In the legal arena, Brazil clearly moved from the "trial of the century" phase to the "century of great trials" one.[4] Even though still ongoing, the *Lava Jato* Operation has already had important repercussions for the country's history, including the *impeachment* of a president, prison for two ex-presidents, and a new government whose main campaign *slogan* was the fight against systemic corruption,[5] elected within the context of a very strong social and political polarization.

Regarding the two criminal procedures above mentioned—*Mensalão* and Lava Jato Operation—there is no doubt that an important alteration of the social perception about the corruption practices took place, making clear the need to put an end to the "jeitinho",[6] an expression which consolidated corruption as a cultural phenomenon inherent to Brazilian society. Likewise, Criminal Law seems to have momentarily abandoned its selectivity, to reach those who don't fit the stereotype of a criminal, often tied to the socially marginalized. Independently of the positive effects of both cases, it is worth exploring other issues that

[4] Cf. BECHARA, Ana Elisa Liberatore S. Corrupción, crisis política y derecho penal. *Revista General de Derecho Penal,* n. 26, nov. 2016.

[5] In this sense, it is particularly noteworthy that the current Minister of Justice of Brazil, Sérgio Moro, was justly the judge responsible for the trial resulting from *Lava Jato* Operation.

[6] The expression, difficult to translate into other languages, was identified by Keith S. Rosenn as an ingenious way of doing the impossible, possible; the unfair, just and the illegal, legal. ROSENN, Keith S. *The jeito* - Brazil's institutional bypass of the formal legal system and its developmental implications. Heinonline, 19 AM, J. Comp. L., 1971, p. 515.

could be extrapolated from them, in regards to content, legitimacy and the broader effects of the criminal policy options to control corruption in Brazil. Public corruption begins when the power granted by the State to a government official is mismanaged to obtain personal gain. This has to do with the venality of power, whose causes as well as its containment strategies may differ greatly, allowing for the assertion that the historic and current elements of each country, determine the traits of "its own" corruption. On the other hand, an economic crisis creates a social response of greater rejection of corruption and, in extreme cases it can lead to the questioning of the political system, to the abandonment of existing attitudes of tolerance before the phenomenon and to generally propose an indiscriminate lack of legitimization of those who hold political power, which can also lead to a political crisis.

Corruption therefore constitutes a political, economic, social and legal problem – specially complex in the Criminal Law sphere. To not ignore such complexity is essential for an effective control; it must avoid falling in the simplification of believing or attempting to pass the idea that the phenomenon is an issue simply related to the content of the criminal types and the concrete consequential sanctions—understanding corruption from a global perspective, not placing it exclusively in the criminal arena.

Certainly, systemic corruption can damage the basic values of the Social State and the Democratic state governed by the rule of law; it can also affect human rights and the citizen's trust in the system. Aside from the ethical, social and even legal discussions, to expect a non-corrupt society to rely on Criminal Law is impossible and undesirable from a political-criminal stance, based on the principles that shape this branch of the Law. It is that way because aside from barely being effective, an excessively repressive criminal policy that symbolizes the control of corruption can lead to intolerable transgressions of human rights; these may extend to the entire criminal justice system, selectively affecting the usually intended targets.

2. The Evolution of Public Corruption Control in Brazil

It has been stated that deviations in the Public Administration arena—and therefore corruption—correspond to a cultural phenomenon inherent to Brazilian society. In that sense, the "public" notion in Brazil would present itself in a deterministic manner historically related

to the State and not to the people; those holding State control (or the "owners of power" as per Raymundo Faoro)[7] would benefit at the expense of the public interest.

In fact, it is possible to identify throughout history a cultural tolerance for corruption in Brazil, stemming in large part from the inequity (rooted in Brazil in the slavery regime) and individualism with which the state educated its citizens and shaped public interest.[8] In this context, the legal system operated historically more as a means of protection to the State against attacks from the general public, instead of as a regulatory instrument of the state at their service.

In that sense, we see that the Brazilian criminal justice system has promoted an individualist and selective culture, while strongly focused on the protection of equity. This is evident in the analysis of both, the proportionality of sentences usually imposed and those on whom the incriminating norms fall, mainly those sentenced for crimes against property or related crimes, who represent almost the entirety of the current prison population. In a context where the fundamental social interests give room to important values for the individual, it is logical that the corrupt practices become less visible as they do not generate immediate visible property damage. As a result–all along Brazilian history–a relative negative social sense has been attributed to the misappropriations carried out in the Public Administration arena.

