

## 1) PREVENTION OF CORRUPTION, TRANSPARENCY, AND PROTECTION OF INFORMATION SOURCES

In Brazil, we see a vicious circle of public and private corruption. There is a warped and rationalizing culture in which, on one side, many accept the corruption as a way to do business while, on the other hand, public agents accept corruption because they were employed to "guarantee a kickback from the one who put them there" or because they want to "ensure their participation in the 'scheme'". The process of corrupt a justification before the court of their consciousness is called the rationalization by psychology and neutralization by criminology. The context in which this happens is that of an hedonistic and patrimonial culture and postmodernist paradigm-breaking views in which each one does what they think is right in their own eyes.

An extremely corrupt country, Hong Kong, became the 18th most honest in the last edition of International Transparency's corruption perception index, through a strategy for combating corruption in three areas: 1) effective investigation and punishment of corruption; 2) implementation of internal controls, transparency, audits, surveys and perception surveys; and 3) education, awareness and marketing. The first "slogan" of the anti-corruption agency in Hong Kong agency was "denounce corruption."

To break the vicious circle that still exists in Brazil, the Federal Public Ministry (Federal Prosecution Office – MPF) is proposing some legislative changes. The first change encompasses a body of preventive proposals.

The first aims at transparency through the creation of an accountability rule and the efficiency of the Public Prosecution Office and the Judiciary Branch. It deals with a trigger of efficiency. A reasonable duration of the process is established, consisting of three years in the first instance and one additional year for each different instance. Courts and prosecutors are instructed to make statistics on the processing time in each body and instance, as well as to route the data to the Justice National Council (CNJ) and Public Ministry National Council (CNMP) so that these bodies can assess the appropriate measures, including legislation, which must be proposed in order to reach a reasonable duration of the process.

Another proposal is to create the possibility of conducting integrity tests, also known as the "simulation of situations without the knowledge of the public official or employee in order to test their moral conduct and predisposition to commit crimes against the public administration". Performing such tests can be done by correctional agencies and surrounded by precautions, including the creation of a measured temptation to the public employee, the audiovisual recording of the test and prior notice of it being carried out to the Prosecution Service, which may recommend the implementation of cautions. Carrying out these tests is not a testimony of distrust regarding public officials, but rather the perception that every public official has a duty of transparency and accountability, therefore understanding that scrutiny of their activity is desirable and indicated. Both the Transparency International and the United Nations encourage carrying out these tests.

The third proposal determines the investment of around 10 to 20% of advertising resources from Public Administration entities for activities and marketing programs aimed at establishing

a culture of intolerance against corruption, raising awareness of the social and individual harm caused by it, garnering public support for action against corruption and to report corruption-related crimes.

Finally, the last proposal within the first legislative change is set forth in order to make express and clear in the ordinary procedural law the confidential informant privilege, in favor of the Prosecution Office. According to our point of view, 5th Article, XIV of the Federal Constitution opens a leeway that admits such a privilege in Brazil. According to this privilege, the Prosecution Service is allowed to protect its sources of information when such action is necessary for an informant to report corruption, for the protection of the informant or in order to attend to any relevant public interest. Although it would be an obvious statement, we propose that no one can be convicted solely on the word of an informant. Nevertheless, the identity of the informant might be revealed in case that the information provided regarding the crimes is proven to be false.

## 2) THE CRIMINALIZATION OF THE ILLICIT ENRICHMENT OF PUBLIC EMPLOYEES

Difficulties in proving corruption guarantee impunity and encourages corrupted behavior. The criminalization of illicit enrichment ensures that the agent does not get away with it even when the specific acts of corruption committed can't be discovered or proven.

In addition to that, the criminalization of illicit enrichment is also a product of the disapproval, in itself, of the discrepancy between a public official's total assets and the assets s/he has legally acquired. The disproportionality of the patrimonial status, often hidden or disguised, of a public agent, who is subject to rules of accountability, transparency and honesty, may be criminalized.

Thus, the proposal #2 criminalizes the illicit enrichment of a public agent, creating the Article 312-A in the Brazilian Criminal Code. With respect to the description of that crime in the Code, it was adopted the wording of the Temporary Committee of the Study of Criminal Code Reform (Rapporteur Senator Pedro Taques), adding the conduct of "possessing" to the description of the crime. The three to eight years penalty, which was adopted, was extracted from the Bill of Law 5.586/2005, originally offered by the Comptroller General. Yet, the penalties of imprisonment continue to be subject to the substitution by less serious penalties, such as the execution of community services, in the case of less serious conducts.

