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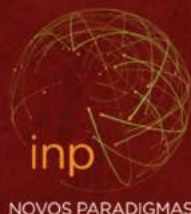
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COMMENTS ON A NOTORIOUS VERDICT

THE TRIAL OF LULA

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Introduction

“Comments on a notorious verdict: The trial of Lula” might be the most important judicial document published in Brazil for decades. The present selection of articles came to exist after a spontaneous movement, and significant enough as well, of Brazilian and foreign lawyers who carefully verified the verdict rendered in the extent of the procedure which was processed at the 13^a Vara Federal de Curitiba, in the case that was known at the media as “the Guarujá triplex”.

Beyond the unprecedented aspect of the criminal conviction of an ex-President in political circumstances, in thesis not comparable to last century Brazilian dictatorships, the verdict, which in large scale was expected as a non-surprising closure of this criminal process, provoked immediate reaction between the ones who read it and were committed only with the purpose of trying to understand the reasons why Luiz Inácio Lula da Silva is being punished for the criminal acts of passive corruption and illicit asset laundering.

The certainty of conviction was a fact. Admirers and opponents of the ex-President were aware that there wouldn't be another verdict. The hesitation was in knowing the conviction reasons, normative requirement of the 1988 Constitution, which by the inevitable political repercussions of the cited procedure, showed the 1987-1988 Constituent's right act when lifting the decision foundations to the constitutional warranty level of the process.

Only recently, after twenty years of an intense judicial battle starred by Fernando Fernandes, by coincidence Paulo Tarciso Okamoto's lawyer, who is a defendant together with the ex-President in this “Guarujá triplex” case, it was achieved to accomplish the Federal Supreme Court decision, bringing the trials audios to be known which the Superior Military Court (SMC) recorded during 1964-1985 dictatorship.

The cited trials, now made public, reveal the democratic virtues of the process publicity and of the decisions motivation. Sentences like “I'm going to take a revolutionary decision, leaving the law aside, because he can't be convicted in any ways by the law”, said in the trials, by the highest judicial authorities, military and civil, in a secret environment, now known by all who take the effort of listening the audios of that session.

The motivation on the decisions and the publicity of the trials are the *peaceful weapons* of the State of Law against arbitrations and abuses, besides providing the courts with the opportunity of bigger quality and efficiency in the duty of rectifying convictions considered unfair, despite rendered in accordance with the sincere belief that the law was applied to the case.

In addition, the judges work, as an expression of the regulated republican activity by a scrupulous group of material and procedural judicial rules, is subjected to be known and evaluated not only by the direct recipients of the verdict. Each person, interested in the luck of an equal subjected to a criminal prosecution, disposes of means and resources to promote a true archeology of the reasons by which someone is convicted or acquitted.

The publicity of the process and the decisions motivation work as shields against that type of justification cited above, common at that time at the Superior Military Court (SMC), typical of political trials. In cases in which the condition of the political process isn't covered by the criminal way with which it presents itself, is by means of scrutiny of the magistrate's reasons that the citizenship is felt protected or threatened.

If the motifs of an occasional conviction correspond to what the actual judicial *body* predicts and the penal law is being applied in accordance with the dominant understanding of the group of concepts and produced notions by the so called *penal dogmatic* in Brazil, it is justifiable to assume the conviction and, so, its right action will depend on the rectification of the magistrate's judgment about the proof evaluation, which must have been produced in an environment of rigorous rules compliance of the due process of law.

However, if the concepts and canonical notions of the Brazilian Penal law are put away and, besides, the warranties of this process are vulnerable, the judge appealing to proof evaluation criteria and other procedural practices at least highly questionable, the *common* converts itself into *exception* and the alert signs, in the defense of the State of Law, must be set immediately.

In the hypothesis there is an expressive consensus that the foreign law *apparently* substitutes ours, operating itself the phenomenon which Elisabetta Grande calls *symbolic circulation* of judicial models arising from different scopes of judicial culture and different areas of Law itself.¹

The handling of concepts and notions followed this conviction path, reverberating particular convictions and formed presumptions in penal matter with nonconformity concerning the fact analysis supported by proofs.

However it is about a simple presentation of the book, it is important to clarify the reader of the meaning, in terms of danger to individuals' liberties, of converting the exception into rule, as in my opinion it is clear that the conviction is of choice of the magistrate. About the subject Janaina Matida underlines:

“The judicial presumption isn't other but the reasoning about the facts done by the judge; it's expected that existed in judicial systems in which the directive of free and rational valuation is in force, because it is the judge's duty to value the proofs with enough information (or not) for the determination of the occurred facts under debate. Its quality is directly attached to the empirical generalization selected by him; so if the generalization is not universal, it, by definition carries the possibility of exception. Therefore, the reasoning construction must attend to demonstrate that the individual case is the rule and not the exception.”²

The condemning reasoning that holds itself on the exception rhetorically appeals to foreign judicial models and *incorrectly translates* penal concepts – as it jumps to the eyes in the ex-President's conviction for corruption – making a dead letter of the impossibility of gender *transplants warning*³, it would provoke a vivid reaction among the Law scholars.

The true *team* of jurists, female and male professors, lawyers and intellectuals who closely followed the process, mobilized themselves when realized the exceptionality in the style and arguments used by the criminal judge in the cited decision.

1 GRANDE, Elisabetta. Imitação e direito: hipóteses sobre a circulação dos modelos. Tradução de Luíz Fernando Sgarbossa. Porto Alegre: Sergio Antonio Fabris, 2009.

2 MATIDA, Janaina. Em defesa de um conceito jurídico de presunção. Tese doutoral. 2017. (Ainda não foi publicada).

3 Por todos: HENDLER, Edmundo S. Derecho. Derecho penal y procesal penal de los Estados Unis Aires: Ad-hoc, 2006. p. 45.

Thus, the entire process – and not only the verdict – was written out on the articles the reader has on one’s hands and that are of exclusive responsibility of each author.

The hundreds of texts details the procedure, clarifies what rules are actually in force and how they coincide in the case. According to the articles’ authors’ opinions, these rules weren’t attended and its non attendance lead to a rendered unfair decision.

It’s relevant to notice that on times of public trial and corresponding publicity of the motivation there is no more space to *not applying the law to condemn*.

Something similar, whatsoever, subverts the logic and would hardly be acceptable especially in this period of political instability and judicial insecurity. Questioning each argument, from its inadequacy to its legal procedures and to the current interpretation configured the method which authors used to verify if and in what measure the due process of law was violated or respected.

The probability of the ex-President’s condemnation and its confirmation are more than *mere convictions* of an extremely problematic process under any perspective.

The reader has with oneself more than the work of one hundred and twenty one authors in the version of this book in Portuguese, “Comentários a uma Sentença Anunciada: O Processo Lula” and sixty-five authors in this English version, portrayed on one hundred and three articles which subdue all aspects of the long verdict to the judicious exam that the penal science, Constitutional Law and other knowledge areas consider fundamental to claim the State of Law in Brazil.

“Comments on a notorious verdict: The trial of Lula” is a type of *Letter of commitment to Citizenship, Democracy and the State of Law*.

Trusting that the courts will make justice to Luiz Inácio Lula da Silva is to believe that the statement of the 1970s trials, at the Superior Military Court (SMC) – “I’m going to take a revolutionary decision, leaving the law aside, because he can’t be convicted in any ways by the law” – is definitely buried between us. If there are no crimes, and there aren’t any, the absolution is the only possible decision.

In the name of all the authors I thank all who brought this judicial document to life, to this *Letter of Commitment to Citizenship, Democracy and the State of Law*. Without the exceptional, courageous and determined Professors Carol Proner, Gisele Cittadino, Gisele Ricobom and the combative, tireless Professor João Ricardo Dornelles, what would be the individual resentment concerning the injustice of such a transcendent decision wouldn’t leave place to a document of which is expected to be of effective contribution for the re-establishment of the Empire of Law, with the absolution of the ex-President Lula.

Thank you very much, Carol Proner, Gisele Cittadino, Gisele Ricobom e João Ricardo Dornelles. As Miguel Littín once said, clandestine while in Chile, to Garcia Marques: there are acts apparently courageous, but deep down they are a commitment to civic dignity. You are courageous and encouraged us to make the *peaceful fight* for the civic dignity.

Geraldo Prado

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Let Brazil be Brazil again. Against The Case against Lula

Oscar Guardiola-Rivera*

I. Discomforters.

Let's begin with the classical story of oath-making in rituals of sacrificial violence or warrior semiophagy as well as love, as described by mythmakers and anthropologists. Let's then refer to the futuristic genres of horror fantasy and science fiction that, after all, are always philosophical. Let's say that in these cinematic genres we are presented with something our body cannot perceive as its own, as is the case in David Cronenberg's *Videodrome* or Scott's and Villeneuve's *Blade Runner* saga. Not different worlds organized in linear or progressive manner, but realities that exist in the present as the gift of time in the sense that although they are not currently lived they confirm reality and universality by rigorously undoing any compromise or accommodation with it. The figure that characterizes this cinema is the 'discomforter', who also appears in contemporary theatrical plays such as Aimé Césaire's *A Season in the Congo*. Just when everybody understands what is possible and is more or less satisfied with things as they are, when everything is under control, then comes the discomforter, who refuses the inquisitorial origins of truth and frustrates any easy return to older grounds upon which we can justify judgment, compromise and satisfaction with given reality. The real emerges when the discomforter makes heard the contradiction and pursues the question that no one wants to hear.

Such is Max Renn and the philosophers couple Brian and Bianca O'Blivion in *Videodrome*. Such is Deckard. Such is K, the 'decoy son' in *Blade Runner 2049*. Such is Patrice Lumumba in *A Season in the Congo*, who calls himself 'the discomforter'. Convinced that "Africa needs [his] intransigence he sets his own death in motion when he ruins the common sense consensus around *dipenda* (independence) by proclaiming as the true goal for the people of Africa the same concept of freedom but expressed in their own tongue: *Uhuru!*" Such is Lula of Brazil, the last in a long series of discomforters to be subjected to inquisitorial judgment. His crime is the same as Lumumba's: to believe that compromise in freedom (*dipenda*) was not enough, that a purely formal transition to democracy, liberty and equality was not enough, and to proclaim, together with the Workers Party, the Landless and the Base Communities of Brazil that the true goal for the people of Brazil was the same concept of freedom but delivered and performed in a different key, another tongue, as a battle cry for freedom (*Uhuru!*).

As Souleymane Bachir Diagne, quoted above, has explained, *Uhuru* is a *cri de guerre*, also the very first word pronounced by Caliban when appears for the very first time in *The Tempest: Uhuru!* Caliban tells Prospero. From Shakespeare's transliteration of the figure of the dark skinned commoner made landless by conquest and occupation into the enemy, to beer as metaphor for politics and the struggle for liberation, to being political and transforming anger into laughter, thereby undermining the established orders of colonialism and techno-reality capitalism by being mischievous to the highest degree. This high level of mischief operates performatively, as a refusal of the given *symbols* of justice (corrupted by those in power) and the enactment of a new dimensionality in time and space, an interval, in which new alliances and new *forces* might take place in actuality, in action, beyond the once critical but now trivial

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topics of fragmentation and breakdown that writers of the postmodern used to encompass contradiction, exclusion and residuation. Forget good orders and canonical behaviors. Just to do it! Force the beneficiaries of past injustice to abandon their bias of endowments! Bring the new times, do it here and now! Such is the battle cry of discomforters like Lumumba and Lula. That's their crime.

II. Standardization.

Put otherwise, when we press the distinction between *symbolic formation* (extensive or background/foreground image) and *force* (intensive, performative image and speech), or that between mechanical succession and cataclysmic split, itself the effect of an elementary past injustice sweeping in and out rather than being an abyss, revived in negotiation, the entire focus of the present shifts away from reciprocity and the economic exchange of the present to the presentation of time itself.

Such is the point made by Claudia Rankine's evocation of the indifference between the ritual handshake and a poem. The handshake, a gesture of peacemaking, is a ritual of both asserting and handing over. The poem is also that. "Here. I am here". It can be understood, in other words, as both complete and reciprocal determination. As in Velázquez's paintings, where one can see a vanishing point in relation to which everything slides; or in the North-South axis of Amerindian villages and topological formations that appear to have no purpose at all other than to allow the social structure of life as such to exist. What we have found, once again, is something anthropologists and their indigenous interlocutors worked out in their dialogical negotiations: the 'zero-value' institutions that having no content of their own open up an interval between absence and fullness that goes beyond the (inquisitorial) morality of judgment adjudicating between differences.

As such, these 'zero-value' institutions, and the discomforters that actualize them introduce a provocation to think. That is to say, they bring back (from the future, as it were) a reminder of the intolerable or the impossibility of carrying on with things as they are. In other words, these forms - performative, visual and topological - open up a new path, a pathos, as pathos forms (*Pathosformeln*) that induce an affect bridging up justificatory reasons and action. The affect in question is a sense of insufficiency that carries nothing of the weight of the inevitable but cannot end there. From here onwards a radical investment becomes necessary.

Capitalism wants nothing to do with such radical investments, for it can only deal in tamed risks. Like radical political action, capitalism also works in the differential space opened up by the interval and its logic. But it does so by displacing differences, slicing and dicing the gift as an instance of the dividual (rather than individual) character of the giver that is attached to it, and exchanging the resulting fragments. It deals with people, or their sliced and diced attributes as tokens of given types. Hence, the kinds of relations supported under Capitalism are relations of subsumption or absorption on grounds given prior to the fact. The "facts" in this case are fabricated a priori and repeated serially so as to create a ground or an expectation of guilt or abnormality. That is why the legal-theological form that is most proper of capitalism is judgment, the absorption of a case under given norms – normalization or standardization.

Capitalism treats people as dividuals that enter in exchanges with other dividuals in their roles as traders, enemies, familiars, ancestors, debtors, creditors and so on. It can deal with 'activists' who denounce the illegal force used to found capitalism and its legal orders by quickly dismissing them or containing them for a while. But it totally abhors discomforters like Lumumba, Che, Salvador Allende, or Lula, who refuse to play according to their role.

III. Role and Play.

Anthropologists working in Brazil and elsewhere have been quick to notice that the idea of role is itself so deeply anchored to the idea of a prior ground that it does not capture the groundlessness out of which our societies are actually granted existence. Capitalism (and its legal order) keeps promising us a new ground (or a return to older grounds) where none exists. To keep such a promise, it has to go to war –warfare and lawfare- and instead of producing ground it takes the land held in common by Amerindians or Africans, or distributed by lots under the seeing ways of Nemesis, Goddess of Rhamnous, daughter of Justice. By this first logic *nomos* is born, in the very act of dispossessing women of their own bodies and voices (as when Telemachus tells Penelope to shut up and go back to the sewing room) and taking them as objects of exchange for housekeeping (*oikonomos agathe*) and war ideology.

This first logic is that of the totemic and metaphorical (as opposed to metonymic) conjunction between two terms, each on their respective role: for instance, distribution and vengeful retribution, or *nomos* and *oikos*. It is an act of mass expropriation that conjoins them, giving us economics; and as Paul Lafargue put it, in that same act sanctions the inequalities of land and women taken by force as an act of State justice (Solonic *nomoi*, or Luis de Molina's 'just war'), thereby turning the chance of lots (by inverting it) into an inescapable destiny. In its apparent simplicity, this dualism (*oikos/nomos*) elevates to the level of the universal what today's behavioral economists call 'the cognitive bias of endowments', the habit to keep one's own, meanwhile obscuring the third term that keeps *nomos* and *oikos* together, namely, war.

This totemic logic of permutations, extensive redistributions, and inversions (in Spanish *inversión* means both the action of inverting and of using resources for industry, profit and rent) gives place to (fore-grounding) practices of value, discursive justification, pragmatic contestation and 'expert' decision-making. This is the logic of 'spirit' or redemptive and imitative magic (as theorized by Max Weber, Émile Durkheim, Frank Knight, and Marcel Mauss, among others), which stresses what we could call the "scientific" or theoretical subjectivation-ethical level of motivation and social hedging against danger: double-entry book-keeping, the rational disposition towards parsimony, and aspirational ethics. Ground (certainty) is produced here by the practice of methodical profit-making (the famous 'spirit' of Capitalism) but persistent uncertainty becomes an existential condition that cannot be resolved in this life. The cosmology that results from this logic of spiritual grounding seeks to eliminate ambiguity by either integrating death into the management of life as if it were a portfolio of options or, quite often, by promising immortality to man. Its ethics is a matter of eliminating the ambiguity by making oneself pure inwardness or an exchangeable object, by escaping from the sensible world or enclosing oneself and one's environment in the pure moment of decision and judgment. In doing so, rather than granting existence the Capitalist spirit takes it away.

But the second logic, which gives rise to the virtual yet actualizing 'zero-value' of institutions, entirely reorients the first. It does so in the sense that it simultaneously elevates one side of the exchange logic to a more absolute whole and in this manner also shows the very idea of duality, exchange and the presupposed ground – the idea of one's self as an economic self realizing his dream of keeping to oneself- to be quite a limiting and limited idea. It takes capitalism's spirit more seriously by shifting the plane of analysis to what we can understand as the structural level of institutionalization and techniques of differentiation and recombination, akin to those referred to by anthropologists studying contagious magic and linguists such as Roman Jakobson. The latter observed, in this respect, that the best way to

influence someone is to speak her name for it remains connected to her even when uttered in her absence. In this way, Jakobson and the anthropologists help us identify not only the spirit of *oikos-nomos* but the (symbolic and pathetic) forms that discursively and pragmatically test, justify and criticize prices, wages and quantifiable options in a sort of Wittgensteinian way – as a language game, but one that displaces differences geographically and temporally.

This is the point of shifting from ‘spirit’ to ‘forms’ such as standardization, the formation of trends (such as fashion), the asset or derivative form distinctive of financial markets and the collection form of luxury and art markets (as theorized by Karl Marx, Malinowski, Hoebel & Llewellyn, J. Butler, Nancy Fraser and Luc Boltanski). These forms of valorization can be understood as ways of seeing and (linguistic) frameworks that constitute the background which enable people’s judgments to converge and inform their reasons for acting, becoming integrated into other cognitive resources available to them as new grounds helping them orient themselves in market-driven reality. They make it possible to connect objects to the perspectives from which they can be viewed in order to be valued, and as such have an effect on the organization of commodities.

However, this is the case only insofar as they combine ways of seeing and speaking that can configure the discourse on objects considered as commodities (i. e. in association with a price). “It is precisely, however, because they affect not the things themselves, but the discourses” and the fantasies or imaginaries “surrounding them that they are structured –as is every argumentative procedure based on the use of language”. In the case of commodities that give rise to frequent transactions in our societies these (symbolic) forms of valorization relate to each other in a way that can be articulated as a set of transformations, in Claude Lévi-Strauss’s sense of the term –that is, differential and temporal. “An advantage of this type of model, as Lévi-Strauss showed, is that it can be translated into mathematical language”. The danger, however, lies in thinking that because geographical and temporal displacements or differences can be expressed quantitatively they are part of a necessarily coherent numerical series that is readable and repeatable, and thus, as a discernible metric of prior value, the firm ground for predictions and price-setting.⁴

There is a third logic that radicalizes duality as such, like the second one, but posits this zero-value structure, the interval as such, in which actors recombine parts of themselves with things via metonymic ‘techniques of liberation’ in volatile negotiations, as Drucilla Cornell says, which serve as the enabling motor force of the whole system that comes in its wake while in a way remaining outside it. Here role turns into play.

IV. All Against Lula.

This is precisely what happens in the classical example of the oath by scepter that appears in Book I of *The Iliad*, but also in the generic consideration of love. After all, love is an effervescence that splits the individual and cannot be realized individually. The electricity we call love may be better described by the notion that ‘to love is to see, and to see is to grant existence’. For love isn’t mere recognition (which tends to return to self as a pre-existing

⁴ Luc Boltanski & Arnaud Esquerre, “Enrichment, Profit, Critique. A Rejoinder to Nancy Fraser”, in *New Left Review* 106, July/August 2017, 67-76, at 68, for quotes and paraphrases; as well as *Enrichissement: Une critique de la marchandise* (Paris: Gallimard, 2017). See also Nancy Fraser, “A New Form of Capitalism? A Reply to Boltanski and Esquerre”, in the same issue, 57-65.

whole, and in that sense fails) but both affirmation of self and a totally risky handing over of oneself to another.

Affirmation (I am here) is an indexical; it happens through a deictic and anaphoric play in which I speak of myself from the viewpoint of the lover highlighting those differences that give it an advantage over other objects of love that might be able to substitute for it: I am here, I see you. I am here, I love you. I love you, I see you. I see you, you grant me existence.

Another example of affirmation, one which takes love from the familial to the socio-political context, is present in Langston Hughes's poem *Let America Be America Again*: "I am the farmer, bondsman to the soil/I am the worker sold to the machine/I am the Negro, servant to you all/I am the people, humble, hungry, mean". In these verses love is affirming yet also combative. There is no 'speaking for the other' in this case insofar as the other (the farmer, the worker, the negro) also speaks, of difference and contradiction, of bondage, of servitude, of being priced and sold. This entails the existence of an option for someone to sell at the exercise price (a 'put' in the lingo of trade) and an option for someone to buy (also known as a 'call'). If affirmation is the first aspect that determines what is at stake in the relation, the second aspect of risky handing over concerns estimates in time. Consider the fact that the options identified above are themselves contingent claims that can be traded at estimated prices evolving in time (short-term/long-term). This determines not the what but the who.

Consider the farmer, the worker and the Negro in Hughes's poem: each of them has a contingent claim given to them by history to demand restitution under conditions that have yet to occur. From whom? From current beneficiaries of past injustice. The value of such claims, which can be valorized by presenting them in the form of a limited number of characteristics with reference to numerical data or to a story, fluctuates in time. This is crucial, for it directs our attention to moments when historical claims may be liquidated through compromise and moments when the contradiction interrupts the possibility of any compromise or bargain ("validating the universal", as Balibar would say) and thus a negotiated settlement or a resolution can be legitimately forced upon beneficiaries, in order to overcome the cognitive effects of endowments –the habit to want to keep what one has. Here emerges the idea of justice as optional, meaning that the liquidation value of an option for historical redress rises and falls under different economic and socio-political situations but is not determined by the situation. A change of perspective between victims and beneficiaries of past injustice on restitutionary claims can take place in the context of a revolutionary option that forces a resolution, or even when that option isn't exercisable, if granting such claims would reduce the uncertainty that exists as long as they remain outstanding.

Arguably, this was precisely the force exercised by the Workers Party of Brazil, especially during Lula's term on office (government, not power). The case against Lula is in fact a case against historical justice and the shift from symbols to force, or against any attempt to take restitutionary (contingent) claims advanced by the victims of past injustice against its beneficiaries by forcing a resolution (for instance, via cash transfers such as the Bolsa Familia schem, which are of course incomplete means of doing justice). Further, the point of the case against Lula is to make sure that such force can never and will never be exercised again by historical-political agents taking seriously the contingent claims of the victims of past injustice.

Furthermore, the inquisitorial system of judgment in Brazil, a peculiar mixture between the remains of the prosecutorial system brought by the colonizer (Portugal in this case, which has itself rid itself of such a system) and the most up-to-date techniques of spectacular media (a

mix deemed “primitive” by Geoffrey Robertson QC during a recent brief to the UK Parliament, which I was part of) in the hands of a judicial movement in cahoots with the privileged of Brail has advanced the means of lawfare and character assassination or femicide to undermine the possibility of Lula’s 2018 candidacy having dispossessed Dilma Rousseff of the presidency. Clearly, the aim is to undermine the chances the only existing political party that, imperfect as all human institutions are, has so far dared to take seriously the claims of historical victims. Thus, the case against Lula (and Dilma) is really a case for the beneficiaries and against the victims of past historical injustice in Brazil. As such, it is a new instance of injustice adding insult and further injury upon injury. Or as Walter Benjamin would say, piling up catastrophe upon catastrophe.

By means of lawfare, the judicial movement and the privileged as well as their media outlets set to undermine Lula’s candidacy (while presenting themselves as successors of the “Clean Hands” operation in Italy, thereby shrouding themselves behind the mantle of morality) have advanced false facts and events, which repeated serially, are then taken as grounds for criminal prosecutions. Lula was accused, for instance, of owning an apartment provided by means of corporate corruption. Although Lula’s lawyers manage to demonstrate Lula didn’t own the apartment, the judge-media partnership didn’t allow the defense team to “follow the money” so as to prove beyond doubt that Lula hadn’t benefitted at all, thereby showing the lack of basis of any corruption charges. This is, as they put it to the meeting of the UK Parliament referred to above, “an organized war”.

There is no evidence, no offshore accounts, no US Dollar or Real in any account; Lula lives modestly in an average apartment outside of Sao Paulo; defense lawyers have had their offices wiretapped, and the results of further wiretapping, which are supposed to be kept secret together with other potential evidence, promptly released to the media that frames a spectacular narrative of corruption without any care for the crucial rights to presumption of innocence; Judge Moro, who has acted as a political actor, was criticized for these releases that broke the rules of evidentiary dealing but wasn’t removed; no “contempt of court” operated here, and thus, on the face of these events, a judiciary acting independently. The aim is to create an expectation of guilt, a ground, prior to the actual facts and prior to a proper evaluation of the available evidence. Once created this expectation, guilt will likely be confirmed by the appellate court just in time to disable Lula from running for office in 2018. Let’s call this lawfare by its proper name: a coup, the second coup to take place in Brazil in three years. This is how the right is going about re-establishing its rule over Latin America for its powerful clients, the beneficiaries of past and present injustice, ripping off a page from the worst practices of its nemesis on the left: by every and all means necessary.

Nobody denies there’s corruption at many levels in the dealings and partnership between Brazil’s political system and the corporate sector. Construction companies and other corporations have paid bribes, and these also made it to the Workers Party. But there’s no evidence at present that Lula is guilty of it. It is nonsense to say “he must have known”, for the fact is that there’s no evidence that he made promises to benefit others nor he benefitted himself, there was no quid pro quo, and thus the very possibility of him being guilty of gaining benefit isn’t there. He was sentenced for supposed “improvements” to a property, in spite of the above. The behavior of these judges and their inquisitorial attitude towards the lawyers in the defense team constitute a serious pattern of unfairness and lack of judicial independence, which the Special Rapporteur on the Independence of Judges and Lawyers,

Peruvian Diego García-Sayán, would do well to investigate and report on. The latter was also briefed in London by some of us on the particulars of the case against Lula.

V. Justice.

Ditto, the aim of lawfare against Lula and the Workers Party of Brazil is to seriously undermine any possibility of taking seriously the contingent claims of the victims of past injustice, and to see some measure of redistribution. Arguably, greater distributive justice would enhance political stability, and political stability would itself become more desirable after achieving greater distributive justice. However, some proponents of liberal democracy and clearly those at the helm of Brazilian lawfare against Lula believe otherwise. They feel politically safe and tend to view the role of law and judges as little more than the calculated application of precedent as a quantifiably readable past series with a precise temporal beginning and stopping point. That is why they also tend to reject economic redistribution based on historical claims –stories and histories of expropriation and exploitation- as lacking an ultimate ground, a temporal stopping point to which we can return in order to apply the law and set things right.

They might agree that an image of future justice built with the help of artists, philosophers and other speculative minds is necessary to develop a forward-looking conception that treats the whole of past history as irremediably lacking and terrible, but would suggest that we place a ban on migration from all too distant pasts and future utopias to the present as potentially disastrous, contaminant, if not impossible. Liberal democracy, a tamed version of democracy, they conclude, represents the most we have progressed and can progress to, or at least the worst framework for justice achieved in history, except for all the others. Having recognized the more or less immediate past as horrible, replete with poverty or scarcity and authoritarian despotic or genocidal regimes, and the present as proposing a set of normative standards embedded in a developmentally superior historical form of life, they ask, what is the point of going back trying to right such errors? To them, the time for rectifying historical injustices is never now; if so, isn't it better to turn the page and transition towards liberal modernity as the necessary shape of things to come?

The view of optional justice involved in retro-futurist performances of forms and forces that has been advanced in the previous paragraphs takes account of the kernel of truth wrapped within the liberal shell: reversing any particular moment in a whole history of injustice is tricky because, if any abstract socio-metric valorization of remedies could be applied to any form of inequality in the present, then there's no obvious way to limit remediation by arbitrarily choosing some single injustice that must now be set right.

But the rule of law in liberal societies entails that negotiators and adjudicators are called upon to make justice in relation to the actual case before them, rather than to any case. Further, this doesn't mean reading the past (precedent) as a quantitatively repeatable series, or the mechanical eternal return of some original intent, or as presenting us with a nonarbitrary baseline for righting historical wrongs. The absence of ground does not necessarily entail that arguments about justice must disavow or erase all past history.

The 'law as integrity' position successfully defended by Ronald Dworkin, among others, demonstrates the two sides of law's dilemma. On the one hand, the body of the law must affirm itself -it must exercise its authority and pass judgment here and now on the basis of cumulative history as a learning process. On the other, the body of the law must continually rule against what it previously established as the truth and thus its own ground and authority

– as in the case of *Roe v. Wade*, where Justice Blackmun heeded the call to justice as well as the demand to negotiate since the existing constitutional law of the U. S. did not provide him with a ready-made framework to consider the question of abortion. The judge is therefore called to interpret, in Dworkin’s sense of the term, go back to what is ‘right’ or ‘just’ in the law and aim towards the fuller realization of certain normative commitments (such as equality) that have become incorporated into the legal system as a universalizable principle, and to accept that progress in history isn’t linked to any sort of claim about whether the historical form of life in which such normative commitments are embedded is developmentally superior to supposedly non-modern forms of life. Speaking more technically, judges interpret through law and not through equity. This is why they require aesthetic ideas or symbolic forms and forces of the political imagination, like any other negotiator, which help them travel to the past and the future, and, crucially, return to the present so as to produce effervescent connections between historical moments –as it happens in Proust’s novels, Benjamin’s critique or Jean Epstein’s cinema. If this is the case, if there is no nonarbitrary baseline for restorative justice insofar as law and the state (but also the market) are nothing but ‘not-necessarily true or incomplete pasts’ (and the future is open), then we can equally easily conclude that equality, as such, is a remedy for the cumulative injustices that are the sum of past history, all and incomplete.

Liberals are right in pointing out that once we start correcting singular instances of contradiction and historical injustice made heard by missing voices, incarnated in foreign bodies, or expressed in the debt we owe to those who have come before us and to those coming after us –above all, the returning dead who tragically disappeared in the struggle for justice- we will find no stopping point. If so, rather than asking counterfactual questions about how well-off would peasant farmers, the proletariat, Africans or Amerindians would have been had there been no conquests, wars and exploitation, which would require us to imagine a world in which history never happened, we could consider what kind of ceremonial can look back into the past for those experiments on justice untimely interrupted, without requiring a stopping point, and reactivate them by unleashing forces that transcend their moment of inscription and increase the deeper legitimacy of social institutions from the reactivated past onwards as a continuous chain of retro-futuristic validations.

When due process of law isn't followed, democracy loses

Alvaro de Azevedo Gonzaga*

Drafting and creating laws, applicable to everyone, is one of the main elements that defines the transition from absolute power, centered on the figure of a monarch, to a society that at least has the goal of being equal.

In general and brief lines, it's the consolidation of the idea of norms and principles that everyone should follow and, in the event of deviations, determines that all would be judged also according to norms and principles established and applicable to all.

Very well. The world of ideas is one. The world of reality is another. Unfortunately, often the second is no less than a distortion of the first.

We are talking here about the case involving the trial of former President Luiz Inácio Lula da Silva, federal judge Sérgio Moro and the Federal Public Ministry.

The relation between these three elements gained contours, narratives and episodes that far exceeded the field to which they had to limit themselves: due process of law.

Concern about the existence of laws - so dear to our society - has become secondary. There is no search for the "truth of facts," which would be achieved through the application and observation of the legal process. We have, on the contrary, a truth that must be proved, even if, for that, the law is left aside.

Perhaps, from a perspective, or bias of our time, we see as absurd and senseless the excessive power and authority that the monarchs once had. What is the sense of nations, countries, thousands of people blindly obeying one person who stood above all of them?

That's the image we have today. However, a less arrogant view of the present would take account of the fact that the power of kings was based on the legitimacy that came out of the divine order, historical-family, tradition and identity, essential elements in those times. Factors so strong, of such relevance, that for the people of those times, justified and founded all power concentrated on the figure of the monarchs. This would give rise to the well-being of the nation.

Obviously, these were not better times. But social organization had these elements that gave it cohesion. Nowadays, such cohesion should be based on the Constitution and other provisions deriving from it. And from the observation and fulfillment of this agreement that we hope to achieve the common good.

However, it seems today, we have regressed on some issues. Brazilian society - perhaps without even realizing it - has chosen to believe in a particular vision of justice (with a lower J), rather than respect for the laws, which, par excellence, is what defines Justice (with capital J).

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Let us make even clearer what we defend here and the reason for the brief historical loss of the formation of Modern States. Law as regulator of social life exists to guarantee impersonality and to determine that society works, according to the will of that society itself. Okay. Of course there are distortions, political reform is a must. But it is a model (in constant improvement) more advanced in relation to other forms of government.

We question: if in a society that observes the laws and judges deviations according to it, there are already so many distortions and problems, what about one where the Law, which should be the main paradigm, becomes an accessory?

Will we change the law, which, with its imperfections, is the fruit of a collective and social effort, by the belief in the good character, in the messianic ideal that some characters avow to themselves? Will we again submit to subjective ideas, as did subjects in monarchies?

We believe that the criticism and concern we bring here is already clear. The observation of the legal process cannot be seen as an obstacle to the law being fulfilled. It's observation is what ensures compliance with the law.

A conviction is no guarantee that justice has been done. Does justice lie in the fact that there is a judgment or do we understand that every defendant will always be guilty? Are there no more innocents?

We cannot replace the defense of Law, which is the defense of the Democratic State of Law, for combating corruption, as if combating the second was possible without respect for the first.

It is not a question of relativizing or, much less defending corruption. On the contrary, fighting corruption must be so firm and decisive that we do not allow corrupt laws to fight against political corruption.

When Moro and Lula met last May, the event was treated as a confrontation, a clash, a dispute. If it is positive to ensure emotion, newspaper pages, clicks on the internet or even mobilize the political groups interested in the case, seeing the taking of a testimony in such a way is a sign of a sick process, a sick democracy.

President Lula using the meeting as a political piece is lawful, natural and a right. What he cannot do is to lack with respect, not to meet the decorum required in a session. When judged in a lawsuit, the law establishes what its obligations are and all of them have been fulfilled.

On the other hand, Judge Sérgio Moro, assuming the posture of those on the other side of the ring, faces the defendant, escapes from his duties and, therefore, does not harm only the case, or the defendant, harms and hinders all Democracy. He's a judge, not a fighter.

Examples of a performance beyond its attribution are not lacking. Before one of the demonstrations of the fighters dressed in t-shirts of the Brazilian national team, Moro issued a note saying that he felt "touched and moved" by being honored by the demonstrators. There is a Facebook page called "Eu moro com moro" (I live with him). Worse than the pun, just the fact that the page is kept by his wife and fed with videos starring the judge himself.

It is still important the idea that "to the judge it is only possible to appear inside the records". Does it have any relevance? Or is it observation to the event, without motivation, without reason? Will we ignore the Organic Law of the Judiciary?

From a politician, no impersonality is expected. If he wants to be impersonal, let him do it. He is given the possibility of acting as he wishes, in the limit of the Law, of course. However, it is not possible for a magistrate to do so.

A judge is not, nor can he be a hero. A paladin of Justice. A fighter of corruption. He does not exist for that. This is not his assignment. The judge is a servant of the Law, an official, someone who acts in obedience to the law, never the opposite.

To be direct, if the decision of a process means the advance of society, this advance is a result of the law, which was observed. Not from the judge, who only fulfilled it. Do we realize how it is and how it should be?

It is not a matter here of diminishing the importance of the judge, of the public prosecutor or of the defense. However, we must seek to see things as they really are.

Unfortunately, Judge Sérgio Moro understands this process differently. An avowed fan of the clean hands operation in Italy, Moro saw the opportunity to use his public function to fight corruption and moralize the country. Now in a declared way, sometimes indirectly, the magistrate acts according to this mission that he has thrown for himself.

The protagonism and the personality are dangerous and act against democracy. The law is impersonal because it is not the victim of interests and disputes. It's only committed to itself.

When Moro decides to dialogue, to be in tune with demonstrators, with communication vehicles (who receive orders and decisions before the court and the lawyers), his commitment, which should be restricted to the law, becomes with these groups, hence things become confusing and harmful.

For the "paneleiros", for those who wore the Brazilian national team shirt and went the streets, President Lula is guilty. Score. Such people wish to see him imprisoned. Desire, dreams, will, when that is limited to personal will, okay, no problems. They do not have the power to condemn the president.

We open parentheses. The problem is not it being convicted, but the desire to convict. Condemnation has nothing to do with desire, it has to do with crime, whether or not it has been practiced. We close parentheses.

When, who has the power to condemn becomes a party or puts himself in the position of symbol of those who have the desire, we have a problem of difficult solution. The decision is linked to the expectations of those who support it, the support was given because the decision was expected. What should be technical and impersonal, becomes political and personal.

In analyzing the fragility of the evidence, how much political action is confused as an action that by its nature would be criminal ... and from that, responsibility and guilt are attributed. The situation becomes even more tragic. Justice is set aside. And with that, a judge and a defendant lose. And with that, democracy loses.

The judge, the collaborator and the gaps of the conviction narrative

Beatriz Vargas Ramos*

Who is acquainted with the criminal procedure no. 5046512-94.2016.4.04.7000/PR? This is the official, discreet and uninteresting register of the process that arose with hullabaloo and a Powerpoint presentation from the Curitiba “task force”. On September 14th, 2016, Deltan Dallagnol, federal prosecutor in Brazil, leader of the Baptist Church of Bacacheri and fan of radical sports, commanded the media presentation of the accusation raised against Luiz Inácio Lula da Silva, on account of corruption and money laundering – the “*Lava-Jato*” – version about a triplex apartment in the town of Guarujá. According to Dallagnol, the former president was the “head of the Petrobras corruption scheme”.

Another formal accusation had been presented before. On March 9th, 2016, the State prosecutors Cássio Conserino, Fernando Henrique Araújo and José Carlos Blat, of the State Attorney’s Office of São Paulo, accused the former president of the Republic of Brazil of committing crimes of money laundering and false representation, and demanded his preventive detention. The Federal Prosecution Office, author of the second criminal charge, was deemed to have jurisdiction on account of the subject-matter. Judge Sérgio Moro already had an interpretation of the case: “The honorable State prosecutors, authors of the accusation, wrongly connected the granting of the aforementioned apartment” to frauds in the bank employees’ cooperative (<<http://www.conjur.com.br/2016-nov-30/ministro-stj-volta-aprovar-fatiamiento-denuncia-lula>>). Since then it was established a “alleged connection” of the case with the object of the Operation *Lava-Jato*.

On July 12th, 2017, Sérgio Moro sentenced former president Luiz Inácio Lula da Silva to nine years and six months in prison, imposed him a fine and also ruled the 19- year suspension of his eligibility to hold any public office or to act as “director, board member or manager of legal persons”, as indicated in Art. 9 of Law no. 9.613/1998. Furthermore, he determined the confiscation of apartment 164-A of the apartment block Solaris in Guarujá, considered a product of corruption and money laundering, and settled the sum of 16,000,000.00 (sixteen millions) *Reais* for the “reparation of the damages arising out of the crimes”. The judge decided that there was not sufficient proof of criminal evidence of corruption on the subject of storage, albeit “irregular”, of objects from the presidential archive. Regarding this charge he declared that there was not “much controversy about the facts, only about their interpretation” (item 926 of the sentence).

In order to accept the narrative of the federal prosecution in its main points, the judge supported his argumentation on the statements of one of the codefendants, José Aldemário Pinheiro Filho, also known as Leo Pinheiro, former president of the OAS Group. It is his statement which supports the accusatory pleading. All other elements – an assemblage of scattered fragments, subjective impressions, small bits and pieces over erased spots, as well as details which, on their own, would not have the effect of indicating a single and conclusive way among other possible ways – begin to make sense in the light of Leo Pinheiro’s truth. His “confession” is the thread which orients the whole intrigue. The proof, “preexistent” and allegedly “independent” from the codefendant’s collaboration, a “documental proof collected in preliminary proceedings of search and seizure” (item 246 of the sentence), is not much

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more than a set of confused and imprecise findings without any major evidencing force – were it not for the codefendant’s statements. The truth of Leo Pinheiro was fundamental not only for convicting former president Lula, but also for acquitting him of another corruption charge, namely, the one which the federal prosecution office related to the storage of the presidential archive. Two other codefendants, employees of OAS, the engineer Paulo Roberto Valente Gordilho and the architect Roberto Moreira Ferreira, were also acquitted of charges, based on Pinheiro’s statements – both were only charged of money laundering.

No other collaborator – or denunciator – affirmed so clearly and incisively the knowledge and participation of former president Lula concerning the “Petrobras corruption scheme”. It is Pinheiro who said that there had been a “corruption agreement whose specific beneficiary” was Luiz Inácio Lula da Silva. According to him, this agreement was not set in money, but was “materialized” in the triplex apartment and its renovations. In which form this apartment had been destined to the defendant and what exactly would have been this alleged benefit (without the effective incorporation of the object into the patrimony of the defendant) are important questions for the classification of the corruption offense which were not considered by the judge and much less answered by the collaborator.

Nevertheless, none of these questionings has any utility, given the version that the real estate was “assigned” in a “surreptitious” manner and that the “formal ownership of the object remained with the OAS Group”. Thus, it is exactly the fact that the apartment is not a property of the defendant which would prove the intent of “concealment” and “dissimulation” of the crime. It is really a strange benefit which consists in an “assignment” – never taken into effect – of something different (what would that be?) from the ownership of a real estate which was not even occupied by the defendant.

According to Sérgio Moro, the credit given to Pinheiro’s statements stems from their correspondence with the “vast documental proof” collected – that aforementioned assemblage of confuse findings. In the sentence, the codefendant is treated as a collaborator:

Considering his manifest intention to collaborate we do not see for which reason he would admit one corruption offense and would deny the other. If he aimed at giving false statements to his own advantage as well as to the advantage of former president Luiz Inácio Lula da Silva, he would have denied both crimes. If his intention were only to obtain legal benefits from the false statements, he would have confessed both crimes (item 936).

In spite of the firm opinions of judge Moro, there is only one sure thing: Luiz Inácio Lula da Silva is not, and never was, owner, possessor or usufructuary of any apartment of the apartment block Solaris in Guarujá. The sentence is stuffed with expressions meant to define the relationship between the former president of the Republic of Brazil and the Guarujá real estate, such as “owner in fact”, “beneficiary”, and “addressee”. Moreover, the term “owner” is frequently used simply like that, without any arguments, as if this condition would exempt the judge from analyzing the admissible evidence. Passive corruption, an offense described in Art. 317 of the Brazilian Criminal Code, is only specified if the public servant “solicits”, even through middlemen, “receives” or “accepts” an undue advantage for his own benefit or the benefit of another person, for committing or omitting an act inherent to his or her function. One of these three hypotheses is excluded – although not expressly – by the sentence itself, namely that of “receiving”. And if it is evident that he did not receive – there is no proof of ownership, possession or usufruct of the apartment –, then what is the demonstration of the fact that former president Lula would have “solicited” or “accepted”? The answer comes with

the statement of Leo Pinheiro (in all what was said and not said, the real estate would have been indirectly solicited). So, what would OAS have received in turn for this solicited undue advantage? Again we have the answer of Pinheiro: OAS paid it because this was the “market rule”. The judge, however, found a better explanation: “Since 2006 or 2007”, the company belonged to the “club” of those who “manipulated public bids by fraud” (item 861 of the sentence). Between the company’s entry into the “club” of public bids and the “grant” of a real estate for the benefit of the defendant which never took place, there was missing only a bridge, a link, a connection. This bridge was constructed by using elements which were much beyond anything the analysis of the proof could allow: for judge Moro, Luiz Inácio Lula da Silva was directly involved in the alleged “Petrobras corruption scheme”. And even more: the sentence states that a “misconduct” had been effectively committed – and this increased the criminal sanction against the former president of the Republic of Brazil. Item 890 of the sentence is one of those excerpts which best express the argumentation developed by the federal judge of Curitiba:

Even in the perspective of former president Luiz Inácio Lula da Silva, his act of appointment of the Petrobras directors who were involved in corruption crimes, such as Paulo Roberto Costa and Renato of Souza Duque, as well as their maintenance in their offices, although aware of their involvement with collecting bribes, which is the natural conclusion, due to him being also one of the beneficiaries of the corruption agreements, represents a misconduct. It is certain that former president Luiz Inácio Lula da Silva probably did not have knowledge of details and neither involved himself directly in the agreements and collection of amounts, given that he had subordinates for such purposes; but having been materially benefitted by part of the bribery [sic, error in the original formulation] derived from the corruption agreement in Petrobras contracts, even by the use of a general account of bribes, it is not possible to deny the knowledge of the criminal scheme.