These factors contributed to the consolidation of a patrimonial state–characterized by the visible confusion between what is public and what is private–and thus for the general practice of corruption.[9] With the concept of public interest absent, the State was historically managed as a private entity, characterized from the start by the distribution of influence, honorary titles and public posts—which could be even negotiated and sold as merchandise—to a socially privileged minority;[10] this enabled Sérgio Buarque de Holanda to set the concept

[7] Cf. FAORO, Raymundo. *Os donos do poder.* São Paulo: Globo, 1975.
[8] In the same way, v. GRAU, Eros Roberto; BELLUZZO, Luiz Gonzaga de Melo. A corrupção no Brasil. *Revista Brasileira de Estudos Políticos,* n. 80, janeiro 1995, p. 07.
[9] Analyzing the historiography of corruption in Brazil since the colonial period, v. HABIB, Sérgio. *Brasil: quinhentos anos de corrupção. Enfoque sócio-histórico-jurídico-penal.* Porto Alegre: Sergio Antonio Fabris, 1994.
[10] In this sense, exposing the political strength of public offices in the Brazilian patriarchal system, desired because of the power that characterized them, Gilberto Freyre describes: "Under the Brazilian patriarchal system these were the noble careers: government, diplomacy, public administration or the legal profession, the church or the priesthood and, for the most progressive, medicine ". FREYRE, Gilberto. *Interpretação do Brasil.* Aspectos da formação social brasileira como processo de amalgamento de raças e culturas. Rio de Janeiro: José Olympio Editora, 1947, p. 127-128. On the criticism of the Public Administration in the colonial period in Brazil, especially regarding widespread corruption, v. PRADO JÚNIOR, Caio. *Formação do Brasil contemporáneo: colônia.* São Paulo: Companhia das Letras, 2011, p. 356.

of “cordial man”, characterized by the inability to distinguish private from public interest as a Brazilian historic feature.[11]

Directly related with the patrimonialistic concept of the Brazilian political culture are the “coronelism” and the “clientelism”, characterized by favors and benefits granted, stemming from commercial, friendship or kinship relationships. These phenomena, consolidated in history a culture of mockery, profoundly pragmatic and tolerant in the sphere of an unfair society, where the law was seen as a favor, setting the base for the populism and welfare that are still present in Brazil. On the other hand,—there are always two sides when it comes to corruption—the social inequality and organized private interests, generally hidden in a barely regulated market, lead in history to the concentration of economic power and to the formation of an elite, privileged and individualistic, capable of corrupting the public and civil servants.[12]

Regrettably, it seems that the legacy of these historic elements have survived until now; it is clear that corruption continues to find fertile ground to spread in the Brazilian society, where the notion of respect for republican virtues has not yet consolidated. In reality, if during the Imperial period the distancing between the formal prevision of rights and its efficacy was clear, in today’s society there are still some practices in the Public Administration arena that lead to social inequality and to the failure of effective participation in the democratic arena. The individualism, the low popular participation and the diverse forms of violence, compromise the fairness and the correct social concern of the citizens, leading to regard public participation as a synonym of hidden interests, far from the public interest.

It is worth noting then, the consolidation of a mistaken conception regarding the nature of the crimes committed in the Public Administration, understood as an inherent and incurable pathology of the human being.[13] The treatment of corruption as a moral deformation, aggravated by the historic legacy of colonization, led to an attitude of conformism and impotency which allowed conveniently, for a long time, the Brazilian social stabilization

[11] HOLANDA, Sérgio Buarque de. *Raízes do Brasil.* São Paulo: Companhia das Letras, 2001, p. 146 e ss.
[12] In the same way, v. SOUZA, Jessé. *A elite do atraso.* Da escravidão à Lava Jato. Rio de Janeiro: Leya, 2017, p. 129 e ss.

[13] V., as an example, the treatment given by Rui Barbosa to corruption, identified with medical terms such as "cancer" and "tumor". BARBOSA, Rui. *Escritos e discursos seletos.* Rio de Janeiro: Cia Aguilar Editora, 1966, p. 242.

within those patterns.[14] Theoretical ideas associating the crimes in the Public Administration arena to lack of socio-political maturity—characteristic of an underdeveloped State—as well as specific political regimes, were also historic contributions for the delay in the debates on control and limits in the Public Administration arena. In this last case, it was even said that corruption would grow more easily in the democratic context, given the lower concentration of political power and given the greater opportunity of interaction between the public and civil servants and the individuals.[15]

However, from the decade of the 1980s, the broadcast by the press—of a significant number of crime cases committed by public and civil servants—led society to perceive the concrete seriousness of the repercussions of corruption. It is capable of undermining both the development of its citizens in regards to the possibilities of effective social participation, and therefore, the adequate maintenance of the democratic foundations of the State.