The burden of proving any illicit enrichment rests on the accusation, which will only succeed if neither the careful investigation of the conduct nor the investigated agent indicates the probable existence of legal sources. Ultimately, should the investigation or the accused be able to raise reasonable doubt as to the illegality of the income, there will be an acquittal.

## 3) INCREASE OF PENALTIES AND FELONY STATUS FOR CORRUPTION CRIMES OF HIGH AMOUNTS

Firstly, it is extremely difficult to discover the crime of corruption. When it is discovered, it is even harder to prove it. Even when it is discovered and there is proof, a conviction can't sometimes be reached because of procedural issues like procedural nullities. Even if it is possible to discover, prove and reach a conviction, the chance of prescription (run out of the statute of limitation period) is real, which can give rise to absolute impunity. It is necessary to

say that, in Brazil, even when there is conviction for various crimes, the statute of limitations period is individualized and computed separately for each crime committed. When prosecution is not limited, it takes many years to be concluded and lower sentences tend to be imposed because the factors that influence the penalty are in favor of white-collar criminals. This penalty is usually replaced by community services and some other smaller punishments. On top of this, one quarter of a conviction sentence is all that is needed to be served, as there is a presidential pardon at the end of every year (Christmas pardon).

Corruption is therefore now a high benefit and low risk crime whose perpetration is not sufficiently repressed for those very reasons. In fact, unlike blood crimes such as murder, corruption involves a rational decision that takes into account the costs and benefits of honest and corrupted behavior. Researchers devoted to the study of corruption, like Rose-Ackerman and Klitgaard, reported that two key factors in deciding whether to accept bribes or not are the amount of punishment and the likelihood of being punished.

The proposal #3 reclassifies corruption as a high risk crime, by the means of increasing the amount of punishment. This also amplifies the likelihood of punishment, since the limitation period is proportional to the amount of punishment.

Firstly, the penalties in Articles 312 and 1st §, 313-A, 316, 316 2nd §, 317 and 333 are amended, since all them treat different kinds of corruption, resulting in punishments of 4-12 years of imprisonment – today, the penalty of Article 312 varies from 2 to 12 years. With this, the crime shall entail, at the very least, prison in a semi-open system. Nowadays, the penalty scarcely surpasses 4 years, because the penalties in Brazil are established around the minimum, and such a penalty either is executed in an open regime system, which amounts to almost no punishment at all, or is substituted by community services and other lighter penalties. This increased penalty also entails an increase in the limitation period that, when the penalty exceeds four years, shall be of 12 years. The limitation still may occur before or after the formal charges are offered and even after the conviction.

Moreover, Article 327-A of the Criminal Code is inserted, creating an escalation in the penalty for these crimes according to the amounts involved in the corruption. The crime of corruption may be considered as one of the reasons why people die in Brazil, as the money embezzled from the State by corrupted persons was originally intended to be directed at ensuring the population's basic rights such as the rights to security, to health, to education and to basic sanitation. Therefore, the punishment for corruption has been paired up with that for murder.

Finally, with the inclusion of section IX to Article 1 of Law 8.072/1990, the above mentioned corruption crimes, when the correspondent economic harm amounts to more than one hundred minimum wages, are classified as a specific type of felony, called heinous crime, which will hinder benefits from being granted to their perpetrators, such as a pardon of the sentence, or partial pardon or sentence substitution (e.g. prison sentence to be substituted for community services). The economic reference is a hundred times the amount that people often have to spend a month in Brazil – a hundred dignities may have been stolen. This proposed legislative change is even more conservative than many projects pending in Congress, being offered since 1992, which simply classifies corruption as an heinous crime

regardless of the amounts involved, thereby seeking to overcome any resistance to approval of the proposal.

#### 4) AN INCREASE OF THE EFFICIENCY AND OF THE FAIRNESS OF APPEALS IN THE CRIMINAL PROCEDURE

It is common for cases involving serious and complex crimes committed by white-collar defendants to take more than 15 years being reviewed after conviction. This is what is going on in one of the main subcases of the Banestado Case (file 2003.70.00.039531-9, of the 13th Criminal Federal Circuit Court of Curitiba), which convicted defendants for crimes such as the mismanagement and embezzlement of a Public Financial Institution, the Banestado Bank. In this case, as in many others, the defense aim is simply to delay decisions (such as by filing successive motions for clarification). In that subcase, the Brazilian Superior Court of Justice, which reviews federal law, has itself deemed the strategy to be abusive.