This decision-making narrative obviously reveals that the conclusion is built on a sequence of suppositions which filled in the many gaps not resolved by the evidence *corpus* (“it is a natural conclusion”, “it is certain that”, “probably”, etc.). The higher the number of gaps in the convicting sentence, the lower is the certainty about the facts. Thus, if a question can get more than one answer of the same logic or verisimilitude, none of these answers can be considered sufficient for the level of certainty which is necessary for a conviction – it is exactly this principle that orientates the golden rule *in dubio pro reo*.

Finally, the version of the facts adopted in the sentence – the same contained in the accusatory pleading – makes sense within the context of a hypothetical direct participation of former president Lula in a “complex scheme” whose execution would be divided among several agents. The judge makes a lot of references to this hypothesis, although there had been no formal prosecution referring to a possible conspiracy, participation of the defendant in an “organized criminal group” or in a “criminal association”. Nevertheless, the sentence includes the fact of this participation, and some of the judicial conclusions show a direct dependence on this premise, a situation that imposes on the defense the burden to handle it – an example of this problem is the aforementioned item 890.

These are only some initial impressions gathered from the reading of the convicting sentence. The judge gives the impression that he has a case to win. Maybe he really believes that the judiciary system has the most expertise to fight corruption. With the support of the mainstream media, he presented himself in the public space in a manner that shows this idea. He became a kind of hero of the “fight against corruption”, an expression that originates from

the vocabulary of penal populism and is a political weapon of the punishment efficiency. He certainly believes that former president Lula is the “head of the Petrobras corruption scheme”, in the way it was stated in that Powerpoint presentation of 2016. It is true that the judiciary has an important task to fulfill in the field of crime repression, but it is also true that this mission cannot and may not be achieved at any price. One of the most important conquests of the occidental civilization is the rationality of the rules and principles which orientate the decision-making of the judges and put limits to the state’s punitive power. We are witnessing a serious and delicate political moment in which the system of rules and principles of the democratic constitutional state is put to the test, and therefore it is desirable and expected that the judicial authorities do not succumb to the temptation to make justice by sacrificing this system. From now on, it is up to the Court of Appeals to decide the appeals of the prosecution and of the defense.

The due process of law is under threat in Brazil: jurisprudence of the Inter-American Court of Human Rights upon analyzing the sentence that found Lula and others guilty

Carol Proner^{*}
Gisele Ricobom^{}**

The unsurpassable due process of law

A myriad of norms make sure the due process of law complies with International Human Rights. Such norms can be construed as a limit to the State when faced with the need to guarantee fair trial as a human right. Moreover, it is a structuring principle, a prerrequired principle containing other principles equally needed to make sure the defendant is granted full right to defense and adversary system against legitimate state violence and punitive power.

Before analyzing the due process in light of jurisprudence of the Inter-American System, which is the scope of this article, it is important to highlight something that must be understood previously in order to relate the supranational law system to the sentence that has convicted former President Luiz Inácio Lula da Silva in the case known as Guarujá Triplex: repeatedly not abiding to the most elementary constitutive principles of what can be regarded as a fair trial.

The lack of compliance with the guarantees of the due process of law is cross-sectional in all the stages of the process before reaching the verdict in the lawsuit against the former President; upon reaching such verdict, it is surprising to notice that the judge admits carrying out procedures in a very particular way, which is justified as fighting a bigger evil, “fighting against corruption”, “fighting against systemic corruption”, “fighting against the systemic acts of corruption and money laundering in Petrobras contracts”.

Thus, a serious issue pertaining to our current criminal justice system is unveiled in disputes involving human rights and criminality in which a false dilemma between the due process of law and crime control arises, as highlighted by the former Inter-American Court of Human Rights Justice, Sérgio García Ramírez⁵. On the one hand, we deal with the efficacy of the criminal justice system, which is construed as a system for crime control; and, on the other hand, procedural guarantees, individual guarantees, the full right to defense, the presumption of innocence, the adversary system, and so many other instruments of guarantee regarded as barriers to the investigatory efficacy of infringements and their plaintiffs.

On the sentence, the false polarization between individual rights and society’s rights is clear – corruption as a systemic evil that affects us all – gives rise to the vile justification for exceptional use of law, oftentimes causing suspension of a law or mere noncompliance with the law, and many times, crossing comprehensive legislation, taking rather unusual means to

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⁵ Mexican Justice, former President of the Inter-American Court of Human Rights. Ramírez, Sergio García. *El debido proceso*, Editora Porrúa, Argentina, 2012.p.7.

intended ends, or, as the judge himself would put it, “justifying investigation actions always based on the law, however, on comprehensive law” (item 81 on the sentence).

In other words, and making reference to a category of human rights philosophy studied by Franz Hinkelammert, there is an ideological inversion of rights: violating individual rights and guarantees of those who – potentially– could violate human rights (on the grounds that those people are probably corrupt). To do so, the judge takes a monocrat-like decision of what the bigger evil is and which rights are to be violated in *dubio pro societatis* and overlooks duly furnished evidence, as pointed out in other articles in this book. Such situation is some kind of lawfare on behalf of the fight against systemic corruption, as the defendant’s lawyers have proved countless times.

The case goes beyond the former President himself, although one could not ignore the influence of his political and biographic personality on the judge and plaintiffs from the Public Prosecutor’s Offices. The case goes beyond that and represents a great danger to the ultimate fundament of the due process of law, the *ultima ratio* of legitimacy of the rule of law itself. The German doctrine regards fair trial/*fares Verfahren* as the supreme principle, for that reason, it is inseparable from the principle of the democratic state based on the rule of law/*Rechtssaatprinzip*, of constitutional nature shaping penal procedural law.⁶

Setting limits to the State, by demanding it dutifully conducts the due process of law is a means to control the reasonability of laws and guarantee the applicability of essential individual rights against the will of the public power. It is some kind of defense against the acts of authority upon using legality. Thus, it is easy to realize that even in the lay perception of law, that enforcing the law is not enough for the trial to be regarded as a fair one, before considering those, it is important to encompass a set of elements and material criteria, aside from the required legal support that entail procedural issues, the dull form, full defense, lawful evidence, presumption of innocence, the adversary system, no denial of rights, quality characteristics based on the sense of what is “fair”, and “appropriate”, of what is appropriate and is closer to the criteria of justice, humanity, truth, and reason.

Exceptions cannot be made as regards the set of principles; otherwise such exceptions could annul the trial and damage the prospects of reaching a fair and valid sentence. The opposite of that, as judge Sérgio Moro seems to prefer, shall never bear legitimacy, as the ends shall never justify the means. The judge, who claims to be impartial and uninterested, uses 20% of the sentence to defend himself from the impartiality accusations filed by all of the defendants. Such fact turns the sentence into a rather eccentric one. Such a mutant judge, oftentimes resembling an accusing judge, others, being mistaken for a defendant who feels guilty for poorly conducting the proceedings, should have been careful to assure the legitimacy of the means, proceedings, and integrity of the process in every single detail, due to the potential repercussion of the case and the social and public responsibilities that stem from a process against a great popular leader who, as previously stated, draws crowds who believe he is innocent.

In times of political polarization, economic crisis, and the weakening of State institutions, it is fundamental to reinforce vehemently the need to preserve procedural serenity in cases such as this, which will necessarily have an impact on the political future of the country and on the jurisprudential fate of similar cases, although in others perhaps not so much. If it is true that

⁶ Bustamante Alarcón, Reynaldo, *Derechos fundamentales y proceso justo*, Lima, ARA Editores, 2001, p.183.

punitivism, exceptionality and selectivity are the rule for thousands of people in daily life, affecting the black and under-schooled youth⁷, it is also true that the effect of institutionalized exception will not bring a better destiny to these excluded individuals. It is better to increase the legal equality of so many disadvantaged and discriminated citizens.

Having passed over three years since its start, Operation Carwash has gradually lost its initial altruistic purpose and has become a politicized jurisdictional provision marked by Manichean disputes and by the political and media manipulation, with the prosecution playing a strange "messianic" role, as the court is driven by a need to legitimize and support actions in face of the public opinion, in absolute prejudice to due process, as can be seen in the conviction, especially with regard to the judge's impartiality and the spectacle's criminal law.

II. Jurisprudence in Sentence Analysis

The analysis of this principle is based on a significant number of contentious and advisory cases of the Inter-American Court of Human Rights. The due process of law, in its substantial sense, refers to the reasonableness and justice of laws as a way of containing the will of the legislative and executive powers. In an adjective sense, due process "that constitutes a limit to state activity, refers to a set of requirements that must be observed in the procedural instances so that people are able to defend their rights before any act of State that can affect them".⁸ In sum, as already stated, it translates as the right to a fair trial.

The American Convention on Human Rights provides for such a guarantee in Article 8 – rights of defense, appeal, presumption of innocence, among others. More specifically for the purpose of this analysis, it states that "Everyone has the right to be heard, with due guarantees and within a reasonable time, by a competent, independent, and impartial judge or court previously established by law, in the investigation of any criminal charge against them".

Impartiality was the subject of a decision of the Inter-American Court of Human Rights in the case of *Palamara Iribarne versus Chile*:

The Court considers that the right to be tried by an impartial judge or court is a fundamental guarantee of due process. That is, it must be guaranteed that the judge or court in the exercise of their function have the utmost objectivity to rule the trial. Likewise, the independence of the judiciary in face of other State powers is essential for the exercise of the judicial function¹⁹⁶.

The impartiality of the court implies that its members do not have a direct interest, position, or preference for one of the parties and that they are not involved in controversy.

The judge or court must be separated from a case submitted to their knowledge when there is any reason or doubt that goes to the detriment of the integrity of the court as an impartial body. In order to safeguard the administration of justice, it should be ensured that the judge

⁷ 40% of Brazilian detainees are serving provisional arrest, in absolute non-compliance with the basic principles of due process of law. According to data from the National Survey of Penitentiary Information (Infopen), 55% are between 18 and 29 years old, 61.6% are black and 75.08% have only completed elementary education. Available at <<http://www.justica.gov.br/noticias/mj-divulgara-novo-relatorio-do-infopen-nesta-terca-feira/relatorio-depen-versao-web.pdf>> Accessed 18 July 2017.

⁸ Also known as due material or substantial process and formal or procedural, respectively. *Ibid.*, p.22. As translated into Brazilian Portuguese by the authors.

is free from all prejudice and that there are no signs that could cast doubt on the exercise of jurisdictional functions.⁹

Along the same lines, in the case of *Apitz Barbera et al. (First Administrative Litigation Court) versus Venezuela*, the Court considered that "impartiality requires that the judge who intervenes in a particular dispute approaches the facts of the case without subjective prejudices, in addition to offering sufficient guarantees of an objective nature to allow the dismissal of any doubt that the individual or the community may have in respect to lack of impartiality".¹⁰

Moreover, the European Court of Human Rights considers that personal and subjective impartiality is presumed, unless there is evidence to the contrary. For the court, "the so-called objective test is to determine whether the questioned judge provided convincing evidence to eliminate legitimate fears or well-founded suspicions of bias in his/her person. This is because the judge must appear as acting without being subject to influence, inducement, pressure, threat or interference, direct or indirect, but only and exclusively according to - and moved by - the Law."¹¹

What is evident from the reading of the condemnatory sentence under analysis is a previously defensive narrative about the judge's partiality. The rhetorical construction aimed at disqualifying the behavior of the defense, by the alleged attacks at the judge, even if such attacks had in fact occurred, should have been more objectively developed at trial, which was not the case. The reiterated diversion argument is disrespectful and does not correspond to the quality of the expected decision, as can be seen in the example below (with numerical reference to the sentence items):

Item 57. Doubts about this judge's impartiality are mere diversions and although understandable as a defense strategy, such questions are deplorable since they find no factual basis and do not present any minimally consistent arguments, as already found by the Honorable Federal Regional Court – 4th Region.

Furthermore, there has been a habit of pointing out the Defense's lack of civility, as well as its alleged attack at the judge. It should be noted that chapter II of the sentence is entirely designed to expressively present the so-called offensive and disrespectful moments of the defendant's lawyers. Thus, if it is the judge's duty to "150. Decide the accused's responsibility based solely in the law and on evidence, rendering the procedural behavior of the accused's defenders as irrelevant", as the judge himself acknowledges, the extensive behavioral description precisely reveals that the judge engaged in this controversy, losing the objective ability of impartial judgment.

At another point in the sentence, the judge's partiality becomes even more evident when his opinion of the former president's government administration is mentioned:

Item 793. The merit of former President Luiz Inácio Lula da Silva's government in strengthening control mechanisms of corruption crimes must be acknowledged, including measures of prevention and repression, and especially considering the investments made in the Federal Police during his first term, as well as the reinforcement of the Federal Inspector

9 Available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_135_esp.pdf>. Accessed 18 July 2017.

10 Available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_182_esp.pdf> Accessed 18 July 2017.

11 Idem.

General Office, and the preservation of the Federal Public Prosecution Office's independence, seen in the choice of Attorney General, which was made according to a list voted among members of the institution.

Item 794. It is true that this initiative is not exclusively presidential, since facing corruption is a consequence of democracy maturation; nevertheless, the merit of political leadership cannot be ignored.

Item 795. Some crucial measures, however, have been left aside, such as the necessary change in the requirement of a final and binding criminal conviction for sentence commencement, which is fundamental for the effectiveness of criminal justice, and which only came to existence as per jurisprudence of the Honorable Federal Supreme Court (in HC 126,292, adjudicated on 02/17/2016, and in appeals 43 and 44, adjudicated on 05/10/2016).¹²

Moreover:

Item 959. Combining this behavior with the cases of guiding third parties to destroy evidence, one might even consider issuing a preventive arrest warrant for former President Luiz Inácio Lula da Silva.

Item 960. However, considering that the precautionary custody of a former President of the Republic involves certain traumas, it is prudently recommended to await for the Court of Appeal's judgment before acting on the consequences particular to the conviction. Hence, former President Luiz Inácio Lula da Silva will be able to file his appeal in freedom.

In these passages, it is clear, once again, that the judge's objective nature was not preserved. What is the purpose of giving an opinion on public policies in the course of a criminal process, policies that do not contribute to clarifying the case, in addition to appointing extra measures that could have been object of constitutional amendment?

Similarly, the motivation for the precautionary arrest based on prudence and the vague conception of "certain traumas" is symptomatic of a decision that was not based exclusively on the law, as indicated in the jurisprudence of the Inter-American Court.

Finally, the numerous public manifestations in the media reveal a true partisanship on the judge's part in regards to matters of national politics, which can be seen in several pronouncements and interviews outside the records of the criminal process, in a true jurisdictional spectacle that reinforces, amplifies and fosters all the fears and the justified suspicions of his bias. Indeed, in an operation of this magnitude, which has altered the course of the political and juridical history of the country, the judge's protagonism is crucial.

Perhaps one day this and other cases in which the former President is a defendant will come to rely on jurisprudence consolidated in the inter-American system, so that justice is to be done. We hope, however, that it is not necessary and that the duly atonements be made shortly, in a court of law, acquitting the defendant and restoring the judiciary power in the role of administrator and distributor of justice within the parameters of democracy and the rule of law.

¹² Available at <http://conteudo.imguol.com.br/c/noticias/pdf/sentenca_lula.pdf> Accessed 18 July 2017

The criminal law of the (Political) Enemy

Charlotth Back*

The verdict by Judge Sérgio Moro, who sentenced former President Lula to nine years and six months in prison for alleged (and unproven) illicit enrichment, because of alleged corruption practice, is a clear example of use of the Enemy Criminal Law doctrine - with the purpose of "fighting corruption in Brazil". This doctrine was created in the 1980s by the German jurist Gunther Jakobs, but acquired political influence under George W. Bush's administration after the September 11 attacks and especially during US invasions of Afghanistan and Iraq.

Under arguments of national security, self-defense, or counter-terrorism - the proclaimed evil of the twenty-first century - certain people, from the moment they are regarded as enemies of the society or the State, would not hold guarantees and criminal protections that are assured to all individuals. In the name of the "defense of society", the minimum criminal guarantees established by the constitutions and international instruments for the protection of human rights, such as the presumption of innocence, the prohibition of conviction without evidence, the principle of legality, the neutrality of the judge, the prohibition of torture, as well as the impediment of obtaining evidence through illicit means, are not applied to those proclaimed "enemies of society".

Jakobs proposes to distinguish between the Citizen Criminal Law, which is characterized by the maintenance of norms, criminal guarantees, and limits to the power of punishment and investigation of the State, and the Enemy Criminal Law, totally oriented to combat the social "dangers", which allows any available means, licit or not, to be used to punish those non-citizens. According to Jakobs, it is not a matter of contrasting two isolated spheres of criminal law, but describing two poles of one world, and making two opposite tendencies visible in a single legal-penal context.

In this context, there is the Citizen Criminal Law, whose task is to guarantee the validity of the norm as an expression of a certain society, and the Enemy Criminal Law, which has the mission of eliminating dangers. In addition, in the Enemy Criminal Law, there is a real hunt for the author of an alleged offense, since the agent is punished for his identity, his characteristics, and his personality. Here, the punishment is imposed upon the author, not upon the criminal conduct itself. Thus, the threat posed by the agent is reproached, not the guilt of the agent. The application of the Enemy Criminal Law means suspending "certain norms" for "certain people", which is always justified by the need to protect "good men", the society or the State against certain collective threats.

In the aftermath of September 11, terrorism was prosecuted under the laws of war, and those accused of terrorism were considered prisoners of war. The guarantor and limiting sense of punitive powers of the State, assured by the Criminal Law, gives rise to a persecution, in which the laws become laws of combat, a situation similar to those that occurred in fascist regimes. Individuals criminally prosecuted are no longer protected by the constitution or minimum human rights principles. Those considered to be offenders or contrary to order are not subject

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to the law - they are oppressed by the law. Law enforcement becomes, rather than protective, combative and used for the purpose of eliminating "enemy of society".

Although this doctrine is controversial and subject to criticism, reality shows that, in fact, the Enemy Criminal Law has been systematically applied in contexts of war - as in the war in Iraq, and under the justification of national security - such as in Guantanamo Bay Detention Center. This prison is an unequivocal example of jurisdiction for "irregular combatants" - suspected of terrorism - which allows all kinds of exceptions to the principles of constitutional criminal prosecution. Hence, there is suspension of minimum human rights in the name of combating terrorism and protecting national security.

In Latin American states, which are not targeted by terrorism, creating the enemy means resuming the process of demonizing the Left and criminalizing social movements. The new coups against democracy, now disguised as legal-parliamentary coups, are a symptom of a new offensive against social gains. In both cases, there is an ideological inversion of the Law that allows for human rights to be tainted instead of protecting them.

In the Brazilian context, the Enemy Criminal Law has been used in the self-proclaimed mission of the Judiciary in the "fight against corruption". Lula and other left-wing politicians are being treated as real enemies and not as citizens accused in a criminal process; that is, the defendants here are not subjects of law, or even targets of legal protection. They are, in fact, objects of coercion, deprived of rights and the minimum legal protection to which all human beings are entitled, even those investigated for crimes. It is important to keep in mind that using the Enemy Criminal Law in Brazil is not an innovation implemented by Judge Moro, since, in police operations inside the poorest communities and in the outskirts of big cities, the common rule is to treat both criminals and the population at large as if they were social enemies.

Firstly, the plain use of the Enemy Criminal Law in the sentence of Judge Moro is clear in several moments. First of all, there are no grounds for starting an investigation against Lula. It seems that Lula is being investigated because of his political identity and his past. The purpose of the investigation is to punish the agent's possible danger, not his guilt. In the final part of the sentence, in which Moro considers Lula's position to be an aggravating circumstance and, therefore, justification for extending his sentence period, the judge, once again, appeals to the person represented by the agent, and not to circumstances of conduct, in order to enforce the Criminal Law. It is important to highlight that it is not a feasible or even a potential aggravating factor in the Brazilian Criminal Law.

Secondly, the trial conducted by Sérgio Moro is partial and tended towards convicting the defendant, regardless of any concrete evidence, for reasons that are actually political, not legal. This aspect is corroborated by the judge's own conduct, who repeatedly goes to the media to make statements against the defendant, attends events hosted by right-wing political parties and is frequently and publicly accompanied by political opponents interested in destroying the former President's political image. In addition, the judge spends a significant part of the sentence criticizing Lula's defense strategy, which alleges suspicion and partiality of the Judgment. The former President has every right to defend himself and to denounce what he considers to be an unjust, partial, and groundless process. Lula's defense cannot be criticized or prevented from resorting to this kind of criticism, let alone be reproached for invoking his defense thesis simply because the judge considers that those arguments attack his moral authority or his prestige as a judge.

Thirdly, although the Lava Jato Operation has some social appeal due to the so-called "fight against corruption" mission, the legal methods that have been used, especially as regards to criminal investigation, are extremely questionable in light of our Constitution and the minimum guarantees of International Law due process. Obtaining a plea bargain by means of harassment, considering a disqualified plea bargain (by the Federal Public Prosecutor - responsible for the prosecution) in the sentence, tapping telephones in a law offices, disclosing audits obtained illegally, as in the case of the conversation between Lula and then President Dilma, and publicly exposing the accused, all of those constitute a series of clearly illegal conducts. All those actions support the "conviction" of the judge to condemn former President Lula.

However, no evidence, I repeat, no conclusive evidence was furnished in the judgment to justify the conviction - nor the property public deed, which is in the name of the company OAS; nor the fiduciary assignment agreement, which was signed between Caixa Econômica and OAS, no document, no secret recording, no bank account abroad. In addition, the prosecution witnesses were at no time able to directly relate either the former President or his wife to the obtaining illicit resources or purchasing the Guarujá triplex.

It is clear that the change in proceeding rules relates to the use of the Enemy Criminal Law. One of the pillars of criminal law, and consequently one of the guarantees of citizens against State perversity, is the principle that prosecution should prove what was alleged in the claim. There is no possibility for criminally responsible people without a direct and relevant relationship between the agent and the affected juridical asset, that is, without the existence of a robust and sufficient evidence to link the crime to the agent. It must be established that there was in fact unlawful conduct, and that such conduct may be imputed to the accused; otherwise, there will be undue weakening of constitutional guarantees in the name of combating corruption, as if that was the greatest evil in Brazilian society.

Behind a supposedly democratic discourse and defense of public goods is a covert judicial authoritarianism, typical of State of Exception contexts and the application of the Enemy Criminal Law. In the latter, authoritarianism becomes more efficient because it is diluted and disguised within a discursively democratic proposal, which, for this reason, cannot be opposed to any other argument, without being considered a " danger to good men ".

According to this common-sense discourse, based on the ideology of "social defense," it is fully possible to mitigate fundamental rights and guarantees "for the benefit of society." The stark collaboration with the media, to create popular mobilization against Lula, and the various interviews of the prosecutors of the Lava Jato Operation, prove that the process is very far from a proper legal criminal process; it is a political criminal process and, in that sense, tolerates non-compliance with proper criminal guarantees.

Judge Moro's sentence is unequivocal in demonstrating its main objective: to use all existing legal and illegal means to convict the former President – who is regarded by him and by part of the Judiciary as an enemy that must be defeated and eliminated -, even if it is necessary to tarnish the Law, to make procedural safeguards more flexible, and to change constitutional principles, that is, to explicitly enforce the Enemy Criminal Law.

Lawfare (or, simply, War)

Cristiane Brandão*

The concerns related to criminal law and its procedures have certainly been well explored herein, reflecting the technical contemplation provided by so many qualified specialists, academic colleagues and renowned jurists. Therefore, my dogmatic contribution, whether related to the theory of final domain of fact, the dosimetry of penalties, the competence or the system of evidence is exempt.

The point I would like to emphasize related to the court's decision and to stimulate reflection upon is related to the recurring use of arguments to counter the defense's claim regarding the obvious "lawfar". The dedication of countless pages of Sérgio Moro's decision denying such a warlike state, without at least problematizing its meaning or exposing the concept of this term adopted by Court is therefore highlighted. Based on the Freudian premise, negation has much to tell us ... (Freud, 2014).

The proposal I present is, therefore, to map the foundations offered by the judge, in order to interpret the rhetoric used therein and to measure the possible implications of the supposedly neutral speech in the construction/conformation of a political-social project.

"Nothing equals to a lawfare" (or the sense of denial)

The term "lawfare" appears ten times throughout the court's decision (items 39, 66, 77, 83, 118, 127, 128, 130, 132 and 138).

Initially, within the decision's opening description: *"The Defense of Luiz Inácio Lula da Silva, in their final allegations (event 937), sustains that: a) that the former President is suffering from political persecution and is a victim of 'lawfare', 'with the support from traditional media sectors'"*(p.7).

In an attempt to deconstruct the lawfare, Sérgio Moro refers to procedural moments in which he claims to have acted in a technical and legal manner, emphasizing that *"the acts performed by this court respected the regular exercise of its jurisdiction"* (p.15). By quoting factual episodes determined by him - such as bench warrants, searches and seizures, breaches of confidentiality, disclosure of audios - without even mentioning the allegations of the accusation, his speech displays an unconscious embracing of the Lula-Moro polarization so well carved by the media and so well assimilated by *doxa*.

At the same time as it assumes this defensive and trivial tone, the court has invoked the pleasures of "ownership of actions" for itself as an expression of its (judging) power, underlying a repressed enjoyment. In a precise manner, the denial of lawfare:

Freud demonstrates the importance of the meaning of negation in the psychological origin of the intellectual function of the judgment since, by denying something, in fact, the subject is affirming that there is a relation of meaning that he would prefer to repress. This function was established upon the experience of perception/satisfaction, and for Freud this is not a passive process. Thus, the judgements are constructed in the process of a subjective constitution,

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originally guided by the pleasure principle, which regulates the inclusion or not of something in the ego, and also by the experiences of repression. (Ripoll, 2014, p. 312).

In fact, denial and pleasure are intertwined. However, the function of judgment remains strong and is made possible *"by the fact that the creation of the symbol of negation allows the thought a first degree of independence from the consequences of repression and thus also from the coercion of the pleasure principle"* (Freud, 2014, p.29)

Almost in a tone of impatient¹³ contempt, Moro resorts to personal impressions in order to minimize the gravity of the bench warrant. He disregards the hypothesis of lawfare¹⁴ by using the assumption of normality of the measure since it only lasted a few hours and the presence of a lawyer was guaranteed, as well as the safeguard to physical integrity and to the right to remain silent (however, when is the guarantee of the presence of a Lawyer, the physical integrity and the right to remain silent no longer applicable to precautionary prisons or disfigurement of lawfare?). The rhetoric around a photo legal language, from a psychoanalytical point of view, can only aim to hide the subjective process of appropriation of scientism to conceal the forcefulness of an argument made by authority:

By directly associating the symbol of negation with the production of primary drives, Freud deconstructs a whole Cartesian rationality of thought and also the affirmation of an unquestioned truth secured by the parameters of classical logic. It opens a gap in the supposedly neutral edifice of science and in "well-formed" reasoning. (Ripoll, 2014, 312).

Thus, even while recognizing the bench warrant is entirely questionable, while understanding that the claims of those who suffer the search and apprehension, while agreeing to the possibility of questioning the authority of the court¹⁵, without considering as objectionable or inappropriate the terms or language used by the Attorney General's Office at a press conference in which Lula's¹⁶ image was attacked, Moro follows on with a blind eye of Freudian denial to try to show a "well-formed", uninjured, impartial scientific reasoning. He has even

13 Item 66: "But, since the issues were raised, some questions about these judicial decisions will be considered, albeit briefly, which according to the defense of former President Luiz Inácio Lula da Silva, represent a "lawfare" against his client. " (P.15 - my emphasis)

14 Item 77: "Even if one can possibly disagree with the measure, it must be said that conducting someone for a few hours to testify, with the presence of a lawyer, absolute protection of physical integrity and the right to remain silent, is not equivalent to pre-trial detention, nor did it transform the former President into a "political prisoner." Nothing like "lawfare". (P.16 - my emphasis)

15 Items: "82. Although the complaints of those who suffer the search are understandable, the fact is that household searches and seizures are routine investigative measures in the daily routine of criminal investigations. 83. Nothing equivalent to a "lawfare". 118. Lastly, regarding the decisions taken to characterize the "lawfare" against former President Luiz Inácio Lula da Silva, there is a record of lifting the secrecy on interceptions authorized by the court dated as of 03/16/2016 and 03/17/2016. 127. The telephone interception held for less than 30 days in complex investigations and the lifting of secrecy on the content of interceptions, even if we question the authority of this last item, is nothing equivalent to a "lawfare". (Pp. 17, 20 and 23 - my emphasis)

16Items: "128. The Defence of Luiz Inácio Lula da Silva also claims that the "lawfare" would be characterized by the press conference held by the Attorneys General Office on 09/14/2016, in which they would have attacked the image of the former President by explaining the content of the complaint. 129. On this issue, this Court has already rejected the exception of suspicion promoted by the Defence against the Attorneys General Office subscribers of the complaint and participants in the aforementioned press conference, with a copy in the event 335. It is referred to therein. 130. Even if it is possible to criticize the form or language used in said press conference, this has no practical effect for the present criminal action, because what matters is the procedural pieces produced. 131. Although it may be understood that the interview was not appropriate, it seems far from characterizing a "lawfare" against the former President." (P.23 - my emphasis)

denied the most obvious support carried out by the traditional hegemonic media or their influence on the news that has been published¹⁷. According to the court's decision, in its paragraph 138, *in essence, therefore, it is more an attempt at diversion in relation to the merits of the prosecution and to present the former President as a victim of a non-existent "lawfare"*.

But, after all, where is the war? (or the exception and the general rule)

I will not dedicate words herein to explore the concepts of lawfare (Werner, 2010) or SLAPP (Pring and Canan, 1996), since I prefer to discuss the notion of war and then draw a few conclusions.

In the famous treaty On War, Carl von Clausewitz demonstrates a classic view based on the demonstration of war as an imposition of violence to force someone to do his will. War, then, is not only *"a political act, but a true instrument of politics, its continuation by other means"* (*apud* Foucault, 1999, 22, no. 9). It also aims at a *certain peace* linked to the victory of one of the belligerents, after the bloodshed caused by the conflict of interests between the parties (Passos, 2005).

However, in Hannah Arendt's perceptive insight into On Violence (2001), we have already noticed the announcement of an epistemological turnaround. The author draws attention to the fact that peace did not follow the Second World War, the opposite was established by the Cold War and an entire structure of industrial-military work. The logic of the potentiality of the fulfilment of war infiltrated in society's composition supports and structures the Institutions:

To speak of "the priority of the potential to make war as the main structuring force in society," to reason that "economic systems, political philosophies and *corpora juris* serve and enlarge the war system, not the other way around" to determine that "war itself is the basic social system in which other secondary manners of social organization conflict or conspire" - all this sounds far more plausible than the XIX century formulas of Engels or Clausewitz. (Arendt, 2001, p.17)

Actually, the social mechanisms and institutions gain conformity to a certain *modus operandi* of constant struggle, in which power appears as a system of domination. Relations and apparatus of power are constituted by this logic of war-domination-subjection, in which the subject must fit into a certain standard of normality (standard which is constructed by the truth determined by the knowing power).

We cannot avoid quoting Foucault on this point and one of the many questions that stirs his (our) concerns: *"under peace, order, wealth, authority, under the calm order of subordination, under the State, under the apparatus of the State, under the laws, etc., must we understand and rediscover a kind of primitive and permanent war?"*(1999, 53). Reversing, therefore, Clausewitz's proposition, Foucault goes on to say that *"politics is war continued by other means"* (1999, pp. 22 and 55). Consequently, war is intrinsic to the relations of power and constantly used to destroy the political enemy, whether through the science of biopower

17 Items: "132. Finally, even on the so-called "lawfare", it would also stem from the "instrumentalization of the media" or would be held "with the support of traditional media sectors." (...) 135. In any case, this Court does not control and does not intend to control the press, nor does it have any influence on what it publishes." (p. 23)

(which justifies racism, for example), or through the (equally technical) methods of subjection of the people considered as crazy, abnormal, different, delinquent.

In agreement herewith the philosopher, the methodical line of analysis of power must include the disciplinary system. Thus, from a triple point of view, it is necessary to investigate the techniques, heterogeneity of techniques and their effects of subjection. The instruments of Criminal Law, Criminal Procedure, Criminology and Criminal Politics, which are integrated with the apparatuses of punitive control, are shifting their gaze, their weapons and their cannons to the "disorders" caused by the "different":

It is not so much a matter of making territorial conquests, and often even of economic conquests; it is a matter of shaping the minds, the spirits, the souls, the subjectivities of others, of the enemies. If we put religious, artistic and social practices in general under the umbrella of the word culture, we are facing cultural wars. And if we put all the practices of xenophobia, sexism, ethnocentrism, intolerance of difference, etc. under the qualification of racism, we will find a connection with Foucault, when he says that the expressive majority of the wars of the twentieth century - and I allow myself to extend them to The 21st century - are racist wars. (Veiga-Neto, 2014, p.3).

And what if we place all the exercise of acts which are rightfully to be performed by the courts under a legal qualification, supported (or not) by law, supported (or not) by the Federal Constitution, but in any case, show intolerance to differences and to the "disorders" provoked by these "different" individuals, what war would we be facing?

Interpreting them as acts performed in the regular exercise of their jurisdiction, therefore as normal acts, there is an assumption of normality is the exception transformed into the general rule, like a symptom of the defendant's treatment as an enemy (Jakobs, 2007). The bench warrant, the searches and seizures, the secrecy breaches and the publicity of audios represent, in this context, *exceptionality of normality*. By relying on Benjamin, "*the tradition of the oppressed teaches us that the 'state of exception' in which we live is in fact the general rule*" (1940, p.

If we had many more pages to discuss, we would follow here Agamben's proposal for a deep reflection on the suggestions made by Foucault and Benjamin regarding the imbrication of *bare and political life* in the modern ideologies. We limit ourselves, however, to referring to the author of *Homo Sacer* in his investigations of the intersection between the juridical-institutional model and the biopolitical model of power, as well as, specifically, the schmittian observations on sovereignty¹⁸.

Moro's decision reflects his status as sovereign. The state of exception is confirmed in the suspension of the validity of the norms, creating the apparent paradox of the very possibility of the validity of the juridical norm and ratifies, with this, the very sense of State authority. In a continuum of decisions of exceptionality, the jurisdiction says the legal-not-legal, fomenting the legal-political structure of inclusion of what is expelled, that is, the transformation of exceptional acts into *regular* acts:

The exception is a kind of exclusion. It is a singular case, which is excluded from the general norm. But what properly characterizes the exception is that what is excluded is not, therefore, absolutely out of relation to the norm; On the contrary, it remains in relation to it in the

18 " Sovereign is the one who decides on the state of exception" (Schmitt apud Agamben, 2007, p. 19)

suspended form. The rule applies to the exception by disengaging, withdrawing from it. The state of exception is not, therefore, the chaos that precedes the order, but the situation that results from its suspension (Agamben, 2007, p.25).

In view of foregoing, it is possible to conclude that the state of exception, generated by the erratic judicial decisions, gives precedence to exclusionary measures that, when incorporated into the rule of exceptionality, hide the subjection of enemies to a standardization of subjectivity. Moro's decision is emblematic in relation to the routine of war waged within the walls of the Judiciary system as an expression of introjected fruition from additional stimuli, in the logic of an intolerant and classist society.

With Brecht, in *Exception and Rule*, we end the voyage of two travelers and an explorer:

Thus ends

The story of a trip,

That you have seen and heard:

And they saw what is common,

What is always happening

But we ask you

In that which is not surprising,

Find out what is peculiar!

In what appears to be normal.

Find the abnormality!

In what seems to be explained,

See how much you cannot explain!

And what seems ordinary

See how amazing it is!

In rules see abuse!

And, wherever abuse is pointing at,

Try to remedy it!!

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The sentence against former president Luiz Inácio Lula da Silva: another tragic chapter of the 2016 Coup

Eder Bomfim Rodrigues*

Brazilian history has its peculiarities. Among them, an interesting situation takes center stage: the impression that time in Brazil has apparently not passed and that everything remains the same in society and in the State. It seems as though the past has not been outgrown and that people are always living the same life – or yet, the same life, but with new characters, in a social structure identical to old times. A kind of Brazilian social *déjà vu*.

But the past is not entirely gone: it is here and it leaves its traces in the present. For instance, even today, in the height of the 21st century, Brazil has not been able to free itself completely from the profound marks of slavery and its exceedingly outdated elites, who have never had a plan for country sovereignty. In fact, Brazilian elites have always thought of the country solely for their private whims, disconnected from any idea of real independence or strong development processes to face the world's major powers. To this day, the interests of the country and of the Brazilian people clash with those of the elites, especially the economic elite, since this group wishes to perpetuate a slavery-like model of State and society, placing the country submissively in the face of international capitalism.

In such a scenario, it is possible to state that "there is a real, continuous and institutionalized link that leads any attempt at breaking apart our class apartheid - however partial and fragile, such as those up to now – to coups d'état and violent reactions of the vulture elites"¹⁹. This happened with Getúlio Vargas, Juscelino Kubitschek, João Goulart and now with Lula. Luiz Inácio Lula da Silva is part of this list precisely due to his government's

Veiga-Neto, Alfredo. Wars, 2014. Available on file:///C:/Users/Dell/Downloads/Guerras%20-%2030nov14.pdf. Accessed on 07.21.2017.

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Translated by: Rane Souza

¹⁹ SOUZA, Jessé. A radiografia do golpe: entenda como e por que você foi enganado. Rio de Janeiro: LeYa, 2016, p. 42-43

victorious social inclusion process and improvement in the lives of millions of Brazilians, who, levied from hunger, were given dignity and a chance to exercise citizenship, in a clear attempt to translate the 1988's Constitution rights into reality. However, this seems to have resulted in great discontent for the Brazilian elites and the middle class, now threatened by the social ascent of millions of people in the Lula and Dilma Rousseff governments.

Therefore, due to changes in the social structure of the country, class hatred and the slavery marks preserved in Brazil's collective imaginary have re-emerged. Similarly, a bloody and cruel defamatory campaign against Lula and the Workers' Party (PT), directly responsible for the greatest process of inclusion, development and income distribution in the history of Brazil, has taken place in a wide range of media channels. This has led to the criminalization of the PT (Workers Party), of social movements and of Lula himself, in a media, police and judicial persecution that seems to have no end.

The manipulative media's heavy attacks at the PT and Lula concatenated were therefore not attacks at specific people or political parties. They were attacks on a successful inclusion policy directed at the popular classes, represented by Lula and the PT. A social inclusion process that, albeit flawed, had a historical meaning that will not be forgotten.²⁰

Within this logic of Brazilian social *déjà vu*, the Lula case is not different from another instance in Brazilian history: the story about former President Juscelino Kubitschek's apartment, at 206 Avenida Vieira Souto, in Rio de Janeiro. At the time, the apartment was said to be a secret property of Juscelino, acquired as a result of corruption. Like Lula, JK had his life turned upside down, having suffered great injustices from untrue news media. Several newspapers of the time (many of which are doing the same today) treated Juscelino like a criminal and untruthfully tried at all costs to destroy his image and that of his government. This was a clear attempt to banish him definitively from public life and to put an end to any chance of a possible candidacy for the Presidency.

The same is happening with Luiz Inácio Lula da Silva. The past is back and the old story of Juscelino's apartment has returned. Only now, it is Lula's infamous Guarujá triplex, through

²⁰ SOUZA, Jessé. A radiografia do golpe: entenda como e por que você foi enganado. Rio de Janeiro: LeYa, 2016, p. 85.

which the past is relived in the present, in a very similar context. In 1964, it was the Military Coup, now it is the Legal-Parliamentary-Media-Financial-Coup of 2016.

The main purpose of the aforementioned Coups is the perpetuation of the elites in power. In the 1964 Coup, the military was used as a means to control Brazil and to keep its wealth in the hands of a few. In 2016, with the military model rendered inappropriate, the law and the Judiciary power have taken its place, with the Judiciary gaining a prominent position in legitimatizing the acts of the new Brazilian order. Hence, forces have been replaced, and now the Judiciary occupies the place once held by the military, in a clear attempt to legitimize the change, to give it and all its actions an air of legality and compliance with the rules of a Democratic State of Law. However, in both situations, Brazil has plunged into a State of Exception, human rights violation and inequality.

Transposed with a certain appearance of legality, this State of Exception has led to a merciless hunt for Lula via misleading use of legal instruments, as well as illegalities practiced by the State itself and its agents, such as confidentiality breaches (even by lawyers), coercive bench warrants, telephone interception leaks, public exposure, invasion of privacy, and many other outrageous measures. In order to consolidate the legal war against Lula, a political persecution with the misuse of State and Law apparatus is in place, in a clear attempt to destroy his image, the legacy of his government in Brazil and his actions in the world.

The law has become a weapon used to annihilate the adversary, with the Judicial Power acting through exceptions and melodrama, unable to promote a fair process that observes the fundamental rights and guarantees enshrined in the Constitution and in the international human rights treaties to which Brazil is a party. Consequently, the July 12, 2017 conviction against Lula in Federal Court is part of the whole atmosphere of *Lawfare* and State of Exception currently experienced in Brazil.

The sentence that condemned Lula is yet another chapter of the 2016 Coup, as part of an attempt to create a legal impediment to his candidacy in the 2018 presidential elections, in addition to being an instrument to showcase public and media persecution, culminating in a text that resembles a hatred manifesto of the Brazilian right against Lula. This is an eminent, politically biased decision, since there is not a single proof that Luiz Inacio Lula da Silva is the triplex's owner. There is and there has never been any record that Lula is or has ever been the owner of said property. Nor has the document produced any evidence of such situation. In

fact, this matter has been settled, since the legitimate owner of the now infamous property on the coast of São Paulo has already been established.

Thus, the sentence given by the 13th Criminal Court judge of the Federal Court in Curitiba is a political declaration of persecution, and the result of an arbitrary criminal procedure particular to States of Exception. It is a decision deprived of compliance with the Constitution's fundamental rights and guarantees and the guiding principles of National Criminal Law, a sentence contaminated by illegalities, among them the judge's political views and the persecution originated in the Federal Attorney General's Office accusations, then offered in a Power Point presentation.

A fair criminal proceeding was therefore never performed, as numerous evidence added to the records and acquitting Lula of all charges were disregarded by the first instance judge. Even the defense witnesses' statements were not properly considered and valued. What we had was a condemnation based not on evidence, but on convictions and political reasons, including the use of news reports published in the *O Globo* newspaper dated March 10, 2010. It is inconceivable that a judicial sentence has favored a journalistic news piece as relevant proof in a *sub judice* case.

One cannot be condemned without proof, based exclusively on the judge's conviction, on mere suspicions, on news reports or even on a false "plea bargaining" deal by someone who recanted his statements post-incarceration, only to please the judge and the prosecutor, thereby seeking to obtain benefits through "some sort of collaboration with the Justice". This is nothing less than psychological torture, an obsolete means of obtaining false information. Incredible as it may seem, the OAS representative's so-called "plea bargaining" deal is devoid of evidence against Lula, a mere allegation without any real possibility of duly verification. Nevertheless, such allegation has been used to convict Lula.

Once again, Brazil is found struggling for democracy, in a real battle for its former president. The July sentence is concrete proof of this persecution, of a first instance judge's aversion to Lula and to everything that he represents in Brazil and in the world, in disagreement with the provisions of article 93, item IX (judicial decisions must be justified) and article 95, sole paragraph, item III (judges are prohibited from exercising political-partisan activity).

Finally, the Democratic State of Law in Brazil seems to be liquidated, seeing that every day the Brazilian society witnesses a strong step towards authoritarianism, a return to the past and the deconstruction of a country that once promoted inclusion and tolerance. In a similar scenario to that of JK, Lula's case today has the Judicial Power as a substitute for the military of the past. Ultimately, democracy and freedom are defeated in this process.