In this context and according to an international harmonization tendency, it is seen that Brazil tried in the last two decades to improve the setup of corruption control mechanisms. It even signed a series of international treaties such as the OECD, OAS and UN conventions. Despite the compliments as to the evolution of the Brazilian corruption control strategy—especially for the creation of intelligence and administrative oversight agencies—the prevalence of the Criminal Law under the prism of a repression ideal, ever so more rigorous and supposedly effective is evident, at the expense of a deeper reflection on the effective preventive control measures of this phenomenon.

The Criminal Law in regards to anticorruption has acquired an international dimension, which is supposedly more effective, but has brought new and complex legal issues; the implementation process of the international recommendations led to a dangerous proliferation of unpublished concepts and norms, frequently objectionable in the system. The main difficulties lie in the clash between the norms and principles in the national and

[14] Cf. BECHARA, Ana Elisa Liberatore S. La evolución político-criminal brasileña en el control de la corrupción pública. *Revista General de Derecho Penal,* n. 17, mai. 2012.

[15] In reality, the apparent growth in the democratic sphere of public corruption in general is due to its greater visibility and, thus, the possibility of punishment. It is observed, rather, that the apparent lower incidence of these crimes during the military period experienced in Brazil between the 1960s and 1980s was, paradoxically, due to Criminal Law itself applied authoritatively as a political instrument of government. In fact, according to article 16 of Decree-Law 898, of September 9, 1969, it was an offense "to disclose by any means of social communication, false, biased news or incomplete or disfigured true fact, to indispose or try to indispose the people against the constituted authorities ", guaranteeing abusive protection to public agents against the disclosure of their illegal conduct..

international arenas, as well as in the interaction between different cultures and legal systems; they are marked by normative gaps (interlegality)[16] and the preeminence of hegemonic political and economic interests. A growing convergence of the *civil law* and *common law* families is evident in this scenario, as a legal innovation built in the search for a more efficient criminal justice system, with an economization tendency of Criminal Law; the most illustrative example may be the plea bargaining rule, present nowadays in varied proposed legislation in Brazil.

The same way, in response to the expressive demonstrations of 2013 throughout the country, the so called Ley Anticorrupción (Ley Federal n. 12.846/2013) (Anticorruption Act - Federal law No 12.846/2013), established the objective extra-penal responsibility of the legal entity and requirements of corporate auto-responsibility. In the legal arena, given the supposed need to respond more effectively to the social demands for corruption control, the principles of criminal law gave in. From the deconstruction of elements of the theory of crime —like the examples of omission, willful misconduct and culpability—and the dysfunctional applications of foreign theories, such as the authorship of the crime and the deliberate blindness, criminal responsibility is attributed in an expansive manner and without precedents, allowing for a new Criminal Law, understood already as a new path without return.

From an efficiency perspective, Criminal Law is losing its fundamental character of *ultima ratio*, to become progressively only one —maybe even the main—between several equivalent mechanisms of government intervention. The need for a criminal assessment is replaced by the idea of agility in the solution of issues, going against the criminal and procedural principles that advise the democratic state governed by the rule of law. The protection of the individual is then relativized when compared to the need for superior protection of the so called "common interest"; this is a general concept practically empty of content , used to justify any type of excessive criminal intervention.

Going back to the *Mensalão* and Lava Jato cases, what stands out is the idea of punishing in exemplary manner those supposedly responsible for the criminal practices. This is not only with the purpose of reaching the idea of justice but also to convey to the society the need to create an anticorruption culture. However, it seems that an extra step was taken, with the blunt upsurge of the punitive government intervention, through a trial seeking to

[16] Cf. VOGEL, Joachim. Derecho penal y globalización. Tradução de Manuel Cancio Meliá. *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid***,** n. 9, 2005 (Ejemplar dedicado a: globalización y derecho), p. 116.

stand out as a symbol of the fight against corruption—even when the price to pay may be the sacrifice of individual rights, which are seen as simple obstacles to criminal efficacy.