This delay not only entails limitation of prosecution, which runs out the statute of limitations periods,, but it also fosters impunity, even when there is a mere postponement of the punishment, which encourages the commission of further crimes. With a view towards contributing to the speed in processing appeals without damaging the rights of defense, proposal #4 offers a number of specific changes.

First, Article 580-A is added to the Code of Criminal Procedure (CPP), establishing that a convict would have to start serving his/her jail time immediately when the court recognizes an abuse of the right to appeal, a provision that also applies to civil proceedings. Second, Article 578-A is added to the CPP, which has a five-session limit for requests for examination of the case in courts, when made by one of the judges or the panel responsible for granting the decision. Thirdly, the 4th § of Article 600 is revoked to prevent appeal briefs from being presented directly in the Court of Appeals, instead of filling them, as usual in Brazil, before the first degree of jurisdiction. Additionally, changes in Article 609 to revoke rehearings en banc.

In the fifth place, through a suppression of section I of Article 613, Revising Justices, who review the case after the rapporteur and before it is taken to the session of judgment, shall no longer take place when appeals are processed. In addition to this, a second motion for clarification against the same decision, just after the decision about the previous motion, shall no longer be admitted, pursuant to a change in Article 620. Saving a large part of the processing time of the appeals before the Superior Court of Justice and before the Supreme Court, a proposal was made so that these two appeals should be processed in parallel, which would replace its successive trial as is done today. With a simple measure like this, there is a reduction of half the time required for the trial of the case after a decision is reached in the second degree.

The changes below, the eighth to the eleventh, deal with writs of habeas corpus. The amendments aim to: avoid decisions being issued without there being a more complete set of information about the case; avoid hasty decisions or replace careful analysis of the case when the decision sought does not involve putting the prisoner in liberty; ensure that procedural acts

that are not tainted by a nullity declared in writs of habeas corpus are not wasted; ensure the occurrence of summons of the Prosecution Service and of the petitioner to the judgment of this constitutional action; allow an appeal in favor of the prosecution in the court itself when a writ of habeas corpus is granted, which aims at ensuring some equality with respect to the possibility of appealing against an unfavorable decision, since the petitioner always can appeal when a writ is denied; and prevent the granting of habeas corpus in cases of the nullity and nullification when the decision does not directly touch the right to come and go (the right to freedom).

Finally, a constitutional amendment is proposed to authorize that the convict starts serving his/her jail time after the Appellate Court has rendered their decision (a conviction), even if further appeals are still filed before the Superior Court of Justice and the Supreme Court. When this proposal was originally written, a conviction could be executed only after the four instances had examined the case, which could take more than 20 years in white collar cases. Recently, the Brazilian Supreme Court authorized that the execution may occur after the decision of the Appellate Court (second instance). However, there have been movements in Congress in order to postpone the execution, again, so that it could not occur until a final decision is reached.

#### 5) AN ACCELERATION IN MISCONDUCT OF OFFICE ACTIONS

Two causes of delays in civil cases involving administrative misconduct of public agents are: a) a duplication of the initial phase; b) due to the fact that Circuit Courts are usually overburdened with multiple cases, simpler cases end up being tried with higher priority while misconduct of public agents, which tend to be quite complex, are usually delayed. In addition, there are still no statistics regarding how such actions are processed or any solutions proposed to speed up their processing. In light of this, proposal #5 advances three changes as to Law 8.429/92.

First, the wording of Article 17 is amended to streamline the initial stage of the procedure, which now contains a duplicate step that is inefficient and unnecessary, consisting of the existence of two successive opportunities for an answer to be filed. The model now being adopted is, by analogy, a reform of the Criminal Procedure Code, which protects the most sensitive right (freedom) and allows for only one initial defense, after which the judge may extinguish the action if it lacks the foundation to proceed. In this way, it prevents someone from responding to an unjustified action of misconduct while avoiding an unnecessary repetition of acts.