Nevertheless, even in the face of all difficulties, with enormous pressure from the country's oligarchies, slave-like elites, plutocrats, and media (responsible for all defeated attempts at democracy), the 4th Zone Regional Federal Court may be able to end such arbitrariness and to redirect this chapter of the 2016 Coup. May the struggle for democracy and due process remain at the heart of future decisions, seeing that the Judiciary can still change history and enable millions of Brazilians to dream of a country that respects the Constitution and the Law. May the Brazilian people gain sovereignty and that the 2018 elections take place within normality and freedom, obstacle-free, for "[...] in the age of a completely secularized politics, the rule of law cannot be had or maintained without radical democracy."²¹

²¹ HABERMAS, Jürgen. Facticidad y validez: sobre el derecho y el Estado democrático de derecho en términos de teoría del discurso. Trad. Manuel Jiménez Redondo. Madrid: Trotta, 2008, p. 61.

Lula's witch-hunt through the criminal procedure of exception in the post-truth age

Fernando Hideo I. Lacerda*

More personal beliefs, less facts. The mark of our times, i.e., the "post-truth" — chosen word of the year 2016 by the *Oxford Dictionary*²² — it denotes the circumstances in which objective facts have less influential in shaping public opinion than appeals to emotion and faith.

It is only in the context of this post-true empire that the sentence that condemned the former President Luiz Inácio Lula da Silva can be understood as the apex of the new authoritarian curve of the criminal procedure of exception, inherent to this decade of 2010.

In the first place, we start from three premises.

As an **initial premise**, we have the Criminal law which is a tyrannical instrument of control, manipulated by a Military Police that acts as a force of territorial occupation, by the Judiciary Police and by the Public Prosecutors' Offices that scrutinize and selectively bring actions; and, on top of that, by a Judiciary Branch that ignores the Laws and the Federal Constitution to judge according to its own convictions supported by the opinion published by the major media.

In this sense, it is enough to look in the rearview mirror to realize that the attribution of the condition of the human being to the slaves has occurred, so that, the practice of crimes could be attributed to them. "Things" do not commit crimes; therefore, it was necessary to transcend the condition of "thing owned by a Lord" to enable the application of criminal sanctions. For this reason, "the first human act of the slave is the crime, from the attack to his Lord to the escape of the captivity"²³. Pure and simple domination, since the beginning.

The **second premise** is based on the fact that the Brazilian Criminal Justice System is guided by the interests of elites. We have never overcome the culture of slavery. If we used to identify the "casa grande"²⁴, the slaves' quarters and the "capitães do mato"²⁵ as well-defined social elements; today, we must understand the camouflaged structure in which live together the Rule of Law, the permanent State of Exception and the Military Police.

The "casa grande" as the landlord's stronghold gave rise to the legal form of a supposedly democratic Rule of Law destined for the included population, where the fundamental rights and guarantees are secured according to the convenience of a certain thought dominated by the economic elite.

While, in a diametrically opposite situation, the "slaves' quarters evolved into a permanent State of Exception destined for the excluded ones, where the logic of the selective combat

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22 "After much discussion, debate, and research, the Oxford Dictionaries Word of the Year 2016 is post-truth — an adjective defined as 'relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief'". (<https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016>)

23 GORENDER, Jacob. O escravismo colonial (i.e., "The colonial slavery"). 3. ed. São Paulo: Ática, 1980, p. 62-63.

24 Casa Grande, i.e., the same as "big house" and it was the main house or family residence in a farm of Brazil.

25 Captains of bush (i.e., capitães do mato) were the servants of the farms responsible for capturing the fugitive slaves and being commissioned to recapture other runaway slaves

against the poor and marginalized population is based on the imposition of fear and terror through the severe application of incriminating norms and denial of right to a legal defense.

So, it is not difficult to notice that the mission once attributed to the captains of the bush, the agents of repression and punishment of the slaves, has been entrusted to the Criminal Justice System, particularly to the Military Police - an institution incompatible with a democratic regime - which acts, on one hand, as a protection force of the dominant class interests (legal assets?) and, on the other hand, it acts as a force of territorial occupation and repression against the poor population.

This is the logic of a contemporary State of Exception: to combat an enemy with an apparent institutional legality. Thus, the Criminal Justice System develops the function of an agent of the exception, with the intention to attribute legitimacy to the practice of essentially authoritarian measures with a veneer of legality.

The **final premise** intends to explain for us, the phenomenon regarding on Lula's witch-hunting, which does not only affect him, as an individual, but as his symbolic representation of a fairer and less unequal society. Naturally, a society guided by an enslaving logic would not be capable of reducing its privileges without showing resistance. For such reason, the criminal procedure of exception is the denomination that I gave for such mechanism utilized.

In our country, contrary to the Enemy Criminal Law, according to the concept that the Günther Jakobs has propounded, we do not have two criminal laws abstractly in force and regulated differently, i.e., a criminal law of the citizens and a criminal law of the enemies (take the case of the 18 U.S. Code Chapter 113B-Terrorism and its Patriotic Act).

In fact, in our legal system, is current in full force the same criminal law, the same rules of the criminal system, but they are being applied and interpreted in a different way through the mechanism already denounced as a criminal procedure of exception.

If the enemy of centuries ago was dominated in the context of an explicitly slaving relationship, nowadays, it is the Criminal Justice System that plays vehemently the same role. According to a survey conducted by IDDD²⁶, more than 90% of the prisoners interviewed are responding for crimes against property (theft, robbery and reception) or drug trafficking: hence, this is the pure and simple criminalization of the poverty that has affected our entire Republic.

In its turn, in parallel with the traditional concept of the enemy (i.e., the poor: labeled as thief, trafficker, bandit), the decade of 2010 witnessed the outcome of a new authoritarian curve of the Criminal Justice System through its power extension for the political class portion that has occupied the national government until it was overthrown by the coup of 2016.

The current Minister of the Federal Supreme Court in Brazil, the Justice Luis Roberto Barroso, during his debate in such Court, has identified the judgment of the AP 470 as point outside the curve, according to his own words: "– I consider that "Mensalão" was, for several reasons, a point outside the curve, but it did not correspond to a general hardening from the Supreme regarding to such specific case".

26 IDDD - the Institute in Defense of the Right to Defense, a project supported by the Brazil Human Rights Fund aims to reduce the abusive use of provisional detainment (pre-trial custody) in the state of Sao Paulo.

Conversely, it has shown, that was not just a point outside the curve, but the beginning of a new curve. A new authoritarian historical circle: the judgment of the “Mensalão” was the first step to the current model of the criminal procedure of exception, where the exception that proves the rule, and the Criminal Justice System passes to be manipulated in accordance to political interests, selectively conducted by the economic power and by the media system.

The seed planted by the Federal Supreme Court has germinated into to so-called “Operation Car Wash”, in which the criminal proceeding ceases to be the findings in a concrete fact to materialize in persecution focused on targets politically selected, which starts through illegal plea-bargains; and they are developed through coercive conditions and arbitrary threats of imprisonment with the intention to halt the defense; and, they are judged according to the pressures of the economic power as well as the media system; and, they impose advanced punishments that transcend the legal field through illegal caution imprisonments and selective leaks that contribute to the spectacle of public execration before an official judgment.

It is chosen an official enemy to be called as “corrupt” and to be ceaselessly persecuted by the police, by the judiciary and by the media. Being an abstract label capable of concealing a real and selective persecution against the political opponents, the “fight against corruption” attends the interests of its economic power in Brazil, such as the “fight against terrorism” in the US Law.

In this point, the lesson of Zaffaroni is unretouchable, for whom that “crime organized and the corruption are both functional to enable the punitive power and the intervention of the State in any economic activity, bothering the government in activity or it is useful for eliminating or for defaming the competitors without the limits or constitutional guarantees in such interventions. Moreover, the campaign against corruption seems to be more concerned on avoiding higher costs to the foreign investors from peripheral countries, instead of being worried with the ethical principles that are stated or even, in relation to the structural damages that they cause to the local economies”²⁷.

Thus, the condemnation of the former President Lula is the apex of the new authoritarian curve that aims to combat the political enemy (the popular government: called as “corrupt”), the traditional and legitimate representative of the economic enemy (poor: called as “thief, drug dealer, bandit”).

The criminal procedure of exception is an anti-suit. It is a legal form of political and economic persecution in the post-truth age. It is the violation of the fundamental rights and the individual guarantees of a portion of the population (and, its symbolic representatives) with a hypocritical varnish of lawfulness. It is the result of the manipulation of the Criminal Justice System (the Police, the Public Prosecutor’s Office, the Judiciary Branch and the media) to meet the interests of the market against their true enemies: the poor, the marginalized and oppressed ones.

According to the market’s perspective (the sovereign on the contemporary time), the enemy cannot have any perspective of development: the airports cannot seem as bus stations, the

27 ZAFFARONI, Eugenio Raul. O inimigo no Direito Penal (i.e., “The enemy of the Criminal Law”). 2. ed. Trad. Sérgio Lamarão. Rio de Janeiro: Renavan, 2007

universities should be the upper classes' privilege, Mall is not the proper place for "rolezinho"²⁸.

As well observed by Pedro Estevam Serrano ²⁹, the persecution against Lula, is not the attack on the individual itself, but represents the war of the market against to the greater symbol (perhaps unique, in the current political scenario) of social change and elevation of the undesirable ones against the privilege of the elite.

But, do not dare to doubt: the arbitrary acts against some members of the privileged class (directed selectively against those who do not represent the interests and the privileges of the market) will only intensify (and, it is already giving evidence about this) the traditional violence against the marginalized class, persecuted and discriminated by the economic power.

History will judge those who refuse to see the blindness of their not seeing.

²⁸ It is understood as a social movement, organized via Facebook which result in a mass social gatherings of most of the time by low-income teenagers.

²⁹<https://www.cartacapital.com.br/politica/pedro-serrano-201co-prejuizo-nao-e-so-de-lula-mas-da-sociedade201d>

Disrespect to the practice of law and breach of the principle of judicial impartiality

Flavio Croce Caetano*

It is widely known that in any legal relationship, on all legal levels, including in any civil, electoral, labor or criminal other court of justice, the settlement of disputes by any legal means should follow some fundamental principles such as bilateral hearing, equality between the parties and, above all, impartiality of the judge.

This is how things are done in our constitutional and in our court system, just like in most of the world's legal systems and in the international system of protection of human rights, as presented, for example, in the rules established in the International Covenant on Civil and Political Rights,³⁰ ratified by 169 countries:³¹

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. (...)

Article 19 of the Universal Declaration of Human Rights (UDHR),³² published before the Covenant, also stated that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." On a regional level, Article 8, paragraph 1, of the 1969 American Convention on Human Rights (ACHR) provides, inter alia, that "every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

In short, in a legal relationship there is no and there can be no relationship of supremacy between the judge, the plaintiff and the defendant. All parties perform roles that are equally essential to the court system, yet these roles are absolutely different and must be respected in their entirety.

For no other reason, our Federal Constitution gave absolutely identical treatment to those parties without distinguishing or assigning any hierarchically superior position to the judge compared to the other operators of the justice system. In its Title IV, on the Organization of Powers, our Constitution assigned Chapter III to the Judiciary Branch and Chapter IV to the Essential Functions of Justice, namely the Prosecution, the Attorney General, the General Counsel and the Public Defender.

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Translated by: Rane Souza

³⁰Adopted by the 21st Session of the General Assembly of the United Nations on December 16, 1966; approved by the National Congress through Legislative Decree No. 226 of December 12, 1991; enacted by Decree No. 592 of July 6, 1992.

³¹As published on the United Nations website on July 23, 2017. Retrieved from https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en.

³²Proclaimed by the United Nations General Assembly on December 10, 1948.

Likewise, the Constitution also established that the Judiciary Branch should follow the principles governing public administration, with special emphasis on the mandatory compliance with the principle of impersonality. Without a doubt, when it comes to the court level, the principle of impersonality imposed on the State turns out to be the principle of impartiality.

To determine whether the principle of impartiality (and the principle of impersonality) is respected in court, it is absolutely imperative to examine the observance of both the rights assigned to the attorney (and defender) and the duties of the judge.

Article 6 of Federal Law no. 8906 of July 4, 1994, which contains the Rules of Professional Conduct for Lawyers and for the Brazilian Bar Association, sets forth:

Article 6. There is no hierarchy or subordination between lawyers, judges and members of the Prosecution, all of whom must be treated with mutual respect and appreciation.

Then, Article 2 of the same law establishes:

Article 2. Lawyers are indispensable to the administration of justice.

Paragraph 1. In the private domain, a lawyer provides a public service and performs a social function.

Paragraph 2. In a judicial proceeding, a lawyer helps a judge makes his/her findings, in an attempt to secure a final judgment that is in favor of their client, and a lawyer's acts are a public function.

Paragraph 3. In the practice of law, a lawyer's acts and performance are inviolable, within the limits of these provisions.

In short, in our legal system, the practice of law is a public function, essential to the administration of justice and fundamental to make a judge's findings. A logical conclusion from this statement is that the practice of law cannot be considered by the judge as an actual hurdle in the court proceedings, let alone obstruction of justice.

Strictly according to the Brazilian legislation, it is worth quoting the United Nations Basic Principles on the Role of Lawyers.³³ Among the many relevant pieces of legislation, the following main ones are reproduced here:

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions. (...)

20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

³³ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990.

Given the importance of this matter, no wonder that, on the international level, the United Nations appointed a Special Rapporteur on the Independence of Judges and Lawyers.³⁴ Now under the supervision of the UN Human Rights Council, the Special Rapporteur's mandate has been extended through Resolution No. 26/7 of the Human Rights Council. Many experts have addressed this issue in the UN, having given the following important statements and recommendations:

“Any legal provision protecting the independence of judges, lawyers or prosecutors becomes useless if there is no commitment to respect and enforce it. Moreover, whenever one of these groups “forgets” the specific roles they have to play in a democratic society — roles which come with both rights and duties — the prerequisites of independence become difficult to fulfill.”³⁵

“The threat to judicial independence comes not just from the executive arm of the Government nor from the legislature, but from organized crime, powerful businessmen, corporate giants and multinationals.”³⁶

“Corruption within the judiciary goes far beyond economic corruption. It could, for instance, take the form of biased participation in trials and judgments as a result of the politicization of the judiciary, or party loyalties of judges.”³⁷

“There has been an increased number of complaints concerning identification of lawyers with their clients' causes. Lawyers representing accused persons in politically sensitive cases are often subjected to such accusations. Identifying lawyers with their clients' causes could be construed as intimidating and harassing the lawyers concerned. The Governments have an obligation to protect such lawyers from intimidation and harassment.”³⁸

The United Nations Office on Drugs and Crime (Unodc) published the Bangalore Principles of Judicial Conduct, which expressly determines unacceptable conducts of judges.³⁹ This document was annexed to the report presented at the 59th Session of the United Nations Commission on Human Rights in April 2003. On April 29, 2003, the Commission unanimously adopted resolution 2003/43, which included the Bangalore Principles of Judicial Conduct.

One of these Bangalore principles is, again, the Principle of Impartiality, worded in the said document as follows:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

³⁴Created in 1994 by Resolution No. 1994/41 of the United Nations Commission on Human Rights.

³⁵ UN document A/HRC/32/34, Human Rights Council, 2016, paragraph 39.

³⁶ UN document E/CN.4/1996/37, paragraph 246.

³⁷ UN document A/HRC/35/31.

³⁸ UN document E/CN.4/1998/39, paragraph 179.

³⁹United Nations (UN). United Nations Office on Drugs and Crime (Unodc). See also Comentários aos Princípios de Bangalore de Conduta Judicial / Escritório Contra Drogas e Crime; translated by Marlon da Silva Malha, Ariane Emílio Kloth. — Brasília: Conselho da Justiça Federal, 2008. Retrieved from http://www.unodc.org/documents/lpo-Brazil/Topics_corruption/Publicacoes/2008_Comentarios_aos_Principios_de_Bangalore.pdf.

The United Nations Office on Drugs and Crime (Unodc) has published the Commentary on the Bangalore Principles of Judicial Conduct.⁴⁰ As expressed in that document, and according to the European Court of Human Rights,

“... there are two aspects to the requirement of impartiality. First, the tribunal must be subjectively impartial, i.e. no member of the tribunal should hold any personal prejudice or bias. (...) Secondly, the tribunal must also be impartial from an objective viewpoint, i.e. it must offer sufficient guarantees to exclude any legitimate doubt in this respect. Under this test, it must be determined whether, irrespective of the judge’s personal conduct, there are ascertainable facts that may raise doubts as to his impartiality. In this respect, even appearances are important. What is at stake is the confidence which the courts in a democratic society must inspire in the public, including an accused person. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw.”⁴¹

The above-mentioned document goes on to elaborate on a number of sub-principles. For example, according to Principle 2.1, “A judge shall perform his or her judicial duties without favor, bias or prejudice.” And goes on:

“Bias may manifest itself either verbally or physically. Some examples are epithets, slurs, demeaning nicknames, negative stereotyping, attempted humor based on stereotypes (related to gender, culture or race, for example), threatening, intimidating or hostile acts that suggest a connection between race or nationality and crime, and irrelevant references to personal characteristics. Bias or prejudice may also manifest themselves in body language, appearance or behavior in or out of court. Physical demeanor may indicate disbelief of a witness, thereby improperly influencing a jury. Facial expression can convey an appearance of bias to parties or lawyers in the proceeding, jurors, the media and others. The bias or prejudice may be directed against a party, witness or advocate.”⁴²

Sub-principle 2.2. establishes that “a judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.” Put differently, according to the aforementioned document, “a judge must be alert to avoid behavior that may be perceived as an expression of bias or prejudice. Unjustified reprimands of advocates, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgments and

⁴⁰ Comentários aos Princípios de Bangalore de Conduta Judicial / Escritório Contra Drogas e Crime; translated by Marlon da Silva Malha, Ariane Emílio Kloth. – Brasília: Conselho da Justiça Federal, 2008. Retrieved from http://www.unodc.org/documents/lpo-Brazil/Topics_corruption/Publicacoes/2008_Comentarios_aos_Principios_de_Bangalore.pdf.

⁴¹ Commentary on the Bangalore Principles of Judicial Conduct, op. cit., paragraph 53, commenting on the case *Castillo Algar v Spain*, European Court of Human Rights, (1998) 30 EHRR 827.

⁴² Commentary on the Bangalore Principles of Judicial Conduct, op. cit., paragraph 58.

intemperate and impatient behavior may destroy the appearance of impartiality, and must be avoided.”

“A judge is entitled to ask questions to clarify issues. But if the judge constantly interferes and virtually takes over the conduct of a civil case or the role of the prosecution in a criminal case and uses the results of his or her own questioning to arrive at a conclusion in the judgment in the case, the judge becomes advocate, witness and judge at the same time and the litigant does not receive a fair trial.”

Finally, sub-principle 2.4 provides that “a judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.”

Going back to the Brazilian legal system, article 35, paragraph IV of the Organic Law of the National Bench — Complementary Law no. 35, dated March 14, 1979, sets out, as one of the duties of a judge, the duty of

IV - being courteous with all the parties to the suit, Public Prosecutors, lawyers, witnesses, court officials and clerks, and assisting those who, at any time, may come to the judge to ask for any action to be taken whenever an emergency arises that needs to be addressed.

In greater detail and according to the Federal Constitution, the Code of Ethics of the National Bench, approved by the National Council of Justice on August 6, 2008, determines that all judges must observe the principle of impartiality, by providing in articles 8 and 9, as follows:

Article 8. An impartial judge is the one who looks for the truth in the records, with objectivity and grounds, keeping himself/herself equidistant from the parties throughout the suit, and avoiding any kind of behavior that may reflect favoritism, predisposition or prejudice.

Article 9. A judge, in the discharge of his/her judicial duties, must assign equal treatment to the parties, and any kind of unreasonable discrimination is prohibited.

Therefore, whether in the Brazilian law or based on international rules, it is indisputable that the legal practice must always be as broad as possible, as it is a key piece in the court system, so the judge is supposed to act as a state agent to give voice to the law in the case in dispute with neutrality, impartiality and impersonality, without dwelling upon any personal, ideological or partisan preferences, showing absolute respect and courtesy to the legal practice as a public domain. If these principles are not followed accordingly, the judge’s behavior will be one-sided and fraught with illegalities, hence irreversibly breaching the principle of impartiality and invalidating the court’s judicial duties.

The judgment under discussion, in which former President Luiz Inácio Lula da Silva was sentenced to nine and a half years in prison for the alleged practice of the crimes of solicitation of bribe and money laundering, in addition to the absolute lack of evidence for such conviction, as far as we are concerned, reveals the ultimate and legally reprehensible breach of the principle of impartiality of judgment.

Let us now focus on the analysis of some excerpts of the judgment which, in line with what we have been arguing, is filled with blatant instances of offense to the legitimate exercise of lawyering and reveal unequivocal breach with the principle of impartiality of judgment.

i) disrespectful adjectives used to describe Lula’s defense attorneys’ practice of law

In paragraph 57, the judgment reads as follows:

57. The concerns expressed about my impartiality is a mere filibuster and, although they are understandable as a strategy used by the Defense attorneys, they are still regrettable, since they are not grounded on facts and are not based on minimally consistent arguments, as already ruled by the Regional Federal Court of the 4th Region.

It can be seen that the judge has profoundly disrespected the practice of law by referring to the said concerns as “regrettable.” By doing so, he also breached the duty of civility by exposing his personal derogatory feelings towards the Defense attorneys’ practice to the detriment of a technical legal analysis without any subjective characterizations.

ii) negative criticism regarding Lula’s defense attorneys’ exercise of the constitutional right to seek legal remedy and an acknowledged stance of rivalry

And the judgment continues, in paragraphs 58 and 59:

58. As Luiz Inácio Lula da Silva’s defense strategy was disqualifying me as a judge, since they apparently feared an unfavorable outcome, questionable actions were taken by the defense attorneys out of this criminal prosecution.

59. For instance, former President Luiz Inácio Lula da Silva, assisted by the same attorneys, filed a criminal complaint for official oppression and court-ordered disclosure of information by wire-tapping against the present judge before the Regional Federal Court of the 4th Region.

The judge is not supposed to refer to the complaints filed by Lula’s defense attorney as “questionable actions,” since those actions were based on the legitimate exercise of the right to seek legal remedy, as laid down in the Brazilian Constitution. It should also be considered that judgment on such matters was not within his jurisdiction, but within the jurisdiction of another court, and the Organic Law of the National Bench does not allow him to issue any opinion on that matter.

Besides this, the judge is not supposed to take the stance of an authentic adversary in the suit to make a statement about the reasons that led Lula’s defense attorneys to take legal action, that is, the phrase “they apparently feared an unfavorable outcome” denotes the behavior of an adversary, rather than an impartial judge who is devoid of any feelings towards the parties.

iii) negative criticism of Paulo Okamoto’s practice of law as a defense attorney

In paragraphs 150 and 151, the judgment reads as follows:

150. The defendants’ liability should be tried only on the basis of law and evidence. The professional behavior of the defense attorneys is irrelevant.

151. For example, the judge does not blame Paulo Tarciso Okamoto, despite his inappropriate behavior.

Once again, the judge is not supposed to express his opinion on the attorneys’ behavior. He is only supposed to enforce the law on the case at hand. Any derogatory comments towards the attorneys’ practice of law breaches the judge’s duty of impartiality.

iv) expression of the judge’s personal feelings in his judgment of conviction against Lula

The judgment continues in paragraph 961:961.

Finally, it should be noted that the present judgment of conviction does not give me any personal satisfaction. The opposite is true. It is regrettable that the former President of Brazil

be criminally convicted, but what has caused all this were the crimes he has committed, rather than the actual enforcement of the law. (...)

Again, no judge is supposed to state whether he or she has any “personal satisfaction” in convicting a defendant, nor that he/she believes that the conviction is “regrettable.” A judge is supposed to try the case, rather than express feelings that reveal their preferences or differences. The judge’s behavior is indisputably at odds over the principle of impartiality.

Based on just a few excerpts from the long sentence of conviction, it is found that the judge has demonstrated extreme feelings of contempt and disrespect to the practice of law by both Lula’s defense attorneys and Paulo Okamoto, using derogatory adjectives such as “regrettable” or “inappropriate”, in addition to negatively criticizing the legitimate exercise of the right to seek legal remedy before other courts, taking a blatant adversarial position and failing to adopt the necessary equidistant behavior that is expected and required of any judge, thus revealing profound disrespect to the principles of impartiality and impersonality.

The tyranny of justice

Francisco Celso Calmon *

"The weapon of criticism can not, of course, replace gun criticism, material power has to be overturned by material power, but theory also becomes material force when it seizes the masses".

Karl Marx (Critique of Hegel's Philosophy of Law)

I carry marks of combat to the dictatorship of 1964 to resist the terror of the cops was an arduous task. Political persecution, kidnapping, torture, disappearances and deaths were the products of that regime. Now I see myself in the fight against the arbitrariness of the coup of 2016. Phone tapping and illegal coercive conducts, espionage, extortion, prisons as a means of torture, accusations and condemnations in absentia are the fruits of a police State characterized by a regime of exception, in which state apparatus controls society, while in the democratic State society controls the State.

As in every regime of exception, law is always the first victim, by subverting the right, democracy collapses. As in the Inquisition, in which the barbaric tortures ended in the fire, which slowly burned the body of the condemned, the fire of the Lava Jato⁴³ burns and tears the dignity of the accused. With an intermittent but constant method of humiliation, physical and psychological embarrassment, sadly assuming the risk of causing illness and even death, such as that of the former President's wife, Luiz Inácio Lula da Silva, Mrs. Marisa Letícia.

Like an illusionist forced to present constant surprises to keep the eyes of the audience fixed on him, the judge-inquisitor, Sérgio Moro, and his minions carry out a new blow to law and democracy every day, reaching the workers and the homeland.

"In the present day, when irrationality itself has become reason, its only mode of being is the reason for domination, and it continues to be the reason for exploitation and repression, even when the dominated collaborate with it. Everywhere, there are still those who protest, who rebel, who fight" (Herbert Marcuse - Commentary on "18 Brumaire ... "by Karl Marx).

The conviction of former president Luiz Inácio Lula da Silva, pronounced by Judge Sérgio Moro, of the 13th Federal Court of Curitiba, PR, is a piece that will be marked in history by the antiexample of legal technique. In the future it may bring forth theatrical pieces of comedy, drama and terror. Thus, as in the course of the trial, the judge behaved like a capricious inquisitor, the outcome is fraught with arbitrariness, justified only by the desire to shine in the light of the spotlight, as the hunter exposes his hunting awaiting the trophy, as he has defined by the dean of the state of Espírito Santo, João Baptista Herkenhoff: "The judge, who abandons impartiality to get the tribute to the spotlight and newspaper headlines, betrays his office. Even if the general public clap hands for him, well-informed citizens about the constitutional costumes condemn his procedure." (A Gazeta Newspaper, July 19, 2017).

The procedural law provides that the criminal sentence must contain a brief statement of the prosecution and the defense; the indication of the reasons and facts on which the decision is

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43 Lava Jato = Operation Car Wash (Portuguese: Operação Lava Jato) is an ongoing criminal investigation being carried out by the Federal Police of Brazil, Curitiba Branch, and judicially commanded by Judge Sérgio Moro since March 17, 2014.

based and the application of the law according to the corresponding criminal type (Article 381 CPP). However, it is strange that in the sentence of former president Lula, Judge Moro allocates about 50 pages of the total of 238 of the decision to talk about himself and defend himself, a kind of self-defeating sentence.

Such is the weight of his guilt that after spreading the sentence, he set his head on the bible in a demonstration of exhaustion, for chasing tires, *coup d'état*, tires more, and let himself be photographed.

In the analysis of the object of the criminal action the judge revealed his partiality. There is no evidence that the accused had or has ever had the possession or ownership of the "triplex" (apartment) that is assigned to him by the Federal Public Ministry and received by the judge. He goes so far as to create concepts that are extremely exogenous to doctrine and law, such as that of "formal ownership", contrary to the legal concepts of ownership and possession. If such inventions thrive, what will be the student of today and tomorrow who is learning the right concepts? **Will evidence and facts give way to assumptions and made up stories?**

Therefore, there is no proof of the crimes of corruption and money laundering. Unlike the illegitimate president Michel Temer, the candidate defeated by Dilma Rousseff, Aécio Neves and the former president of the Chamber of Deputies, Eduardo Cunha, who opened the process of impeachment against the legitimately elected President, whose abundance of facts and evidence of their crimes and resulting products are in their assets and bank accounts in Brazil and abroad.

The sentential piece considers accusations as evidence, not as mere indications and ways to prospect evidence. Besides this very serious metamorphosis one has to consider the question of the accusations.

The rewarding accusation is the exchange of betrayal for a prize; it is not a repentance, it is not a collaboration, but an exchange, a barter, a moral mercantilism. Repented without repentance, collaborators without collaboration. How long will it be in the name of opinion without being?

Culturally the awarding award is a count value. It should not be cultivated. It is not an example for the education of the new generations. We do not want children preaching false ideas about their colleagues, teenagers giving their partners, young professionals pointing to companions, because nobody wants a society of informers, like living an accusation world.

"Among the fierce beasts, the most dangerous bite is the delator; among the domestic animals, the flatterer" (Diogenes in ancient Greece)

The judge-inquisitor, as well as the Federal Public Ministry, can not, and can not because they do not exist, to show and to prove the products of the alleged crimes attributed to former President Lula.

There are indications that Judge Moro is in the service of USA interests, but when judged at any time of the history, there will have to have evidence. The courses, trainings and constant visits to that country, as well as their correspondence with USA agents, are indicative enough in the policy to accuse of being co-opted and in the interests of geopolitical objectives of that country, however, from the point of view of law, it is not sufficient to condemn him, unless they applied the same criteria and parameters invented by Judge Sérgio Moro and the Attorneys, allied in this crusade of dismantling the State of Right

In fixing the penalty, the judge continues delirious when applying condemnant sentence. Says: "The guilt is high. The convicted person received an undue advantage as a result of the office of President of the Republic, that is, of a major representative." The responsibility of a President of the Republic is enormous and, consequently, his guilt when he commits crimes" (Judgment Case No. 5046512-94.2016.4.04.7000 13th Federal Court of Curitiba/PR)

Therefore, it sets the basic penalty of five years in the crime of corruption and four years in the money laundering. Following on this trail, the judge could also weigh the penalty with the results of the Lula administration, such as the 52 (fifty two) million Brazilians benefited through public policies: the real increase of the minimum salary of 72%; GDP per capita jump from US \$ 2,800 to US\$ 11,700, placing Brazil as the fifth world economy and international protagonist; Inclusion of 1.5 million young people in the University through Prouni (University Program for all), while countries such as Spain, Portugal and Greece were stifling a crisis that generated around 24 million unemployed in each of these countries, and in the United States of America until soup was distributed in New York during the crisis that began in 2008.

At the end of the verdict, the restriction of freedom was established in nine and a half years. The ruthless judge's repertoire of mischief is such that social networks have already asked: Is it a sadistic analogy to the nine and a half fingers of former President Lula?

The Judge Moro also dared to set the prohibition, in addition to the custodial sentence, of former president Lula to hold any office or public function. Now, to fix this kind of penalty for those who have already been honored with so many titles of doctor *honoris causa*, for the excellent public services rendered, is the same as for a civil engineer who can work on anything but not engineering; or to the doctor, who can not practice medicine; or to the metallurgical, who can not work in metallurgy. It is continued perversity, whose purpose of a sentence ceases to be, and aims at curtailing political activities, since, as a rule, public office and function are of a political-administrative nature.

This impediment leads us to remember the dictatorship of 64, when, by decree 477, penalized the student considered subversive, suspending him for up to three years of school seats, harming not only the young, but Brazil, since it would delay the entry of the future professional in the labor market in three years. In the same way, dictatorship fighters, regardless of whether they were students or not, through indictments or convictions, after being released but still under the dictatorship, were prevented from working for years because the dictatorship forced public and private companies to require the candidate to present the "Check or Records of Good Background" and the "Attestation of Political Ideology".

The first was provided by the public security secretariats, which stated whether the individual was responding or would have responded to a lawsuit filed by the dictatorship, if it were stated, the companies did not, as a rule, admit. The Ideological Attestation was required for public companies and it contained a questionnaire that the candidate answered in the Department of Political and Social Order - Dops (Departamento de Ordem Política e Social). This instrument was to ascertain whether there was any sympathy for the left and against the dictatorship, that is, in addition to the punishment for the torture, prison time, there was also a lasting persecution that was the impediment to entry to the labor market and consequent survival. Again: besides the injury to the individual, there was the injury to the country.

Finally, Judge Sérgio Moro, after the unappeal sentencing, issued a new decision, provoked by the Federal Public Prosecutor's Office in October 2016, and which he handled in a court of

secrecy, blocking the accounts and confiscating the property of former President Lula, composing the web of paranoid persecution of hampering its political activities. In the dictatorship of 64 the Military Justice was less shameless than it has been the judgment of the 13th Federal Court of Curitiba, creator of a model of Judgment of exception.

The dean Capixaba judge, João Baptista Herkenhoff, points the target of the Moro:

"If it is not possible to defeat a leader, who intends to reach the Presidency of the Republic by popular vote, he may be defeated by the vote of a small group of dressed togas, without the right to appeal to the Federal Supreme Court in Brasilia" (A Gazeta newspaper, July 19, 2017).

The list of convicted innocents is long. The one of Jesus Christ generated the greatest religion of the Western world. Sacco and Vanzetti, acquitted 50 years later, generated a reference of resistance and dignity before the (in) class justice. Socrates, condemned to death, drinking the cicuta (poison) in a only sip and listening to his friends sobbing, says: "No, my friends, everything must end with words of some omen: remain calm and strong." The condemnation of Lula is generating the increase of supporters to his candidacy and affiliations to the Workers Party - PT (Partido dos Trabalhadores). And as he himself said: "If they thought that with this sentence they took me out of the game, more and more I am in the game" and "Only those who have the right to decree my end are the Brazilian people."

Brazilians were, for the first time, believing in the construction of a democracy of all and in the State of Rights that the guarantee, if this feeling is lost, Brazil can march to a social chaos and disappear the self-esteem of being Brazilian. As Charles Darwin said, "The end of hope is the beginning of death." Vitoria - ES, July 21st, 2017.

The crisis of the Brazilian institutions reflected in the conviction of a former president of the Republic by a single judge

Gabriela Shizue Soares de Araujo*

The European Union suffers until now the effects of the world economic crisis that began in 2008, mistakenly faced through severe austerity policies that do not enable most of the affected countries that compose the block to recover while the economic and social inequalities increase to a very disproportionate extent to the desired discharge of public debts.

The referendum held in the United Kingdom in 2016, which approved its withdrawal from the European Union - also known as BREXIT - was one of the main reflections of the collapse of the European institutions in facing the crisis and also its communication with the European citizens.

Since the beginning, in the "postwar" period, as it became known, was a long term of development to the European Union. It turned to be the most modern and democratic model of regional integration in the world, based on the principles of solidarity and mutual cooperation with a clear objective of creating a European identity that can be capable of extending besides the national territories of the Member States, taking as a priority the economy of the social welfare.

However, its project bumped into the conformation of the institutions that "rule" the Union: while the decision-making powers are very concentrated in the heads of state of each Member State, emphasizing the intergovernmentalism not in favor of the supra-nationality in relations; the Parliament, on the other hand, shows impaired and far from its constituents. In addition, the excess of measures and procedures adopted among the European institutions makes it difficult for ordinary citizens to understand its functioning.

Furthermore, with the economic crisis of 2008, the result of the measure of forces between the different Member States that are part of the European Union was the turn towards a very neoliberal economic policy, of austerity and protection of the financial system in detriment of spending on education, health and social welfare and suppression of previously acquired social rights. It is the policy to combat public "deficits."

Almost a decade later, it is possible to affirm that the line adopted was a slip-up: the countries most affected by the crisis are breathless to recover their economies and are following tied up in consequence of high unemployment and marginalization of the lower classes which ends up spreading throughout the continent because of suppression of the boundaries peculiar to the European Union.

These factors, coupled with the low level of understanding of European citizens about the functioning of the European institutions and their real possibility of interference in the conduct of such institutions (i.e., democratic deficit), provide a favorable environment for the growth of nationalist movements, separatist preaching of the ultra-right and xenophobia. The

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citizens feel the effects of being part of the European Union, but at the same time, they do not feel part of it.

With regard to Brazil, although it did not feel the effects of the economic crisis back there in 2008, due to the high investments in social and infrastructure policies that were in full force during the second term of former President Luiz Inácio Lula da Silva, indeed, in a globalized world, and given the prolonged recession Europe has faced in the last decade, it would not be possible for Brazil to go completely unharmed under the pressure of the global financial system.

Brazil has started succumbing to the crisis, although later, mainly because the economic conducts in Dilma Rousseff's government, most of them ceding austerity measures that already have demonstrated improper in Europe. When it is mentioned herein the term "ceding" is because we cannot forget the coordinate pressure of the globalized financial system, eager to profit with the neoliberal logic. However, small concessions were not enough to the financial system and to the dominant elites, bringing countless losses to the lower classes, the main financers of the Brazilian Workers Party governments, until then.

Concurrent to that, it has started an institutional crisis in relations of the three Branches, i.e., the Executive Power, the Legislative Power and the Judiciary Power, which supposedly should be balanced harmoniously to each other by a system of checks and balances.

In relation to the democratic deficit it can be highlighted as the National Congress of the Federative Republic of Brazil's main problem such as occurs with the European Parliament. From the point of view of Brazil, it is possible to cite as factors of influence the low level of understanding about the real functions of the parliament, lack of a previous binding commitment from the candidates in defense of a certain economic or social policy, the parliamentarians' absence of transparency and accountability of their acts, no popular mechanism where the citizen can effectively charge the fulfillment of the sealed political agreements and eventually a way to destitute public mandate for those whose not fulfill them.

Similarly, as in Europe, where its citizen cannot feel represented in the Parliament, in Brazil, the Executive functions seem to have a closer direct relationship with their electors than the Legislative functions with them. In both cases, however, the absence of a political consciousness is reflected in personalist votes, usually influenced by the economic superiority of each campaign. A vote is not acquired based on ideas and programs, on the contrary, it is influenced by the faces showed during the party election broadcast, so marketing, advertising have a great value. But it is still easier to understand the proposals of the majority positions and their functions because they are clearer for a common citizen.

The major example of the Brazilian democratic deficit is the odd voting session of the *impeachment* of the former President Dilma⁴⁴, which was extraordinarily transmitted live by the television station that dominates such medium of communication and during such session most of the Brazilians could watch shocked and surprised with the political and personal background of the majority of the parliamentarians, whose justification for their votes were

44 In 2016, democratically elected President Dilma Rousseff underwent to a legally questionable impeachment proceeding, ruled by the dominant elites and by the conservative classes, which with the support of the mass media, that in Brazil has been monopolized for decades by only six families. No crime has been committed, only an insurgency of the defeated elites in the elections, who took advantage of the economic crisis to pressure the Parliament to participate in this process of exception.

based on issues extremely foreign to the proceeding, such as their own families, God and any other narcissistic invocations.

In this moment, it is necessary to punctuate the lack of democratization of the media⁴⁵, which is concentrated in the hands of a select group representing the dominant elites that only shares the information that suits them and usually the ones that are directed to their interests. This also contributes to a large part of the Brazilian people being surprised by the identity of their own representatives in the Brazilian Parliament.

The difficulty of understanding or education to filter what is disseminated by the monopolized media, causes that, even if unconsciously, published opinion is absorbed as an absolute truth, so that published opinion and public opinion become in the national context as synonymous.

This institutional crisis manifests itself in greater proportion when a public opinion is able to influence the Judiciary Branch, the major interpreter of the Brazilian Constitution and the holder of the bureaucratic power to give the last word in situations of conflict involving the other powers or their actions.

On other occasions in the world History, where the monopolized media promoted the advancement of reactionary forces with the upsurge of class hatred and class disguise under the "moral and good manners" discourse, the omission of the Judiciary Branch in the role of protecting fundamental rights and its cowardice or connivance in the face of the subsequent measures of exception promoted in the fight against an elected "enemy," enabled the establishment of prolonged States of Exception such as Hitler's Nazi Germany or the recent military dictatorship in Brazil.

What permeates the now-known " Operação Lava Jato⁴⁶" (i.e., Car Wash Operation), is a single judge promoted by the monopolized media to a figure of superhero in the fight against the evil - represented herein by the corruption in the political class that does not serve to the purposes of the financial system and also the dominant elites.

So, instead of using force or military power, the establishment of a State of Exception is sought by the ruling action of the Judiciary Branch itself. Following the example of what was done in 1989 with Fernando Collor⁴⁷, the "caçador de Marajás," (i.e., Maharajahs' Hunter) all the efforts of the media are aimed at promoting the figure of the single judge Sérgio Moro in order

45 The hegemonic media in Brazil are formed by a private group of companies, which constitute an oligopoly, and they are part of a political and economic elite that has been leading its country for more than 500 years. This elite, of which the oligopoly of communication is part and spokesman, never accepted that Brazil could be presided by a left-wing metallurgical leader (Lula) and later by a woman, ex-guerrilla (Dilma Rouseff). The main representative of this monopolized media is the Rede Globo, under the command of the Marinho's family.

46 In Brazil, major investigation, accomplished jointly with the Federal Public Prosecutor's Office, receive names that are often mediatics, such as Car Wash Operation, which investigates alleged corruption crimes involving the national oil company, i.e., the PETROBRAS. Structured and developed in the image and likeness of the "mani pulite" (clean hands) operation - conducted by the Italian Judiciary in the 1990s - the Car Wash, as well as its inspirer, has the main intransigent support of the media. Initiated in the city of Curitiba, capital of the State of Parana, the operation ended up being assumed by a federal judge of first instance, the judge Sérgio Moro.

47 After a long period under military dictatorship, the first democratic presidential elections had as its protagonists the elites' representative, Fernando Collor de Melo and the representative of the working class, Luiz Inácio Lula da Silva. At the time, there was a great media campaign to overestimate the figure of Fernando Collor and demoralize the figure of Lula, mainly under a Macarthist speech that came as a trace of dictatorship times. Fernando Collor was elected, but did not support himself in the government, being exonerated under denounced for corruption.

to avoid the return of former president Luiz Inácio Lula da Silva to the presidency of the Republic.

It is important to clarify herein that the expression single judge is not being applied in its legal sense, i.e., meaning a trial court rulings are uttered by a single judge, but by the application of its own adjective: this is a rare case within the Brazilian Magistrature. After all, fleeing from all judge's principles and duties, this single figure was imbued with a certain bias since the beginning, ignoring legitimate rights, the defenses' evidence and acting himself in detrimental to the public prosecution service not only regarding the noncompliance with the Constitutional and legal precepts, but also in his promiscuous relationship with the media.

It can be said that the Brazilian National Council of Justice or the Federal Supreme Court would be capable of controlling the abuses committed by the judge Sérgio Moro in his exercise of the magistracy, or even capable of restoring the credibility and seriousness to the institution. As Montesquieu warned, it is an external experience that every man who has power is impelled to abuse it, for such reason, it is necessary to stipulate limits and forms of controlling his performance. However, there is such great passivity in the face of the public misunderstandings committed, which can only be explained by the tireless pressure of the published opinion, and the increasingly "sanctified" promotion of the public figure of the single judge of Curitiba⁴⁸.

Sérgio Moro has conducted a long and disseminated case to the media, guided by his own solipsism. The judge has reportedly ignored all the human rights treaties to which Brazil is signatory, besides the Federal Constitution itself, violating basic rights and the protections inherent in the Due Process of Law, such as reasonable timeframe, right for an impartial judge and the equal treatment in the procedure, without, however, being able to achieve his ultimate goal: evidence of the illicit committed by the former President Luiz Inácio Lula da Silva.

With respect to the extensive conviction based only on his own assumptions and in the testimony of a single witness (which was not even homologated as a negotiated plea); thus, it is not appropriate herein to make a great deal of digressions on the applied hermeneutic procedure: a single decision is explained by the deviation of existing function in the partiality of judge's conduct who rendered it. It is not even possible to speak of a hermeneutical circle, when the interpretive process is cut in the interpreter's pre-comprehension. From then on, his voluntarism led to the whole grounds of the decision.

It is no great surprise that, after years of vain interaction with the monopolized media, the judge Sérgio Moro based on his own conviction has decided to condemn the former President Luiz Inácio Lula da Silva without any evidence. It is something typical from a solipsistic judge, as previously noted by Lenio Luiz Streck⁴⁹. In fact, what worries, is the grounds of the sentence based on elements completely foreign to the process, such as political issues and articles published in the media, and especially the attacks of such magistrate against the defense lawyers in their exercise of profession. It is perceived the deliberate intention not only to condemn someone without evidence, but also his legitimate and constitutional right of defense by repressing his lawyers.