Also, the agencies and public and civil servants involved in the criminal persecution seem to distance themselves from the role traditionally carried out by its peers; in the current context, more politicized, assuming clear prominence while attempting to control corruption. In the Legislative arena, this takes place through the proposed legislation of predominant criminal content (for example, the "Ten measures against corruption", created by the Attorney General's office, with express support from the judge responsible for the trial of the Lava Jato Operation). A worrisome approximation between the judge, the prosecutor and the police is also ascertained, which can lead to the abandonment of the boundaries of judicial impartiality, paramount in a democratic state governed by the rule of law, as is the Brazilian State.

In brief, the trend than can be observed in general in the criminal justice system for corruption control in Brazil is the substitution of a Legal Law for a Judicial Law. This seems especially dangerous, as it materializes itself in an interpretative activity, excessively broad and based on pragmatic and/or subjective criteria, under an emergency argument that is efficiency based and punitivist. These political-criminal traits materialize in: arbitrary imprisonments, the general suppression of individual guarantees and rights, and illegal cooperation agreements in exchange for a prize—which even foresee sentences not contained in the law and percentages of the recovered assets for the informers.

In this dysfunctional context, the first thing to do is to investigate the empirical effects of the predominantly repressive option in the corruption control in Brazil. The last report issued by Transparency International, states that since 2017 the country has dropped 25 places in the International Ranking of Social Perception on Public Corruption. Ultimately, Brazil scored the 105th position among 180 countries analyzed, showing the worst result since the beginning of the measurements in 2012.[17] These data allows us to reach the conclusion that the preventive policy against corruption in Brazil was a failure with a generalized perception that the secondary criminalization processes were ineffective. In turn, these leads us to verify the purely symbolic character of many of the criminal reforms carried out, provoking a

[17] Document available at https://ipc2018.transparenciainternacional.org.br/. According to the report of Transparency International, the trajectory of Brazil's curfew observed in recent years can be explained by the effects of *Lava Jato* Operation and other large cases that demonstrate an institutional effort to confront corruption. Such an initial effect of worsening the social perception of corruption would also be observed in countries that begin to confront it effectively, shedding light on the problem. However, if the country persists in the control of corruption, such negative effect is reversed in a greater social perception of control of corruption, which seems not to be happening in Brazil.

boomerang effect, inherent in many laws based in a positive general prevention premise; instead of generating the sought after trust in the law and in the system, the way it is applied or better yet the way it is not applied, lead to the generalized awareness of inequality before the law and to an institutional legitimization crisis.

In fact, the disappointing results of the exceedingly repressive criminal policy in relation to corruption is a known subject for the criminalists. The average criminal sentences for corruption worldwide is quite small, especially when the large amount of cases that never make it to be formally known by the State are taken into account. On the other hand, the corruption cases in Brazil where the damages are never recovered and the public servant is never withdrawn from its duties are frequent, exposing the communication deficiencies amongst the various authorities and agencies. Also, an important part of the cases come to light before the Brazilian State through complaints filed by relatives, acquaintances or adversaries instead of them surfacing as a result of the regular oversight, which would be the desirable means of detection within a rational control policy.

Despite the importance of the pedagogical dissemination of the *Mensalão* and the *Lava Jato* Operation to create social awareness of the intolerance to corruption, the social communication of the disdain for the corrupt behaviors based on the application of the Criminal Law, is generally seen as very inefficient. Thus, it is not possible to try to change the social reality of corruption through Criminal Law. Such promotional objective, besides unrealistic according to the statistics, is capable of leading to a perverse picture of socio-political demagogy.

In this context, in the *Mensalão* and the *Lava Jato* Operation a cause of concern is the great visibility of the judges involved, some of them turned into national idols and important political agents. Such phenomenon derives from the social disenchantment with politics, which end up politicizing the judicial power; this gives rise to the expectation to deliver over the imposition of an excessive responsibility onto the judge, demanding from the judge efficient responses to issues that should be debated and resolved in the political arena. Clearly, despite holding a heroic image as perceived by society, the representatives of the Judicial Power are not able—and should not try—to address through the simple application of Criminal Law, the demand for greater control of complex crimes; those are the result to a great extent of the existing serious problems in the structure of the Public Administration.

Even though the criminal intervention—due to its symbolic meaning—is traditionally the preferred means to combat corruption, it is important to highlight that the Criminal Law

always has a deficient and excessively delayed delivery, leading to failure—the damage already inflicted to society by the criminal behavior. That is why, the key to effectively handle corruption does not lie in the criminal sanction (even though it must exist without a doubt) but in prevention.