Proposal #5 also suggests the creation of circuits, chambers and specialized classes to judge accusations concerning misconduct of public agents and actions resulting from the anti-corruption law. This will avoid having the judgment of misconduct actions, naturally more complex, be preempted by the judgment of the simpler and less relevant cases, which are preferred as a way to vent the overload of work in already overburdened courts.

Finally, an addition to Article 17-A of Law 8.429/92 is proposed to make it express that the Federal Prosecution Service can propose a leniency agreement to companies, as to the civil

penalties of the same Law, as it can do towards defendants in the case of cooperation agreements in criminal matters.

## 6) REFORM IN THE SYSTEM OF THE STATUTE OF LIMITATIONS

Proposal #6 promotes changes in articles of the Criminal Code governing the limitations system in order to correct distortions.

One of the changes concerns Article 110, modified for two purposes. First, an increase by one-third in the limitation period regarding the penalties applied by definitive convictions, in a similar manner to what happens in many other countries. The underlying principle which justifies the difference between the terms of the limitation of prosecution before and after a definitive conviction is that when the intention to punish by the State is topped with a conviction, there is a firm demonstration of state activity to promote the punishment, which justifies the delay of time in which inertia implies a reading of state disinterest. Second, it extinguishes a retroactive limitation, an institute that exists only in Brazil and is one of the most harmful to our system through encouraging delaying tactics, wasting public resources, punishing a non-culpable behavior of the State, as well as giving rise to insecurity and unpredictability.

Article 112 is also amended to correct an illogical distortion of the system. With the final and unappealable sentence for the accusation, the running of time begins to flow for the limitation of prosecution, although there are defense appeals that will take years to be tried. In the meantime, a convicted criminal shall not start to serve his/her jail time. Effectively, at the time of this proposal, the Supreme Court cemented that jail time shall only be served after the final judgment, and, more recently, established that jail time shall only be served after the decision of a Court of Appeals. The fluency of the limitation, which sanctions the inertia, does not make sense when there is no other option to the State but to remain inert.

Article 116 is amended to prevent the flow of limitations while appeals before the Superior Court of Justice and the Supreme Court are still pending, a change that is provided for in Project 8045/2010 of the new Code of Criminal Procedure. Article 117 now provides, in section I, the interruption of the limitation through filing the complaint, which is consistent with the accusatory principle. The limitation of prosecution should apply only when the State shows disdain in the activity of punishing an offender; e.g., by not filing a criminal complaint against him/her. Notably, the Judiciary Branch, whose activity is passive, in the sense that it should be provoked in order to act, shouldn't actively give rise to the limitation of prosecution. Similarly, it is the interest of the State to punish, as declared by the prosecution, which should give rise to the interruption of prescription, not a judicial action, which is inert in principle.

Two other changes are made in the Article 117. The limitation period shall be interrupted by decisions rendered after the ruling and by the offering of a prosecution petition asking for priority to be given to the appeal. Whenever the case reaches the appellate instance there is a long period of time for an appeal to be tried.

## 7) ADJUSTMENTS IN CRIMINAL NULLIFICATIONS

The proposal #7 advances a series of changes in the nullifications chapter of the Criminal Procedure Code.

In this case, small changes are made in Articles 563-573, with four objectives: 1) expanding the preclusion of nullification claims; 2) sometimes the defense acts in bad faith by not alleging a nullity in due time so that it may benefit from the fact that the accusation shall have no more time to validly redo the procedural act because, by the time the defense finally alleges such a nullity, prosecution has been limited by time having elapsed. In such instances, the limitation of prosecution shall be deemed as having been interrupted by the nullification request in order not to jeopardize the prosecution; 3) establishing that both the parties and the Judge should strive not to nullify procedural acts to the best of their ability and in the best interest of the procedure; and 4) establishing the burden for the parties to demonstrate the loss generated by a procedural defect in light of actual circumstances so that there may be the nullification of the procedure.