48 Curitiba is the capital of the State of Paraná, the jurisdiction of the federal judge Sérgio Moro.

49 Lenio Luiz Streck is a jurist, professor of Constitutional Law and Post-Doctorate in Law, well known in Brazil for his studies on constitutional hermeneutics. He has developed a theory about the judge's solipsism.

The defense lawyers from all over the country, unfortunately, are already beginning to feel the domino effect in other jurisdictions, i.e., the institutional breakdown so promoted over the figure of this single judge in Curitiba. The danger is that such singularity becomes ordinary to the point of opening space for the establishment of a State of Exception, in this country that has lived so little under democracy⁵⁰.

There is still hope, of course, that the judicial system will recompose itself, with the review by the higher courts of this exceptional political-media-legal process being faced by the main representative of the lower classes, the former President Luiz Inácio Lula da Silva.

However, it is also necessary to do a radical work of restructure in our institutions, and to promote an end-to-end review, beginning with the political reform and the democratization of the media - very different from the censorship, it should be noted – in order to avoid that our country immerse itself in a permanent State of Exception.

As Thomas Piketty says about the institutional crisis in the European Union, which is also true for the Brazilian institutional crisis, "*men and women are good: institutions are bad and can be improved.*"

⁵⁰ The Brazilian Federal Constitution dates from 1988, after a long period of military dictatorship in Brazil (from 1964 to 1985).

The multiple and perverse meanings of Sérgio Moro's sentence

Gisele Cittadino*

We tend to learn, during the first classes of philosophy of language, that we cannot separate speech from the subject of the speech. In this sense, the texts are produced by determined people, carrying on their own histories, inserted in worlds of life full of values, to which, such subjects of speech bind to each other. Therefore, there is an internal structuring link between who we are and what we produce⁵¹. On the other hand, the reader's text does not approach it from a non-place. We receive the speech of the others from places and with peculiar contours, internalized commitments, constructed identities.

The polysemy or the multiple meanings that a text possesses, are precisely the result of that diversity of places, from which we have received the information, the speeches, the texts, that, in turn, they are also equally produced from so different places and from differentiated perspectives. With, this in mind, it is important to mention herein, that the polysemy does not result in the impossibility of communication. On the contrary, our ability to communicate is intrinsically associated with the understanding. In this sense, we can use the legs to the purpose of kicking a ball, but their primary function is allowing us to walk. Likewise, we can use the language to deceive, to mislead, but no society would be able to keep its internal relations, if it was used, in priority, for a strategic action, reverted to deception, instead of, to a communicative action, aimed to the understanding.

Likewise, we can use the language to deceive, to mislead, but no society would be able to keep its internal relations, if it was used, in priority, for a strategic action, reverted to deception, instead of, to a communicative action, aimed to the understanding. So, are we capable of entering in a classroom, expecting to receive a false information from a teacher? Who is capable of leaving a doctor's appointment, taking into consideration that the seriousness of the diagnosis provided by such doctor, was result of his bad taste joke? Are we capable of not obeying the command of a firefighter who orders us to grab the rope as a way to help us to get out of the fire and we think that the firefighter's good actions are not true? Certainly not. In fact, none of these above possibilities is even considered, because we are aware that strategic action is parasitic, derivative of a communicative action. Or, in other words, we use the language to make us be understood to the others. The deception, the lie, the manipulation, are subsequent to the understanding.

Why does Sérgio Moro's sentence against Lula cause us so much indignation? It is not difficult to understand. Just imagine the judge next to the teacher who feels pleasure to confuse his students, as well as the doctor that feels good with suffering of the patient or even, the firefighter who has fun with the consequences of a fragile rope. All the times that we are capable of realizing about the manipulation and the deceit and, in such mentioned times, we can notice about the strategic action, equally, we find out the banishment procedure of the

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51 In the art world – and, only then - we are delighted with the ability of those who can speak from places that are not theirs. Chico Buarque thrilled us, because he achieved authenticity by expressing himself as a woman from ancient Athens, an exhausted construction worker or as a desperate mother who had just lost her son.

communication and of the understanding. Then, why does it cause us so much indignation? Because the strategic and manipulative perversity, means to ignore the pain of the others in the accomplishment of their goals and their pleasures. It is the opposite of empathy, of understanding and of approximation.

There is in the Moro's sentence, a set of perversities, all of them assuring the deception. So, in order to achieve his goals, the judge ignores the defendant's procedural guarantees, manipulates the Law and the legal theory, and finally, he intends to attack a national political project. Sérgio Moro has elected three enemies: Lula, the Law and the popular national sovereignty. It is not something that we can simply ignore.

A conviction is terrible for an innocent defendant. An unlawful decision represents the greatest injustice to a citizen by the part of one the Powers of the State. When the State Power and the monopoly of violence fall into the civilian bodies, then such decision must be legal and legitimate. The former President Lula or any other Brazilian citizen can be condemned, losing personal assets and own freedom, only if the materiality of the case be expressly supported by evidence, and, be observed, the requirements of an effective legal protection, ensuring the rights of defense and the due legal process. As a matter of fact, it is not what we are seeing. Due to, an incomprehensible coercive conduction up to the illegal leaks, passing by all types of public constraints resulting from such selective leaks, the citizen Luiz Inácio Lula da Silva is experiencing violent actions which confirm the witch hunt that he is being subject to, as a politician, by the first time, in our History.

The conviction equally manipulates, distorts and manipulate the rule of law, the theories of law and the procedural rules, according to its own wicked pleasure. The adjective "formal" is, unconventionally, added to the concept of ownership, and then, we are introduced now, to a new civil law sensation: the ownership in fact. The former President Lula, would not have the "formal" ownership of the "triplex" (i.e., the three-storey apartment), as his defense lawyers have legally demonstrated in such case, and already have disclosed that the "formal" owner of it, is Caixa Econômica Federal", (i.e., it is one of Brazil and Latin America's major public banks), even so, he was convicted, because he has the ownership in fact. The complaint filed by the Public Prosecution's Office, on the other hand, points to briberies which the former President Lula would have been received in exchange for contracts obtained by OAS, the Brazilian conglomerate, with Petrobras, the state-owned energy giant. Meanwhile, the judge, when challenging the defense's appeal requesting clarification of the decision, states that he has never considered the possibility of the former President Lula would receive undue advantages from Petrobras' illegally diverted resources, thus inaugurating a procedural rule, which allows to convict someone, on the basis of something which is not present in the complaint. Finally, and with the intention to not extend too long with the matters of others, I mention the Moro's opinion in his sentence, stating that he may should consider the imprisonment of the former President. However, in such point he argues that the reason for that, is not based on political matters, but due to, a possible trauma. In this point, it seems that the fear would had had paralyzed him and, once again, we can notice, a judge that ignores the technique and disrespects the function that he occupies.

At last, the conviction aims to ban the former President Lula of the national political life, because he will be ineligible to seek the presidency if his conviction is upheld. So, among all the perversities of this decision, which aims to prevent the free expression of popular sovereignty is, without a doubt, the most serious one, mainly if we consider the sad political trajectory of a country that suffers from frequent institutional ruptures, even when we

overcome these traumas. So, when a judge believes that he has a mission to banish a political leader from his public life, because he does not agree with the Lula's project for the country, or even, due to the fact, that he walks in another direction; it is to imagine that such individual considers himself as a kind of substitute for the popular sovereignty or as an enlightened vanguard of first instance. The Brazilian democracy, which has succumbed to a recent coup d'état, cannot be conducted by judicial leaderships wishing to silence the free popular manifestation.

Moro, Lula and the Triplex Apartment: notes on a verdict.

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On 12 July 2017 Judge Sergio Fernando Moro sentenced former president Luiz Inácio Lula da Silva to nine and a half years in prison for corruption and money-laundering⁵². The 238-page, 962-paragraph verdict provides justification and grounds for Judge Moro's conviction of Lula in relation to the Guarujá triplex apartment case. The document is strikingly weak on legal arguments and appears, in various passages, to be more self-justification than verdict, a feature typical of a judge who has lost impartiality and legitimacy through being personally involved in the case.

A well-known enthusiast for Italy's Mani Puliti operation, considered by Moro himself in a 2004 text to be "one of the most impressive judicial crusades against political and administrative corruption"⁵³, the judge cites "loss of legitimacy on the part of the political classes" as being a deciding factor in the success of corruption investigations.⁵⁴ To achieve this, Moro defends an alliance between the judiciary and public opinion through broad media coverage of the work of justices. The video footage of Moro asking the population to support continuation of his crusade was no accident. As for methods adopted to obtain evidence, Moro is an enthusiastic advocate of plea bargaining, believing that "crimes against public administration are committed in secret, in most cases using complex machinations, and are thus difficult to bring to light without the collaboration of one of the participants"⁵⁵

Judge Moro's verdict in Penal Action nº 5046512-94.2016.4.04.7000 condemning former president Lula not only reflects these convictions and beliefs but also reveals the difficulties arising from politicization of the law and the activist style of judges in Brazil. The verdict in itself attests to the dangers of using the law for political ends, as occurs in cases of "Lawfare", in which the law is converted into a weapon of war.

The function of the judiciary is to provide legal answers to legal problems. A desire to respond politically to legal problems compromises the autonomy and functionality of the law. Clearly,

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Translated by: Rane Souza

52 The verdict recommends conviction. However, paragraph 959 states that, as "detention of a former President of the Republic cannot fail to involve a certain degree of trauma, it is prudent to await the ruling of the Court of Appeal, before carrying out the sentence. Former President Silva can thus lodge his appeal as a free man".

53 MORO, Sergio Fernando. Considerações Sobre a Operação Mani Puliti. p. 56 Retrieved from <http://s.conjur.com.br/dl/artigo-moro-mani-pulite.pdf>

54 MORO, Sergio Fernando. Considerações Sobre a Operação Mani Puliti. p. 57 Retrieved from <http://s.conjur.com.br/dl/artigo-moro-mani-pulite.pdf>

55 MORO, Sergio Fernando. Considerações Sobre a Operação Mani Puliti. p.58 Retrieved from <http://s.conjur.com.br/dl/artigo-moro-mani-pulite.pdf>

in the case of a judgment regarding a former President of the Republic and potential candidate for the same post in 2018, a political dimension will always be present. In such cases, it behooves the judge to maintain strict observance of the law, avoiding any political use of the process, since the appropriate forum for politics is the public square, not the court-house.

Judge Moro's report outlines the charges and the defense in 47 paragraphs and his decision is grounded on the defense team's questioning of the impartiality of the judge. To this end he adduces a series of rulings of TRF4 that upheld previous rulings by Judge Moro in connection with this case, including exemption from suspicion of impartiality as a result of academic articles published by the judge, rulings regarding breach of telephone communication confidentiality, coercive behavior, search and seizure, relations with the press and so forth. This argument drags on up to Paragraph 138, at which point the decision turns to transcriptions of passages of testimony in which the judge was allegedly offended by the defense.

Other noteworthy features of the verdict include working with plea bargaining as a procedural strategy and with some evaluation of evidence on the part of Judge Moro:

Plea bargaining emerged in Brazil with Law 12,850 of 2013, ratified by then president Dilma Rousseff. According to this legislation, the purpose of plea bargaining is to facilitate investigation and it thus has no probative value per se, requiring confirmation by concrete evidence. The procedure is hedged in with guarantees, with the plea bargainer having the right, according to Article 5,v, "not to have his or her identity revealed by the media nor to be photographed or filmed without prior written authorization". Moro uses plea bargaining as a fundamental tool for securing his conviction. The problem with plea bargaining is that it tends to involve haggling⁵⁶. If the informant says something that interests the judge, he or she will be rewarded; if not, the full force of the law will bear down upon them. Arrest can easily be used to force a denunciation, with the prospect of release as a reward.

In proving ownership of the triplex, the verdict can be seen to be analytically disproportionate, since Moro reserves few paragraphs for examination of the case for the defense. By contrast, extensive space is dedicated to the accusation. Moro even uses news reports to back up his conviction⁵⁷. In various passages the judge transforms the suppositions of witnesses into peremptory affirmations, as when he remarks on one statement that "in her view, the aim of the visit must have been to check whether the renovation of the apartment was going well". In fact, the witness had responded to the Public Prosecutor's question on the purpose of the visit to the apartment by Marisa Leticia and her son, "I believe it was to check on how the renovation was going". Later on, she said, "I wasn't around them that often. Someone said, 'It's going well', and that led me understand that they had asked for it" (Paragraph 488). Hearsay was also used as evidence. The verdict highlights the statement made by Rosivane

56 Art. 4º § 8o L. 12850: The judge may refuse to approve a proposal that does not meet legal requirements, or adapt it to the case in point."

57 Paragraph 376: "It is worth noting that, in the year following the transfer of the real-estate company to OAS Empreendimentos, more specifically on 10/03/2010, with an updated version on 01/11/2011, O Globo newspaper published a report by journalist Tatiana Farah entitled "The Bancoop Case: presidential couple's triplex apartment is behind schedule"; Paragraph 412: "Not long afterwards, on 07/12/2014, O Globo published a report by Germano Oliveira and Cleide Carvalho on the triplex apartment in the Solaris Building, in Guarujá, according to which the apartment belonged to Luiz Inácio Lula da Silva and his wife Marisa Letícia Lula da Silva <https://oglobo.globo.com/brasil/cooperativa-entrega-triplex-de-lula-mas-tresmil-ainda-esperam-imovel-14761809>. Emphasis added.

Soares that it was “common knowledge” in the building and the neighborhood that the apartment belonged to President Lula. Asked if she had heard anyone say who the apartment belonged to, the witness said, "Yes, most of the residents and the local shopkeepers. I was actually surprised when I started working there that I did not know this. I was first told by a business owner when I went to register the company to buy building materials and he said, 'Ah, that's Lula's apartment, isn't it', but I wasn't told at the start, in writing. I have no document formally informing me of this." (Paragraph 500) It is common, in this testimony from workers at the company responsible for the renovations, for them to be asked about the behavior of Marisa Leticia on her visit to the apartment. The witnesses' feeling that her behavior was that of a purchaser or an owner is used to ground the verdict. The judge writes in Paragraph 506 that "On one of Marisa Letícia Lula da Silva's visits, the witness states that she may have shown her the building's facilities and that, in this witness's opinion, she behaved like the owner of the property and not like a potential buyer".

In espousing and courting public opinion fostered by the national mass media, Judge Moro transformed evidence into mere procedural details. When the evidence (or lack of it) does not speak for itself, any verdict is unpredictable, depending on the whims and convenience of the moment.

This verdict, therefore, not only reveals a perilous extension of the reach of judicial power in Brazil, but also employs measures typical of a state of exception. There can be no fair judgment when the rights of the defendant are curtailed and inference and conjecture on the part of the judge predominate in arriving at a ruling.

The decision to convict President Lula is not an isolated incident. It is part of a more general expansion of the power of judges, a process that was already worrying when found to be present in arguments put forward by constitutional justices. The spread of this practice to the criminal justice system raises all kinds of red flags. If this goes unchecked, we will see further examples of decisionism and voluntarism in the coming years.

When those invested with the special powers of the judiciary feel at liberty to reach decisions as they please, without the obligation to follow rules, guided only by their own personal sense of justice, we are all threatened. The foundations of the State of Law are eroded and we are left at the mercy of the reaction of an all-powerful limitless authority.

In the classic Weberian typology of legitimate forms of authority, charismatic authority is characterized by belief in the extraordinary qualities of the person in authority. This leads to the emergence of demagogues and strongmen. Judge Moro's actions constitute an appeal to the masses typical of authoritarian democracies, which is troubling when made by the head of the executive branch of government, but especially alarming when the individual concerned is responsible for upholding the rule of law.

Judicial juggling and the end of the democratic state of law

João Ricardo W. Dornelles

“Moro condemned Lula with a guilty conscience. Why did he need 60 pages of self-justification before ‘grounding’ and delivering the sentence?” (Leonardo Boff)

Present day Brazil has witnessed the strengthening of penal practices as a means of regulating conflict in society. This has led to the dislocation of the political to the judicial sphere, with penal procedures occupying a central role in this process. The protagonism of the Judiciary in processes involving widespread criminalization has been one of the most important points for the weakening of the constitutional democratic order and the significant growth of spaces of exception. In Brazil these characteristics have been deepened as a form of intervention in the political struggle, especially the actions of ‘Operation Lava Jato’ (Operation Car Wash as it is sometimes known in English), with the immediate consequence being the criminalization of the political, the increase of penal selectivity, and stigmatization through the construction of the figure of the ‘enemy’ resulting in a profound weakening of the democratic constitutional order.

How can a conviction be justified where no proof is presented, or what is considered evidence is restricted to the plea bargaining of another accused in exchange for benefits in his own trial? How can something be considered to be a conviction when it lacks material evidence or documents proving the materiality of the imputed crime?

This is the case of the sentence issued on 12 July 2017 by Judge Sérgio Moro, of the 13th Federal Criminal Court of Curitiba, against former President Luiz Inácio Lula da Silva.

A decision which appears nothing like a judicial sentence. It is more like a long – as it has more than 200 pages – personal opinion in relation to the accused.

Accompanying the trajectory of Judge Sérgio Moro since the beginning of Operation Lava Jato we can see a large quantity of situations and decisions practiced by him that we dubious at the very least. Starting with the numerous and exhaustive *conduções coercitivas* of various accused, including the former President himself; the enormous number of people detained preventively for long periods of time, without trial; the numerous condemnations without proof or with fragile material evidence, including the condemnation of Lula.

In an initial reading what calls attention is the number of pages, around sixty, where Judge Sérgio Moro gives the impression that he is making a political defense of the sentence he will announce at the end.

Some of the many points which stand out include:

- The judge assumes the position of inquisitor by simultaneously presenting himself as prosecutor and judge. At various moments, he actually becomes confused with the prosecution;
- The practice of lawfare against the accused;

- Restriction of the right to defense, disrespecting International Human Rights law and the International Conventions signed by Brazil, in relation to the treatment given to the accused and his lawyers;
- Selectivity of the judicial system, which condemned former President Lula without proof, while there exists an enormous quantity of evidence against Senator Aécio Neves, Michel Temer; Gedel Vieira Lima, etc;
- The condemnation of the accused with an absolute lack of evidence;
- Illegal tapping of telephone conversations between former President Lula and President Dilma Rousseff.

From the judicial point of view, Moro's sentence is a pile of arguments and insinuations which prove nothing. It contradicts judicial and penal doctrine, the democratic constitutional order, and the basic principles of civilization, which have been pushed aside throughout Operation Lava Jato.

Moro's sentence incorporates the worst that exists in the judicial and penal area: the inquisitorial logic of 'penal efficiency,' the 'penal law of the enemy,' the promiscuous confusion between the prosecution and the judge. It is a setback, a return to a pre-modern, pre-enlightenment past.

In item 32, subsection P, Judge Moro's sentence states that "there is documentary, testimonial, and expert evidence that the former President was the owner of the property, and that its refurbishments were done for him, without any price or value being paid by him."

Returning to the question that refuses to be silent. Where is the "documentary, testimonial, and expert evidence" that Judge Moro states exists? It is a worthless statement, since the evidence does not appear in the sentence itself or in the documents submitted by Federal Prosecution Service.

It is not enough to announce something for it to become true.

Just for the purposes of supposition, let us imagine the following situation: someone accuses Judge Moro of many things, various crimes and other immoral and illegal actions. These accusations will be judged by another magistrate. However, the accusations remain in the field of deductions, suppositions, intention, or the subjective desire of those who make the accusations, if no material, testimonial, or expert proof is presented. In other words, **intention, supposition, desire, intuition, and conviction**, by themselves alone, cannot be transformed into a fact, they do not become truths. Accusations, against anyone, can only become true with the existence of documentary or testimonial proof, which give materiality to the accusation, making it concrete and giving it a precise content in relation to the facts and acts imputed to the accused. Only this type of proof is admitted by Brazilian law.

Drawing on the above example, the same occurred in relation to Judge Moro's sentence concerning the accusations against former President Lula. Everything remained in the field of **subjectivity of the judge**, a result perhaps of his desire being confused with reality. And what is still more serious, confusing his desire and subjectivity with his public role (or what should be the public role of a magistrate), with his personal desires and/or his politico-ideological positions and convictions. However, without the proof admitted in the Brazilian judicial system.

The criticism made here refers to the issuing of a conviction against anyone, irrespective of who they are. A conviction which requires more than two hundred pages to try to prove, in a merely argumentative manner, the deliberate responsibility of the accused for the act imputed to him. Moreover, the entire sentence was solely based on the arguments presented by the Federal Prosecution Service and accompanied by the judge.

And we are always compelled to return to the initial question, where is the proof? Attention, we are asking about the proof, not about desires expressed through arguments, convictions, or affirmation. Concrete proof. Where is it, Judge Moro?

All of this become even more serious when what is presented as conclusive evidence (or should we have written 'evidence' between inverted commas?) are *delações premiadas*, roughly speaking plea bargaining.

As Professor Afrânio Silva Jardim wrote in his "Legal Opinion for the Human Rights Committee of the United Nations," in 2016, called by him "Qualified Evidence":

"I am convinced that the former president Luiz Inácio Lula da Silva is 'condemned in advance.' Against him has been created an 'environment' of persecution, through police and penal investigation lacking a penal offense and the minimum evidence of conduct of authorship or participation in felonies. As they say: they chose the 'criminal' and now they are looking for the crime...".

According to the jurist Fernando Hideo Lacerda "there is no materiality for the condemnation for the crime of corruption," as there is also "no judicial foundation for the crime of money laundering." According to him, "the fact on which the conviction of former president Lula was based according to the judge was the 'de facto ownership' of an apartment in Guarujá. As a result, he was condemned for corruption (because he is said to have received the refurbished apartment as an undue benefit from Grupo OAS due to contracts with Petrobras) and money laundering (because they had hidden and dissimulated the ownership of this property)."

In his sentence, Moro stated that "former President Luiz Inácio Lula da Silva and his wife were DE FACTO OWNERS of the triplex apartment 164-A, in Condomínio Solaris, Guarujá." He made this affirmation even though no witness has stated that Lula or his wife had frequented this property.

Moreover, the concept of 'de facto ownership' used by Judge Moro in his sentence does not exist in the Brazilian judicial system. It does not exist because it is the concept of Ownership which most approximates this situation. In Article 1196 the Brazilian Civil Code states "The owner is considered to be the one who actually exercises, in full or in part, of some of the powers inherent to ownership." In no part of the sentence does Judge Moro prove that Lula and/or his wife had exercised, whether fully or in part, the powers inherent to ownership. In other words, **Lula and Dona Marisa were never the owners and never had possession of the property in question** or, as Judge Moro prefers, never had "de facto ownership" (sic).

Thus, in the sentence there does not appear any proof, or even indication, that the former President or his wife had ever exercised ownership of this triplex apartment. What actually existed was a visit by the couple to see the property. Moreover, a visit does not configure possession ("de facto ownership," according to the judge) and much less ownership.

So, what do we have? We have a single visit based on which the judge concluded that Lula held possession of the apartment.

What is even more curious (or is it only negligence on the part of Judge Moro?) is that no document was presented about possible negotiations for the purchase of the property, no property deed, no agreement of sale, promise of donation, nothing which could indicate that Lula and his wife had obtained at least possession of the triplex or the perspective of becoming owners of this.

Hideo Lacerda also calls attention to the fact that in his sentence Judge Moro used at least nine times reports from O Globo newspaper as if they were documentary proof. We recognize of course that Organizações Globo has a special power in relation to the entire Operation Lava Jato, and we also know, as we have been reminded by someone, that 'Globo makes a difference.' However, it is going too far to give the status of documentary proof to the journalistic reports of the Rio de Janeiro newspaper. Strange, if not lamentable or laughable.

Are this set of reports from O Globo, which in a legal magical trick are transformed into 'documentary proof,' the proof that Lula is the 'de facto owner' of the apartment? As I said before, strange, lamentable, laughable.

But it was important to link the case to Petrobras, after all how to justify the fact that the judgement was under the auspices of Operation Lava Jato? There is no limit to this judicial juggling. Here the role of the readymade plea bargaining comes in. A former director of Grupo OAS, Léo Pinheiro is said to be the testimonial evidence to prove that the ownership of the property and its refurbishment were the result of negotiations involving Petrobras. We should remember that Léo Pinheiro offered two versions of his delação premiada. In the first, he exempted former President Lula. Since the original version did not please the judge from Curitiba, another version was made, denying what he had previously said.

And where is the documentary proof of these claims? No document. Nothing. The only things which exist are declarations obtained through the negotiation of the plea bargaining agreement. It is important to remember that those making these plea bargains are not required to say the truth. **They offer these accusations not in the name of justice or for elevated ethical principles or the nobility of their acts, but rather to try to negotiate a lighter punishment, or perhaps better to 'save their own skins.'**

We should remember other things: that in his sentence Judge Moro did not take into account Lula's more than seventy defense witnesses; that during the various Operation Lava Jato trials he was selective in dealing with the delações premiadas, accepting those which could indicate something against Lula and discarding those which denied his involvement with receiving bribes or, because "this is not relevant," as in the case of those which involved PSDB politicians, such as the former President Fernando Henrique Cardoso, Aécio Neves, etc.

According to the jurist Dalmo Dallari, the condemnation of former President Lula is illegal, since it does not point to the practice of any crime. Since it has no legal basis, it is a sentence with political motivation, configuring unconstitutional behavior on the part of Judge Sérgio Moro, for which he could be held responsible, and even punished, by superior institutions of the judiciary.

Dallari also noted that the "very long decision" cites facts and presents arguments which "do not contain any proof of the practice of a crime committed by Lula." He concludes that the condemnation of the accused lacks any legal basis, and it is thus a political condemnation, thereby configuring its unconstitutionality.

The sentence is based on the affirmation that Lula, when he was exercising the Presidency of the Republic, received a triplex apartment in Guarujá in exchange for advantages for Grupo OAS in Petrobras contracts. According to Dallari, “if this really had occurred there would have been a judicial basis for accusing Lula of committing a crime and his subsequent correct judicial condemnation. However, it occurs that in the relevant public records Lula does not appear as being or having been the owner of the apartment in question, nor was any document submitted in which he appears as such, or even as the committed purchaser.” Since the act on which Lula’s condemnation was based never existed and no proof was presented to confirm this, the conviction is ground on a false basis, and is thus illegal.

Finally, an appeal can be made to the 4th Federal Regional Court (TRF-4), based in Porto Alegre. According to O Estado de S. Paulo newspaper, TRF-4 has already upheld 38% of appeals made to it against the decisions of Judge Moro. It is thus expected that this court will annul the sentence against former President Lula. It is worth noting that recently, on 27 June 2017, TRF-4 upheld the appeal of João Vaccari Neto, former treasurer of the PT, condemned by Sérgio Moro to 15 years and 4 months in prison, acquitting him of the crimes of corruption, money laundering, and criminal association. The appellate judges Leandro Paulsen and Victor Luiz dos Santos Laus voted in favor of the acquittal. The only judge to defend the maintenance of the condemnation was João Pedro Gebran Neto. The upholding of the appeal was based on the lack of proof in Judge Moro’s conviction.

The relevant number of Judge Sérgio Moro’s sentences which have been changed in the TRF-4 could be an indicator of a routine practice in his decisions without any legal basis.

What is normal is that the appellate judges will consider the fragility of the material evidence on which the sentence is based and acquit Lula. However, we are not living in normal times and weighing on the appellate judges is the political pressure to prevent Lula’s candidacy in 2018. Pressure exercised by the same sectors who were involved in the 2016 Coup which, in an unconstitutional manner, removed President Dilma Rousseff.

Once again Dalmo de Abreu Dallari’s lesson is clarifying:

“The fundamental fact is that the condemnation of Lula by Judge Sérgio Moro has no legal basis, with the only justification being political motivation. It is worth noting here that Article 95, Sole Paragraph, of the Brazilian Constitution stipulates that judges are prohibited from: “III. Being involved in political-party activities.” Evidentially, this activity can be exercised, and is being exercised, when someone practices acts motivated by a political objective, or the creation of obstacles to members of a political orientation contrary to the preferences of the Judge. In issuing a judgment lacking any judicial basis, aiming at creating obstacles for an outstanding politician opposed to his convictions and to the candidates of his preference, the Judge is participating in political party activity. This is precisely what Judge Sérgio Moro did, who, as well as issuing a sentence lacking any judicial basis, offended the explicit stipulations of the Constitution.”

In addition to the lack of material evidence, the sentence was issued without legal basis and with an evident political motivation. This is not a sentence based on law, but rather a trial based on exception.

Partiality and fetish: Freud explains

Joao Vitor Passuello Smaniotto*

Décio Franco David**

*We say no: We refuse to accept
this mediocrity as destiny*
(E. Galeano)

The system, defined by Eduardo Galeano as “machine”, teaches “to accept horror as if accepting the cold in winter”⁵⁸. Coincidentally, in this winter of 2017, we received the release of the Conviction of former President Lula, in which the federal magistrate Sérgio Moro condemns him for practicing the crimes of passive corruption and money laundering. The 218 pages written by the magistrate clearly demonstrate the intent of the process and its declination to a judgment value outside the conduct of a criminally typical conduct, concentrating exclusively on the symbol represented by the figure of the former president. On here, in this relationship between the subject and the object is that the interest of the judge becomes understandable. On here, lies the true materialization of the whole paranoid frame instituted and confirmed by the primacy of the hypothesis about the fact⁵⁹.

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58 GALEANO, Eduardo. *Dias e noites de amor e de guerra*. Porto Alegre: L&PM Pocket, 2016, p. 83.

59 CORDERO, Franco. *Guida alla procedura penale*. Torino: UTET, 1986, p. 51. Cordero's finding is explained by the fact that the magistrate creates a hypothesis on which he seeks, throughout the judicial instruction, only facts or signifiers confirming the accusation, dispensing with any different element.. The same reasoning is present in CORDERO, Franco. *Procedura penale*; 7. ed. Milano: Giuffré, 2003, p. 25. In Freud's psychoanalysis we find a similar passage when he deals with the suffering of reality: “While this procedure already clearly shows an intention of making oneself independent of the external world by seeking sanction in internal, psychical processes, the next procedure brings out those features yet more strongly. In it, the connection with reality is still further loosened; satisfaction is obtained from illusions, which are recognized as such without the discrepancy between them and reality being allowed to interfere with enjoyment. The region from which these illusions arise is the life of the imagination; at the time when the development of the sense of reality took place, this region was expressly exempted from the demands of reality-testing and was set apart for the purpose of fulfilling wishes which were difficult to carry out. At the head of these satisfactions through phantasy stands the enjoyment of works of art — an enjoyment which, by the agency of the artist, is made accessible even to those who are not themselves creative. People who are receptive to the influence of art cannot set too high a value on it as a source of pleasure and consolation in life. Nevertheless the mild narcosis induced in us by art can do no more than bring about a transient withdrawal from the pressure of vital needs, and it is not strong enough to make us forget real misery. Another procedure operates more energetically and more thoroughly. It regards reality as the sole enemy and as the source of all suffering, with which it is impossible to live, so that one must break off all relations with it if one is to be in any way happy. The hermit turns his back on the world and will have no truck with it. But one can do more than that; one can try to re-create the world, to build up in its stead another world in which its most unbearable features are eliminated and replaced by others that are in conformity with one's own wishes. But whoever, in desperate defiance, sets out upon this path to happiness will as a rule attain nothing. Reality is too strong for him. He becomes a madman, who for the most part finds no one to help him in carrying through his delusion. It is asserted, however, that each one of us behaves in some one respect

Initially, it can be verified that in a good part of the decision, there is a sincere concern (or not!) of the magistrate in justifying his acts, trying to dispel his personal values and opinions in a clear attempt to assert “having no choice but to condemn”. However, from the Freudian studies, it is known that everybody “usually says more than intend to say”⁶⁰. After all, in every speech, the subject talks about what has consciousness, but, at the same time, the unconscious is also manifested in discourse, either by choice of words, in associations, in lapses of language, in the insistence of some signifiers⁶¹.

Since now, This psychoanalytic interpretation of the decision allows us to understand and conclude that we are facing a punitive fetish and that the construction of the decision content reinforces a retributive matrix⁶², very close to what Nietzsche⁶³ identifies as the spirit of revenge and that, different its decision, the Judge is heavily influenced by the media and is directed at political persecution or, under the terms of the decision, direct at a “legal war”⁶⁴.

Therefore, knowing that the unconscious is not so hidden⁶⁵, The conviction of the former president clearly demonstrates the lack of impartiality of the judge. A democratic procedural system centralizes its action in the inertia and impartiality of the magistrate⁶⁶. As stated by Rubens Casara, this pillar of the structure of the jurisdictional function corresponds to a subjective public right, fundamental right of the citizen materialized by the access to an independent and impartial judge⁶⁷. Luigi Ferrajoli states that impartiality is expressed by three inherent profiles of the jurisdictional action: 1) *Equidistance*: Corresponding to the removal of the judge from the interests of the parties; 2) *Independence*: Represented by the externality of the magistrate to the political system; 3) *Naturalness*: Represented by the determination of its designation and its competences⁶⁸. The decision demonstrates the infraction to the three profiles identified by Ferrajoli. The *naturalness* was the subject of reflection by the magistrate when trying to justify his competence to analyze the process (chapter II.1 of the conviction) and, independently of not agreeing with the pleas put forward by the magistrate, there is, also, grotesque aggression to the two other profiles. It is easily observed that the magistrate's *independence* is non-existent. If the judge should remain outside the political

like a paranoid, corrects some aspect of the world which is unbearable to him by the construction of a wish and introduces this delusion into reality. A special importance attaches to the case in which this attempt to procure a certainty of happiness and a protection against suffering through a delusional remoulding of reality is made by a considerable number of people in common” (FREUD, Sigmund. Obras Completas, volume 18: O mal-estar na civilização, novas conferências introdutórias à psicanálise e outros textos (1930-1936). São Paulo: Companhia das Letras, 2010, p. 37-38).

60 CASARA, Rubens. Mitologia Processual Penal. São Paulo: Saraiva, 2015, p. 100.

61 As in FREUD, Sigmund. Obras Completas, volume 16: O eu e o id, “autobiografia” e outros textos (1923-1925). São Paulo: Companhia das Letras, 2011, p. 14-21. In the same point of view, GOMES, Gilberto. A teoria freudiana da consciência. Psicologia: Teoria e Pesquisa, vol.19, n.2. [online], 2003, pp.118.

62 About the subject, DAVID, Décio Franco; SALOMÃO NETO, Antônio. Fetichismo e Pena: Reflexões sobre psicanálise no Direito Penal. Revista O Mal-Estar no Direito, v. 2, n. 2. Set./2016, p. 1-17.

63 NIETZSCHE, Friedrich. A genealogia da moral. 2. ed. Petrópolis: Vozes, 2011, p. 31 e ss.

64 In portuguese the term is “guerra jurídica” and it appears in the items number 39, 66, 77, 83, 118, 127, 128, 131, 132, 138 of the conviction.

65 “The unconscious is a concept forged in the wake of what works to construct the subject” (...) “The unconscious is what we say” (LACAN, Jacques. Escritos. Rio de Janeiro: Zahar, 1998, p. 844).

66 According LOPES JR., Aury. Direito Processual Penal. 11. ed. São Paulo: Saraiva, 2014, p. 169-171.

67 CASARA, Rubens. Op. cit., p. 144.

68 FERRAJOLI, Luigi. Direito e Razão: Teoria do Garantismo Penal. 3. ed. São Paulo: Revista dos Tribunais, 2010, p. 534.

system (*independence*) how not to question his partiality when he participates in political event of opposition party to the ex-president? ⁶⁹. Likewise, his performance as a true investigator (active procedural part) demonstrates the lack of respect for equidistance. Of course, the desired impartiality is not confused with neutrality, as Jacinto Nelson de Miranda Coutinho explains ⁷⁰. On the contrary! It is necessary that in addition to maintaining in an endoprocessual impartiality by equidistance and distance from the management of evidence, the magistrate presents a subjective impartiality ⁷¹ (maximum expression of his *independence*). This avoids the blurring of procedural democracy, which requires that procedural subjects ideologically assume their positions ⁷².

The assumption of an ideological position must be consistent with the systematic constitutional democratic structure. In other words, if I judge a defendant, let me judge him as the dignified person and citizen who is and if there is any factor that interferes with this process, I must move away from it. In other words, if my (un)conscience desires punishment, even before examining the proof, that I, magistrate, do not exercise the act of judgment! This observation avoids the formalization of a fetishist relation to punish (subverting the part for the whole) ⁷³. This subversion, in the case in the spotlight, corresponds to the punishment of a party member as if it were punishing the whole party because the judge has a position contrary to the ideology of the collective (party). Or also corresponds to a fallacious punishment that believes restore the *status quo*, whether by deprivation of liberty or by blocking assets ⁷⁴.

However, in this procedural game, the former president was not identified as a subject (signifier) of rights by the magistrate, but only as an object (subversion of the party to the detriment of the whole). For this reason, the understanding of a signifier ⁷⁵ was abandoned and the satisfaction of the object of fetish (Which corresponds to the punishment) had been sought by the judge. From the famous writing of Freud ⁷⁶, the fetish can be understood as correlated to the image, symbol, etc. The projection on what is expected of the object by the

69 An observation: The participation of the judge in the mentioned event is notorious. There are a lot of images of the judge participations in PSDB's events. However, just to maintain the academic benchmark, following report link: <http://www.gazetadopovo.com.br/blogs/certas-palavras/sergio-moro-e-o-palanque-do-pre-candidato-do-psdb/>. In addition, it is necessary to highlight the criticism to the fact that the decision contains as condemning substrate the newspaper "O Globo" report, as the basis of its positioning. (Item 376 of the judgment).

70 COUTINHO, Jacinto Nelson de Miranda. Introdução aos princípios do Direito Processual Penal brasileiro. Separata ITEC, ano 1, nº 4 – jan/fev/mar 2000, p. 12.

71 Cf. CASARA, Rubens. Op. cit., p. 146.

72 COUTINHO, Jacinto Nelson de Miranda. O papel do novo Juiz no Processo Penal. Empório do Direito. Disponível em: <http://emporiოდireito.com.br/o-papel-do-novo-juiz-no-processo-penal-por-jacinto-nelson-de-miranda-coutinho/>. Acesso em 21 ju. 2017.

73 This replacement of the whole by the part, integrates the fetishistic characteristics presented by Binet (abstraction and exaggeration). In this way, the particular object is a representation or projection of an image of the whole. About the subject: SAFATLE, Vladimir. Fetichismo: Colonizar o Outro. Rio de Janeiro: Civilização Brasileira, 2010, p. 40-41.

74 View the same argumentation in DAVID, Décio Franco. SALOMÃO NETO, Antonio. Op. cit., p. 10 e ss.

75 "A subject is that which can be represented by a signifier to another signifier" (LACAN, Jacques. O Seminário, livro 16: de um outro ao outro. Rio de Janeiro: Zahar, 2008, p. 21).

76 FREUD, Sigmund. Obras Completas, volume 17: Inibição, sintoma e angústia, O futuro de uma ilusão e outros textos (1926-1929). São Paulo: Companhia das Letras, 2014, p. 302-310.

realization of a drive (or even a perversion⁷⁷) unleash acts to achieve the desired object, but the individual forgets that often the desired object does not match the achieved object (precisely because it is a rediscovered object)⁷⁸, what, somehow, is represented by the conception of *ghostly image*⁷⁹. In the present case, it corresponds to punishing someone to extirpate endemic corruption. In short, the *ghostly image* would be the scene of the ex-president going to prison, satisfying, thus, the punitive fetishism.

This is perceptible by the vague and ambiguous expressions and arguments that denote an early inclination to condemnatory judgment. In particular, in paragraphs 106 to 110, the decision states that it is possible use illegal telephone wiretapping, which would not characterize an infraction by the fact that no content of this illegality was used, as if the right to private life and intimacy could be relativized by the simple fact that no such illegal wiretapping was used in the conviction. In item 126, the judge states that the possibility of “reviewing judicial decisions by the higher courts is part of the system” (which is correct), but his ideological position is not this. As is known by all, the judge openly supports a proposal to reduce the number of procedural appeals⁸⁰

In items 242, 243, 244 and 245 the decision affirms that there is confirmation of the content presented in the some plea bargain done throughout the process; however, throughout the text, it is verified that there is only mention to the testimonies themselves and documents that can not corroborate the indictment. Furthermore, in parts of the decision, there is a clear attempt to reverse the burden of proof (especially in items 442, 447, 448, 449 and 450), when, indeed, how well defines Paulo Rangel, the burden of proof is exclusive to the prosecution⁸¹. In other words, in saying that the former president “did not present concrete explanation at all” (item 450), the magistrate reversed the burden of proof, a fundamental characteristic of

77 Lacan believes that fetishism should be classified as a perversion (LACAN, Jacques. O Seminário, livro 04: a relação de objeto. Rio de Janeiro: Zahar, 1995, p. 157).

78 LACAN, Jacques. O Seminário, livro 04: a relação de objeto. Op. cit., p. 25.

79 “We saw earlier how Freud, in a move that will be greatly implemented by Lacan, opens the door to the resonance of the most archaic sense of the word idealization. It is the subjection of the object to the mental schema we have of it. That is, it is the apprehension of the object as the projection of a mental scheme which, in the case of fetishism, is the ghostly image. (...) This explains, for example, why the fetishist is necessarily a scenographer who, through a kind of contract, constructs situations in which he seeks to nullify any dissonance present in the body of the object by means of its perfect conformation to the image” (SAFATLE, Vladimir. Op. cit., p. 120-121).

80 About his ideological position against defense juridical procedures: DAVID, Décio Franco. As “boas intenções” causam mais um terremoto no sistema jurídico-penal. Justificando. Disponível em: <http://justificando.cartacapital.com.br/2015/04/13/as-boas-intencoes-causam-mais-um-terremoto-no-sistema-juridico-penal/>. Acesso em: 20 jul. 2017.

81 For example, if the Prosecutor narrates, in indictment, the fact called “kill someone” with the description of the modus operandi and all of the circumstances of the crime and in his interrogation the defendant alleges that on the date and time of the event he was traveling to another state or country; It will be up to the Public Prosecutor to prove what he described in the indictment: a typical, unlawful and guilty fact and, consequently, if his alibi is false by means of evidence admitted in the legal system. (...)

Anyway... The defendant alleges, but the burden of proof, nowadays, due to the Federal Constitution, is exclusive to the Public Prosecutor's office. The right of the defendant to plead in his defense whatever he pleases is not to be confused with the burden of proof. This burden is totally and exclusively of the Prosecutor. The rule inserted in the article 5º, LVII, da CRFB should be seen as the total investor of the burden of proof and any doubts that remain regarding the non-substantiation of the fact imputed to the defendant by the indictment of Prosecutor must be resolved in their favor. It is the application of the principle in dubio pro reo. (RANGEL, Paulo. Direito Processual Penal. 23. ed. São Paulo: Atlas, p. 507).

the presumption of innocence, as set forth in article 5º, LVII, of Constitution of the Federative Republic of Brazil.

Also, in items 468, 591, 592, 593, 627, 628, 629, 630, the magistrate affirms the existence of contradictions and – rather than assessing the arguments (called *evidence* by him) under the filter of *in dubio pro reo* – he interprets in the opposite direction (“If there is inconsistency, he is guilty!” - clear expression of fetishistic perversion). This pre-sentencing provision is blatantly exposed in the selective assessment of testimonials, as stated in items 641, 642, 643 and 644. In these items, he only considered “true” the superficial testimony against the former president, materializing, therefore, the *ghostly image* relative to the object of fetish. The same occurs with the innumerable repetitions regarding the contradictions and the insistence of the magistrate to repeatedly ask for the same explanation (to confirm this, it is enough to make a quick reading of the excerpts of the interrogation that were transcribed in the sentence - item 437).

A democratic criminal procedure should focus its structuring on the *Scenic Comprehension* defended by Winfried Hassemer⁸², according to which the magistrate (in the role of spectator) watches the *stories* of the procedural actors – because there are no truths for previous convictions⁸³ – so that at the end of the dialogue process, the magistrate comes to a judgment on the case produced (analysis of a fleeting object⁸⁴). *Scenic Comprehension*, in itself, corresponds to the understanding of the relationship between what is already produced in the criminal enunciation (Criminal Substantive Law – case) and what will be completed (Criminal Procedural Law) in the form (how and when) that the text regulates (acts, deadlines, etc.), all in accordance with democratic procedural rules. In this model, the defendant “is not only participant of the scenic comprehension, but also the object: it is the proper means of proof”⁸⁵ and, as such, deserves all respect and preservation of his procedural and material guarantees. Unfortunately, both the process and the sentence do not match this model. Therefore, it is possible to speak of an unbridled and delirious search for “happiness” by punishment⁸⁶.