However, the issues with an excessively repressive and symbolic criminal policy for corruption control cannot be summed up as the inefficiency of that option; they are related in worrisome ways to the abandonment of principles, values, and norms of the democratic state governed by the rule of law, inflicting injury to the human rights. In such context, the selectiveness of Criminal Law allows such injuries to also affect—even more seriously—individuals who are well beyond of the corruption crimes in the sphere of an ordinary criminality.

In fact, the normalization of offenses affecting the fundamental values and principles of Criminal Law may reach mainly the socially marginalized individuals because they don't have the economic means to pay for their own defense and thus unable to resist a punitive power applied in an arbitrary and excessive manner. Therefore, without abandoning the fundamental rights and guarantees of those investigated and accused in corruption cases, it poses a greater threat for those usually intended targets in the secondary process; that is, those who do not wear white collars and that effectively represent more than 90% of those sentenced and imprisoned in Brazil.

3. Between Efficiency and Guarantees: For a Rational Criminal Policy for Corruption Control

The relationship between Criminal Law and human rights has always been ambiguous, revealing a contradictory tension between two poles. This contradiction resides in the very essence of the punitive power of the State, which affects the individual's fundamental rights, beginning with its freedom. On the other hand, the criminal justice system also plays a role in the protection of the fundamental rights, through the incrimination of behaviors, within a context of a double movement, positively affirming the values and assigning a criminal sense to their transgression. The search for balance between the stakeholders (social security and

individual rights) is thus revealed as one of the most serious difficulty to be able to set the content and legitimacy of criminal intervention. Therefore, it is always subject to revision.

This gives rise to the reflection about the limits to rationality in Criminal Law, based on the creation of the implications of recognizing the fundamental rights over its content. The issue currently stands out, precisely due to the astonishment caused by the symbolic and ideologic turns of the criminal policy to deal with some issues, such as corruption.

In reality, the contrasting discourse between efficacy and individual guarantees is not new; there are several examples in the history of intervention models that stray from the liberal criminal paradigm. With the pretension of being backed by: a public order maintenance ideology or the citizen's security against its enemies, they produce the same authoritarian effect of segregation of certain social segments through Criminal Law.[18] This pendular movement between authoritarianism and humanism seems to be closer to a security criminal law, which implies the imposition of limits on individual rights and freedoms in the name of greater efficacy and social protection.

Facing the wishes of a society that sees itself as a potential victim, an important transformation takes place within the sphere of Criminal Law: its vision gets lost as an instrument of defense of the citizens against the coercive intervention of the state. So, the classic conception of the Criminal Law as the "Magna Carta" of the servant as Von Liszt stated, gives way to understanding Penal Law as the "Magna Carta" of the victim, causing a worrisome change in criminal science. Criminal Law assumes the role of a security political instrument, guided to transmit a sensation of: social tranquility and an active and interested legislator.

From such penal model—frequently an exception to the constitution itself—the rules of criminal responsibility and the legal reasoning succumb to the reasons of the State, which imposes the fight against the different forms of delinquency at any cost. This culture of emergency[19] and exception made possible the creation of dogmatic deviations, that are

[18] Cf. ZÚÑIGA RODRÍGUEZ, Laura. Viejas y nuevas tendencias políticocriminales en las legislaciones penales. In BERDUGO GÓMEZ DE LA TORRE, Ignacio; SANZ MULAS, Nieves (Coord.). *Derecho penal de la democracia vs seguridad pública.* Granada: Comares, 2005, p. 102.

[19] The term "Emergency Criminal Law" has its origin in Italy, designating the structural changes promoted in its penal system (in the material, procedural and enforcement aspects), in the 70s of the last century, as the objective of fighting mainly the terrorism and organized crime. These modifications consisted of reforming the existing criminal laws and creating new legal provisions to provide an immediate state response to the then new crime, following a social appeal strongly influenced by the media. The adoption of this emergency criminal legislation was initially provisional, although it was finally incorporated into the legal system definitively. Understood as a political instrument of the State in the fight for the defense of institutions and civil society, the Italian Emergency Criminal Law was justified by its supposedly temporary use, only to counter the exceptional events that

capable of causing the setback of Criminal Law, worsening its traditional legitimacy crisis, stemming from the discrepancy between the duty to be normative and to be effective.