In addition, the inclusion of new paragraphs into Article 157 is proposed in order to encompass, now with regards to illicit procedural acts, legal excuses which defeat the illicit character of what would be otherwise considered criminal action before the Brazilian law. Such excuses are suggested as exceptions to the exclusionary rule, in addition to other exceptions which have already been admitted by Brazilian legal provisions, stemming from the US law, such as the independent source doctrine and the inevitable discovery. The United States is a country with a strong democratic tradition from which our exclusionary rule derives. These changes seek to reserve the cases of nullification and exclusion of proof for when there was a real violation of the defendant's rights and for those cases when the exclusion of evidence is able to achieve its purpose, which is to give rise to a correct behavior on the part of the Public Administration. Nowadays, the exclusionary rule doctrine is applied in a much more strong fashion than in the US, from where it was imported, allowing the exclusion of evidence, for example, when an Appellate Court merely disagrees with the decision of a judge which determined the execution of search warrants or a wiretap. Moreover, in the proposal, the use of illicit evidence is expressly permitted in order to prove the innocence of the defendant or to reduce his/her sentence.

## 8) LIABILITY OF POLITICAL PARTIES AND THE CRIMINALIZATION OF "CAIXA 2" (SLUSH FUNDS)

The proposal #8 offers a modification of Law 9.096/95 to provide the strict liability of political parties regarding corruption. Besides that, it criminalizes the performing of parallel electoral accountability ("caixa 2", or slush funds) and the electoral money laundering (to conceal or disguise the nature, source, location, disposition, movement or ownership of property, rights or values directly or indirectly derived from a criminal offense or, from a source of funds that is prohibited by the electoral legislation or that has not been accounted for as required by law).

This measure is important because up until then only the natural persons (individuals) were to answer for any crimes committed for the benefit of the party.

## 9) PREVENTIVE DETENTION TO ASSURE THAT DIVERTED MONEY IS RETURNED

The proposal #9 advances an amendment to the sole paragraph of Article 312 in the Criminal Procedure Code, creating a new hypothesis for preventive detention: in order to avoid that criminals do away with money obtained as proceeds of their crimes. In fact, this modality of detention is expected to "allow the identification and location and ensure the return of the proceeds and any benefit from the crime or its equivalent, or to prevent them from being used to finance the escape or defense of the person being investigated or accused, when the actual precautionary measures are ineffective or insufficient or while they are being implemented."

This is not about imposing some kind of debtor's prison: the concealment of money diverted from the government is usually an act of money laundering practiced in a permanent way. Preventive detention of criminals in such instances protects society against the continuity and repetition of these crimes. It is a protection of the public order against the perpetration of new crimes, which would be admitted under the current law. Although the current law could allow it, it is convenient to set it as a new hypothesis, in order to avoid discussions that would otherwise exist. It should be noted that preventive detention (or pre-trial detention) is an exceptional measure. It is to be used with discretion, and only when the actual precautionary measures are ineffective or insufficient.

In addition, proposal #9 offers an amendment to the Law 9.613/98, in Article 17-C, in order to allow for a faster tracking of dirty money, which will facilitate not only the investigation of serious crimes but also to trace back, restrain and repatriate any money proceeding from crimes. The new suggested wording will allow that data from financial transactions are processed electronically and in an expeditious manner, providing the imposition of fines when the banks fail to comply with court orders to provide data within a reasonable time. Banks must also combat money laundering through providing rapid information to the Judiciary.

## 10) REPATRIATION OF PROCEEDS OF CRIMES

Proposal #10 deals with two legislative innovations that close loopholes in the law to avoid having criminals benefiting from receiving bribes.

The first of these is the creation of the extended forfeiture, a method whose introduction in Article 91-A in the Criminal Code is proposed. In short, this institute allows for the forfeiture of the difference between legally acquired and the totality of assets owned by a person who has received a final conviction for the perpetration of serious crimes that ordinarily generate large profits, such as crimes against the public administration and drug trafficking. This measure, which is similar to those instituted in many other countries, such as Portugal, France, Italy, Germany, the UK and the US, are in consonance with treaties to which Brazil is a party. Because it reaches only ill-gotten money, several courts around the world have recognized the harmonization between this measure and the basic constitutional principles of democratic countries.

The second innovation is the civil action in the public interest for the extinguishment of rights over assets, as proposed by the National Strategy for Fighting Corruption and Money Laundering (ENCCLA) of 2011. There are other bills being analyzed by the National Congress



with the same subject, but this proposal was favored for having been considered the best one in a forum that involved dozens of government agencies, which gives it ample legitimacy. The extinguishment of rights action allows for the forfeiture of illegally acquired assets regardless of the criminal's responsibility for crime, which may go unpunished should it not be discovered, or due to other legal restrictions, such as the perpetrator's death or the time-limitation of the prosecution of the case.