In the face of all this, we refuse to accept the *the horror like the cold of winter*. At this historical moment in which the criminal constitutional guarantees seem to evaporate before the punitivist fury, We come together to **say no** to this conviction, and saying **no**, we say **yes** to democracy as Galeano⁸⁷ very well wrote:

“And in this state of things, we say **no** to the neutrality of the human word. We say **no** to those who invite us to wash our hands in the face of the daily crucifixions that take place around us.

To the annoying fascination of a cold, indifferent, contemplative art of the mirror, we prefer a warm art that celebrates the human adventure in the world and participates in it. To the

82 HASSEMER, Winfried. Introdução aos fundamentos do Direito Penal. Porto Alegre: SAFE, Porto Alegre, 2005, p. 172 e ss.

83 HASSEMER, Winfried. Op. cit., p. 186.

84 The same weighting on the relation with object that we mentioned above is made by Hassemer: “The objects do not exist outside of our perception and out of our statements about them, so that to verify the truth of knowledge one must only compare the statements with the objects. The theory of the correspondence of truth is naïve; correct is the ‘consensus theory of truth’”. (HASSEMER, Winfried. Op. cit., p. 186).

85 HASSEMER, Winfried. Op. cit., p. 200.

86 According to the first note of this text.

87 GALEANO, Eduardo. Nós dizemos não 3. ed. Rio de Janeiro: Revan, 1990, p. 12-13.

annoying fascination of a cold, indifferent, mirror beholder art, we prefer a warm art that celebrates the human adventure in the world and participates in it. An irrevocably passionate and quarrelsome art. Would beauty be beautiful if it were not fair? Would justice be fair if it were not beautiful? We say **no** to divorce between beauty and justice, because we say **yes** to his powerful and fruitful embrace.

It turns out we say **no**, and saying **no** we are saying **yes**.

Saying **no** to dictatorships and **no** to dictatorships disguised as democracies, we are saying **yes** to the fight for true democracy, that will deny the bread and the word to no one; and that it will be beautiful and dangerous as a poem by Neruda or a song by Violeta Parra.”

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The invalidity of the plea bargaining under state coercion in the Lula's process

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Although the Criminal Procedure has the political nature of counter-power *vis-à-vis* the State and the typicality of the forms is a guarantee for the parties, to be observed⁸⁸, it is not a novelty that procedural rigidity has been relativized by the hands of the judges themselves, using what it has been called "instrumentality of the forms" to convalidate any nullities arising from non-observance of the procedural formulas expressly prescribed by regent legislation, on the grounds that it has not been proven that the damage occurred to the party - the venerated *pas de nullité sans grief*.

On the other hand, the legal prediction of procedural flexibilization mechanisms have gained relevance and is currently a worldwide trend⁸⁹ towards the argument - not yet demonstrated - that this will achieve the objective of stimulating the simplification and acceleration of the procedures, with a view to the alleged improvement of the access to justice⁹⁰.

In this context comes the plea bargaining, classified by the doctrine⁹¹ as a bilateral legal business, of mixed nature, of procedural and material content, abstract and hypothetically present the requirements of existence (agent, will, object and form), validity (capacity, free will, legal and possible object, form prescribed by law) and effectiveness (conditions, term and charge), ideally admitting that the parties freely express their willingness to participate in the business, using their full capacity to participate in the agreement to be formally signed prescribed by law.

It remains to be seen in what amplitude and depth these legal proceedings can be carried out in the context of criminal proceedings and which hypotheses, assumptions and criteria govern this unusual modality, since the flexibilization of criminal procedure through agreements between prosecution and defense, when admitted, must be compatible with the process view as a constitutional guarantee against the authoritarian perspectives of the State holding the *jus puniendi*, within the ambit of a Democratic State of Law. The purpose of the guarantee

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88 ROCHA, Jorge Bheron. A Importância de Moro e da Lava-jato para a Democracia e para as Garantias do Processo Penal no Brasil. Wednesday, September 28, 2016. Capital letter. Available in: <<http://justificando.cartacapital.com.br/2016/09/28/importancia-de-moro-e-da-lava-jato-para-democracia-e-para-as-garantias-do-processo-penal-no-brasil/>>. Access in: October 01, 2017.

89 ARBS, Paula Saleh. Negócios Jurídicos Pocessuais: É necessária a homologação judicial? In: PEIXOTO, Renata Cortez, SOUSA, Rosalina Feitas Martins. ANDRADE, Sabrina Dourado França (Org.). Temas relevantes de direito processual civil: Elas escrevem. Recife: Armador, 2016.

90 BIAVATI, Paolo. I procedimenti civili semplificati e accelerati: il quadro europeo e i riflessi italiani. Rivista Trimestrale di Diritto e Procedura Civile, Milano: Giuffrè, pp. 751-775, p. 752 and footnote 6, 2002, p. 752.

91 DIDIER JR., Fredie; BONFIM, Daniela. Colaboração premiada (Lei n. 12.850/2013): natureza jurídica e controle da validade por demanda autônoma – um diálogo com o Direito Processual Civil. Revista de Direito Processual Civil, v. 7, n. 2, 135-189, May/August, 2016, p. 155.

procedure is to promote the protection of the person against the State's unconstrainable power - the *kälteste aller kalten Ungeheuer*⁹² - to limit (and legitimize) the imposition of a criminal sanction, which ensures not only the impartial application of the right but also that is done without deviations and excesses⁹³.

Although it is a majority in jurisprudence the understanding that the object of the legal business of winning collaboration is licit because the possibility of such an agreement is legally provided for in various legal provisions, among them arts. 3 and 4 of Law 12.850/13 - Brazilian law to criminal organizations combat - a dense debate about the (a) (anti) ethical aspect of delation must be promoted. It is because the State, by stimulating betrayal and disloyalty by offering advantages to the accused/investigated, calls into question the observance of the Principle of morality which pervades everything in any state act, and not only the administrative ones, which could even configure in abdication of its ethical foundations and the loss of legitimacy to demand appropriate behavior for other citizens⁹⁴. The State begins to negotiate a part of its essence, the Justice itself, avoiding to apply the criminal law, promising impunity or mitigation of criminal responsibility to the informant in exchange for statements and documents that incriminate third persons⁹⁵.

The plea bargaining, due to the complexities it presents, should be the last investigative resource and not the first one, however "easy", remembering that it is traumatic to the foundations of a democratic criminal procedure that we allow the accused to abandon his/her right to silence or worse, his/her right to not produce evidence against himself - *nemo tenetur se detegere* - committing himself, in addition, to make full confession in exchange for the expectation of receiving a certain legal award, provided that he/she has achieved the result.

Lava Jato Operation has been noted for the constant, central and indiscriminate use of the plea bargaining as a technique to obtain evidence, or rather, to what is derived from the sentence imposed on former President Lula, the word of the informers turns on itself means of proof⁹⁶, reversing the criminal procedural logic and subverting the Democratic State, since it could not lend itself to the direct conviction of the judge, or indirectly serve to reconstruct the history of the facts⁹⁷. In guarantee procedure, criminal prosecution must respect the rights, freedoms and guarantees of the individual, not only importing the legitimacy of the ends pursued but, above all, the legitimacy of the means employed⁹⁸.

92 NIETZSCHE, Friedrich. "Also sprach Zarathustra: Ein Buch für Alle und Keinen" iBooks. Epub. Project Gutenberg, p. 97.

93 COSTA, Eduardo José da Fonseca. Opinião O processo como instituição de garantia. November 16, 2016. Conjur. Available in: <<https://www.conjur.com.br/2016-nov-16/eduardo-jose-costa-processo-instituicao-garantia>>. Access in: October 01, 2017.

94 PORCIÚNCULA, José Carlos. Inconstitucionalidades e inconsistências dogmáticas do instituto da delação premiada (art. 4º da Lei 12.850/13). Empório do Direito. Available in: <http://emporiiododireito.com.br/tag/jose-carlos-porciuncula/>. Access in: August 28, 2017.

95 J. J. Gomes Canotilho e Nuno Brandão. Colaboração premiada e auxílio judiciário em matéria penal: a ordem pública como obstáculo à cooperação com a operação Lava Jato. Revista de Legislação e Jurisprudência, Section of doctrine, year 146º, nº 4000, 2016.

96 STF, HC127483/PR.

97 BADARÓ, Gustavo. Processo Penal. Rio de Janeiro: Campus: Elsevier, 2012, p. 270.

98 FERRAJOLI, Luigi. Direito e Razão: Teoria do Garantismo Penal. Translated by Ana Paula Zomer Sica, Fauzi Hassan Choukr, Juarez Tavares e Luis Flávio Gomes. 3ª ed. Sao Paulo: Revista dos Tribunais, 2010, p. 88.

It should be noted that prosecution and defense are not in an equal position in criminal procedure. In the Brazilian legal system, the Institution responsible for prosecution - Public Prosecution - is much better structured and with much more powers to carry out its persecutory mission than the conditions granted to those institutions (advocacy, Public Defender) that carry out the defense - there is no prediction of defensive investigation and the doctrine and jurisprudence are insipient on this subject. This inequality is undoubtedly reflected in the plea bargaining, with a clear imbalance between the "agreeing" parties, which undermines the legitimacy of the legal process. It should be emphasized that it is undeniable that the will is especially vitiated when the agreement occurs with the accused/investigated submitted is already provisionally incarcerated or has already been convicted in high penalty⁹⁹.

Such perception remains clear to the organs of persecution, that was even recorded in the opinion of the Federal prosecutor Manoel Pastana, that the use of the Preventive Prison for the investigated of the *Lava Jato* operation occurs in view of the possibility of the segregation influence them in the will to collaborate in the determination of responsibility¹⁰⁰. There is a judicial decision under the so-called *Lava Jato* Operation of revocation of pre-trial detention for the simple fact that the investigated would already be in negotiations for an agreement of legal collaboration¹⁰¹.

Specifically, Lula's defenders, sentenced to very high penalties in other cases, began to collaborate with the organs of persecution in exchange for a reduction in punishment and benefits, not only in the case where they appeared alongside the former president, accused of passive corruption for supposedly gaining as an undue advantage an apartment and a farm. The benefits of the plea bargaining also reach the penalties of these other cases in which there has already been a conviction, and it is the *Lava Jato* judge himself who applies the benefits, usurping the jurisdiction of the criminal enforcement court¹⁰², even though his trial has been closed with the trial and the publication of the respective sentences.

It is clear that the invalidity of the plea bargaining conducted under the State's coercion all Lula's case. Prison is the most severe state imposition for an individual, since it removes, besides the freedom, his/her possibility of enjoying many other rights, violating a loss of dignity immanent to Criminal Law, even if still in condition of investigation, being merely in the theoretical plan his/her presumption of innocence.

The free will of the individual suffers the influx of the unconstrainable longing to be subtracted from the prison to which he/she is subjected. It is part of the human nature.

The magistrate, for not being part of the procedural business, has contact with him/her only *a posteriori*, when he/she must accurately review the regularity and legality of the agreement, syndicating the (un) balance between the positions of the Accusation and the Defense; the

99 For the professor of Criminal Law of the USP, David Teixeira de Azevedo, the law firm has captivated by accepting illegal clauses to seek the best legal solution for its clients. He also denounced that "the public prosecutor's office threatened to involve a wife, children and possibly partners, even though there was no involvement". Programa Entre Aspas de 17 de outubro de 2017, Globonews. Available in: <https://www.youtube.com/watch?v=ycXLIR9DpGc>. Access in: October 22, 2017.

100 Available in: <https://www.conjur.com.br/dl/lava-jato-parecer-mpf-prisao-forcar.pdf>. Access in: October 22, 2017.

101 Justiça Federal. Pedido de busca e apreensão criminal nº 5004568-78.2017.4.04.7000/PR.

102 Available in: http://estaticog1.globo.com/2017/07/12/sentenca_lula.pdf. Access in: October 22, 2017.

inflows that restrictive measures - precautionary or criminal - have on the will of the investigated / accused; the effectiveness of technical defense; the search for narrative construction of the prosecution by other investigative means; respect for the lawful obtaining of evidence; the failure to use the evidence as the sole means of obtaining evidence; the non-use of the allegation as a means of proof / grounds for prosecution or conviction, as well as issues related to retraction or revocation and their legal consequences.

In *Lava Jato*, this ideal of impartiality is far from being realized, as it overcomes the role of the judge who does not remain equidistant and does not resist the appeal to become a vigilante participant in the fight against corruption as an instrument of public security, objectively expanding its functions under the effusive look of the population that accompanies the operation with a representation of Justice that gains contours of religious veneration¹⁰³.

This is not his/her role in the Democratic State of Law.

103 MAUS, Ingeborg. Judiciário como superego da sociedade: o papel da atividade jurisprudencial na “sociedade órfã”. Translated by Martônio Lima e Paulo Albuquerque. *Novos Estudos CEBRAP*, Sao Paulo, n. 58, pp. 183-202, nov. 2000, p. 183.

Criminal conviction without evidences and special tribunal as a threat to democracy - a macula to be overcome*

José Carlos Moreira da Silva Filho*

I.

The verdict published on July 12, 2017 by the chief judge of the 13th Court of the city of Curitiba condemning the Brazilian ex-president Luiz Inácio Lula da Silva to nine years and a half imprisonment for the offense of passive corruption and money laundering presents a serious threat to the democratic state governed by the rule of law. It is already a common place within the framework of critical thinking over the Brazilian judiciary branch that a good deal of the country's courts, particularly within the criminal framework, practices clear illegalities, arbitrariness, and violations of constitutional principles and rules concerning that matter and that these violations target usually the most vulnerable parts of the population: poor and black young people.

Some say that the violations, arbitrarinesses and abuses practiced by the judge of Curitiba in his verdict against Lula is just another variation of this regrettable tendency, now directed to a social class that is not usually targeted by what could be called a true state of exception in democracy. However, considering things this way leads to a big miscalculation. Lula represents the Brazilian worker; a professional lathe operator, with no university degree, a northeastern Brazilian famine survivor, and a tough union leader so successful in communicating with the country's most humble people exactly for being one of them. No Brazilian president has ever gone so far in fighting inequality and in promoting income distribution. He is the greatest leadership of the largest leftist party in Latin America.

It is not by chance that the ill-fated verdict condemning him was issued one day after the Brazilian National Congress approved a bill that devastated labor rights and the historical achievements represented by the Labor Relations Code of 1943. Carried out in a selective, discretionary way and without evidences, the criminalization of Lula corresponds to the criminalization of all left-wingers and to the dismantlement of the welfare state and, particularly, of minimal conditions for a democratic contest within the rules established by the Constitution. The thread to exclude Lula from the presidential elections in 2018, if materialized¹⁰⁴, will constitute an extreme and crude fraud staining the democratic experience and turning the Brazilian civil society more and more into a hostage of the high-established bureaucracy and the well-connected elites' despotic power. The same happened during the coup perpetrated in 2016, which ousted a legitimate president, elected with more than 54 million votes, by means of a fraudulent impeachment.

Just as the materialization of an impeachment without the penal classification of high crimes and misdemeanors undermines the only legitimate source of power in a democratic rule of law, divesting the citizen of a public decision-making process and causing an overwhelming

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¹⁰⁴ Such situation is enabled by the so called Ficha Limpa (clean record) complementary law no. 135/2010, which provides that any person convicted by a collegial court becomes ineligible, even if appeals may be lodged. If confirmed by the 4th Region Federal Regional Court before the 2018 presidential candidacy consolidation, the guilty verdict will impede Lula da Silva's candidacy.

institutional instability, the illegal and arbitrary judicial impediment of Lula da Silva's candidacy - clearly the front-runner in the next elections for the highest national office -, if confirmed, will constitute an impermissible intervention in the whole society's democratic liberties.

The purpose of this short article, a chapter of this historical oeuvre, is to point out some revealing issues among illegalities and arbitrarinesses of the guilty verdict produced by the judge of Curitiba against ex-president Lula da Silva. It does not aspire to be exhaustive, since other chapters of this book will also approach the huge quantity of such issues.

II.

What is at stake in this legal action involving ex-president Lula as defendant is not necessarily if the triplex flat is or not his property, but whether or not he practiced the offense of passive corruption, whose evidence would be this supposed possession of his. The bill of indictment core thesis, partially accepted by the federal judge¹⁰⁵, is that Lula supposedly received bribery in form of an upgrading from a regular flat to a triplex flat in the same building¹⁰⁶, boosted by an extensive remodeling performed in the later unit¹⁰⁷ in 2014.

This value allegedly represents undue advantages, coming from a supposed 'general account for bribes' organized by OAS Group president, Léo Pinheiro (also defendant in this process), in a triangular operation with state oil company Petrobras, with the alleged engagement of Lula. The ex-president's participation in the scheme supposedly consisted in the appointment of certain names to Petrobras' administrative council for management positions, with the appointed persons allegedly in charge of collecting bribes from builders as a precondition to signing contracts with the oil company.

Avoiding too many details concerning the existence or not of the aforementioned remodeled triplex property title in the name of ex-president Lula, it must be enough to inform that the flat has never been subscribed to his name, he never had this real state's ownership, there is no valid document proving even the intention of ownership purchase or possession, nor of having asked for remodeling advantages to be enjoyed in the future, and finally, the ex-president defense counsel has proved that the OAS Group holds the triplex flat ownership. Therefore comes the inevitable conclusion that Lula has never practiced the acts described in the passive corruption specific criminal offense (Penal Code article no. 317), which defines: receive or ask for undue advantage. Nevertheless, the federal judge concludes that Lula would have received the real state "de facto ownership". It must be stressed that "de facto ownership" is no civil law existent concept; and even by eventual proximity with possession it could not be applied, since Lula has being in the flat a single time for a visit.

105 The judge dismissed the request for an application concerning the builder OAS payment to another company, Granero, in order to cover the storage of Lula's souvenirs and objects received while incumbent president.

106 The building in question is a condominium named Solaris, on the shores of Guarujá beach, whose construction work was initiated by Bancoop (a bank clerks' union housing cooperative) in 2005 and concluded by the OAS Group in 2009. Lula's deceased wife, Marisa Leticia Lula da Silva, contracted installment payments for a regular flat in this building in 2005, and paid 57 installments, reaching a grand total of BRL 179,650.80 (US\$ 56,869.53 - in August 2017, without monetary adjustment).

107 For illustration purposes, the estimate market value provided by the accusation concerning the difference between the regular flat and the remodeled triplex reaches BRL 2,424,991.00 (US\$ 767,645.31, calculated as aforementioned).

The federal judge concludes that the flat was "awarded" to the ex-president, understanding that there lies the process core point. Here it is already possible to detect a serious breach practiced by the magistrate, *in verbis*:

302. That's the crucial issue in this process, then, if characterized that the flat was in fact awarded by the OAS Group to the ex-president, without payment of the corresponding value, nor of its remodeling, there will be a considerable financial advantage evidence of an OAS Group concession to him, estimated in BRL 2,424,991.00 (US\$ 767,645.31), for which there would be no lawful cause or justification.

303. On the contrary, if characterized that this did not happen, i.e., that the flat was never awarded to the ex-president, the bill of indictment shall be dismissed.

Reinforcing the distorted way through which the judge presented the question, we find the following paragraph, located at the final part of the decision, the conclusion, *in verbis*:

852. Once defined that the flat unit 164-A, a triplex, belonged in fact to ex-president Lula, and that the remodeling benefited him, in the alibi of defendant Luiz Inácio Lula da Silva there is no licit indication of a cause for the concession by OAS Empreendimentos to him of such material benefits, remaining in the case file, as sole explanation, solely the corruption arrangement resulting in part from Petrobras contracts.

Reviewing the transcriptions above, one notices that one of the arbitrarinesses in the construction of the judge thinking is to locate the process' core in the supposed ownership existence - or not -, when in fact the crucial point here is to know and prove that this alleged benefit was a payment to the ex-president for his supposed participation in Petrobras corruption schemes. In other words, it would be perfectly possible and probable that the ex-president was bestowed by the builder with a more valuable flat than the one he effectively paid for and with remodeling upgrades already in place. As stated above, there is no evidence of the supposed gift receiving or even that this gift existed, but for the sake of the argumentation proposed here, let us consider that it existed.

Would the only justification for this be the compensation for an act of corruption? Absolutely. Moreover, we do not have to leave the verdict text to find other possible reasons. I stress and comment three verdict excerpts in this sense, *in verbis*:

914. With no better evidence that the executives were aware that the unduly keeping of the estate in OAS Empreendimentos' name and that the performing of the remodeling with real beneficiary concealment arising from a corruption arrangement, they cannot be charged for the crime of money laundering.

915. I do not consider pertinent here inceptions around the intentional blindness doctrine in the money laundering crime and around accountability for eventual intention, for they also demand the existence of a context in order to change into high probable - at least - the awareness about the criminal origin of the used resources in a money laundering transaction. Considering the cases' peculiarities, with compensation of undue advantage through real estate transactions, it is possible that they have conceived of other reasonable assumptions for justifying the orders received from José Adelmário Pinheiro Filho (a.k.a. Léo Pinheiro), even that it was about an OAS Group gift to the ex-president.

Here the federal judge justifies the absolution of the process' other defendants, Group OAS employees, with his understanding that they could have "conceived of other reasonable assumptions" to proceed the triplex flat remodeling and, among these, "even that it was about

an OAS Group gift for the ex-president." Therefore, one notices that when the judge gives up the belief (without evidences) over an existing corruption arrangement where the ex-president could be involved, suddenly "other reasonable assumptions" arise to justify advantages concerning a future and supposed ownership of a remodeled triplex flat.

Still, it would be pertinent to ask why, after all, bestowing an ex-president with a gift. In the very verdict text, we will find two reasons that could form the listing of the judge invoked "reasonable assumptions" to absolve some of the process' defendants. The judge refers to José Afonso Pinheiro's - someone who would have worked as janitor in the building under discussion here between 2013 and 2016 - testimony in the verdict's paragraphs 502 and 503. The judges' goal with the transcription of this testimony's part was using it as evidence that the triplex would belong to the ex-president. I copy here an excerpt of this testimony's part, mentioned at the verdict paragraph 503:

Defense counsel: Did the condominium members say to you that ex-president Lula had a flat at Solaris Condominium?

José Afonso Pinheiro: There were even [real estate] brokers that tried to sell flats of the Solaris Condominium, people bought it precisely because they thought that the ex-president had a flat there; the brokers themselves advertised the flat so.

Defense counsel: Did they advertise it by saying that ex-president Lula had a flat there?

José Afonso Pinheiro: Exactly, that he had, that he has, right.

Defense counsel: So it was used to promote sales, is that right?

José Afonso Pinheiro: Yes, because there were brokers who said 'Look, this is the building where president Lula owns a flat.'"

Well, according to the building's janitor testimony, the brokers mentioned Lula's presence in the building as an owner, aiming with this information to promote the selling of other building's units to potential buyers. In other words, it would be an advantage for the firm's business if one of the flats built and commercialized by them were intended to such a prominent and famous person. One can add that this could also be the advertising to sell other ventures. Something like "Buy a flat built by OAS Group, just like ex-president Lula did."

Finally, it is possible to identify in the verdict text yet another reasonable motivation for the alleged gift. So reasonable, that it convinced the judge to dismiss the case against Lula and the OAS Group president, Léo Pinheiro, of another crimes where both were defendants in the same process, for corruption and money laundering because of a storage and transport contract with Granero company over the presidential souvenirs and received objects. At verdict's paragraph 934, there is part of Léo Pinheiro's (José Adelmário Pinheiro Filho) testimony on this process. I copy here part of this testimony:

Federal judge: So, as for these payments, do you think that there was some sort of illegality or undue advantage involved?

José Adelmário Pinheiro Filho: I believed it did not, and I still believe it does not.

Federal Judge: Right. Was there any compensation, any benefit for the company, due to this payment for Granero?

José Adelmário Pinheiro Filho: No, not directly, of course we had an intention, because I already knew what the president intended to do once he were out of the presidency and took

over his foundation, and we had a lot of interest in forging this ties even closer, moreover due to the international market."

Next, the judge presents his interpretation over such statements:

935. The defendant statements, about not having seen illegality or that there was no debit in the general account for bribes, remove the corruption crime. The final part, with a mention that the payment purpose was forging closer ties is not enough to characterize corruption, since it did not involve payment due to the presidential position or to arrangements involving public contracts.

Therefore, the judge considered legal and reasonable the OAS Group offering the service of contracting the presidential souvenirs and received objects storage in exchange to forging closer ties, since the international market was the company's goal. In other words, it would be an advantage for the international business and expansion plans if the company had ex-president Lula among its clients and beneficiaries, particularly due to the international reputation he conquered with particular intensity during his two presidential terms.

Well, couldn't it be a good reason to favor the ex-president while intending to give him a remodeled triplex instead of a regular flat without charging the price difference? If so, why does the judge state in his verdict that there wouldn't be a legal justification for this supposed advantage? The answer is that the judge has a conviction (without evidences) that the money for covering the difference between the remodeled triplex and the regular flat came from an OAS bribery general account, designed to serve the Partido dos Trabalhadores (PT- Worker's Party), exclusively managed by Léo Pinheiro. And beyond the federal judge convictions, which are the existing evidences over a) the existence of this account, b) that it was furnished with bribery derived of Petrobras' contracts¹⁰⁸, c) that it was reserved for paying the campaigns of PT politicians, and d) that the resources to pay for the difference between the two flats price and the remodeling came from it?

The sole evidential elements in this direction are the testimonies of Léo Pinheiro and Agenor Franklin Magalhães Medeiros, respectively OAS Group president and building director. In short, Léo Pinheiro declares that he had a conversation with João Vaccari Neto, PT treasurer then, and the latter said that the amount to cover the difference between a regular flat and a remodeled triplex destined to ex-president Lula could be deducted from the aforementioned general account for bribes. However, he claimed to have no evidence of this conversation because in a later moment, when he met Lula personally, the ex-president would have instructed him to destroy these evidences. Agenor Franklin, in turn, mentioned that Léo

108 There is no space here to enter the debate over the questionable universal competence assumed by the current holder of the 13th Federal Court in Curitiba to conduct the Car Wash Operation. Yet, even understanding that such competence should be admitted in situations involving Petrobras, it is necessary to note that, if there isn't minimal correlation evidence between the OAS flat (located in the state of São Paulo) purchase/donation and Petrobras (based in the State of Rio de Janeiro) corruption schemes, this process should have never happen or be tried by a Curitiba (state of Paraná state) federal judge, even by the competence criteria practiced by the court. The situation becomes astonishing when, in this verdict's Motion for Clarification, the judge of Curitiba comes to the point of affirming that: "This trial has never affirmed in the verdict, nor anywhere else, that the funds obtained by Construtora OAS through contracts with Petrobras were used for paying the ex-president's undue advantage." If it were not enough, soon after he also asserts: "Neither corruption, nor money laundering, as a precursor to the crime of corruption, require or would require that the paid or hidden amount specifically originated from Petrobras contracts."

Pinheiro would have commented to him over this supposed arrangement with João Vaccari, but since this comment happened in the middle of an international trip, there was no other witness to this dialog between himself, Agenor, and Léo Pinheiro.

It should be stressed that, besides the complete absence of evidence of this corruption arrangement or of the conversation with João Vaccari Neto, the testimonies in question - which were formulated after more than one-year imprisonment, considering also that before it both denied the alleged facts - were not validated as part of plea bargain program. It may be possible to speculate on why it could not be proven by any other evidence. After all, the plea bargain law clearly states that a mere whistle blowing is not sufficient for conviction and that it must be supported by other probative means, i.e., evidences. Nevertheless, the judge decided to grant a substantial benefit to defendant Léo Pinheiro; a benefit that could be called an "informal reward". It allowed Pinheiro to obtain downgrading incarceration conditions after two years in closed conditions, considering the totality of sentences related to other processes at Car Wash Operation where he is a defendant, and without conditioning it to complete damage remediation for his crimes, plus enabling him to discount the time he has been imprisoned from the sentences' grand total (which is almost the total time required for downgrading incarceration conditions). What justifies such generosity? I copy directly from the verdict operative part referred to Léo Pinheiro (paragraph 946), *in verbis*:

However late and without the collaboration agreement, it is inevitable to recognize that the convicted José Adelmário Pinheiro Filho contributed in this legal action to clarify the truth, testifying and providing documents.

Involving in the case crimes committed by the republic's highest public officer, it is not possible to ignore the relevance of José Adelmário Pinheiro Filho's testimony.

If his testimony were consistent with the rest of the probative framework, particularly with documentary evidences, and if the testimony had probative relevance for the trial, then granting legal benefits would be legitimate.

The fact is that, beyond the absence of some advantage evidence (since the flat was not received neither as ownership, nor as possession), there is also no evidence that such advantage was undue. It happens because there is no evidence that Lula, while appointing names to Petrobras' administrative council, knew that such persons would be involved with company detrimental corruption schemes¹⁰⁹. There is also no evidence that any payment order for the differences between a regular flat and a redecorated triplex, which should originate from a supposed general account for bribes, and that this account was furnished by a corruption scheme derived of Petrobras' contracts with the ex-president awareness.

Maybe that is why the federal judge decided to validate as the trial main evidence, suitable for justifying a decision capable to deprive of liberty an ex-president, the isolated testimony of a crime admitted culprit that is imprisoned since more than two years, which fights desperately to regain liberty in exchange for a leniency agreement, even an informal one. The justification for granting such an importance to this testimony, which was obtained in the already described circumstances, is that if Léo Pinheiro had lied about the triplex aiming to

109 Beyond the already infamous and legally invalid justification as well used by federal judge, that "there was no way that the President of the Republic did not know", there is in the records a testimony by former senator Delcídio do Amaral declaring that Lula did know everything, but that he, Amaral, had never talked personally to the ex-president about it (sic).

compromise the ex-president, he should also have lied to compromise the ex-president on the presidential souvenirs storage, *in verbis*:

936. José Adelmário Pinheiro Filho statements sound true. Considering his clear intention to cooperate, one cannot envision why he should admit a corruption crime and deny the other one. If his intention were to lie in his own and in ex-president's Lula's interest, he would deny both crimes. If his intention were to lie only for obtaining legal benefits, he would admit both crimes. Considering that his narrative about the triplex flat finds support and corroboration in ample documentary evidence, it is the case of giving him also credit for this report on the presidential souvenirs storage.

Whether to clear or to convict, Léo Pinheiro's words were balance pointer for the judge of Curitiba, maybe because the magistrate did not manage to 'envision' another reason for Léo Pinheiro to lie on court, who knows? Here comes a possible suggestion to be envisioned: a lie is much more convincing when it comes together with a fact. One way to enhance a lie is to surround it with many facts. Exactly because it is difficult to know if the word of a whistleblower (formal or informal) must be taken as evidence of a crime practiced by a third party that the law requires corroboration of other undisputed evidences.

As pointed out, the ex-president incriminating testimony was Léo Pinheiro's winning ticket for receiving the judge's grace in compensation for his crucial "collaboration". It was not necessary that the ex-president were convicted also in a process over the presidential souvenirs storage. To reach the nine years and a half imprisonment decision and opening the way for the sequestration of the ex-presidents assets and means of subsistence, therefore achieving the Car Wash task-force awaited final - a logical result of its constructed narrative, adopted as well in many of the judge's partiality demonstrations along the whole trial and even before it - a single conviction based on the triplex would do.

III.

There are many absurd, illegal and arbitrary aspects in the verdict analyzed by the other articles gathered in the present book. The space is short for so many exceptional situations, so here comes my short list of some others:

- The judge understands that the triplex "de facto ownership" is "evidenced" even without documentation of title transfer or property and punishes the ex-president, because while not having the title nor the possession, nor admitting the so called "de facto ownership", he would be hiding an undue advantage. And then, if it were not enough to be convicted for corruption, he is also convicted for money laundering. There is nothing left in this case but to ask how could the ex-president have laundered a money he has never owned through the property of an apartment that was never his, nor has he had its possession? If still alive, maybe Franz Kafka could explain that.

- The confirmation that Lula would not have "how to deny his knowledge of a criminal scheme" at Petrobras, as the judge of Curitiba reasons at the verdicts' paragraph 890, is the fact that he would have been "materially benefited with part of the bribery resulting from corruption arrangements in Petrobras contracts, even if through a general account of bribes". Here we have two astonishing facts without evidence (just whistle blowing of imprisoned whistleblowers, and some of them are informal) that serve, in the judge's logic, as evidence - one to the other.

- At paragraph 958, the judge declares that the criminal complaint placed by ex-president Lula's defense counsel against himself - due to the judge's leaking of private conversations between the ex-president and his family to the press, exposing the defendant therefore to public execration, as well as another leak of an illegally recorded phone conversation between the country's incumbent president and the ex-president - represented an attempt to intimidate the judgment. The same assessment happens in relation to Lula's defense counsel proposed actions for libel or slander, claiming indemnity from attorneys for the government (due to their infamous and notorious PowerPoint snafu spectacle, exhibited in the main national television news program) and against a federal police chief-officer. In this paragraph one can notice in full detail the judge's high level of partiality and arbitrariness towards the defendant, which he relentlessly convicted without evidences, since he transforms the legitimate exercise of the right of defense and of the right of action into objectionable acts. Increasing his level of arbitrariness, the judge declares in the next paragraph (959) that the proposition of such actions, in addition to the supposed destruction of evidences, which would have been ordered by the ex-president (an unproved fact), should justify his preventive detention, but that he would not demand it to avoid "traumas" and due to "prudence". The question one should ask here is who is intimidating whom?

From paragraph 793 to 796 he does considerations both subjective and unnecessary over what ex-president Lula correctly did or did not regarding the issue of corruption during his term. And on paragraph 795 he comes to the point of declaring that Lula should have acted to "revert" the Supreme Court case law regarding the impossibility of imprisonment before *res judicata*, that is to say, that he should have (who knows how) have influenced the Supreme Court judges to decide (as they unfortunately did in February 2016) to violate an eternity clause of the Constitution of 1988.

- It is symptomatic that the judge of Curitiba spends a great deal of his verdict trying to justify himself for this abusive actions against ex-president Lula, practiced before and during the process. Such justifications, however, are far from convincing. I want to mention one of them. In his attempt to justify the compulsory process to which Lula was submitted in March 2016 - despite not having received previous subpoena and during which his image was exposed in this condition by means of a frantic media circus, with 24h transmission on the country's main TV channel -, the magistrate wrote on the verdict that on wiretapped conversations there were hidden grounds for the compulsory process, namely the organization of activists to protest against the search and seizure procedure that would be carried out in the ex-president's residence. The judge claims that the compulsory process was decided for the "protection" of police agents (sic) because of activists' mobilization "threads". Curiously, the federal judge's justification at the time of this fact was that the compulsory process would have been authorized for the ex-president's protection... It is deplorable that the magistrate also considers a thread or a violence the legitimate and pacific demonstration of political activists that happened during the ex-president's testimony in May 2017. It is indeed sheer fear of democracy.

There is much more, but the space is short. It is expected that this decision will not be confirmed by other instances of the Brazilian judicial system and that it ends up being nothing but a macula of sad memory in our institutional history. Shall the Brazilian judicial branch validate this genuine special tribunal, then we will have completely returned to the authoritarian origins of this branch, so clearly represented by a history of conviviality,

sometimes laudatory, sometimes silent, but undoubtedly institutional, involving the judiciary and the Brazilian civil-military dictatorship.

Plea bargain, paper news and the verdict: elementary, my dear Watson!

José Francisco Siqueira Neto

The Criminal Lawsuit 5046512-94.2016.4.04.7000/PR, sentenced by the 13th Federal Criminal Court of Curitiba on July 12th wraps up one of the most important phases of the longest “real life soap operas” featuring the Law ever run by the largest television network in Brazil.

After the Plea Bargain of a very well-known doleiro with an extensive criminal record with the very same judge that passed this sentence, a cunning plot capable of inducing aggressive behaviors in Brazilian society was developed, with the so-called “Inquisitors of Good” from Curitiba playing a leading role. This was only possible by conjoined forces of the Federal Bureau, the Prosecutor’s Office and the Court itself that has never happened in the history of democracy in the West.

Even without saying it directly, when taken into consideration everything that happened, there is no doubt that even before the charges were pressed, the target has always been the former Brazilian president, Luiz Inácio Lula da Silva, “LULA”. It wasn’t few – from the start of the operation until the pressing of charges – the comments circulating in mainstream media (radio and television), tons of messages in social media sent out by robots and humans alike that painted a guilty image of the defendant.

They often used phrases like “reaching the bottom of this”, “a clean slate for the country”, “taking down the mighty”.

This operation was carefully executed by a certain media network using all its branches (printed, radio, television), with collaboration from social media.

Everything was designed to make it seem like prosecution was a natural consequence, so that it seemed only normal when the PO’s announced their intention to pursue this case in a press conference held in a fancy Hotel, where the apex was a power point presentation that had several accusations portrayed in balloons tied up to the name of LULA.

This weird document, however, is an infographic that contains information obtained by the prosecution and organized in a way that would create an image of this gathering. The result portrays a feeling of evidence and proof of abnormal behavior by the defendant. It is the ultimate result expected by the accusation, for it influences public opinion on the matter.

The scenery was then ready for the “hero/academic/social activist/judge” to strike.

After the filing of the complaint, the Court began to assess the possibility of using the interpretation technology presented by this very article to sentence the lawsuit 5046512-94.2016.4.04.7000/PR .

There are several circumstances surrounding this episode that put some legal elements into question in regards to the Court and Democracy, such as the amount of paperwork in the form of depositions, recordings and images produced by the accusation that were leaked to mainstream media with a narrative so precise, as if to maintain the coherency of the story from one end to another.

Such evidence revealed that the accusation is using a very powerful computer to arrange the documents in a way that provides rationality to the story the prosecution wants to tell.

Finally, it became crystal clear the members of the prosecution were able to carry on with a very active social life – reported by the media – and still produce evidence in a never-seen-before pace.

I started checking in with physicians and mathematicians alike on if it was possible to answer the accusation’s software program, with the intent of checking the correlation between the certainties demonstrated by the prosecution with the facts.

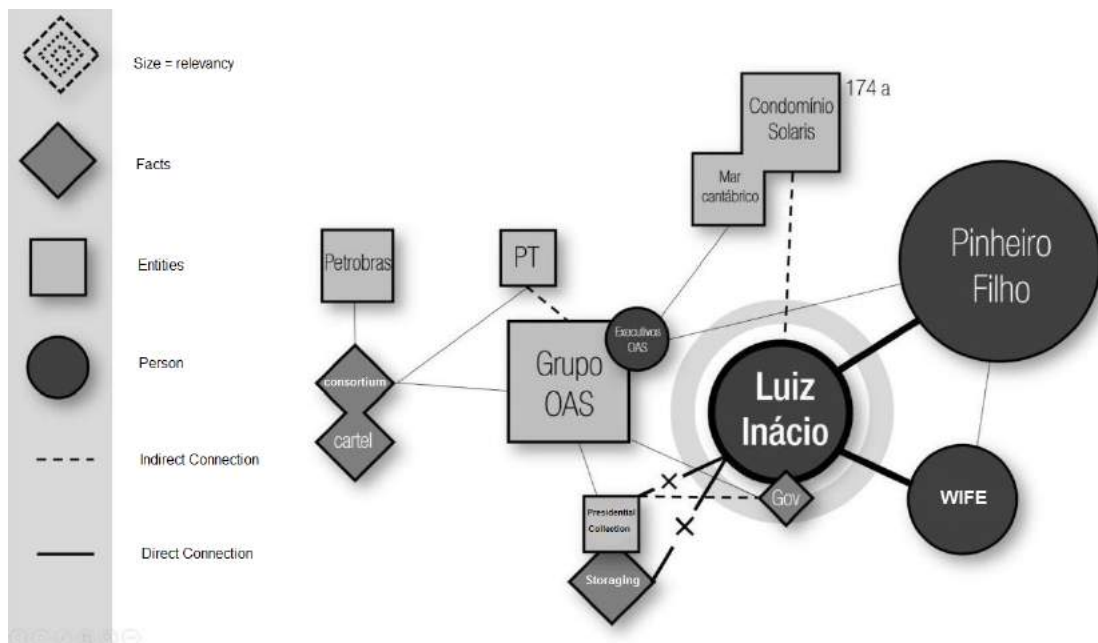
After an extensive round of information leveling, language check and experiments, our tool was ready to go, a month before the issue of the sentence in the LULA case.

This technology – called legal reading – is an algorithm of AI – called deep learning – that allows you to interpret texts with exclusive IP, which is functional in over 60 countries, making it easy to audit it.

It extracts large volumes of text, correlation between motive, themes facts and people which would be otherwise impossible to be performed by humans, especially when taking into consideration the deadlines imposed by the law.

It would also allow you to read thousands of texts in the span of seconds and to create a hierarchical structure between main and secondary subjects. Aside from organizing these texts, the technology also allows you to identify connections between people, entities and facts, their connections and the amount of relevancy of such information. In the end, it creates an interactive visual map that allows its user to comprehend its conclusions in a matter of seconds. Therefore, it allows you to analyze the thesis elaborated by either the accusation or the defendant, or even the Court, to validate the assumption that the rational train of thought is anchored in fact, hypothesis, or deduction. The chart created by this robot of sorts is similar to a power point presentation, and it sets a path for the Court to support its conviction.

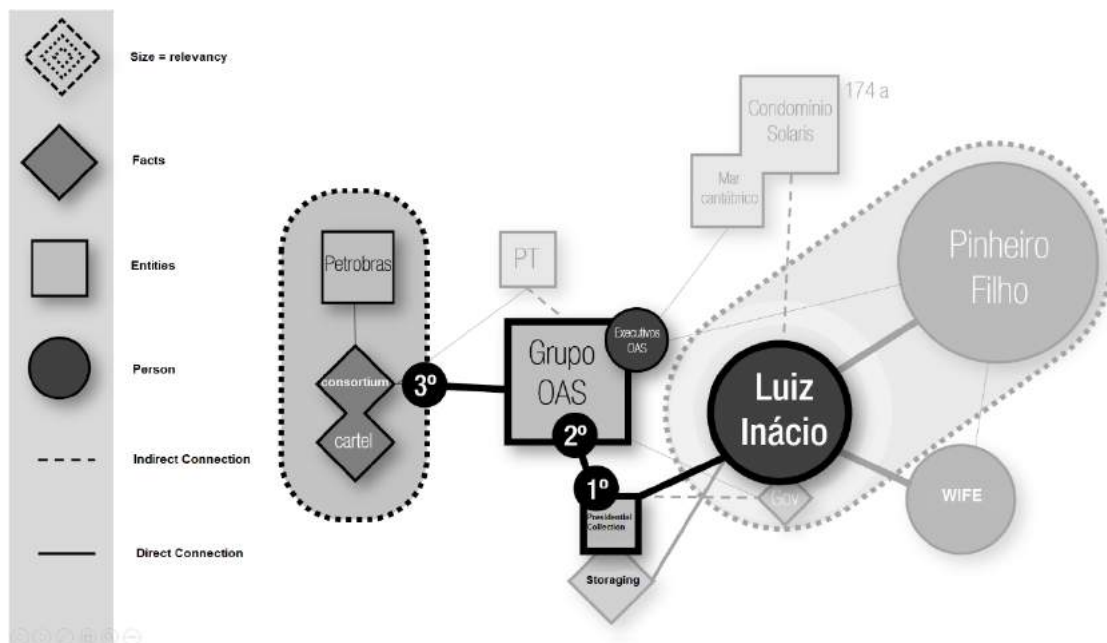
By applying this technology to the long – 238 pages, 29.567 words – sentence issued in the Criminal Lawsuit 5046512-94.2016.4.04.7000/PR, we were able to put together the following chart:



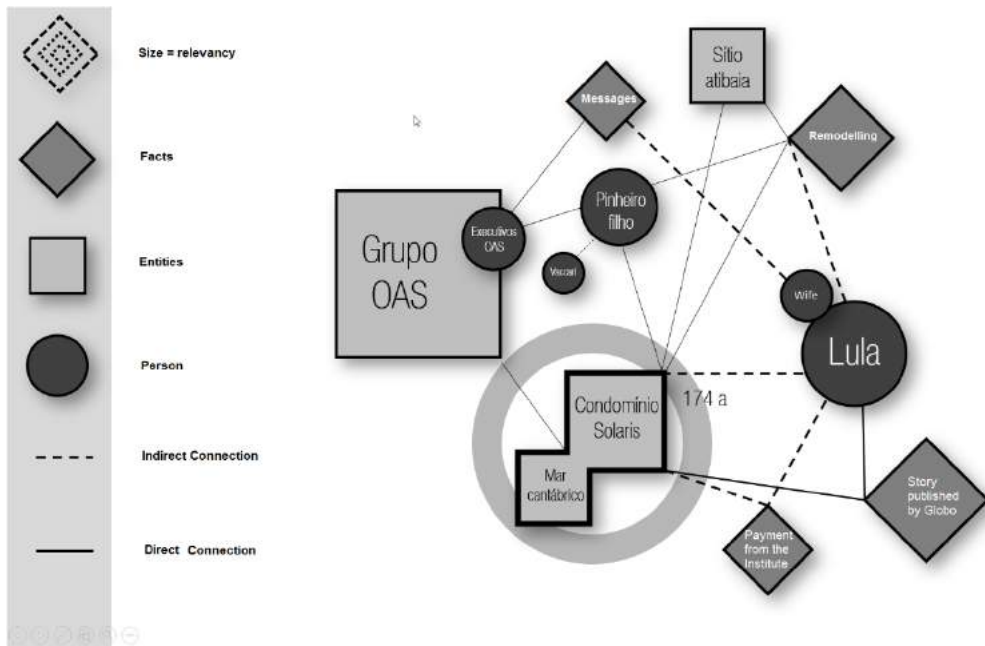
As you can see, never mind the excessive use of pages, the sentence fails to establish a direct connection of LULA with anything other than the other defendant who took a plea bargain. The direct connection with the Presidential Collection and its storing has been discarded by the Court for a lack of evidence.