The criminal emergency policy may have several focal points from the selection of specific social enemies. At present, the corruption crimes representative occupies in the social imagination the position of enemy; a result of its over exposure in the press, with the pretense of justifying any type of intervention—of exception to the legal system—in defense of the victimized society. From the acceptance of the illegal and unprecedented application of penal intervention, justified as "a point outside the curve", the arbitrary practices get normalized and end up penetrating the whole criminal justice system. So, the symbolic war against corruption is gradually turning the Brazilian Criminal Law into a perpetrator's Criminal Law, the criminal trial in an inquisition technique, and the penal enforcement in the imposition of special regimes, differentiated through the friend/enemy logic found in Carl Schmitt and more recently in Günther Jakobs. Summing up, the ethics of the fundamental forms and principles such as legality and culpability are now considered simple barriers for the efficiency of the punitive power of the State.

The result of this process is the idealization of penal intervention and consequently the inability to express criticism to the system. It remains immune to limiting external interference and begins to prevail as dogma within a chaotic reality, under the rhetoric justification of protection of the "public interest" or "public safety". When this State motive prevails, aligned with Machiavelli, where the means are subordinated to political motives, there is no jurisdiction; there is arbitrariness, political repression and a setback of the State to premodern ways. This is due to the fact that this State motive, of combatting crime at any cost, is incompatible with the penal intervention understood under the context of a democratic state governed by the rule of law.

The danger of falling into the temptation of the "emergency culture" must be highlighted then, where the notion of security is replaced by the idea of efficiency in Criminal Law. In fact, experience shows that passing legislation of exception for a situation defined as extraordinary, ends up becoming the model of ordinary legislation, affecting the basic

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threatened these institutions. In this sense, the supposedly temporary suspension of some state guarantees was seen as a way to ensure their own survival.Cf. MOCCIA, Sergio. *La perenne emergenza.* Tendenze autoritarie nel sistema penale. 2ª. ed. Napoli: Scientifiche Italiane, 1997, p. 53 e ss.

principles of social coexistence in a democratic state governed by the rule of law.[20] The denaturalization of the function of Criminal Law as a collateral instrument for the protection of the legal assets, does not produce any positive result in controlling crime; it leads to the definite loss of authority and social credibility, as it has by now turned into a political instrument with symbolic and promotional purpose, lacking any relevant value.

The fundamental political-criminal criterion, within the framework of a democratic state governed by the rule of law with personal character, is without a doubt the human rights guarantee. By accepting this political-ideological assumption and taking the State as an instrument serving the individuals, the political-criminal activity must be directed towards the protection of the fundamental rights, even in the criminal sphere.[21]

Therefore, the connection between the legal-governmental intervention and human rights must take place in such a way that Criminal Law does not derive neither from a moral interpretation of the fundamental rights nor from an ethical reading of popular sovereignty. The person subject to the penal norm must be respected and recognized before any other value or interest; for its dignity, materialized in the autonomy directed towards the search of free development within the context of social relations in which it participates, and not because it corresponds to the collective.

Going back to the specific subject of corruption, even though the dysfunctionality in the attempt to control it mainly through Criminal Law is clear, Brazil seems to be heading deliberately in this punitive sense. In that regard, it is worth noting the recent proposed legislation by the Brazilian Justice Department named "Ley Anticrimen" (Anticrime Act) limited to proposing measures to harshen penal law, increasing sanctions, reducing individual guarantees and making criminal dogmatic and procedural norms more flexible, without any concern in regards to the factors that lead to the crimes, especially those related to corruption. Such proposed legislation is rooted in the phenomenon of the "cruzada judicial" (legal crusade), movement known for decades in other countries as war against crime, based on the belief that judicial repression would be the best way to reduce people's feelings of insecurity, control criminality and reduce violence. In reality, the strategy tries to "govern through

[20]In the same way, MOCCIA, Sergio. *La perenne emergenza,* cit., p. 55.

[21] BERDUGO GOMEZ DE LA TORRE, Ignacio. Derechos humanos y derecho penal. *Estudios Penales y Criminológicos,* XI, Santiago de Compostela, 1987, p. 33.

crime", it creates new political leadership forms, legitimized with the justified desires of an insecure population.[22]

Judges, prosecutors and police may act against corruption, but those who can prevent it are those who usually practice it. This is the paradox. Only through a political reform and the direct questioning of the public administration model itself—even it means touching a raw nerve and the destruction of taboos created by patrimonialism—the Brazilian society will be able to dissipate the fog created by the media spectacle around the penal application and will be able to substitute its frustration with hope.