Another aspect that deserves attention is the percentage of quotes. “Petrobras” was cited 252 times, while “Condomínio Solaris” was cited 75, LULA 395, “Leo Pinheiro” 156, and the “GRUPO OAS” 367. “GRUPO OAS” and “Leo Pinheiro” put together corresponds to 132% of the citations of LULA that demonstrates a higher emphasis on the informants than on the defendant itself.

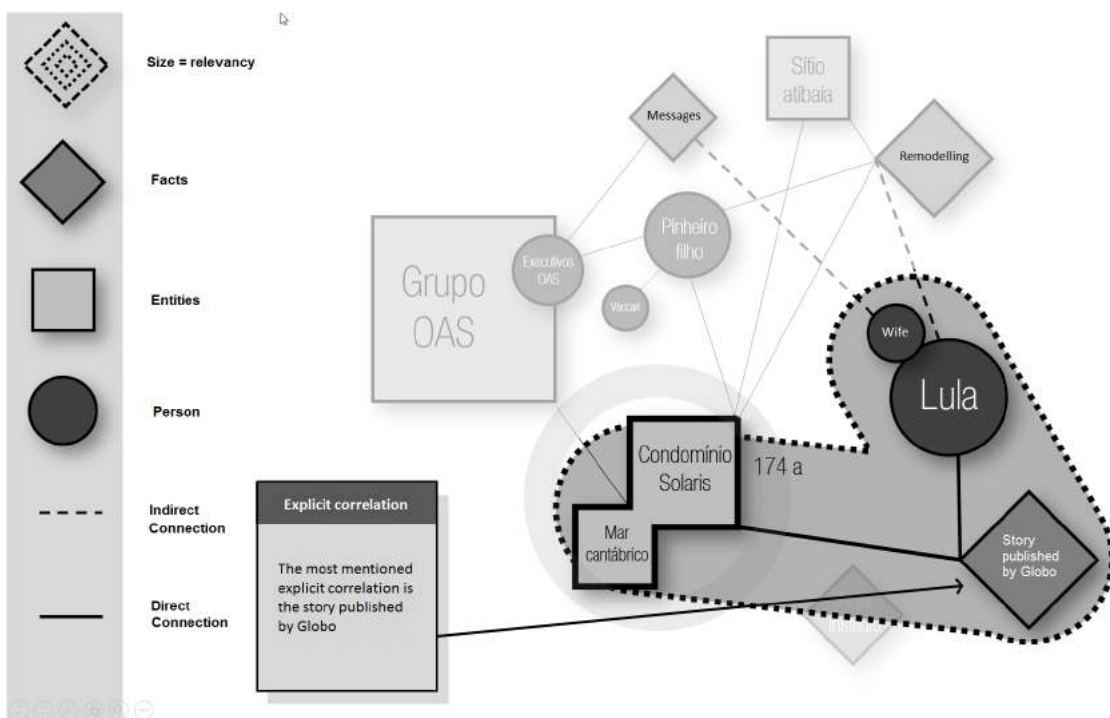
On the matter of links between different groups, the sentence emphasizes the connection between LULA and Petrobras happens in a 3rd degree level, predominantly 4th degree, demonstrating the unlawful ruling carried out in the sentenced issued by the 13th Federal Criminal Court of Curitiba.



When determined that the link with Petrobras was at best a 3rd degree level of connection, the only source of direct connection between former president LULA and the crimes he is accused of is the informant, which meant that the authorities had to find proof to further strength that claim. Their answer to that issue was found in a news report mentioned 8 (eight) times (!) in the sentence. That means there is absolutely no concrete evidence. Here is a chart that represents what is said above:



And another one ordered by the relevancy of the evidence:



Therefore, the sentence is technically weak, however strong it may want to seem. Some of its particularities are to be highlighted like the sheer number of pages (238), 45 of which are used to fight political and ideological views of the defendant and its lawyer, in a clear-cut demonstration of complete disregard for the impartiality of the judge, which is in its own right an essential aspect of a fair trial according to every International Law Organization.

The numerous grounds for annulment are evident, but what sets in motion the forces currently attacking Democracy is the manipulation of AI technologies that ensures the victory

of the accusation over the real facts. Thus, with grounds solely on a news story, former president LULA was convicted.

The offense of passive corruption and the sentence that violates the principle of legality

Juarez Tavares*
Ademar Borges**

The correct interpretation of the content that constitutes the criminal offense of passive corruption (Art. 317, Brazilian Criminal Code), in spite of a settled case law by the Brazilian Supreme Court and an unanimous interpretation of legal doctrine, emerges again in face of the recent convicting sentence against former president Luiz Inácio Lula da Silva. In the prism of its legitimacy, this sentence could be discussed according to several dogmatic perspectives: (i) the unconcealable disdain for the maxim according to which the legitimacy of a criminal conviction depends, as far as the evidence assessment is concerned, on a reasoned decision by the judge – based on the proof presented by prosecution – regarding the existence of a criminal fact beyond a reasonable doubt, as established in the common law; (ii) the multiple violations of the Principle of Accusation, resulting from the reiterated violation of Art. 212 of the Brazilian Code of Criminal Procedure, due to the judge’s excessively intervention in the production of testimonial evidence¹¹⁰; (iii) the outrageous affront to the principle of lawful judge, resulting from the undue expansion of the sentencing jurisdiction power, so often denounced by the doctrine¹¹¹, among innumerable others, many of which were discussed in other brilliant essays collected in this work.

The subject of this short essay – the analysis of the boundaries of the offense of passive corruption in Brazilian law – was chosen basically for three reasons: (i) the understanding of the requirements of the offense of passive corruption as employed in the convicting sentence affronts clearly the judicial precedents of the Supreme Court Plenary; (ii) in the examined case, the error committed by the judge completely excludes, on its own, the possibility of establishing an offense of passive corruption; (iii) consequently, the inexistency of the passive corruption crime rules out any possibility of conviction regarding the charge of money laundering, as there were no antecedent offense. The critical error present in the sentence

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110 Law no. 11.690, from June 9th, 2008, changed the text of Art. 212 of the Brazilian Code of Criminal Procedure, thus adopting the US Law Procedure called cross-examination in which the witnesses are directly interrogated by the side which called them and then the opposite may execute its inquiry (direct examination and cross-examination), and the judge may demand any remaining explanations and has the supervisory power over the procedure.

111 The issue was definitively settled by Prof. Gustavo Badaró in his excellent doctrinaire essay: “A conexão no processo penal, segundo o princípio do juiz natural, e sua aplicação nos processos da Operação Lava Jato” (“The joinder of actions in criminal procedure according to the principle of the lawful judge, and its application in the procedures of the Lava-Jato Operation”), online at http://www.mpsp.mp.br/portal/page/portal/documentacao_e_divulgacao/doc_biblioteca/bibli_servicos_produtos/bibli_boletim/bibli_boi_2006/122.07.PDF.

when it interprets the boundaries of the passive corruption crime in Brazilian law can be demonstrated without the least difficulty, in the light not only of legal dogmatics but also – and mainly – in the view of the Supreme Court law case.

The sentence stated that *“in Brazilian case law, the issue is still controversial, but the most recent judgments show the tendency to rule that the corruption offense does not depend on a misconduct and that there is no need of its precise determination”*. The sentence continues stating that *“in the Criminal Proceedings 470, ruled by the Honorable Supreme Court Plenary (AP 470/MG, Opinion delivered by Justice Joaquim Barbosa, majority opinion, session from December 17th, 2012), the issue was discussed, but according to the interpretation of this court, in the reasoning of the sentence there is no conclusive affirmation to its regard, at least not expressly”*. The sentence’s conclusion referring to the understanding of the Supreme Court regarding this issue is objectively and completely mistaken.

The Supreme Court discussed thoroughly the issue of the requirements of the passive corruption crime in AP 470 proceedings. At that time, there was a major discussion about the necessity to prove the misconduct that motivated the acceptance or solicitation of an undue advantage as a condition to configure the offense of passive corruption. This problem, already very complex in the dogmatic view – was aggravated – in the perspective of the Supreme Court case law – by the well-known difficulty to extract the majority legal theses from single proceedings in a context in which the deliberation dynamics suggests that the judgments delivered by courts consist of the aggregation of single opinions, without reaching a consensus regarding the central controversies of the debate¹¹². Therefore it is necessary to seek to identify clearly the boundaries of the criminal rule specified in Art. 317 of the Criminal Code, based on the judicial precedents of the Supreme Court Plenary¹¹³. After all, the meaning of the criminal sanction of a typified conduct depends inevitably of the interpretation performed by courts, especially by the Supreme Court, the highest ranking court of the Brazilian judiciary branch¹¹⁴.

The present debate on the normative content of the passive corruption crime requires of their interpreters the following logical steps: (i) the case law determines the rationale of the criminal rule, since the interpretation establishes the boundaries of the relevant criminal conduct; (ii) in the AP 470 proceedings, the Supreme Court discussed exhaustively the objective and subjective requirements to configure the passive corruption crime in Brazilian law; (iii) the normative sense attached to the criminal rule by the Supreme Court case law integrates the content that constitutes the criminal offense itself and determines normatively not only future judgments, but also the addressee of criminal rule itself. Therefore, the

112 For a proper understanding of the serious deliberation problems currently faced by the Supreme Court see: V. SILVA, Virgílio Afonso da. (2006) O STF e o controle de constitucionalidade: deliberação, diálogo e razão pública. Revista de Direito Administrativo nº 250. Rio de Janeiro: FGV Direito Rio, p. 197-227.

113 For the identification of the Supreme Court’s prevalent position was applied the criterion according to which his or her jurisdiction coincides with the orientation established by the competent body with the aim to unify the comprehension of the court divisions, in the case of the Supreme Court, its Plenary. Occasional previous judgments of the court divisions (Turmas) which were contrary to the judicial orientation held by the Plenary of Supreme Court, acting as unifying body, were deliberately excluded from the present analysis.

114 Although it is, as a matter of principle, not the task of the Supreme Court to unify the interpretation of (infra-constitutional) criminal rules, it usually affirms the last word regarding the sense and the boundaries of criminal rules examined in criminal proceedings of original jurisdiction. Hierarchy criteria applicable to Supreme Court jurisdiction lead to the prevalence of its judicial precedents over infra-constitutional criminal law.

examination of the specification of the offense applicable to the charge against the defendant must be subject to the previous meaning given by the Plenary of the Supreme Court to Art. 317 of the Criminal Code¹¹⁵. In fact, in the case we are discussing here, the essential values of a democratic constitutional state¹¹⁶ – such as rationality and legitimacy of judicial decisions, legal certainty and isonomy – recommend the application of the recent legal precedents of the Supreme Court Plenary regarding the meaning and boundaries of the criminal rule specified in Art. 317 of the Criminal Code.

Since a long time, there is in Brazil a discussion on the exact meaning of the criminal rule specified in Art. 317 of the Criminal Code. We can summarize the main controversies as follows: (i) Does passive corruption demand the acceptance or solicitation of an undue advantage to be motivated by the bargain of the public function held by the agent? (ii) Does the consummation of the criminal conduct demand the proof that the acceptance or solicitation of an undue advantage rises from a specific official act made available to someone by the public agent? (iii) Does the passive corruption demand the proof of a concrete misconduct represented by an official act within the capacity of the corrupted public agent?

These issues raise at least two different argumentation levels: (i) The first one consists of deliberating whether the consummation of the passive corruption criminal conduct demands the demonstration of a relation between the undue advantage (solicited or received) and the exercise of a public function, which demands the investigation if there is a causal relation between this undue advantage and a misconduct represented by an official act, even if only potentially considered; (ii) the second one consists of the question if the effective misconduct – an action or inaction – embodied in an official act is required to configure the criminal offense. The first argumentative level suggests the problem of the necessity to demonstrate a causal relation, even potential, between the undue advantage and an official act (allegedly in his or her official capacity). The second argumentative level puts into debate the issue concerning the requirement to demonstrate a concrete action of the public agent to somebody's benefit as a condition of the consummation of the passive corruption crime.

The Supreme Court addressed all these issues in the well-known AP 470 proceeding, when the Court defined with major precision the specification of the applicable criminal rule (Art. 317 of the Criminal Code). To give an idea of the extension of the problem regarding the attempt to find the objective element of the passive corruption crime, it is useful to recall some statements given in the well-known AP 470 proceedings, when the Court, in a plenary session of judgment on merits, struggled to set the elements of the offense. The following chart presents a short synthesis of how the Supreme Court defined the misconduct represented by an official act as a requirement to the passive corruption offense:

115 The case law applicable to the specification of the passive corruption offense, as stated by the plenary of the Supreme Court in the judgment of the AP 470 proceedings, must be also applied to the present case. From the fruitful normative density of the constitutional principle of isonomy we extract primordially the Judiciary's duty of an equal jurisdictional treatment to equal situations (SILVA, José Afonso da. *Curso de Direito Constitucional Positivo*, 16th ed., São Paulo, Malheiros Editores, 1999, p. 221; BOBBIO, Norberto. *Igualdade e Liberdade*, translation by Carlos Nelson Coutinho, Rio de Janeiro, Ediouro, 1996, p. 25; CANOTILHO, J. J. Gomes. *Constituição Dirigente e Vinculação do Legislador*, Coimbra, Coimbra Editora, 1982, p. 380.

116 As Justice Edson Fachin stated, "the construction of a narrative of preceding cases which orientates the whole judicial system it part of the public munus of the Constitutional Court" (ADI 1046, Opinion delivered by Justice Edson Fachin, Plenary, session from December 18th, 2015).

	Defendants: João Paulo Cunha and Henrique Pizzolato (initial stage of the AP 470 proceedings)	Defendants: other Congressmen (final stage of the AP 470 proceedings)
Justice Joaquim Barbosa	Thus it is proved that the defendant HENRIQUE PIZZOLATO received undue advantage from DNA Propaganda, able to motivate him to commit an official act consisting of the anticipated transference of funds of the bank <i>Banco do Brasil</i> to DNA Propaganda, without contractual provision and without control of the use of the funds.	Besides the consistent doctrine and case law, the specification of the crime itself explicates the formal nature of this offense – its consummation does not even depend on the verification of a payment; the simple act of soliciting/receiving something in the exercise of a public office suffices when the official acts are practicable. The effective misconduct represented by the aforementioned official act is not mandatory. The action results in higher penalties.
Justice Ricardo Lewandowski	The passive corruption offense requires the evidence of an official act which represents a transaction or bargaining with the public office he or she holds. The Prosecution Office did not gather any evidence, however minimal, of any unlawful act taken by the defendant [João Paulo Cunha].	Nevertheless, when the Plenary of this Court in its majority addressed the same issue in this AP 470 proceedings, it expressed a more comprehensive understanding, affirming that the criminal rule of Art. 317 of the Criminal Code is verified by the mere receiving of undue advantage by the public agent, being unnecessary the precise identification of the official act. And more: the indication of a relation between the receiving of advantage by the public servant and the practice of a certain act within his or her legal duties is unnecessary. And this is because, even in a case of passive corruption offense, the consummation of the crime took place in the moment when the undue advantage was accepted and not in the moment of the amount's withdrawal. Therefore, according to the judgment of the Court, the passive corruption offense is constituted when an undue benefit is received, and this includes also the possibility or the perspective of an action or inaction, not identified, present or future, real or potential, as long as it occurs in his or her official capacity.
Justice Rosa Weber	An indication of an official act is not an element of the legal type of passive corruption. It is sufficient that the public agent who receives the undue advantage has the power to commit an official act which is able to consummate the offense of Article 317 of the Criminal Code. [...] Which requires the advantage to be offered	However, the majority, according to the assignee's opinion from Justice Ilmar Galvão, shared the viewpoint that the elements necessary to establish the crime required an undue benefit, whether solicited or received, in return for an official act, performed by the corrupted agent in his or her legal capacity. In that case, the charge did not identify any misconduct, performed or even intended, which would motivate the payment of

	and accepted due to an official act; the effective occurrence is not mandatory.	<p>advantage to the former president of the Republic of Brazil.</p> <p>In the specific case, however, the undue benefit was indeed paid to the corrupted congressmen, with the purpose of obtaining political support in favor of the Federal Government.</p>
Justice Luiz Fux	... the practice of some official act due to an advantage received is not necessary to prove the offense. It is sufficient that the benefit is related to a public office holding. [...] The offense of passive corruption is constituted by the simple solicitation or the mere receiving of an undue advantage (or by promising it) by the public agent due to his or her official capacity, it means, due to the simple possibility that the receiving of bribe may influence the action of an official in the discharge of his or her public duties.	As already exhaustively demonstrated, the execution of any official act in return for an advantage received is not necessary to constitute the offense. It is sufficient that the benefit is related to a public office holding. [...] Therefore the indication of a concrete official act committed in return for the offered benefit is indeed dispensable; the potentiality to influence the action of an official in the discharge of his or her public duties is sufficient. The proof of action or inaction or delay of an official act is only an aggravating circumstance established in § 2 of Art. 317 of the Criminal Code.
Justice Dias Toffoli		As already decided by this Plenary in a former session – when I, by the way, delivered a dissenting opinion – the mainstream position was formed in the sense that the execution of an official act is not an essential element for the configuration of the passive corruption offense. To this effect, it is sufficient that the advantage is offered in relation to a public office. Based on this premise, I accept this orientation and I will decide accordingly.
Justice Cármen Lúcia	... had within his powers the control of public bidding, and among other duties he was responsible for the nomination of the bidding commission, the annulment or revocation of a public bidding, the execution of the contract with the winner and the monitoring of the contract performance.	During the proceeding it was proved that undue advantages were granted to the Congressmen Roberto Jefferson, Romeu Queiroz, representatives of the Brazilian Workers Party, and to Emerson Eloy Palmieri, with the specific purpose of obtaining political support consisting actions pertaining to the approval and support of projects and acts which were of the Federal Government's interest.
Justice Cezar Peluso	Regarding the official acts which João Paulo Cunha could have executed, the existence of a causal relation between the public agent's conduct and the execution of an official act, or the sole intent, would suffice.	

Justice Gilmar Mendes	<p>“An unlawful act consists in soliciting (asking for) or receiving (accepting) an undue advantage due to a public office, or to accept a promise of such an advantage. The act must necessarily be related to the exercise of the public office that the agent holds or will hold (if he or she has not taken up the office yet), because the advantage solicited, received or accepted in return for an official act is essential of the corruption crime. Here, the agent markets his or her public office. The act aiming at the corruption conduct does not necessarily consist in a violation of office duty [...], but it must be an act exercised within his or her legal powers or have a relation with his or her public office [...]”.</p>	<p>I insist on this reaffirmation, Mr. Chief Justice, mainly in face of the observation made by the eminent Co-Assignee Justice alleging that the Court revised its position and gave up the requirement of an official act. This is not my position. I think that it is very important to lay the theoretic bases of this judgment, also because of the effect of precedents of the Court in the other levels of jurisdiction.</p> <p>Therefore, the judicial precedent established in the AP 470 proceedings remains: a potential official act is essential to configure the passive corruption office, although an effective action by the corrupt agent is not mandatory.</p>
Justice Marco Aurélio	<p>So I decide, Mr. Chief Justice, as basic idea that the official act, the implement of an official act, is related to t an aggravation of one of the types of corruption, even because, regarding the passive corruption, it may take place when the public servant has already quitted his or her function, and even before taking it up.</p>	<p>He basically agreed with the Assignee Justice and did not participate in the discussion about the official act.</p>
Justice Celso de Mello	<p>When the agent, committing any of the actions specified in the criminal rule established in Art. 317, caput, of the Criminal Code, does not undertake an official conduct necessarily related to the action or inaction of any act in his or her official capacity – or when he or she at least does not act in the perspective of an act assignable to the set of his or her legal duties –, in which case the essential reference to a determinate official act is absent, then it is impossible to charge him or her with passive corruption.</p>	<p>Therefore it is forcibly necessary to recognize, as far as the elements required to constitute the passive corruption offense, according to Art. 317, caput, of the Criminal Code, are concerned, the necessary existence of a relation between the fact charged to the public servant and the concrete execution of an official act undertaken in his or her official capacity.</p>

Justice Ayres Britto	It suffices to deduce with clarity what are the categories of actions, in return for which undue advantages are solicited or received – it means, the nature of the action which constitute the corruption object.	[...] in corruption offenses, the official act must necessarily be a part of the respective causal chain or public office powers. But to the legal concept “official act” must correspond the colloquial meaning of “official act” within the powers of the public agent. And official act, in the legislative sense, is the act of enacting laws, supervising, judging (in the exceptional cases established in the Federal Constitution).
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The opinion of Justice Gilmar Mendes represents the consensus viewpoints in the aforementioned judgment regarding the elements required to constitute the passive corruption offense: (i) *“An unlawful action consists in soliciting (asking for) or receiving (accepting) an undue advantage due to a public office, or to accept a promise of such an advantage”*¹¹⁷; (ii) *“The act must necessarily be related to the exercise of the public office which the agent holds or will hold (in case he or she has not taken up the office yet), because the advantage solicited, received or accepted in return for an official act is an essential element of the corruption crime. Here, the agent markets his or her public office”*; (iii) *“The act aiming at the corruption conduct does not necessarily consist in a violation of office duty”*; (iv) *“It must be an act exercised within his or her legal powers or have a relation with his or her public office”*¹¹⁸; (v) *“The requirement the determination of the official act is related to the essential link between the action and the public office and not, in the strict sense, to a materialized act, since the effective action is not a mandatory element to establish the crime of bribery”*. To sum up, we can say that Justice Gilmar Mendes stated that the judicial precedents endorsed in the AP 307 proceedings remained unaltered in the judgment of AP 470: a potential official act is essential to constitute the passive corruption offense, although the effective action by the corrupt action is not mandatory.

In the same reasoning trend, the opinion of Justice Celso de Mello restated the thesis: *“When the agent, committing any of the actions specified in the criminal rule established in Art. 317, caput, of the Criminal Code, does not undertake an official conduct necessarily related to the action or inaction of any act in his or her official capacity – or when he or she at least does not act in the perspective of an act assignable to the set of his or her legal duties and powers –, in which case the essential reference to a determinate official act is absent, then it is impossible to charge him or her with passive corruption”*. Other statements in Justice Celso de Mello’s

117 “We learn from the doctrine that ‘an unlawful act consists in soliciting (asking for) or receiving (accepting) undue advantage due to a public office, or to accept the promise of such an advantage. The act must necessarily be related to the public office that agent holds or will hold (in case he or she has not taken up the office yet), because the advantage solicited, received or accepted in return for an official act is essential to the corruption crime. Here, the agent markets his or her public office. The act aiming at the corruption conduct does not necessarily consist in a violation of office duty [...], but it must be an act exercised within his or her legal powers or have a relation with his or her public office [...]’ (Rui Stocco, Código Penal e sua interpretação jurisprudencial, RT, 4th ed., p. 1647)” (p. 2300/2301).

118 As stated before, the Court decided that “the action or inaction to which the corruption crime refers must be related to the official capacity of the corrupt public agent, that is, it must be comprised within his or her specific powers, since only in this case the act may affect the regular administrative functions of the State” (Nelson Hungria, Comentários ao Código Penal, p. 369).

opinion make even clearer that the Supreme Court requires, as for the consummation of the passive corruption offense, that the public office bargains an official act in his or her official capacity in return for an undue advantage (solicited or received):

In order to fulfill the essential structure of the criminal rule of Art. 317, caput, of the Criminal Code, there must be a relation between the agent conduct – who solicits, receives or accepts the promise of an undue benefit – and an official act in his or her official capacity, which may occur or not. This requirement is imperative.

It should be emphasized that, in view of the legal objectivity of the criminal rule of the Art. 317, caput, of the Criminal Code, and since we refer to a necessary and typical requirement, there must be evidence of a relation capable of associating the fact charged to the public agent (solicit, receive or accept a promise of undue benefit) with the simple prospect of action (or inaction) of an official act in his or her official capacity.

The crime is fully established even if the agent has only the intent to execute a specific official act at a later moment, that means, regardless of the demonstration of an action or inaction of such nature.

If the reference or connection between the effective conduct of the public agent and the official act is absent – that is, an official act in his or her official capacity (RT 390/100 – RT 526/356 – RT 538/324) – then the lawful application of the criminal rule of the passive corruption offense, as defined in Art. 317, caput, of the Criminal Code, is utterly impossible.

The criminal law doctrine (MAGALHÃES NORONHA, “Direito Penal”, vol. 4/244, item no. 1.320, 17th ed., 1986, Saraiva) emphasizes that bargaining an official act – in other words, trading a public function – constitutes one of the several elements of this offense type; this objective requirement means that “there must be a relation between the past or future action and the thing or advantage” that is offered, delivered or merely promised to the public agent.

In this aspect, the lesson given by HELENO CLÁUDIO FRAGOSO (“Lições de Direito Penal”, vol. II/438, 1980, Forense) is definitive. According to the author, the passive corruption offense, as specified in the caput of Art. 317 of the Criminal Code, “lies within the boundaries of an official act which has to be determined by the prosecution and demonstrated during the proceedings”.

The Assignee Justice, when emphasizing this aspect which is pertinent to the official act, pointed out its existence and referred to the relevant official action indicated in the accusation made by the Prosecution, a consideration which reveals itself essential for the constitution of the corruption offense as well as for the assessment of the crime against the Public Administration by the multiple defendants. According to the Assignee, the criminal conduct was evidenced by proper and valid proof, subject to the adversary procedure” (p. 2442/ 2446).

In another passage of the same judgment, Justice Celso de Mello explained again with great precision the dogmatic outlines of the passive corruption offense, mentioning that the case law of the Supreme Court never excluded the necessity to demonstrate the relation of an undue advantage to the legal powers of the public agent. To the contrary, Justice Celso de Mello clearly demonstrated that the precedents of the Supreme Court require, as an essential element to the offense, that the public agent solicits or receives an undue benefit in exchange of an official act in his or her official capacity, *in verbis*:

I could not overstate, Chief Justice, that the Supreme Court, in this judgment, does not revise or change its precedents and conceptual formulations already consolidated at all, neither does

it turn constitutional guarantees and rights flexible, which would be irreconcilable, absolutely irreconcilable as a matter of fact, with the directives applicable to the Supreme Court, whatever the defendants and the nature of the charges may be.

Chief Justice, as far as the consideration of the official act as an essential element of the criminal rule of the passive corruption offense, as defined by Art. 317, caput, of the Criminal Code, and in accordance with my opinion delivered in these same proceedings earlier on August 29th, 2012, I must highlight that such conduct is mandatory to the configuration of the aforementioned criminal offense.

If the agent concludes any of the essential actions described in Art. 317, caput, of the Criminal Code, but does not associate this action to his or her official capacity, this necessary element is absent and therefore the passive corruption offense is not a verifiable fact.

The materialization of the typical structure established in Art. 317, caput, of the Criminal Code, requires a compulsory association between the agent's conduct – who solicits or receives, or who accepts the promise of an undue advantage – and the identification of a specific official act, which may occur or not.

Therefore, it is imperative to recognize that the configuration of the passive corruption offense specified in Art. 317, caput, of the Criminal Code, depends on the distinguishing of an indisputable relation between the criminal act chargeable to the public agent, if, and only if such action is undertaken in his or her official capacity.

It is opportune to stress, and in view of the legal objectivity of the criminal rule in Art. 317, caput, of the Criminal Code, that the correlation between, on one hand, the fact charged to the public agent (to solicit, receive or accept a promise of an undue advantage) and, on the other hand, the accomplishment of an action or omission within the powers of the public agent, is critical to the constitution of the crime.

The full effects of the offense type are attained when the conduct of the agent is motivated by the eventual execution of an official act, regardless the immediate – or not immediate – action or inaction by the agent in his or her official capacity.

[...]

The case law of the Courts indicates this very alignment to the conception that the passive corruption offense requires a verifiable relation between the unlawful conduct of the public agent and his or her official power, so that the official act is executed in his or her official capacity. This logical structure is essential to the application of the criminal rule (RT 374/164 – RT 388/200 – RT 390/100 – RT 526/356 – RT 538/324).

The Assignee indicated the existence of such act and referred to the relevant official act specified in the accusation made by the Prosecution, a consideration which reveals itself essential for the constitution of the corruption offense as well as for the assessment of the crime against the Public Administration by the multiple defendants.

I deem worthy of note that this judgment is delivered in strict accordance with the opinion I read in the plenary session of September 6th, 2012. There is no reason to question the precedents pertaining to the “official act” established by the Supreme Court in the AP 307/DF proceedings in the opinion assigned to Justice ILMAR GALVÃO. It remains in full force and has not been modified.

In a comparative perspective of the plenary decisions, both the AP 307/DF and the present case (AP 470/MG), in contrast to the “Collor case”, indicate that the Federal Prosecutor’s Office presented charges where the connection between the official act and the acceptance of an undue advantage was correctly described.

Again, in the “Collor case” the former President of the Republic was acquitted on legal grounds of Art. 386, III of the Code of Criminal Procedure (“the fact does not constitute a criminal offense”), as the charges submitted by the Federal Prosecutor’s Office were insubstantial “considering that the official act bargained in his official capacity could be demonstrated”.

In the present proceedings, the Prosecutor’s Office avoided this inaccuracy by clearly describing in the accusatory pleading the reciprocity between the official act and the bargaining of a public office by the defendants.

This Court adheres to the precedent established in the AP 307/DF proceedings, as to the concept of “official act”.

To sum up, Chief Justice: in contrast to the “Collor case” – where the Federal Prosecutor’s Office failed to indicate the exact terms of the unlawful conduct of the former President of the Republic (to receive an undue benefit) and its connection to his official powers – in these proceedings (AP 470/MG) the Federal Prosecutors Office succeeded in demonstrating with accuracy all elements essential to the criminal rule of Art. 317, caput, of the Criminal Code, that is, the causal relation between the official act and the undue benefit received by the defendants, according to the charges of passive corruption.

Even the Assignee, Justice Joaquim Barbosa, was assertive when he stated that the constitution of the passive corruption offense requires the solicitation or receiving of an undue advantage to be related to the feasibility of an official act in return for it (see the Assignee’s Opinion, p. 3675). Justice Ricardo Lewandowski, then in the final stage of the proceedings, identified the majority opinion on the subject and concluded that the configuration of the passive corruption offense requires the evidence of either receiving or soliciting undue benefits, subject to the prospect of an action or inaction, not identified, present or future, real or potential, since this act is undertaken within the powers of the public agent (see Opinion p. 3729-3730).

According to the majority of the Court, the Congressmen who were convicted on the ground of passive corruption in the AP 470 proceedings received an undue advantage in return for their favorable votes to approve government projects, which by all means implicate the bargaining of a public office. Thus, the configuration of a passive corruption offense by the Congressmen relied upon the demonstration of the official act – votes on bill procedures – which generated the undue benefit. The conviction of the Congressmen in accordance with the accusatory pleading was based on evidence that they had received money in return for their favorable votes in bill procedures (official act) which were of the corruptors’ interest. This conclusion is based on the opinions delivered in the judgment:

Justice Rosa Weber

In the specific case, however, the undue benefit was indeed paid to corrupt congressmen, with the purpose of obtaining political support in favor of the Federal Government. This political support may be embodied in several different actions, such as the passing of bills.

There is sufficient proof that the political parties as well as the defendants supported the government and also voted favorably in bill procedures, namely the tax and social security reforms. This evidence suffices to configure an “official act” bargained in exchange of an undue advantage, namely, the voting duties of lawmakers in Congress.

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Justice Joaquim Barbosa

The Congressmen who received payments in cash were acting as party whips to organise majorities and ensure that a smooth vote took place. According to the evidence, the payments in cash would influence the action of several Representatives in the discharge of their public duties, gathering a large supporting group in favor of the Workers Party, easily assuring majorities subject to the corruptors’ interests (p. 3498).

[...] Considering the reciprocity of both passive and active corruption, as in the present case, we can affirm that the perpetrators of the unlawful payments were fully aware of the elements required to configure the offense, in other words, that they would grant undue advantages to the congressmen in return for their support, thus influencing the performance of official acts by the beneficiaries.

The defendants solicited money for themselves and their parties, since they knew that the Workers Party intended to assure their loyalty in the Congress. In exchange thereof they bargained official acts that would meet the interests of the government (p. 3678).

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Justice Dias Toffoli

As already decided by this Plenary in a former session – when I, by the way, delivered a dissenting opinion, the mainstream position was formed in the sense that the execution of an official act is not an essential element for the configuration of the passive corruption offense. Based on this premise, I accept this orientation and I will decide accordingly (p. 4225).

[...]

I observe that the described conduct, according to the prevailing interpretation of the Supreme Court (which applies to public officers and politicians alike), is consonant with the conduct of the congressmen, since the solicitation of the undue advantage, in the case, derives from their official capacity, constituting the causal relation between the public capacity and the facts.

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Justice Cármen Lúcia

The judicial records show that congressmen José Janene (deceased), Pedro Henry and Pedro Correa received the undue amount of R\$ 2.905.000,00 (in words: two millions, nine hundred and five thousand Reais), in return for official acts, namely the support to the Federal Government.

Legislative actions are inherent to the public office of Congressmen, be it to support, be it to oppose governmental directives and actions. For the discharge of their legal duties, they receive salaries and allowances, as provided for in the Constitution. Any other compensation, of whatever nature, effected in return for the acceptance of any promise or undue advantage, constitutes an offense (p. 1952/1953).

During the proceedings, enough evidence was gathered that undue advantages were granted to the congressmen Roberto Jefferson, Romeu Queiroz, representatives of the Brazilian Workers Party, and to Emerson Eloy Palmieri, with the specific purpose of obtaining political support consisting in actions pertaining to the approval and support of bills and other acts which were of the Federal Government's interest (p. 1990/1991).

The evidence included in the proceedings prove that Roberto Jefferson, assisted by Emerson Eloy Palmieri and Romeu Queiroz, received R\$ 4.545.000,00 (in words: four millions and five hundred and forty-five thousand Reais), an undue advantage destined to influence his action in Congress "in order to pass bills of the Federal Government's interest" (p. 45424, closing argument of the Federal Prosecutor's Office) (p. 1994).

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Justice Celso de Mello

The Assignee Justice, when emphasizing this aspect which is pertinent to the official act, pointed its existence out and referred to the relevant official action indicated in the accusation made by the Prosecution, a consideration which reveals itself essential for the constitution of the passive corruption offense as well as for the assessment of this higher offense against the Public Administration by the multiple defendants.

[...]

In the present proceedings, the Prosecutor's Office avoided this inaccuracy by clearly describing in the accusatory pleading the reciprocity between the official act and the bargaining of a public office by the defendants.

This Court adheres to the precedent established in the AP 307/DF proceedings, as to the concept of "official act".

To sum up, Chief Justice: in contrast to the "Collor case" – where the Federal Prosecutor's Office failed to indicate the exact terms of the unlawful conduct of the former President of the Republic (to receive an undue benefit) and its connection to his official powers – in these proceedings (AP 470/MG) the Federal Prosecutors Office succeeded in demonstrating with accuracy all elements essential to the criminal rule of Art. 317, caput of the Criminal Code, that is, the causal relation between the official act and the undue benefit received by the defendants, according to the charges of passive corruption.

As emphasized by the Assignee Justice, on the other hand, the several acts which may give rise to the application of the criminal rule of the passive corruption offense, in the case, comprise the voting of bills as well as any other institutional duties and powers as Congressmen.

Anyway, it is relevant to underline that the voting powers in Congress most notably represent a typical example of an official act (p. 4475/4482).

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Justice Ayres Britto

[...] in corruption offenses, the official act must necessarily be a part of the respective causal chain or public office powers. But to the legal concept “official act” must correspond the colloquial meaning of “official act” within the powers of the public agent. And an official act, in the legislative sense, is the act of enacting laws and passing bills, supervising, judging (in the exceptional cases stated in the Federal Constitution) (p. 4505).

In other words, the entanglement of facts verified in this criminal proceedings allows the reasoning that Pedro Henry and Pedro Corrêa, assisted by João Cláudio Genu, solicited and received an undue advantage at the pretext of undertaking an official act (p. 4516).

The Supreme Court case law consolidated the judicial precedent stating that the passive corruption offense depends upon the verification of a causal relation between the undue advantage (solicited or received) and an official act executed in the official capacity of the public agent (regardless if the act occurs or not¹¹⁹). As Justice Celso de Mello stated in the AP 307 criminal proceedings – a conclusion reaffirmed in the judgment of AP 470 criminal proceedings: *“it should be emphasized that, in view of the legal objectivity of the criminal rule of the Art. 317, caput, of the Criminal Code, and since we refer to a necessary and typical requirement, there must be evidence of a relation capable of associating the fact charged to the public officer (solicit, receive or accept a promise of undue benefit) with the simple prospect of action (or inaction) of an official act in his or her official capacity”*. In the AP 307 proceedings, the majority stated that the specification of the passive corruption offense requires the undue advantage, either solicited or received, to be related to an official action subject to the powers of the public agent¹²⁰. The Justices deliberated that the judgment of the AP 470 proceedings would indeed ratify the judicial precedent established in the AP 307 proceedings, so that the AP 470 would not differ from previous AP 307¹²¹. In this regard, Justice Gilmar Mendes emphasized:

119 It is significant to remark the effective consummation of the official act is not an essential element to the passive corruption offense. The mere perspective of its future execution suffices to the specification of the offense: “The materialization of the typical structure established in Art. 317, “caput”, of the Criminal Code, requires a compulsory association between the agent’s conduct – who solicits or receives, or who accepts the promise of an undue advantage – and the identification of a specific official act, which may occur or not” (Supreme Court, AP 307/DF criminal proceedings, RTJ 162/264, Opinion of Justice Celso de Mello).

120 We transcribe below the main arguments of the Assignee’s Opinion delivered by Justice Ilmar Galvão, which are pertinent to the analysis of the relevant offense types: “The passive corruption offense is configured when the agent who solicits, receives or accepts a promise of an undue advantage acts in his or her official capacity, also if he or she is removed or before taking up the charge. The causal relation between the official act and the powers of the public officer is mandatory.

121 The Assignee, Justice Ilmar Galvão continues: “relying on historical interpretation, the legal expert refers to Nelson Hungria, who remarks that the national lawmaker, when considered the relevant offense ‘was inspired by the Code Pénal Suisse to which adhered also the French law of February 8th, 1945, and the Spanish Code of 1944 (Comentários ao Código Penal, 2nd ed., Rio de Janeiro, Forense, 1959, vol. 9, p. 367)’, stating verbiis: “And the Code Pénal Suisse classifies passive corruption as either simple or aggravated, in different types, the most aggravated occurs when the agent omitted or delayed a mandatory official act. Hence, Art. 316 (« pour procéder à un acte non contraire à leurs devoirs et rentrant dans leurs fonctions ») describes the conduct of a public officer who solicits or accepts an undue advantage to perform an official act that lies in his or her official capacity (indirect corruption, from which Art. 327, caput, of the Brazilian Criminal Code originates). Art. 315 (« pour faire un acte impliquant une violation des devoirs de leurs charges »), on its turn, specifies the unlawful conduct of an agent who solicits or accepts an undue advantage to perform an official act that lies beyond his/her official capacity (direct corruption, from which Art. 317, §1 of the Brazilian Criminal Code originates). The Code Pénal

“On this subject, Chief Justice, I draw your attention to the fact that many persons claim that we are overruling the precedents stated in the AP 307 proceedings in respect of the official act doctrine; perhaps we have debated this issue occasionally. Now, the majority requires – in the case of corruption – the existence of an official act whatsoever. In short, a certain confusion is imposing itself and we have to clarify it before this misunderstanding consolidates” (p. 2912)

Justice Celso de Mello called attention to the same issue during the judgment of AP 470:

Chief Justice, I would like to reaffirm that the Supreme Court has not overruled its judicial precedents, such as the judgement delivered in the AP 307/DF.

There is no reason to question the precedents pertaining to the “official act” established by the Supreme Court in the AP 307/DF proceedings in the opinion assigned to Justice ILMAR GALVÃO. It remains in full force and has not been modified.

In a comparative perspective of the plenary decisions, both the AP 307/DF and the present case (AP 470/MG), in contrast to the “Collor case”, indicate that the Federal Prosecutor’s Office presented charges where the connection between the official act and the acceptance of an undue advantage was correctly described (p; 2912/2913).

Briefly, the case law of the Supreme Court has settled the opinion that the configuration of the passive corruption offense requires both the demonstration of an official act (potential or effective) and the indication that this official act lies within the powers of the public agent. So, the sentence is clearly inaccurate when it states that “*the judgment of the AP 470 criminal proceedings brought this issue about, indeed, but this trial court does not identify a conclusive assessment of this question – at least it was not expressly discussed in the reasoning of the judgment*”.

The sentence of the trial court simply ignored the judicial precedent and the case law ruled by the plenary of the Supreme Court. This intentional disregard will certainly give rise to many appeals, which will certainly originate new debates. At some time, the Supreme Court will have to address these critical issues: (i) will the judicial precedent of the AP 470 regarding the requirements to constitute the passive corruption offense be maintained? (ii) in case the judicial precedents change – for instance, the demonstration of the official act is no longer an essential requirement to constitute the passive corruption offense, so that the boundaries of the crime type are considerably expanded, might retroact?

The true observance of the principle of legality in criminal law encompasses at least the recognition of the non-retroactivity of an eventual modification of the Supreme Court precedents *in malam partem*, if not the maintenance of the prevailing precedents. Justice Teori Zavascki made some remarks about the subject¹²²:

Suisse, thus, requires for both offenses an essential relation between the fact and the official act’. The Assignee concludes in his Opinion: “the well-known author leads our reasoning to one single possible conclusion: if the Code Pénal Suisse inspired the Brazilian lawmakers to specify the different passive corruption offenses, then in Brazil the causal relation between the fact and the official act executed by a public officer is mandatory, even in the provision of Art. 317 of the Brazilian Criminal Code”.

122 See HC 123971, Assignee Opinion by Justice Teori Zavascki; Opinion written by Justice Roberto Barroso, Plenary Session, judgment from February 25th, 2016.

The constitutional guarantee resulting in the principle of the legality of criminal law, and the prevention against its retroactivity show little use, unless the defendants are able to properly identify the applicable norms identified in the legal texts. By the way, the Supreme Court often addresses the problem of the reception of law in the legal system of the Constitution of 1988, and when this reception is not possible, the judgments consider the best solution to milder their effects: INQ 687/SP, Opinion Assigned to Justice Sydney Sanches, Plenary Session, Court register of November 9th, 2001; CC 7.204/MG, Opinion Assigned to Justice Ayres Britto, Plenary Session, Court register of December 9th, 2005; MS 26.604/DF (Opinion Assigned to Justice Cármen Lúcia, Plenary Session, Court register of October 3rd, 2008; RE 560.626/RS, Opinion Assigned to Justice Gilmar Mendes, Plenary Session, Court register of December 5th, 2008; RE 637.485/RJ Opinion Assigned to Justice Gilmar Mendes, Plenary Session, Court register of May 21st, 2013; RE 630.733/DF, Opinion Assigned to Justice Gilmar Mendes, Court register of November 20th, 2013.

[...]

Since the defendant's legal condition is aggravated in such situation, an eventual ruling that denies the reception of the original text of Art. 255 of the Criminal Code in the constitutional system of 1988 should receive only prospective effects.

Justice Edson Fachin delivered a similar opinion in the same judgment (HC 123.971):

Correspondingly, I acknowledge the doctrine studies which, based on the principle of legal certainty, justify that the modification of pro-defendant precedents should have only prospective effect.

Nevertheless, this rationale aims to assure that the State is entitled to modify the sanction applicable to a certain act considered as lawful by judicial precedents. It occurs when the precedent is overruled by a reform in *pejus*.

In such cases, it makes sense to impose the non-retroactivity of in *pejus* changes. After all, the person may comply with judicial precedents he or she believes to be ruling at a certain time.

Conclusively, the judicial precedents of the Supreme Court rule that the configuration of the passive corruption offense requires the evidence of an official act (either potential or effective). As a further matter, Justice Edson Fachin, Opinion Assignee of the Lava-Jato Operation, has recently decided that the overruling of pro-defendant precedents cannot have retroactive effect – as in the case when a lawful conduct is deemed unlawful. So, even if the Supreme Court overrules its precedents, such modifications do not have retroactive effect, otherwise the principle of legality would be violated.

Capture of popular sovereignty, state of exception and juridicism

Juliana Neuenschwander*

Marcus Giraldes**

On 12th July, 2017, the citizen Luiz Inácio Lula da Silva was sentenced to nine and a half years in prison for the alleged practice of crimes of passive corruption and money laundering. Meanwhile, widely published polls point to the politician Lula, who has twice been President of the Republic, as a favourite in the presidential election that is scheduled to take place in 2018. The verdict handed down by federal judge Sérgio Moro suffers from innumerable procedural and material defects: incompetence of judgment, lack of probative value of the so-called "plea bargains", the fact that Lula has neither the property title nor the possession of the famous Guarujá triplex, that there is no causal link between the acts of office practised by Lula as President of the Republic and the contracts entered into between Petrobras and the contractor OAS. Finally, the conviction for money laundering is absolutely absurd without the indication of what money would have been laundered. Due to all this, but also because it is neither consistent nor coherent, the decision against Lula is not correct, it is not fair, it is not just. There are curves, misrepresentations, deviations. One can even say that it is circular and tautological.

A tautology is easily observable, for example, in the use of newspaper articles as evidence, which is only justified, in its artificiality, by the fact that Lula's conviction is devoid of evidence. It is striking the number of stories published in recent years in major newspapers and weekly magazines that directly attack the former President, the number of magazine covers that make extremely negative associations of his image, the brazen media manipulation around his name, especially if contrasted with the almost complete disregard of similar or even worse denunciations made about his political opponents. This type of media manipulation, with artificial and distorted treatment of information, has served the function of (de)forming public opinion, which, in regimes that describe themselves as democracies, is the broth in which collectively binding decisions are produced. As has been verified, this clearly politically manipulative function of the corporate mass media spills over from the so-called democratic processes of choice of political representatives and begins to act and interfere more directly in the processing of lawsuits by the Judiciary. When this happens, the trial ceases to be the judicial process that seeks to achieve a minimally correct or just decision, to become the stage disguised as a battle that is no longer legal, but essentially political.

Since 2010, the newspaper O Globo has published reports about the alleged purchase, by former President Lula, of a triplex at the Guarujá health resort in São Paulo. This same newspaper, and the economic group of which it is a part, has supported since the beginning the so-called Operation *Lava Jato* and the spectacular performance of Judge Sérgio Moro in the cases before the 13th Federal Court of Curitiba. In March 2015, the beginning of mass demonstrations mediatically organised against the government of Dilma Rousseff, the newspaper O Globo gave the judge the "Make a Difference" award, granting him the title of "Personality of the Year". This same Judge, in the decision against Lula, used the articles of the same newspaper as "evidence" for his conviction. Here is the circularity: the evidence is created by the newspaper, which rewards the judge of the case, who uses the evidence

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created by the newspaper. Reference to Globo's reports is made seven times throughout the decision. In this hallucinatory confusion that is the result of the circulation of images and appearances fabricated by the media oligopoly, it is not surprising that the very role of a judge is subject to change, although many believe in the myths of heroes.

If we look at Lula's case in this light, we see that Lula's eventual innocence or guilt is irrelevant and of little interest to the final decision, since the evidence gathered by the defence was also ignored. Lula's case is paradigmatic, since it brings to light the complex relations between law and politics in Brazil today. It is a time of a disjointed politics in the midst of corruption denunciations judicially activated and mediatically selected to be forgotten or amplified. In this context the law is no longer able to contain the force of political impetus, yielding to its moons to operate from political rather than legal reference points.

The confusion between the political and juridical functions and the resulting institutional disarray, a phenomenon that has been defeating popular suffrage and the Brazilian constitution, has its main point of inflection in the impeachment process of President Dilma Rousseff. In 2016, President Dilma Rousseff's *impeachment* was posed as the solution to the economic crisis (amplified by political-media sabotage), which for that purpose was presented as a kind of State reason, capable of exceeding constitutional limits. After stoically defending herself before the Senate, when there was a clear lack of a crime of responsibility, Dilma Rousseff was tried by senators, just as Michael Kohlhaas, the hero of Heinrich Kleist's book, was judged: she was, at the same time, judged guilty and innocent, condemned to lose her mandate, but with her political rights preserved. We prefer to say that she was found guilty because she was innocent. With Lula something similar is happening, but here we are beyond Kleist and Kohlhaas, we come across Kafka and Josef. K., in *The Trial*. At a certain point of his misadventures, lost in the labyrinth of the court, in the architecture of which Kafka masterfully represented the intricacies of the law and its infinite folds, K. states: "My innocence does not simplify the case (...) It all depends on many subtle things, in which the court is lost. But in the end there arises, from somewhere where there was nothing, great guilt."¹²³

In paragraph 961 of his decision that is as extensive as it is unsustainable, Judge Moro states that the conviction of former President Lula shows that no one is so tall that he is above the law. In fact, that is not what is revealed in the decision, but it is only using that argument that Judge Moro / Globo, somewhat biased satisfied with his alleged impartiality, seeks to morally justify a decision devoid of legal grounds. Lula's conviction, for which his innocence (or guilt) was not considered relevant, shows that the law is no longer so high as to limit the political will of a judge. It shows that the Judge has, in fact, surpassed the law in the (undeclared) name of a much broader political-media movement, of which he has become an instrument. It occurs that a judge, although making decisions that have political consequences, is not allowed to decide politically, especially if he does so to the detriment of legal reasons. A judge is not the sovereign, even if he intends to usurp the sovereignty, whose holder, under the regimes in which the right to universal suffrage is exercised, is the people. Judge Moro / Globo seeks to obstruct popular sovereignty, but he is not in a position to act sovereignly.

In the classic formulation of the German jurist Carl Schmitt, the sovereign is the one who decides on the State of Exception, that is, who decides what is the exceptional situation that

123 KAFKA, F. *Der Process* (1925), *The Trial*, translated as *O Processo* by Marcelo Backes, Porto Alegre: L&PM, 2013, p.174.

justifies the temporary suspension of the law. Today, in Brazil, many have described the situation in which we live under the label "State of Exception." However, what we have witnessed, at least up until the time we write these lines, is not a classic State of Exception in the sense of Carl Schmitt, in which the sovereign decides to suspend the whole legal order in order to preserve the order itself. It is indeed true that later Schmitt adhered to Nazism and forgot this concept of suspension for the reinstatement of the law and began to proclaim that a new "law" emanated from the *Fuhrer*.

What we see today in Brazil is the normalisation of political perversion of the law. Lula was convicted, but what was in this way imprisoned was popular sovereignty. In the constructions of the philosophy of modernity, 'the people', except in revolutionary times, was never a sensible reality, but an external referent that is invoked as the foundation of power and the law, only to be, following the foundation of the political and juridical order, prevented from expressing itself again. To a certain extent, the political-juridical order is always founded on an imprisonment of popular sovereignty, which remains something external, like a domesticated beast, prevented from fully manifesting itself. But the people, that domesticated beast, remain feared and respected, as the external referents which establish legal limits on the exercise of power, through respect for a constitution that sets these limits and the ways in which domesticated popular sovereignty can manifest itself from time to time through the exercise of universal suffrage.

In Brazil since the 2016 Coup, the people, who have always been an abstraction and an external referent, have been captured symbolically and materially. In this context, the sentencing of Lula fulfils the role of creating a formal impediment to popular sovereignty because it restricts the electoral options of the forces deposed by the parliamentary-judicial coup d'état, while the government that has established itself since this coup dispenses with have any reference, concrete or even abstract, to the people. The conviction of Lula imprisons popular sovereignty even before it manifests itself, and is an impediment to that popular sovereignty, which although castrated and domesticated still presents some limit to the power of the oligarchy. On the other hand, the people have been stripped of their rights, post-coup, and at that time of the coup, having been legally isolated from the political process, since individual and social rights are, above all, political faculties of individuals which allow them to be legally recognised as the people. What can be perceived then, is that the symbolic and abstract 'people', that has been invoked by democratic constituent processes since the eighteenth century, in this period in which we live is now disregarded as legally and politically irrelevant. For the de facto government installed in Brasilia, there are no more people, but just bodies that will seek their own forms of survival.

The State of Exception appears here not in the Schmittian sense of suspending the legal order for the preservation of political and social order, but in the sense invoked by Walter Benjamin in his theses on History, when he states that "the tradition of the oppressed teaches us that the 'state of exception' in which we live is in fact the general rule" (thesis 8)¹²⁴. As we know, Schmitt, who wrote from the standpoint of an individualised, mythologised sovereign, did not admit the ambiguity between the Rule of Law and the State of Exception, since for him "not every exceptional prerogative, nor every emergency police measure or order is a State of

124 BENJAMIN, Walter, *Über den Begriff der Geschichte* (1940) (On the Concept of History), translated as *Sobre o conceito da História*. In *Magia e técnica, arte e política: ensaios sobre literatura e história da cultura*. 7th edition. São Paulo: Brasiliense, 1994, p. 222/232.

Exception"¹²⁵. The focus was on the decision that politically asserts the sovereign in the face of the enemy. Benjamin, on the contrary, was aware of the duality and immanent conflict between exception and law because he wrote from the point of view of the "tradition of the oppressed", the "subject of historical knowledge" (thesis 12), those who suffer the violence of sovereign power. The structure of this exception is parasitic of every Rule of Law that is based on societies divided into social classes, "normalising itself" as a third party excluded from the relationship between law and politics.

The exception that we live is normalised as a denial of rights, it is that exception that, "in the tradition of the oppressed" makes itself the rule. This is a State of Exception which is not declared, or formalised, but which is present according to the circumstance, to the situation, to those involved. It is not a "state of exception" directed at everyone, since there is a selectivity of the exception, which affects the poor, the prisoners, the blacks, the indigenous peoples, the "enemies" of each place and moment. The exception is concrete and historical in accordance with the power relations of each social formation and is not an abstract paradigm of government. For Jacques Rancière:

We do not live in democracies. Nor do we live in fields, as certain writers claim, who see us subject to the law of exception of bio-political government. We live in oligarchic States of law, that is, in States where the power of the oligarchy is limited by the double recognition of popular sovereignty and individual liberties. We know well the advantages of this type of State, as well as its limits¹²⁶.

This characterisation by Rancière has as much merit presenting a radical critique of the reality of oligarchic supremacy of regimes, that the ideology denominates "democratic States of law", as it is a denial of an ahistorical discourse on the State of Exception that rejects the juridical limits of the power of this oligarchy, which are the result of the historical struggles of the oppressed. Moreover, precisely because of this, implicit in this critique is a theoretical contribution quite relevant to the understanding of the relationship between law and exception. Any retreat from the established limits of the power of the oligarchy is an advance of the State of Exception. In a country such as Brazil, with an incomplete construction of the Rule of Law, the permanence of the legacies of slavery and the military dictatorship, the zones of exception are extensive and have never been hidden. Daily life in the *favelas* of large cities or in peasant and indigenous areas is no doubt comparable to life in the "fields".

The lawsuit against Lula is included in this context of the advancement of the exception. However, we also know that punishments based on criteria outside the law are not really new. It is enough to remember the imprisonment and conviction of Rafael Braga, manifestly unjust, and which today symbolically epitomises all the violence of the punitive system against the poor and the blacks.

The *impeachment* of the President of the Republic without a crime of responsibility means a disruption of the oligarchy with the commitment made in 1988 that the electoral results for the head of State should be respected. Since immediately thereafter, as a consequence of this usurpation of the right to universal suffrage and installation of a government devoid of any

125 SCHMITT, Carl. *Politische Theologie* (1922), translated as *Teologia política*. In *A crise da democracia parlamentar*. São Paulo: Scritta, 1996, p. 92.

126 RANCIÈRE, Jacques. *Hatred of Democracy* (2007), translated as *O ódio à democracia*. São Paulo: Boitempo, 2014, p. 94.

legal or popular legitimacy, an aggressive rights withdrawal program has been under way. The day before the sentencing of Lula was publicised, not by coincidence, the Congress approved a broad amendment to labour legislation in favour of the elite. The suppression of the political, economic and social rights of the people is a loosening of the limits of the power of the oligarchy, a retreat from the Rule of Law, an advance of the State of Exception. The conviction of Lula is one more effect of this offensive and at the same time is a condition, should elections take place in 2018, for them to be even more restricted.

The conviction of former President Lula as the maximum expression of the exercise of lawfare

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The sentence condemning former President Lula is a clear and obvious political instrument. It is part of an antidemocratic power project. In this sense it serves to objectify the attempt to demoralize the popular leader.

Lula must be condemned so that the liberal agenda launched under the codename "bridge to the future" continues to be implemented and without risk of being undone in 2018 with the presidential elections. The reform proposals announced in that document and many others initiated by the illegitimate president represent a political agenda rejected in the presidential elections of 2014 - time frame of the parliamentary coup that happened in 2016.

The labor reform implemented under the name "modernization of the labor law" is the representation of the institution of liberalism in the molds of early twentieth century.

In order to better explain the trajectory of the construction of Brazilian labor rules, it is necessary to recall the moment of private law codification in which rules for labor leasing and service leasing were established along the lines of civil contractualism in which the autonomy of will, validity requirement of legal business, was predominant.

However, in labor relations, autonomy of will is a vitiated element, since the alienation of human subjectivity in exchange for survival characterizes vice of consent, nullifying the previously perfect juridical act.

The labor reform approved a day before the release of the analyzed ruling brought back the so-called "negotiated over legislated" in which prevail negotiated rules with employers to the detriment of state rules.

The reform has as arguments the need to reduce costs, the changes in the productive system with the inclusion of new technologies that reduce jobs, alongside the increase in life expectancy of Brazilians that imposes a change in the rules of social security with the objective to ensure the financial and actuarial balance.

The proposal to reform the Brazilian social security system is, in fact, routing for a complete privatization of the system. Despite the fact that complementary social security has existed in Brazil for several decades, there study is necessary facing the impact on workers income and the country's economy as a whole, since it is of the utmost importance an appropriate and sufficient economic development, generator of jobs and income, so the worker can contribute to their own pension constituting a social security system with an exclusively contributory character, whether it's public or private. In addition, but no less important, a complementary pension system plays the role of a capitalist income generator and not of a benefactor that aims to add advantages that the state gives to the citizen.

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The European Welfare State starts to feel the impacts of the economic crisis that reflects onto the reduction of social rights. It is about the dismantling of the social pact that generated the Social State of Rights and the rise of neoliberal policies. This reveals a vulnerability of the social security system, public or private, to the fluctuations of the capitalist mode of production, so that crises affect and even suppress the rights of the working class. The neoliberal hurricane has been motivating the overthrow of the living and working conditions of the working class.

With each economic crisis the social rights, especially the rights conquered by the working class, begin to be threatened especially those of social security nature. This is because a relevant factor for the sustainability of the contributive social security system is economic development as a determining factor for maintaining the levels of formal employment.

Currently, economic development is triggered, as a priority, by the insertion of new technologies. To this rupture must be added two more factors: the supremacy of financial capital over productive capital and the vulnerability of the security systems because of mismanagement and, in the specific case of complementary pension, dependence, volatility and the risks inherent in the very system of this new model of capitalism focused on the stock market.

The various reforms introduced in the Brazilian system were not able to prevent the actuarial problem in which the Social Security lives. Low wage rates, job instability, allied to underemployment and structural unemployment explain the impossibility of long-term financial planning. The worker who has left the formality will hardly return to it and to the benefits of social security and labor legislation, exposing this same worker to any work condition that is offered to him.

Lawfare. The implementation of the agenda implies neoliberal use of all sorts of resources to achieve its objectives. In Brazil, unfortunately, one observes the deliberate institution of lawfare, which consists of the undue use of legal resources for political persecution. This practice has already been denounced by former President Lula's defense, including before the UN, that recently asked the Brazilian government for explanations on the matter, especially on its occurrence in the Carwash Operation.

One of the main indications of the occurrence of the lawfare in the insistence of Judge Sérgio Moro in carrying out a criminal prosecution, notwithstanding his flagrant suspicion and incompetence under Brazilian procedural laws. They are not as inconsistent as rules that allow Moro to receive, on December of the year 2017, a revenue of R\$ 102,151.58, even though that amount is not morally acceptable in a country where the minimum wage is R\$ 935,00 and the salary ceiling for public functionaries is of R\$ 33,763.00.

Suspicion is flagrantly revealed through acts such as the participation of the judge in social and academic events related to the discussion of the case on which the judge himself is active even before his sentence is pronounced. It seems reasonable to the common and scientific sense that the judge must keep away from any extra-procedural discussion in order to maintain its exemption.

Notwithstanding, (i) he was present at the launch of Vladimir Netto's book about the Operation Car Wash. Book that exalts the operation and incriminate the defendants even not having, at the time of the release of the book, which have become *res judicata* sentences against most of the defendants, including against former President Lula; (ii) met with the actor who represented him in the feature film about the Operation Car Wash, in a "well reserved

restaurant" in Curitiba, according to the newspaper "O Globo". About the event the cited actor (Marcelo Serrado) shot "It was like being in a super national hero skin".

In 11.10.2016 Rogério Cezar de Cerqueira Leite¹²⁷ wrote an article entitled "Desvendando Moro" where he compares the judge with the Dominican Girolamo Savonarola, although he pointed out the partiality of the last one which showed did not exist in Moro, to the writer "has aristocratic feeling" called "the chosen one".

In response, posted in the same newspaper, the Judge raged: It is "unfortunate that a respect newspaper as the Folha grants space for the posting of an article as the 'Desvendando Moro', and its more surprising that the author of the article is a member of the Editorial Board of the publication." He left show his crush for the censorship of opinions contrary to his own.

Sent a message to the population, which can be seen on Youtube¹²⁸, thanking the support given on a Facebook page maintained by his wife in support of the Operation Car Wash. In another video and election, the population on the testimony of the former President Lula in Curitiba¹²⁹ in it he thanks the support of the Operation Car Wash and dispenses the attendance of his supporters on the day of the hearing. When verifying the popular support to the ex-president on the day of his testimony, the Judge started to request the defendant, in other cases, that the testimony be made through a video conference.

From the point of view of legal technique the judge also exceeded. (i) in the procedural instruction, former President Lula presented a list of 87 witnesses. The judge admitted, but demanded that the ex-president appear in all sections of testimony, which obviously would make it unfeasible. The decision in this case was changed by the second instance and the presence of the former president was dismissed;

(ii) at a hearing on December 16, 2016, a prosecution witness was heard who offended former President Lula and his defense by shouting "trash band." The Judge was not reprimanded for this and did not prevent the witness from continuing the insults. And it also provoked Lula's lawyer "Let's see if there will not be a criminal complaint, compensation action, the witness, right, on the part of the defense," says the judge. To which Zanin responds: "It depends ... When people practice illicit acts they respond for their actions. I think that's what the law says. "The Judge insists on the provocation: "Are you going to file a lawsuit against her? "In reference to the witness. To which the lawyer responds: "Are you advocating for the witness?" The Judge once again provokes: "I don't know, the defense goes against everyone, with criminal complaint, indemnity," he said, clearly to the action filed by the former president's defense against the chief prosecutor of the Operation Car Wash task force, in which he asks for \$ 1 million in damages. Zanin replies, "I don't think anyone is above the law. In the same way that people are subject to certain actions, the authorities must also be ". Moro concludes: "Okay, doctor. A very good line of advocacy, "and finally the discussion ends with Zanin's response: "I make your Excellency's record and receive it as a compliment ";

(iii) in a similar case of the same Operation Car Wash, an at least, unusual act, Moro caused a species in every scientific community: after the protocol of the final arguments of the defense

127 Physicist, professor emeritus of Unicamp and member of the National Council of Science and Technology and the Editorial Board of Folha.

128 https://www.youtube.com/watch?v=9dq6KhZc1_M

129 <https://www.youtube.com/watch?v=wo4HTWkmJoo>

the case was concluded at 7:52 am in the following day and the sentence of 160 pages was filed two minutes later, at 7:54.

(iv) Moro vetoed 21 questions from Eduardo Cunha (ex-president of the national congress, currently imprisoned) addressed to Michel Temer (acting president). It turns out that then it was found that such questions would undermine the progress of the interim government. Through controlled action of the MPF was recorded conversation of Temer advising the president of the group JBS to continue paying a monthly allowance for the same Eduardo Cunha, person with whom, in the words of the president, should maintain a good relationship. The political, extra-procedural relationship of the decision and the maintenance of the current power project were clear.

(v) released the audios captured irregularly in a conversation between Dilma Rousseff (president of the republic at the time) and Lula. On March 17, 2016, Judge Sérgio Moro had determined at 12:18 pm the suspension of the staples installed to monitor Lula. It happens that he released a recording that took place at 1:32 p.m. It is known that the Federal Police forwarded the order of immediate compliance with the judge's decision to the telephone operator at 12:46 pm, but the conversations continued to be registered.

The recordings exceeded the jurisdiction of the judge who could not intercept authority conversation with privileged forum. And what's worse, caught conversation outside the period officially determined. Moro still, spread the content of the conversation to the print. For this reason he was heavily criticized by the deceased minister of the Brazilian Supreme Court responsible for the case. In a ruling, Teori Zavaski classified what happened as a "violation of the jurisdiction of this Court," since it would be for the Supreme Court alone to decide on investigations involving authorities with a privileged forum. He criticized: "The violation of the jurisdiction of the Supreme Court occurred at the same time that the judge [Sérgio Moro], when faced with the possible involvement of an authority holding a forum in the practice of crime, failed to refer this Supreme Court the investigative procedure for analysis of blocked content. And, what is even more serious, he proceeded to value judgment on references and conduct of occupants of positions [with privileged forum]. Moreover, it has determined that the confidentiality of the intercepted talks should be removed, without adopting the precautions laid down in the regulative legal order, thereby taking the risk of seriously jeopardizing the valid result of the investigation.

(vi) The coercive conduction of Lula. Moro imposed a coercive, mediatic and unnecessary conduct on former President Lula, since he had never refused to provide any clarification or testimony. Now, if there is no denial or resistance there is no reason to impose coercitivity on the act. It was a clear intimidating action.

These are just a few points collected, among many others, that serve as clear evidence of Lawfare promoted against Lula. An Incompetent Judgment, chosen by the system in defiance of the principle of natural judgment, in clear undue extension of its territorial jurisdiction.

The harmony between the judge's decisions and the coup agenda. It is enough to remember that the sentence was published the day after the vote of the Labor Reform in the National Congress. The media event removed from the agenda of the mainstream press the discussion on the cowardly coup against the working class to reinforce and announce in a victory tone the criminal conviction of a former president of the republic. Evidently the sentence was exalted, and commented on by meticulously chosen analysts. It has come to the idea that the

general impression of the jurists is that the sentence is excellent, when in fact it has been widely criticized by various sectors of the judiciary and the academy.

Lula, the enemy to be fought

Laio Correia Morais*
Vitor Marques**

The Republican Regime, founded on democratic bases, must obey some fundamental precepts of procedure. One of them is an autonomous Judiciary Branch, that respects the territory of the law, defend anti majorities interests and mainly, it must not be influenced by exogenous factors to the process. It is to say, if a court decision would be influenced by popular clamor, for the aspiration of a political sector or by the interests published by the media, one of the Republican Regime columns collapses.

On the highly commented verdict of Judge Sérgio Moro, in scope of Operação Lava Jato, states that in "II.16", it shows that the judgment used not only the case-file of the process, but also facts properly published by the press to make a political judgment about the ex-president Lula, about your administration, as well as about the Partido dos Trabalhadores.

On the "II.16" the judge Sérgio Moro make use of unusual resources to the good and recommended legal techniques. He makes assumptions, illations and even uses a fine irony with the intended Salvationist plot of Operação Lava Jato.

Nevertheless, a sentence must stick to the evidence on the case records, and to not make suppositions about the political activity or about the government exercised by the defendant, which in this case it's an ex-president. The verdict should in thesis, to judge certain conduct practiced by who is being judged, and not about what is commonly known as "work set".

The general press of the country, after the conviction of Lula, roared that "justice is for everybody". If really the Justice is really for everybody, the ex-president should have been judged only for the denounced conduct by the Public Federal Ministry and not for your political and governmental trajectory. The referred point of the sentence is the definitive prove, produced by the one and only Juiz Sérgio Moro, which the trial from the ex-president wasn't at all "for everybody" like the press stated.

Before entering on the merits of the decision, it is worth highlighting that the sentence is constituted by all that it consists. This obviousness must be brought to light because some may say that the illation and suppositions are of minor legal importance for the comprehension of the decision. This understanding does not thrive, seen that the sentence is a manifestation of the judges' will that will terminate the legal imbroglio front to the concrete case, and this way all that consists it's a product of de will of the judge.

This aspect of the verdict, which may seem trivial, corroborates for the thesis that in Brazil we experience a true State of Exception. The ex-president wasn't judge only as a citizen, as it should be, but instead by a damning political plot of witch the sentence corroborates to construct. Lula had in this point of the verdict, your innate right of being judged as an attacked citizen. On the "II.16" it did not treat the verdict object, but it treated something much bigger.

Passing now to the analysis of the very sentence.

In paragraphs 782 and 783, it was about the testimony of a witness José Sérgio Gabrielli ex-president of the Petrobras. In this excerpt the Judge affirms that the listener claimed to not

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know anything about the corruption scheme neither about the alleged participation of Lula as a principal acting of the scheme. Then, the Judge affirms that the deposition of Gabrielli did not enjoy "much credit" because he was the company president at the time that the criminal facts occurred.

In effect, in the paragraphs 784 to 787, the Judge Moro aggravates yours suppositions that Gabrielli was incompetent or lacked the truth in front of judgment. The judge does it so that based on the allegation of ignorance of Gabrielli, in which the exchange to Cerveró for Zelada on the board of directors would have a political influence. In other words, the Judge Sérgio Moro tries to create a thesis that the ignorance of Gabrielli about this specific fact, unimportant to the process, is in reality a lie or a prove of inability for the exercise of the office as Petrobras President.

In paragraphs 789 to 792 it has a curious fact: Judge Moro utilizes 4 paragraphs to try to discredit a series of defense witnesses. According to Moro, the ex-president called several politics and public agents that did not know about the denouncement content just for guarantee the rightful conduct of Lula.

Specifically in paragraph 790 the Judge creates a theory that the defense witnesses might have been brought to the process just to claim that the support base of the government wasn't outcome from a mechanism of bribe from Petrobras. For any reader, jurist or lay, this paragraph shows that the Judge comprehend that the defense testimony served as to try to demonstrate the perennial thesis that the Lula administration had its support base in Congress consolidated by corruption. Now in paragraph 792, Moro uses again the gimmick of discredit of the several defense testimonies.

From paragraph 793 forward it came across with peculiars assertive to the judicial sentences. The Judge Sérgio Moro, in apparently an act of compliment, claims that the Lula administration had its merits in fighting corruption. Next he lists measures that this same government should have implemented. In paragraph 797 he makes a long observation with historic references of agents that implemented politics fighting corruption and had their same crimes undressed by the same politics, or as the Judge calls "increase means of control". It causes estrangement that in paragraph 796, Sérgio Moro claims that the merits of fighting corruption of the Lula administration could not be taking in consideration since in the next paragraph he makes this interesting digression with sarcasm and irony refinements.

The paragraphs 801, 802, 803 and 804 are crucial to demonstrate the partiality of the judgment, seen that such paragraphs seek to contribute for the criminal plot that tries to impute the ex-president.

In paragraph 801 the Judge Sérgio Moro manifests his "strangeness" in the fact that Lula is not aware of the Petrobras scheme, since it was a huge scandal and that it flood PT campaigns, of its own ex-president and your successor.

Following, paragraphs 802 and 803, the Judge speculate about a possible condescension of Lula with the corruption. Sérgio Moro says that the absence of reprobation by Lula to members of his administration and public agents involved in corruption during his term in the office. Precisely to investigate this eventual apathy of Lula with corruption that Sérgio Moro brings to sentence the process called "Mensalão". According to Moro, the ex-president gave dubious statements about the events that took place in this other process, implying that Lula would not reprove, or worst, comply with possible criminals facts.

In paragraph 804 we have the apex of this plot that Sérgio Moro brings to the sentence. In the understanding of the magistrate, the fact that Lula has not shown disapproval with the facts that happened on the Legal Action 470 demonstrate "colluding with the criminal behavior of his subordinates and that this may be considered as a piece of evidence."

We have here a truthful juridical scandal. A Judge in exercise of his function brings as procedural proof the public manifestations of the defendant about other process; he interprets and concludes that such must be valuable evidence. That reasoning, using Carl Schmitt, reveals that for the Judge Sérgio Moro, the ex-president Lula is the enemy to be taken down.

Giorgio Agamben, a Italian philosopher, which elaborate on the theme of Exception, explain to us that the practice of Exception reveals itself in the measure that has a suspension of the Law, phenomenon that he identifies as "legal civil war", in other words, applies a certain understanding due to the exceptionality of the case, and after the overcoming of this one of a kind moment, it turns back to regulate the application of the legal framework.

On Operação Lava-Jato, what we have seen its exceptional treatment, with practices like these mentioned above that elude from the Law.

To justify the technique of Exception before the society and especially to the public opinion it is crucial that exists the character of the enemy, since, for the weight that it possesses on society, it must not acknowledge prerogatives and minimum guaranties, and instead, it must be combated. For the jurist Eugênio Raúl Zaffaroni the figure of the enemy on a society it's the first germ or the first symptom of the authoritarian destruction of the Rule of Law.

Therefore, we understand that the enemy in this moment of history and, it seems, to the judgment also, is the Partido dos Trabalhadores on character the iconic ex-president Lula. It's no use for the defense of the ex-president Lula to ascertain that formally the apartment in question is connected to the contractor OAS; witch the defendant practically did not have any science of the unravel of this subject. For the judge, what is laid, according to what is indicated in paragraph 806, is to answer at last what is the role of the ex-president Lula in this operation and if in fact he was the gang chief.

It is worth mentioning that the defense of the ex-president Lula is treated at all times with disbelief by the judge, as is made evident in paragraph 808, in which, all that is plead presupposes untruth and obstacles for the search of real truth.

The persuasion is only possible starting at the moment that all parts involved in the process speak up. To treat one of the parts with disregard is to understand that your presence is disposable, indicating that the beliefs were already formed previously.

Therefore, what is noticed from item "II.16" of the verdict is the existence of illations in regard of the conduction of the ex-president Lula administration and his knowledge about negotiations existing on Petrobras, besides generic facts occurred that don't ascertain the practice of passive corruption and money laundry.

We noted, for, this exceptionality today against the ex-president Luiz Inácio Lula da Silva, yet, if we alter the characters, perchance the understanding would be other, evidencing so, the political persecution starting from legal instruments, witch on the boundary, serves to erode the bases of the Democratic Rule of Law.

Moro's sentence proves that the unrestrained judicial assessment of evidence must come to an end

Lenio Luiz Streck*

For more than twenty years, I have been exposing the authoritarianism that manifests itself in the unrestrained judicial assessment of evidence, or the *FA* (free assessment),¹³⁰ that are in fact two sides of the same coin. I have unveiled it directly in a debate I had with Judge Sérgio Moro at the 2015 *IBCCRIM*.¹³¹ His reply was that the judge's free persuasion is superior to the system of legal proof. I asked him: so what? *The free assessment is more than this epistemic oversimplification. It is the corollary of subjectivism. Of the authoritarian subject of modernity. Of the internal barbarity of the subject.* At any rate, Moro's reply follows the same dogmatic line that cries and protests today. The free assessment of evidence never seemed to be a problem, for it was *motivated*. This is of an atrocious *naiveté*. The dogmatic doctrine of legal thought still believes in ideas such as "first I decide (i.e. I *choose* whether the defendant is innocent or guilty) and just then I motivate". An epistemic trick.

This is why I speak here of a real philosophical mistake, for the free assessment is a perfect representation of what I call *CPS* — the Cognitive Privilege of the (knowing) Subject. Alternatively, the Cognitive Privilege of Sérgio (Moro). This is a long-standing misconception, but it was only after the *AP 470 (mensalão)*¹³² that lawyers came to realise that insisting on it was the equivalent of an epistemic shot in their own foets. I told so.

In one of my most recent books, *Hermenêutica e Jurisdição*,¹³³ organised under a dialogue-based structure, I make it very clear that we are paying a high price for accepting it. Nobody has yet tried to construct an adequate theory for evidence assessment. We have more criteria to assess the Brazilian Carnival than we do for our criminal evidence assessment. The Brazilian Carnival has surpassed the Law. In the Carnival, there are criteria that include a scale of grading points from 1 to 10 (and there are even decimals among it). The criteria in Law, on the other hand, seem to be *let the judge assess the evidence the way he prefers to, until he finds the "real truth"*.¹³⁴ How do we know whether we found the "real truth"? Well, it is simple. It is the judge who says so. Since we, the jurists, have such an esteem for "ontologies",¹³⁵ I keep imagining the "real truth" as a lost old lady with Alzheimer, sitting on a park bench. When

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130 TN: In the Brazilian legal system, the free persuasion of the judge (in Portuguese, *livre convencimento*) is a conception by which the judges are free to assess the evidences in any given procedure using their own personal reason and inner convictions. Lenio Streck, the author of this article, is one of the long-time critics of this conception and its implications in Brazil.

131 TN: Instituto Brasileiro de Ciências Criminais, or Brazilian Institute of Criminal Sciences. The IBCCRIM held its 21^o international seminar in 2015.

132 TN: The AP 470 (or Criminal Trial n. 470), publicly known as *mensalão* (a neologism in Portuguese for a monthly payment), was a notorious trial under the Brazilian Supreme Court (the Supremo Tribunal Federal) after a vote-buying corruption scandal, emerged in 2005.

133 STRECK, Lenio Luiz. *Hermenêutica e Jurisdição: Diálogos com Lenio Streck*. Porto Alegre: Livraria do Advogado, 2017. TN: Hermeneutics and Jurisdiction.

134 TN: The so-called "real truth" (in Portuguese, *verdade real*) is, once again, a (mis)conception in the Brazilian legal system that determines that in criminal cases, the judges are not restrained by the legal evidences; instead, they must pursue a "real truth", that lies beyond the procedural limits.

135 STRECK, Lenio Luiz. 30% das cirurgias jurídicas dão errado. O que há com os "médicos"? *Consultor Jurídico*, São Paulo. TN: 30% of the legal surgeries go wrong. What is wrong with the "doctors"?

she is finally found, I imagine a court clerk telling her: “we need you to appear before the judge”. There it is, we found the “real truth”.

Seriously: free assessment, “real truth”, and all these performative utterances are nothing more than warrants for the judge to say *anything* about the (lack of) evidence. Besides, I have an article about how American Law theorises about probative value. Even the American jury has more criteria than professional Brazilian judges do. *Bingo*. At each day, it seems even more certain.¹³⁶

It could not have been different with the criminal procedure involving the Former President Luiz Inácio Lula da Silva. The free assessment of evidence was sovereign on Moro’s sentence, which has several aspects that fall short. Therefore, in this short space, I intend to show how some of them lack substance. Just as much as there are several shallow aspects, there are also several analyses of the Judge’s decision, such as those from Afrânio Silva Jardim¹³⁷ and Pedro Serrano.¹³⁸ My plan here is not to analyse the sentence in its entirety, since many people have already done it. It seems to me not only repetitive, but also unnecessary. Not only that, if this was a country that takes itself seriously, a twenty-minute reading of the decision would be more than enough to declare its nullity.

I have already written about it,¹³⁹ and it seems right to start by it once again. I have learned when I was just starting my career as a prosecutor with an old colleague that “*he who proposes the dismissal of the prosecution in sixty pages does so for he should have filed charges in six. He who wants to file charges in sixty pages can dismiss in six, or even require investigation in search of concrete evidence instead*”. Well, right from the start, the number of pages in Moro’s sentence stand out: two-hundred and thirty-eight. That is not to say I expected a fifteen-page decision absolving the Former President. More than that, I would not criticise the number of pages merely out of believing in a mystical number or anything of the sort. I do not believe in a *Grundsentence*, neither do I regard as true that an ideal sentence must have one hundred pages. This is not what I plan to reflect upon here.

What I do intend here is to problematize some elements regarding the validity of the decision. The first of them is the number of pages that Moro dedicates to *explain the reasons why he is not prejudiced*. From page 10 to page 33 (§ 48 to § 152), Moro displays arguments to make it clear that he is unbiased. Someone hastier (or maybe not) could even say that a Judge that spent 23 pages saying that he is *not* prejudice already demonstrates strong indications of bias. After all, it is just as the mother of a dear friend of mine says: *not everything is necessarily what it seems to be, but if it actually is, it always seems to be so*.

136 STRECK, Lenio Luiz. RAATZ, Igor. DIETRICH, William Galle. Sobre um possível diálogo entre a Crítica Hermenêutica e a teoria dos standards probatórios: notas sobre valoração probatória em tempos de intersubjetividade. *Novos Estudos Jurídicos* (Online), v. 22, abr-ago. 2017. TN: A possible dialogue between the Hermeneutical Critics of Law and the probative standards theory: notes on the probative evaluation in times of intersubjectivity.

137 JARDIM, Afrânio Silva. Breve análise da sentença que condenou o ex-presidente e outros. *Empório do Direito*, Santa Catarina. Available at <<http://emporiododireito.com.br/breve-analise-da-sentenca-que-condenou-o-ex-presidente-lula-e-outros-por-afranio-silva-jardim/>>. Access on July 18, 2017. TN: Brief analysis of the sentence that declared the Former President and others guilty.

138 MARTINS, Rodrigo. Pedro Serrano: “O prejuízo não é só de Lula, mas da sociedade”. *Carta Capital*, São Paulo. TN: The damage is done not only to Lula, but also to society as a whole.

139 STRECK, Lenio Luiz: Check list: 21 razões pelas quais já estamos em Estado de exceção. *Consultor Jurídico*, São Paulo. TN: Checklist: Twenty-one reasons why we are already in a State of exception.

But since the mere number of pages is not an adequate way of attesting whether a judge is prejudiced or not – even though it still seems to be a better evidence than a report from *O Globo* or even a comment by Merval Pereira –,¹⁴⁰ I will go further, dealing especially with the *language* used by Moro. Since I am a hermeneutist, I follow Hans-Georg Gadamer’s lesson – which is apparently something retrograde nowadays: before saying anything about a text, *I allow the text to say something for me.*

I shall proceed. On the § 109 of the sentence, Moro argues that Lula’s defence was based on *dramatic* reasoning regarding the telephone communications interception. *Dramatic*, says the Judge, while he himself forgets that the State attorneys listed the telephone number of *Teixeira Martins Advogados*¹⁴¹ as if it was the number of *Lils Palestras, Eventos e Publicações*, the firm responsible for the Former President’s lectures. Would that be a *dramatic* mistake? It is not for less that Moro recognises on § 106 that *he only found out that the telephone number belonged to the law firm once the defence argued so, when the interception was already over.* That is to say, the MPF,¹⁴² through a *dissimulation*,¹⁴³ intercepts communications from the law firm representing the Defendant, and the Judge sees the argument as *dramatic*? Indeed, the situation is dramatic.

On § 113, Moro states that the illicit recordings “are not even a part of the probative elements in the criminal charge, which means that they were not considered”. Well, it might very well be so, but they at least show that the MPF was not exactly performing its usual role, right? As a matter of fact, Moro discusses it from § 128 to § 131, in which the defence claims, based on a “*press conference held by the Public Attorneys on September 19, 2016, in which they attacked the Former President’s personal image while explaining the contents of the criminal charge*”, that the defendant was the target of a true *legal warfare*. Moro does state that the defence claimed that the Public Attorneys were prejudiced, and that “*even though the Public Attorneys’ tone in the press conference might be criticised, it has no practical effect to this criminal trial, for what matters here is the production of authentic probative elements*” (§ 130). Moro also says that “*despite the fact that eventually it may be understood that the press conference was not appropriate, it is still far off from a so-called ‘legal warfare’ against the Former President*” (§ 131).

Well, it is clear that not even Judge Sérgio Moro himself would be comfortable saying that the press conference held by the MPF members was appropriate. Let us remember that it was in that occasion that one of the Public Attorneys exhibited the now notorious PowerPoint presentation, with all the indicators pointing to Lula’s name.¹⁴⁴ It is not even necessary to argue much in the sense that such an attitude was not exactly fitting to an impartial, independent attitude that may be expected out of a public prosecutor. Not even Moro would

140 TN: *O Globo* is one of the most relevant daily newspapers published in Brazil, and Merval Pereira is a *O Globo* right-wing political columnist.

141 TN: The law firm responsible for Lula’s defence.

142 TN: Ministério Público Federal, Brazil’s Public Prosecutor’s Office.

143 DE VASCONCELLOS, Marcos; RODAS, Sérgio. Todos os 25 advogados de escritório que defende Lula foram grampeados. Consultor Jurídico, São Paulo. TN: All 25 attorneys from the law firm that defends Lula were intercepted.

144 TN: Deltan Dallagnol, the leading Prosecutor, presented a curious, unexpected PowerPoint slide with a series of bubbles, each one supposedly representing elements of the criminal charge, with arrows all pointing toward a big bubble in the middle called “Lula”. It then became a practically instant, virally transmitted joke in social media.

argue that. There are also several other MPF manifestations that might be characterised as inadequate or inappropriate – to say the least. Just remember that Carlos Fernando dos Santos Lima, one of the Public Attorneys, wore proudly in public a shirt that read “*República de Curitiba*”¹⁴⁵ and “*Liga da Justiça*”.¹⁴⁶ It is more than clear that the MPF was not unbiased as it should be during the procedure, even though Moro does not seem to recognise it (not even regarding his *own* actions). The MPF was apparently seeking for a trophy. Like if it had no responsibility whatsoever as a public office.

Moro presents some contradictory arguments. He says that Lula’s defence was *dramatic* and *diversionist*. This adjective, let it be clear, was used for four times in the first pages of the decision (paragraphs 57, 65, 138, and 148). Moro asserts, “*This Judge was offended several times by the defence representatives in these unfortunate episodes*” (§ 142). He then lists moments in which the Defence *supposedly lacked respect with him, highlighting those that bothered him the most*. Among them, there is a quote by one of the lawyers claiming that Moro intended on eliminating the defence, an attitude that was supposedly already “*sepulchred by the Allies in 1945*”, and was now “*reappearing in this country*”. There is also other highlights, all of them made by Moro, such as “*this [the elements of the criminal charge] exist only inside Your Honour’s head*” and “*the interpretation [of a given statutory rule] is absolutely contrary to the Constitution and all of the Criminal Procedural Law*”.

However, I think that to characterise a lawyer’s defence as *dramatic* is far more offensive than to argue that a judge’s interpretation of a rule is unconstitutional. To say that something exists only in the Judge’s head is not even close to be as ironic as a judge telling a lawyer that he should either know his place or pass a public exam to become a judge.¹⁴⁷ Let us not forget: the right to counsel is sacred. Not only that, it is acceptable that a lawyer acts strategically. A Judge and MPF members, as public officials, cannot do that.

Moro also says on § 938 that “*the Defendant, oriented by his lawyers, has adopted questionable tactics during this trial, aiming to intimidate public officials by initiating different lawsuits as a plaintiff claiming that his personal honour has been affected*”. According to the Judge, “*these acts are inappropriate and reveal an attempt to intimidate the Public Justice itself, its officials, and even the press*”.