The issue is: who is really interested in restructuring the Public Administration, destroying the favorable environment for corruption? While penal solutions are predicated, there is no discussion of preventive means to effectively control corruption, leaving the political-economic environment that facilitates it and promotes it untouched. Of course, Criminal Law is a false solution, the road is longer, more difficult and it has to be walked.

It is not worth to broadcast the wrong, superficial and symbolic messages about serious problems, selling a false image to the public about a Criminal Law capable of solving the social issues. This leads to three very serious effects: first, the demagogic image of Criminal Law repeatedly broadcast by the media; producing fog that blocks the more profound discussion about the social problems and the alternative solutions. The second serious problem has to do with the idea of selling a Criminal Law that is totally effective. If the objective is really communicative, the more terrifying is the sold spectacle, the greater the (even false) sensation of safety. This leads to a full breakage of the fundamental legal and political principles, and to exceptions that become normalized as rules, leading therefore to total legal insecurity. Finally, such pragmatic dysfunctionality of Criminal Law, even though it is supposedly targeted to fight corruption, ends up contaminating the whole system.

In a broader sense, it seems not to be an exclusive problem of the Brazilian Criminal Law or of Latin America. In general, it is seen that the democracies established in the 20th century face in different ways a "stress test" in the 21st century. It is being questioned: how much can the State respect the individual guarantees in case of conflict, how much can democracy materialize, and how much questioning can be done of the structures and the public administration, without losing the democratic gains.

[22] On this theme, v. SIMON, Jonathan. *Governing through crime*. How the war on crime transformed american democracy and created a culture for fear. New York: Oxford, 2007.

Making the fundamental rights and freedoms more flexible through the modification of dogmatic criteria and political-criminal guarantees, does not sound legitimate—even before the supposed protection of society against the phenomenon of corruption. Criminal Law is only capable of reaching the sought after efficacy, if it can be considered beforehand a legitimate instrument of formal social control, which depends on the adherence to the fundamental limits, starting with human dignity—embodied in art.1 of the Brazilian Federal Constitution, which lay the foundation of the democratic state governed by the rule of law.

4. Conclusion

The reflection about the unsettling relationship between efficacy and guarantees in the criminal arena, specifically as it relates to political-criminal considerations regarding the control of corruption, is a thorny subject given that it refers to the expansion of Criminal Law, which is one of the most intense political-criminal debates of recent times. The main discussion at present is centered around the limits of criminal policy in the postmodern era, and therefore, in the capability of criminal intervention to deal with all the problems posed by today's society; this without losing sight of the respect for fundamental individual rights and the proper foundations of a democratic state governed by the rule of law.

Human rights do not come into conflict with the idea of an effective Criminal Law, instead they justify and delimit it; this legal system is geared for the proper protection of the individual before the State intervention. As Franz Von Liszt said, Criminal Law is and must continue to be the Magna Carta of the citizen, not the Magna Carta of the victim. In this way, even the search for broader protection or social security does not justify the violation of fundamental rights, under penalty of turning Criminal Law in an authoritarian instrument of political control. According to what has been broadly proven throughout history, it would not be the Criminal Law—regardless of its political configuration—the most adequate instrument of social control for the elimination of today's society's problems.

Long time ago, the warning against holding big hopes in relation to the capability of criminal law to stop the erosion of norms and social ties was issued. In this sense, it is common in today's Criminal Law the use of expressions such as "struggle" and "combat" as if the criminal justice system was capable of defeating social evil and control chaos through

violence.[23] The error lies in the perception of Criminal Law as an effective mechanism of transformation and solution of social conflicts.

As highlighted during the 17th International Conference organized by the International Association of Criminal Law (AIDP),[24] corruption control and control of the related crimes require the adoption of several measures. There is no doubt that in this control system there must exist effective penal norms to be able to clearly express to society the negative social sense of such practices. Nonetheless, it is necessary to have effective extra-penal measures of prevention for such crimes.

The use by totalitarian regimes of the ideological discourse of the fight against corruption is seen throughout history, independent of political affiliation—right or left—to justify all types of extralegal intervention. The main features of penal intervention in the totalitarian context constitute the anti-individualism, the disdain for the positive Law, through its interpretative manipulation.[25] Despite the history lessons of the different negative consequences of totalitarianism in the 20th century, nowadays the Brazilian penal intervention seems to follow the same path, negating the individual and the proper foundations of the Law.

It is evident that no one wants to live an institutional corruption reality, capable of serious human rights offenses, but we cannot be deceived by the State on the efficacy of penal intervention as a clever instrument for the solution of complex problems that require discussion and profound reforms; and ultimately no one wants to live under a police State where the Criminal Law is used as a political weapon, reaching the usually intended targets: the marginalized offenders who have no voice before the authoritarian mediation of the State.

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[23] The same warning is made by HERZOG, Félix. Algunos riesgos del derecho penal del riesgo. *Revista Penal,* n. 4, julho de 1999, p. 54 e ss.

[24] In accordance with the Resolutions of the XVII International Congress held by the International Association of Criminal Law in Beijing (2004), the text of which is available at www.aidpbrasil.org.br/resoluciones.

[25] On the relations between legal theories and European totalitarian regimes in the 20th century, v. FASSÒ, Guido. *Historia de la filosofía del derecho 3.* Siglos XIX y XX. Trad. José F. Lorca Navarrete. Madrid: Ed. Pirámide, 1996, en especial p. 247 y ss.

References

BARBOSA, Rui. *Escritos e discursos seletos.* Rio de Janeiro: Cia Aguilar Editora, 1966.

BECHARA, Ana Elisa Liberatore S. Corrupción, crisis política y derecho penal. *Revista General de Derecho Penal,* n. 26, nov. 2016.

BECHARA, Ana Elisa Liberatore S. La evolución político-criminal brasileña en el control de la corrupción pública. *Revista General de Derecho Penal,* n. 17, mai. 2012.

BERDUGO GOMEZ DE LA TORRE, Ignacio. Derechos humanos y derecho penal. *Estudios Penales y Criminológicos,* XI, Santiago de Compostela, 1987.

FAORO, Raymundo. *Os donos do poder.* São Paulo: Globo, 1975.

FASSÒ, Guido. *Historia de la filosofía del derecho 3.* Siglos XIX y XX. Trad. José F. Lorca Navarrete. Madrid: Ed. Pirámide, 1996.

FERRAJOLI, Luigi. *Derecho y razón. Teoria del garantismo penal.* Trad. Perfecto Andrés Ibáñez, A. Ruiz Miguel, J.C. Bayón Mohino, J. Terradillos Basoco, R. Cantarero Bandrés. 5ª edição. Madrid: Trotta, 2001.

FREYRE, Gilberto. *Interpretação do Brasil.* Aspectos da formação social brasileira como processo de amalgamento de raças e culturas. Rio de Janeiro: José Olympio Editora, 1947.

GRAU, Eros Roberto; BELLUZZO, Luiz Gonzaga de Melo. A corrupção no Brasil. *Revista Brasileira de Estudos Políticos,* n. 80, janeiro 1995.

HABIB, Sérgio. *Brasil: quinhentos anos de corrupção. Enfoque sócio-histórico-jurídico-penal.* Porto Alegre: Sergio Antonio Fabris, 1994.

HERZOG, Félix. Algunos riesgos del derecho penal del riesgo. *Revista Penal,* n. 4, julho de 1999.

HOLANDA, Sérgio Buarque de. *Raízes do Brasil.* São Paulo: Companhia das Letras, 2001.

MOCCIA, Sergio. *La perenne emergenza.* Tendenze autoritarie nel sistema penale. 2ª. ed. Napoli: Scientifiche Italiane, 1997.

PRADO JÚNIOR, Caio. *Formação do Brasil contemporáneo: colônia.* São Paulo: Companhia das Letras, 2011.

ROSENN, Keith S. *The jeito* - Brazil's institutional bypass of the formal legal system and its developmental implications. Heinonline, 19 AM, J. Comp. L., 1971.

SIMON, Jonathan. *Governing through crime*. How the war on crime transformed american democracy and created a culture for fear. New York: Oxford, 2007.

SOUZA, Jessé. *A elite do atraso.* Da escravidão à Lava Jato. Rio de Janeiro: Leya, 2017.

VOGEL, Joachim. Derecho penal y globalización. Tradução de Manuel Cancio Meliá. *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, n. 9, 2005.

ZÚÑIGA RODRÍGUEZ, Laura. Viejas y nuevas tendencias políticocriminales en las legislaciones penales. In BERDUGO GÓMEZ DE LA TORRE, Ignacio; SANZ MULAS, Nieves (Coord.). *Derecho penal de la democracia vs seguridad pública.* Granada: Comares, 2005