This is a clear use of double standards. Why is it that Lula’s interviews are “*inadequate*” and attempts to “*intimidate the Public Justice*”, and the MPF press conferences may only “*be eventually understood is inadequate*”? What is the criteria? One of the parties, the Defendant in the trial, came up with inadequate statements. We can agree on that. However, what about the Prosecutor that was publically seen with a shirt reading “*League of Justice*”? What about the leading Prosecutor Dallagnol, that has threatened to abandon the Operation Car Wash if the Brazilian Congress did not pass an anticorruption bill? What about the notorious PowerPoint press conference? All of these conducts, can we just *maybe* consider them

145 TN: Republic of Curitiba. Curitiba is the southern city in Brazil in which the Operation Car Wash takes place. In 2016, Lula was recorded talking to the then president Dilma Rousseff – an ally of him – and, during the telephone call, Lula ironically referred to the provincial city as an independent Republic, which can be explained by the Former President’s following statement: “[supposedly] anything [could] happen in this country if a judge [Moro] wants it”. Republic of Curitiba then became a slogan adopted by Moro supporters in response.

146 TN: Justice League.

147 TN: In the Brazilian Judiciary, the admission to the career as a judge only happens through a public exam. There was an episode in Lula’s trial in which Moro, unhappy with the Defence, replied it to one of the lawyers.

inadequate? Are we now treating the administration of justice as something with nothing more than a collective of enthusiasts, like if it was a sport with winners and losers?

We also have the dramatic (and now I am myself using this word) episode of the tapped phone calls between Lula and the then president Rousseff illegally released by Moro, which unveils his partiality. The Judge himself recognised it as a mistake and apologised.¹⁴⁸ Therefore, if: *a)* the Judge characterises the Defence as *dramatic* and *diversionist*; *b)* illegally reveals intercepted telephone calls; *c)* refuses to acknowledge the biased conducts of the MPF; and *d)* ends all of that by saying that *at any rate, the Judge cannot declare himself prejudiced when the party offends him or even fabricates the alleged prejudice motive* – this is in the article 256 of the Brazilian Criminal Procedural Code –, well, we can say that there is something odd in all of it. After all, if Moro himself uses article 256, he is acknowledging that yes, there is animosity between the Judge and the Defence. This is clear. Moro, however, attributes this to the Defence’s attitude. What about the time when he made illegally public the tapped phone calls? Had the Defence already “*offended*” the Judge by then? Or would not it be that Moro himself created a situation that would later allow him to hide behind article 256? The fundamental question here seems to be about finding out *who caused the animosity in the first place*. That is the point.

The first parts of the sentence make it very clear that Moro and the MPF were biased. Since I shall be brief here – and it would not be necessary *not* to be to get where I want to with this text –, I will analyse very specific points in the decision. Some paragraphs that might be in there even unpretentiously. However, underneath there is always something that has not been said. Silence speaks. Screams. This is how important hermeneutics is. Let us proceed to some examples of evidence that were used during the trial.

One of the most commented features was the fact that Moro used a *O Globo* article as a relevant probative element (§ 376 and 377; § 412; § 452). Let us repeat: a newspaper report was a relevant element for the Judge’s persuasion. Well, for those who still insist on defending the free assessment, there is a field day.

Moro also says that Lula’s manifestations during trial “*are inconsistent even with a statement published on December 12, 2014 by Instituto Lula¹⁴⁹ in response to press reports*” (§ 474). Apparently, the Judge finds it unacceptable that a statement by *Instituto Lula* is supposedly inconsistent with Lula’s trial statements, after all “*it is true that the statement was made by the NGO, but since it is about a personal question regarding the Former President, it is impossible to say that the Institute did not consult him before releasing it*” (§ 476). Let us observe here that the Judge’s utterance does not meet basic significance requirements, semantically wise. How big is *Instituto Lula*? How many employees does it have? Why exactly is it *impossible* to say that the Institute did not consult Lula? Could not his own advisers release a statement? After all, what is the reason for someone to hire professional advice? See, if we took Moro’s quote and changed “*impossible*” for “*possible*”, nothing would change. Let us see: “[...] since it [*the statement*] is about a personal question regarding the Former President, it is *possible* to say that the Institute did not consult him before releasing it”. There it is. No

148 STRECK, Lenio Luiz. Moro criou um novo tipo de extinção de punibilidade: pedido de desculpas. Consultor Jurídico, São Paulo. TN: Moro has now created a new way of avoiding prosecution: apologising.

149 TN: Lula’s Institute. A Former President’s NGO.

empirical verification justifies either the truth or the falsity of such a claim. It is arbitrary. It is fit to condemn... and to absolve just as well.

I follow. On paragraphs 635 and 636, there is some kind of reverse burden of proof. Moro says, “*Lest Luiz Inácio Lula da Silva and Marisa Letícia Lula da Silva*¹⁵⁰ *were merely potential buyers of the apartment 164-A,*¹⁵¹ *triplex, there should have been some discussion regarding the price of both the apartment and its renovations, since they would naturally have to pay for it in a regular acquisition*”. He says, though, “*There is no proof, neither a document, for instance, nor witness testimonies in this regard*”. Self-explanatory.

Moro also works with presumptions. On § 645, he affirms that “*José Adelmário Pinheiro Filho’s*¹⁵² *testimonial [...] confirms only the part of the Prosecutor’s thesis regarding the triplex apartment and its renovations. His testimonial, however, acquits Lula of the charges regarding expenditures concerning the storage of the presidential collection. Lest he [Pinheiro] planned on committing perjury only to acquire legal benefits, he would affirm both crimes*”. In other words, the Judge presumed that, lest the testimonial was not veridical, the witness would have lied. Here, too, we can refer to semantic significance requirements (something I write about in my *Dicionário de Hermenêutica*):¹⁵³ there is no way how to either prove it or disprove it. Pure presumption and/or speculation.

Finally, there is another point extracted out of paragraphs 802 and 804. Moro references “*the lack of any disapproval tone from the ex-President concerning the corruption cases in which many public officials were involved during his time in office*”. He then proceeds to claim that “*usually, if a subordinate commits a crime, it is naturally expected that the superior disapproves it and also demands punishment for the deed. The ex-President did not display such a behaviour and uttered nothing more than generic statements in the sense that those who were found guilty should be properly punished. There was no specific designation, making it seem that there was no identification of those involved in corruption cases – which happened during the course of the AP 470. This is relevant evidence of connivance with significant probative value*”. Let us stop the reading here and reflect upon how serious this is. To the Judge, the fact that the Defendant refrained from publically condemning specific wrongdoers – since he only uttered *generic statements* – has *probative value*. This surreal. A clear violation to Hume’s law.

The question that remains is why a judge would: *a)* use presumptions; *b)* reverse the burden of proof; *c)* make claims with no possible empirical verification; *d)* consider the lack of “*specific public manifestation*” from the Former President as evidence; and *e)* ignore the passionate actions of the MPF? Well, for two very simple reasons: *(i)* because the Judge himself had a personal conviction from the beginning that the Defendant was guilty; and *(ii)* because the legal community in Brazil has no criteria for probative value assessment. Moro is just like the

150 TN: Former Brazil’s First Lady, Marisa is Lula’s recently deceased wife.

151 TN: The origins of Lula’s indictment and later conviction (based on the MPF’s charges of passive corruption, ideological falsity, and money laundering) are in the investigations of the involvement of construction company OAS in the renovation of a triplex apartment in Guarujá, Brazil. The Prosecutors (and Judge Moro) believes that the property is linked to the ex-president and his deceased wife.

152 TN: Director of OAS.

153 STRECK, Lenio Luiz. *Dicionário de Hermenêutica: quarenta temas fundamentais da teoria do Direito à luz da Crítica Hermenêutica do Direito*. Belo Horizonte: Casa do Direito, 2017. TN: Hermeneutics dictionary: forty fundamental topics on jurisprudence under the Hermeneutical Critics of Law approach.

majority of judges in this country. Nothing new. This is what our law schools teach. Everything gravitates around the free assessment. Now those 23 pages dedicated to *deny* prejudice make sense, don't they?

I stop here. This case had an explosive combination: biased judge, biased prosecutor + free assessment of evidence. If I were one of the lawyers representing the ex-President, I would ask them for the *fowl production evidence*, "practiced" by the Azande in North Central Africa. In order to seek for the "*real truth*", they consult the Poison Oracle in the *Benge*¹⁵⁴ factor. The defendant is declared guilty or innocent by whether or not a fowl survives being administered .poison. No *intuitionism* or deductions. If I may be so bold to use such an irony here, well, it is safe to say that Lula was already found guilty the day his trial was assigned to Sérgio Moro. It is not for less that Moro says that the impartiality issue was examined "*just because it was alleged*" (§ 148). Of course, everything was decided already. The reasoning comes later.

There is more. Undoubtedly, even though he does not admit it, Moro adopted the "*legal*" abductive reasoning theory (here is the exotic "theory" brought up by the MPF in its final allegations). To Moro, the Prosecutors' thesis is true because "*it is the one who better explains the evidences*" (§ 847, 848). It is a probability theory! Theories about probative value and two thousand years of philosophy were simply erased by a single sentence. See, the Judge himself, allowing this probability theory inside criminal procedure and evidence assessment, will admit that *the facts were proved beyond reasonable doubt*. However, without criteria, what doubt is reasonable? Whatever the Judge says so? Even if we admitted mathematical reasoning in criminal procedural law, which calculation was made? After several probable conclusions in progress, the Judge finally reaches a final *probable* conclusion! And this conclusion is condemnatory.

This sentence symbolizes a lot. In fact, it reinforces that the Law displayed in law schools is nothing more than political theory of power. And worse: a *poor* political theory of power! And this is atrocious for democracy. Just like I said when I started this article, it is possible to say that the Brazilian Carnival has built a better epistemology than the Law did. In the Carnival, people behave a lot less like fans than they do in Law. Do you think it is a good thing to see the Law contaminated by moral judgements? Do you think it is acceptable to taint constitutional rights as long as it is against an *enemy*? Just bear in mind that you are daily in traffic and you might eventually get involved in an accident. It might happen to anyone. Let us imagine you are in a car and the other party in a motorcycle. Well, if we accept that Law is nothing but a sport with winners and losers, all that is left for you is to *hope* that the judge is a member of *team car* instead of *team motorcycle*. Everything now seems to be a matter of enthusiasts. Two thousand years of philosophy for nothing.

I have nothing against Moro; neither do I have anything against the MPF. In fact, after twenty-eight years working as Prosecutor for the state of Rio Grande do Sul, I still see myself as a member of it. *Nevertheless, an honorary member of an institution must look after society without ever ignoring the constitutional rights of the defendant, impartially*. The Public Prosecutor's Office cannot behave like a lawyer, nor can it act strategically. Once we admit it, the Prosecutors, public officials, will be nothing more than accusers. No different from a lawyer. Well, why is it that the Prosecutor's Office has similar constitutional warranties to

154 CHASE, Oscar. Law, Culture, and Ritual: Disputing Systems in Cross-cultural Context. New York and London: New York University Press, 2005.

those that the judges have? It is quite simple, actually: so that it does not behave like just another party in the trial. Partially. Biased.

More than that, my objections here do not relate merely to Moro's sentence. They are, fundamentally, against the free assessment of evidence and in favour of democracy. I am a jurist that believes that legal decisions shall be taken by principle, not moral judgments or politics. If the personal moral convictions of a judge can *correct* the law, who is to correct the personal moral convictions of the judge? It is the duty of a jurist to recognise that Moro was wrong when he decided to release intercepted telephone calls, just as it is to acknowledge the illegality of the recorded dialogues between President Temer and Joesley Batista.¹⁵⁵ *Constitutional rights have no colour, gender, race, or ideology. Either they are rights or they are not.*

In one sentence: we can never know what the judge thinks. If a judge and the MPF think that reversing the burden of proof and abductive reasoning are revolutionary things, they should take a look at basic political science manuals. Let us have less *Bayesian* probabilities, abductive reasoning, emotivism, and more *respect for the Constitution*. To do the right thing is to do what the Constitution tells us to do. What really is revolutionary is to combat crime without breaking the rules. To combat corruption while turning legal procedure into a mere simulation is easy. It is a lot harder to pick up the pieces. If we admit chaos, there will not even be rules to follow or break anyway.

Actually, in times of constantly, arbitrarily ignored legal and constitutional rules, fighting for legality is a revolutionary act. It is indeed incredible: with my conservative constitutionalism, I have now become a revolutionary.

I rest my case.

155 TN: Michel Temer, President of Brazil, was secretly recorded by Joesley Batista, a businessman, discussing money pay-offs to Eduardo Cunha, former Congressman who is now in jail. While Lula is a left-wing politician, Temer is associated with the right-wing; this is why Streck brings this episode, to state that a serious jurist has a duty to condemn illegalities on both sides, leaving politics aside.

A political trial

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Judge Sergio Fernando Moro's sentencing of Brazil's former President Luiz Inácio Lula da Silva to 9 years and 6 months in jail makes a mockery of Mr Lula's human rights and is an insult to the laws governing the Brazilian state. On 7 July 2017, the former president was sentenced to prison and imposed hefty fines for the alleged crimes of graft and money laundering. He was one of the defendants convicted in civil case number 5046512-94.2016.4.04.7000/PR, which is part of Brazil's Car Wash corruption probe being argued at the 13a Federal Court in Curitiba, Parana state.

Considering, though, that legal arguments in defence of Mr Lula have already been presented by his outstanding legal team, led by Cristiano Zanin Martins, Valeska Teixeira Zanin Martins, Roberto Teixeira and the distinguished attorney Jose Roberto Batochio, a former president of the Order of Attorneys of Brazil; that certain particularities of the case can only be grasped by having detailed access to the court papers; and that some of these points are being addressed elsewhere in this collection by renowned scholars such as Carol Proner, Gisele Cittadino, Gisele Ricobom and Joao Ricardo Dornelles; we will choose to make instead a critical assessment of the rationale behind Car Wash operation itself. Its highest point so far has been reached with this sentence: a far-reaching decision which has surprised in its extent but not in its direction, considering that the gavel seemed banged and guilt presumed from the onset.

The Car Wash operation has become naively ingrained in people's minds as a moral vehicle to redeem Brazil's national morals thanks to a coordinated strategy crucially counting on strong support from the mainstream media, falsely and allegedly interested in eradicating corruption from the guts of Brazilian public administration. In reality, its primary goal has been to remove the Workers Party from power at any cost, even if that meant abruptly ending a political project that has, to this date, brought the most important economic achievements to the country, providing the best social opportunities to the most sacrificed extracts of the population.

As it fed on popular support through a siren call of sorts from the media, Car Wash gradually ploughed against the rule of law by disrespecting people's legal rights, weakening institutions and ignoring basic legal guarantees. It thus contributed to erode support for the government of the former President Dilma Rousseff, paving the way for her illegitimate destitution through a parliamentary coup constitutionally dressed as impeachment for the alleged crimes of administrative misconduct and authorising spending without prior Congressional support. Nothing more than cunning political manoeuvring that relied on technicalities of the law to provoke a collapse of the democratic order of Brazil.

But there is a backlash following this attack on Brazil's democracy and our concern is that this tide does not get stopped in the 2018 elections. The popularity of Dilma's backstabbing heir, Michel Temer, is now in free fall. Mr Temer and his PMDB party spearheaded a spurious

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conspiracy which not only illegally ended her term but forced the Worker's Party social project into a 180-degree turn. His government has rolled back political and social achievements as payback for support from conservative forces including foreign powers (especially the United States) interested in weakening Brazil's sovereignty and controlling Brazil's strategic resources, such as deep water oil, water and mining; international financial speculators and business conglomerates such as banks and media groups; right-wing political parties defeated through the ballot box by the left, particularly the social-democrat PSDB and the centre-right DEM; politically illiterate chunks of the population manipulated by the mass media, conservatives and the right-wing in general.

A return of the Workers' Party, and the left, to power grows more and more feasible as a moral hangover lingers on and people regret as they watch Brazil's once exemplar social policies go downhill. It is in that context that Car Wash picks Mr Lula as a scapegoat for Brazil's problems, without showing a single unequivocal proof of crime, relying consistently on generic assumptions based on the theory of control over the act and controversial information extracted under arrest or plea bargain (when there are incentives for finger pointing in exchange for a milder sentence). If resorting to those strategies might produce evidence to incriminate anyone, it is not a coincidence that the chosen scapegoat is the former President Lula, who would get the vote of more than one third of the population if elections were held today, according to opinion polls; who is considered by many to be the greatest president Brazil has ever had, with unrivalled scope to lead the country out of its institutional crisis.

For the good of Mr Lula as a citizen, as well as the Brazilian state, we hope that an appeal seeking to overturn judge Moro's sentence, lodged with the corresponding Federal court, may be considered in the light of principles that underpin national laws and the judicial system, hopefully exposing the absurdity of the previous decision. A trial cannot be decided by the audience of tomorrow's news, or how much noise is generated by banging pots on the balcony of apartments in well-off areas of the country's main cities. A trial only has to be fair, and nothing beyond that. A politically motivated sentence cannot have another fate but to be overturned.

Lawfare, this crime called justice

Marcio Sotelo Felipe

With the conclusion of the "triplex apartment case" at the first stage, it can be observed that true crimes were committed. Those committed by the judge. Of the crimes the defendant was charged with, nothing can be said.

This is *lawfare*. The annihilation of a political person through judicial mechanisms. The series of grotesque episodes that characterized the jurisdiction in this case leaves no doubt about it. The mere fact that the process enters the social imaginary as a combat "Moro vs. Lula" (a magazine cover stamped a caricature of both as boxers in a ring) gives evidence of the teratological character of the magistrate's performance. Moro committed crimes, violated trivial functional duties, violated the defendant's constitutional rights and guarantees, violated the secrecy of his communications, strived to expose and humiliate him publicly, kept him in detention for hours, revealed intimate conversations with his relatives. There is nothing unreasonable about the suspicion that Lula's wife Mariza Letícia's stroke originated in the series of constraints to which her family was subjected. Mariza died on February 3, 2017.

Let us scrutinise, from this perspective, some of the arbitrariness committed by the judge and aspects of the decision that reveal the reception of extreme theses which deviate from the sound exercise of the magistracy and fully demonstrate the will to condemn. The recognition of the validity of this sentence by the Higher Courts will be the most forceful evidence that we live in a state of exception and that the Constitution is now a useless piece of paper.

Violation of the telephone privacy

The inviolability of correspondence is a classic fundamental right. Clause XII of the Universal Declaration of Human Rights states that "*no one shall be subjected to interference with their privacy, family, home or correspondence ...*"

The 1988 Brazilian Constitution stipulates as a fundamental right and guarantee in clause 5, item XII: "*the privacy of correspondence and telegraphic communications, data and telephone communications is inviolable, except in the latter case, by court order, in the hypothesis and in the manner established by law for the purpose of criminal investigation or criminal procedural instruction.*"

Note the exception. There are two conditions for violating telephone communication: (i) a court order; (ii) for purposes of criminal investigation or criminal investigation.

The proviso is regulated by Law 9,296, dated July 24, 1996, which, in article 10, states that "it is a crime to intercept telephone, computer or telematic communications, or break secrecy of justice, without judicial authorization or with objectives not authorized by law". The penalty is two to four years of imprisonment and a fine.

Moro had determined wiretapping lines used by former President Lula. On 16th March, 2016, at 11h13 a.m, he suspended the measure and informed the Federal Police. The dialogue between Lula and Dilma was picked up at 1:32 pm, when the measure was no longer in force. Moro received the recording and, at 4:21 pm, the order to publicize the conversation between the president and the former president was given, which was followed by Rede Globo broadcasting the aforementioned conversation.

This conduct strictly complies with what is decreed in Law 9.296/96. The recording was no longer covered by court authorization and there was no purpose authorized by law. The

intention was specific and completely impregnated with political interest. Lula had been appointed minister and would take office the following day. The announcement of the audio, that day, through Rede Globo, aimed at creating a political climate to prevent the investiture of the former president. Moro availed himself criminally and unworthily of the toga to impose on Lula a political setback, to disturb the country and to create an atmosphere for the impeachment of the president.

Minister Teori Zavaski said it was illegal to broadcast the tape. In this case, illegality was evidently a crime. The minister, however, abstained from the conclusion, not only at that time, but also, as did his peers, when the matter was addressed to the STF (Supreme Federal Court) plenary.

Abuse of authority

the Code of Criminal Procedure is precise on the matter of coercive conduction. It can be determined in two cases, provided for in articles 218 and 260: when the accused does not comply with the subpoena for interrogation, or when the witness does not heed the summons.

Lula was taken from his home at dawn and driven to Congonhas airport. The former president was not at that time (March 4, 2016) a defendant and had not been summoned. There was never an acceptable explanation for him being led to the airport, given the existence of multiple Union facilities in the city of São Paulo where his testimony could be taken "without turmoil" (the explanation given by Moro).

There is a suspicion that the idea was to take him to Curitiba. A media spectacle was intended (the press had been warned) intending the perverse content of the ex- president's public humiliation. Lula was deprived of his freedom for six hours. This was both violation of the constitutional guarantee of individual liberty and expression of abuse of authority, as provided in art. 4, letter "a", of Law 4,898, dated December 9, 1965: *"it is also an abuse of authority ... to order or execute a measure depriving individual freedom, without legal formalities or with abuse of power."*

An abuse of authority subject to administrative, civil and penal sanctions. That is to say, Moro once again committed a criminal offense and violated functional duties.

Tapping Lula's attorney's office

Every telephone of Teixeira Martins law firm was tapped. Roberto Teixeira, Lula's renowned lawyer, is its owner. The telephone company informed Moro that it was a law firm. The prerogative of secrecy in lawyer - client communication is inherent to the right of defense. Moro excused himself in a way that capped mockery: there had been no attack on the operator's services due to the volume of services of his Court Section, of the numerous processes that run there. As it happens, Moro has an exclusive designation and only oversees the Car Wash case. So, he either confessed gross negligence or lied. A negligence that cannot be observed when it comes to the subject matter of the indictment.

The "foundations" of the sentence

The fact that Lula was condemned can thus be synthesized as follows. According to the indictment, OAS, responsible for works in two refineries belonging to Petrobras, distributed bribes to company directors and political agents. This would have been to Lula's benefit as the difference in the price between a single apartment and a triplex in a building located in

Guarujá, a difference that would amount to R \$ 2,429,921.00. That is why Lula would have incurred in the crime of passive corruption, which consists, according to article 317 of the Penal Code, *"to solicit or receive, directly or indirectly, for himself or for others, even if out of office or before taking it, but due to it, improper advantage, or accept the promise of such an advantage."*

The condemnation would only be justified if it were shown that Lula had control of what happened in Petrobras. If he had consented, joined, participated and that there had been practice of a specific, determined, identified act, rewarded by the apartment in Guarujá. It should be noted that former president Collor was acquitted precisely because the practice of the a specific act was not demonstrated.

Nothing has been proven. There is not the slimmest indication of practice of an official act or mastery of what was happening within the state. This fragility Moro tried, in vain, to compensate with informal confessions (there was no formal agreement of plea bargain) of the OAS defendants, particularly Leo Pinheiro. After denying Lula's participation in the kickback scheme, Pinheiro changed his testimony after being arrested by Moro. He saw the opportunity to gain benefits by telling Moro what everyone knew Moro wanted to hear. Although sentenced to more than thirty years in another case, his sentences were unified into two years and six months of imprisonment.

Let's look at money laundering as typified in Clause 1 of Law 9.613/98: *"to conceal or disguise the nature, origin, location, disposition, movement or ownership of assets, rights or values arising, directly or indirectly, from a criminal offense."*

The fact that the apartment appears as belonging to OAS, Lula being supposed to be the "de facto owner" - the alleged advantage of the specific act never practiced – provided the opportunity of conviction for money laundering.

The understanding that the perpetrator of the foregoing crime may be the active subject of money laundering, although having adherents, is unsustainable. It is part of the punishing fury that plagues us. It highlights part of *iter criminis* to make it another crime.

Verbs that are the core to the type - conceal or disguise - are inherent to the antecedent crime. No one commits any crime without taking care not to expose its produce in order to attain the desired advantage. No one steals, for example, a car to ostentatiously parade it through the streets of the city. Concealment or disguise is the means for the exhaustion of crime, final appropriation of the advantage. Therefore, punishing the perpetrator of the crime for merely concealing or disguising it is double punishment for the same thing, the so-called *"bis in idem."*

Even if it were admitted that the active subject of the antecedent crime could be an active subject of the money laundering offense, a second conduct would be necessary to make the crime fruitful. In the judgment of Case 470, the "Mensalão" Case, several judges pronounced in that sense. For its synthesis and clarity I take a passage from Supreme Federal Court Minister Barroso:

"The clandestine reception and ability to conceal the recipient of the bribe, besides expected, integrates the very materiality of passive corruption, not constituting, therefore, a distinct and autonomous action of the money laundering. In order to characterize this autonomous crime, it would be necessary to identify subsequent acts designed to restore the unduly received advantage to the formal economy".

Indetermination of facts and statute of limitation

Moro did not, at any time, establish the exact date of the facts. This is indispensable to verify the consummation and the consummation is the starting point for the statute of limitation. Lula is now more than 70 years old, which halves prescribed deadlines. So, how to know when the crimes are still accountable for?

State of exception

All considered, what we have is typical lawfare. The destruction of the political enemy through an apparently legal process.

Moro is not a solitary and reckless judge pursuing a political character. Lawfare has only come to this point because it has had the endorsement, coverage, and complicity of the higher Courts, including the STF, which, among other things, kept mute about the telephone communication confidentiality breach (remember, Teori did not dwell on the Matter when the theme went to the plenary, as his peers did not). With this he received "license to kill".

In TRF-4 (Regional Federal Court – Region 4), the rapporteur of the representation against Moro for breach of telephone confidentiality cited Carl Schmitt, the prince of the Nazi jurists, to justify that it was an exceptional situation, thus denying effectiveness to constitutional rights and guarantees of the former president.

Moro has had a favorable coverage of the mass media, which transformed him, in the popular imaginary, into a holy warrior fighting the dragon of evil.

Moro participated, consciously, deliberately, in the impeachment coup. The illegal broadcasting of the audio of the conversation between Lula and Dilma, delivered to Rede Globo for dissemination on the day immediately prior to Lula's inauguration as minister, could have no other purpose.

It is especially important to conclude that we are no longer in a democracy. What we have with the preparations and consummation of the impeachment is a new type of dictatorship that deceptively preserves the classical political and juridical institutions of a liberal and democratic state, but empties them of real democratic content (which the jurist and magistrate Rubens Casara has been called post-democracy). In this new type of dictatorship, what used to be done by the force of arms and violence to destroy the political adversary is now done by lawfare. In this, the Judiciary, which in the old dictatorships had an accessory role, as an adjunct, becomes the protagonist of illegitimate state violence. Before it was a soldier or a policeman who, in the dead of night, destroyed the citizen. Now it's sentencing in daylight.

The captain of bush and the carrier pigeon¹⁵⁶

Marcio Tenenbaum*

During the period comprised between the sixteenth and nineteenth centuries, slavery in Brazil was the mode of production in such economy. The immense territory discovered by Portugal was suitable for a large-scale cultivation of sugar, something so desired by the Europeans, who were extracting it from the beet. So, the slave labor became the “solution” found by the Portuguese metropolis to handle with such production and, for such reason, the Brazil had transformed into one of the main importers of African Slaves. On the other hand, it was so easy to keep the slave under yoke of the Lord of the “Casa Grande”, i.e., a big house where the owner of the farm lived with his family, and in the “Engenho”, i.e., a sugar cane mill, through constant physical punishment against those who insisted on running away to the Quilombos.¹⁵⁷ As a reaction to the desperate struggle for freedom, it was necessary to create an apparatus of search and apprehension of these fugitive slaves that threatened the current mode of production. Then, it was created the figure of the “capitão do mato”.

In the same way, from time to time, the different Brazilian elites create their own captains of bush, mainly when the excluded majority of the people emit some sign that they intend to leave from the place which they consider as the proper one. So, with this purpose, our elites do not usually tend to dirty its own hands, getting used to outsourcing or hiring “laranjas”¹⁵⁸, nowadays, two terms in vogue.

The end of slavery and the birth of the Republic, did not represent great symbol of emancipation in the excluded masses’ lives, not even for those who entered into the newly created Brazilian Army and also, for those who participate in the War of Paraguay. When such individuals returned to Brazil, they found a new type of housing in the capital of the Empire: the “favela”, i.e., the slum, a low-income urban region in Brazil.

The History of the Brazilian economic development is based on a history of exclusion. It is observed, herein, that just a small section of the Brazilian population is being contemplated with the construction of it: in the past, we had the Lord of the Mills; in the present time – at least, until the arrival to the power of the Workers’ Party in 2003 - the captains of industry and the banking system. During the Old Republic, in order to ensure the privileges, the police was in charge of resolving the social conflicts, which hasn’t changed much along the New State, giving power to someone that became a famous Chief of the political police of the Federal District, directly responsible for the deportation of Olga Benario for Nazi Germany, i.e., Filinto Muller. In addition, during the military dictatorship, such responsibility was transferred to the armed forces, in order to ensure, a country for a few. Now, with the Federal Constitution of 1988 in force, is the Brazilian elites seeking in the Judiciary Branch, the figure of the Captain of bush from the past? Is the Judiciary Branch accepting the task to bring back to its place the slave who dreamed of freedom? If Lula represents the dream of Zumbi (i.e., he was one of the first fighters against slavery in Brazil), and many others who believed in the

156 Capitão do Mato, i.e., “captain of bush” was a servant of a Brazilian farm responsible for capturing the fugitive slaves and being commissioned to recapture other runaway slaves.

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157 Quilombo - It refers to the village that sheltered slaves fleeing from farms and family houses, usually outside the urban areas.

158 Laranja – “Orange”, i.e., someone who participates in an act of contravention (voluntarily or unknowingly) providing only his or her data to cover up unlawful people or procedures;

possibility of emancipation of the Brazilian people, the inconsistent conviction received by the former President does not represent, in some measure, the sign that this country is reserved for the few?

The Captains of Bush, although originated from the low-class, were portrayed by Rugendas (i.e., Johann Moritz Rugendas was a famous German painter) mounted on fine horses. Many members of the Brazilian Judicial System, on their outsourced function to ensure the maintenance of the *status quo*, have their images related to prizes, trips and high salaries. But, in the same way that the captains of the woods of the past, they do not marry the daughters of the Lords of the Mills.

The inconsistent sentence of Judge Sérgio Moro, who convicted the former President Lula to 9 years and 6 months in prison, is nothing more, than a new attempt of our elite to put on halter in those who for some moment believed that the Brazilian capitalism should include more than their historical background of 30%. In this sense, the sentence, is not only condemning the individual of the former President, but equally, it also condemns a project committed to egalitarian goals and, also with a transfer of income that allows social mobility and professional growth.

Carrier pigeons are trained to carry and take messages. Through a slow and exhausting training, a pigeon will learn how to fly back to its home where the owner could read their mail. This is the guarantee, that the message was delivered. If, the Brazilian judicial system, is convicting without evidence the former President Lula, intends to eliminate the country's most popular political leader, acting herein, as the captain of bush. They just forget that a political leader like Lula will never return to place where he left. After all, he would not be who he is, if he had a vocation for carrier pigeon.

The conviction of Lula and the negative argumentation in the constitutional state

Margarida Lacombe Camargo*

José Ribas Vieira**

The conviction of the former president Luiz Inácio Lula da Silva appeals markedly to a narrative context that extrapolates the limits of the actual case. In an article published on Jota, in March 2016, under the title “A estratégia institucional do juiz Sergio Fernando Moro descrita por ele mesmo”¹⁵⁹ (“The institutional strategy of the judge Sergio Fernando Moro as described by himself”), we showed that the judge who authored the conviction of the former president Lula, in his academic papers has always sustained the prevalence of the Judiciary against the other powers of the republic, under the equation that “the bigger the delegitimation of the political system, the bigger the legitimation of the magistrature”. And, in the best schmittian state of exception style, in which decisionism¹⁶⁰ prevails, he appeals directly to the public opinion to legitimize his actions. This can also be noticed now, in the conviction of the former president Lula, in which we find a speech that is primordially oriented towards the public, and whose persuasive force falls over the construction of a criminal narrative that goes beyond the limits of the case. Therefore, the decision under consideration can only be understood in the context of the parliamentary coup of 17 April 2016, when the government supporters in the National Congress turned against the elected president Dilma Rousseff, accepting the request for her removal, which was completed on 31 August of the same year.¹⁶¹

Elio Gaspari describes the coup in a nutshell (translated from Portuguese): “The first idea was to elect Aécio Neves. It fell short by three million votes (3%). Then came the second chance, which was to overthrow Dilma Rousseff. It worked, and Michel Temer went to the Planalto with a platform that was the opposite of the one sustained by Dilma’s campaign, but with an almost identical group of supporters in the parliament.”¹⁶²

The parliamentary coup, which is thus merged with the Impeachment, has only been possible because it relied on a strong campaign against the government, promoted by the manipulative press. The mainstream media took advantage of the Car Wash investigation results to instigate a war between the public opinion and corruption, weakening the current institutions. In moments such as this, the credibility of the powers that are supported by popular sovereignty takes the biggest hit, especially when it happens under the approval of the Judiciary. Democracy is thus damaged.

When the combat against corruption, which lies in the field of crime, is carried out with political ends, the political and juridical spheres get confused. This is what was seen recently in Brazil, with the Impeachment of president Dilma, which counted on the compliance of the Judiciary Power. The Supremo Tribunal Federal (the Supreme Federal Court of Brazil) not only omitted itself in regards to the Impeachment but also started to sanction every unorthodox initiative taken by the judge responsible for the Operation Car Wash, which helped to create

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159 <https://jota.info/artigos/estrategia-institucional-juiz-sergio-moro-descrita-por-ele-mesmo-28032016>

160 About decisionism in the State of Exception, see Ronaldo Porto Macedo – Carl Schmitt e a Fundamentação do Direito. São Paulo: Saraiva, 2. ed., 2011, especially the item 4.1.

161 About the parliamentary coup, see the book written by Wanderley Guilherme dos Santos, *A democracia impedida: o Brasil do século XXI* (Rio de Janeiro: FGV, 2017), especially pages 25 to 31.

162 O Globo newspaper, 9 July 2017.

the “body of work” that was necessary to the deflagration of the whole process. This was a typically corporatist attitude from the Judiciary, which also counted on the expressive contribution of the Federal Court for the 4^a region and, by entering the field of politics, served also as a way to confer legitimacy to what was not legitimate. All of this to ensure the substitution of the president and dispel from the political landscape the Partido dos Trabalhadores (Workers’ Party) and its main leader, the former president Lula.

It was a traumatic process for the Brazilian people. Not only because the economy and credibility of the country were extremely affected, but also because the adoption of the austerity measures that followed the process led to the setback of the social rights previously achieved, in the best neoliberal style. But these were not the limits of the negative effects. The success of the coup depended on the *ad nauseum* derogatory portrayal of our institutions promoted by the mainstream media. Day and night, night and day, political parties, parliamentarians and members of the Government were targeted by the press, and politics was discredited. Even if through a selective process, aimed to affect some parties and protect others, the party politics was fatally wounded, prompting the search for alternative frameworks in the private sector, where it is believed that the heralds of the entrepreneurial morality can be found.

Moreover, sectarianism took over the society, reaching the families and personal relationships. The hatred previously inhibited by social norms found a fertile ground in the social media, since in the isolation of the virtual environment people feel encouraged to manifest radical positions, not rarely in an offensive and discriminatory manner, that the physical presence represses. These are perfidious repercussions that the supporters of the coup might not have imagined, since it seemed possible for everything to be peacefully resolved through the Impeachment.

It happens that the coup was not effective when it came to the results intended, since the neoliberal reforms it sought to implement did not reach the previously envisioned success. The Temer government wasn’t able to form frameworks for its administration. It was also target of corruption scandals and lost popularity. The “market” abandoned Temer, according to the same Elio Gaspari; and now the 2018 general elections approach, with PT (Workers’ Party) appearing as a strong candidate to the Presidency. In the pathway of the coup, which didn’t achieve its total fulfillment, the conviction of Luiz Inácio Lula da Silva might very possibly surface in a providential moment to prevent the left from getting back to power. In the same manner that Dilma was removed from the presidency by the “body of work”, Lula was convicted by the “context of endemic corruption” which surrounds us. Just as Dilma had the “pedaladas fiscais” and the budgetary decrees as pretext for her removal from the presidency, Lula had the ghost “property” of a triplex apartment in the city of Guarujá (SP) as justification for his conviction for crimes of corruption and money laundering.

As it is typical of a State of Exception context, in which the institutions find themselves broken and rulers speak directly to the people in search for support, the judge Sérgio Moro, in his decision, specially addresses the society. He constructs a narrative that meets everything the society wants to hear, which is also an easy speech: the fighting of corruption. A good part of the 238 pages is filled with justifications about the measures of exception taken during the whole process of incrimination of the former president Lula, under the logic that the ends justify the means, and always with the backing of the Judiciary power. What we may call

“lawfare”, i.e. the politization of the law for the unlimited use of power and the law serves as weapon against the law itself; or the law fights the law itself.¹⁶³

In order to achieve this end, rhetoric is widely used by the judge. But in a bad sense, because it does not restrict itself to the limits of the process. He constructs an argumentative line that overflows the concrete case, in search of support from the public. He goes beyond the confirmation of the passive corruption and money laundering crimes, in relation to the supposed property of the apartment that was allegedly received as a bribe. Thus, his argument is sustained by a criminal context that he (the judge) constructs.

I place on the account of bad use of judicial rhetoric¹⁶⁴ every strategy of argumentation and of convincing that surpasses the limits of objective substantiation of the authorship and materiality of the crime that is the object of the denunciation, in a strategy of pure convincing of the public in general. Differently from authors of post-positivist matrix who invest in an argumentation that respects the institutional limits of the Constitutional State, such as Alexy, MacCormick, Dworkin and Atienza,¹⁶⁵ what is seen in the sentence of the judge Moro is an argumentation that, in the line of the State of Exception, breaks the limits that are institutionally imposed, in this case remarkably by the rules of the penal procedure. He addresses the society directly, appealing to an argumentation that is merely persuasive in search of support for his deeds. He uses fragments of other lawsuits and inquiries in progress, such as is the case of the remodeling of the ranch in Atibaia. Since the proofs of property of the apartment in Guarujá are weak, the judge Sérgio Moro gets help from these other sources, going beyond the limits of the lawsuit, to construct an explanation that is robust enough to remedy such fragility. Even newspaper articles become support for his probative narrative.

After concluding for the property of the apartment based mainly on the testimonial of a confessing defendant, the president of the contractor company OAS, which as a judiciary collaborator would benefit directly from the results of the information presented (items 643 to 647 of the decision), the judge densifies the justification of his decision with what he explains are the causes of the crime: the participation of OAS in the Petrobras corruption scheme and its relation with the Partido dos Trabalhadores, which he then describes in detail. But the judge went further and pointed out a series of other people involved, even if out of the scope of the lawsuit, transcribing excerpts from testimonies that, by force of illations, end up making him incriminate the former president Lula (items 648 to 806 of the sentence) (translated from Portuguese):

801. It seems, by the way, a little odd that, in front of the magnitude of the criminal scheme, illustrated by the fact that Petrobras acknowledged around six billion reais in accounting losses from corruption in the balance of 2015, that the former president wouldn't have any knowledge, maximum because it, the criminal scheme, would also have involved the

163 See interview given by John Comaroff, professor at Harvard and specialist in the delimitation of the category “lawfare”. <http://www.downloadyoutubeonline.com/video/skCRotOT1Lg>

164 I use here the term “rhetoric” as in “new rhetoric” by Chaim Perelman, who, in his theory, draws the attention to the persuasive elements of the judicial sentences.

165 Post-positivism assumes the juridical argumentation in a perspective of values, respecting the limits institutionally imposed. Alexy defends the theory of the special case, working the practical reason in the limits of juridical dogmatics and of judicial precedents; Dworkin, with the analogy of the chain novel, circumscribes the interpretation and application of the laws in the precedents and in the principles that characterize the Law as Integrity; MacCormick respects the limits of logical and deductive reasoning that is particular to the Law; and Atienza encloses the argumentation in the limits of the Constitutional State.

utilization of bribes in corruption agreements at Petrobras for the financing of electoral campaigns, including for the Workers' Party and by which the former president was elected and elected his successor.

802. Besides, it is remarkable [to notice] the absence of any judgement of disapproval by the former President in relation to the public agents that, during his Government, would have participated in the criminal scheme that victimized Petrobras.

We see, therefore, that the judge had to go far to convict Lula. But his argument is sustained much more by the rhetoric force of the narrative that he constructs than by the probative set of facts that is necessary to convict someone, much less so if we consider the crimes indicated in the accusation that originated the Penal Action n. 5046512-94.2016.4.04.7000/PR, which is currently in question.

The sentence is sustained mostly by an argument of purely rhetoric nature, because it goes beyond the limits of the case and seeks to obtain the support of the public exclusively by the force of persuasion, not of legality. It is an abusive argumentation that does not befit the limits imposed by the Constitutional State,¹⁶⁶ in which the institutions prevail, being more suited to the dynamic of a State of Exception, in which decisionism reigns.

166 Manoel Atienza, in his last work *Filosofía del Derecho y Transformación Social* (Madrid: Trotta, 2017) made an assessment of Philosophy of Law articulating the argumentative perspective with constitutionalism and the theories of social transformation.

Violence and spectacle in the decision against president Lula

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Introduction

The conviction of ex-President Luiz Inácio Lula da Silva by a first instance judge in a criminal case without the necessary, due and appropriate legal basis expressed in the text of the sentence, without crime, besides flagrant illegality is a manifestation of the deep state of violence faced by Brazil, in the current times, with the retraction of rights and the consequent spectacularization of public recognition. Violence that confronts citizens (firstly Lula, a citizen with right of access to justice, and many other Brazilians), against the Brazilian people, against the institutions, against the State, against the Constitution of the Republic, against democracy.

This is analyzed here in the theoretical perspective of the society of the spectacle, originally elaborated by Guy Debord and in the later ideas of Francisco Bosco (2017), associated with the reflections on violence and its sources of passion, brought by the Brazilian thinker Adauto Novaes (2017) and other scholars whose contributions contributed to its debate.

The context and the decision

There is in Brazil a violent process of democratic dismantling and consequent spectacularization of public life, carried out by the media, market agents and institutions whose duty is, paradoxically, to defend democratic institutions. Add to this the absolute absence of the debate about the responsibilities of political subjects, especially the responsibility of the organs of jurisdictional performance and the departure from the ethics of obedience, a presupposition of the first meaning of democracy.

The democratic dismantling is exposed daily in the media, which builds and perpetuates the spectacle and that shields the political actors through the construction of ideal characters, conforming an uncritical public opinion.

In this historical process, marked by actions and antidemocratic judicial and administrative responses contextualizes the condemnation of Lula.

Thus, in a long and confused decision, the judge disregards the objectivity of the decision and shifts the eyes of the court, the reader, the citizen, to other investigations, constructing a spectacular accusatory scenario to make a decision without evidence, without basis of law. The judge, in this action, reveals above all the spectacularization of public life and the use of jurisdiction as an instrument of violence against the jurisdiction, against the constitutional order.

The retract of rights and the spectacle

The constitutionalist Dalmo de Abreu Dallari (2017) points out with great propriety the unconstitutionality of the decision by relying, in his arguments, on the idea here presented of being violent as violating the Constitution and contrary to democracy. The author warns that

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the decision has an unnecessary construction considering that "the accusation specifies the crime committed by the accused." He adds that the judge goes around "citing facts and developing arguments that do not contain any evidence of the practice of a crime that would have been committed by Lula." And without any basis for a legal reasoning comes to the conclusion condemning the accused. The basis for the conviction was not legal and a set of circumstances inevitably leads to the conclusion that the motivation was political, which constitutes a clear unconstitutionality.

"This violence, which is extremely clear in the text of the decision, from the outset thought spectacularly to a society of spectacles, leads to reflection on the role of law and institutions in the construction of everyday violence, and on the participation of individuals who recognize themselves and are recognized in these institutions, and of their passions in propelling a state of war.

The retraction of citizens' rights in the face of political adversities, which exemplarily presents itself in Lula's condemnation, amplifies the potential for spectacular recognition in intersubjective, institutional, and social relations.

Francisco Bosco (2017), in the work "Violence and society of spectacle" affirms that the spectacle is an instance of the social recognition directly associated to the smaller legal recognition of the citizens. According to the author (2017, p. 18) "The weakening of the public spirit means the weakening of the instance of legal recognition (since it is in politics that the processes of extension of rights are defined)".

This promotes the rise of the spectacle as an instance of recognition, obeying a private logic. The media advances, therefore, and the concern of the judge body with the construction of a spectacular scenario, in the condemnatory decision for the Lula case, are evidences of the fragility of the public spirit present there and of the necessity of that body to obtain by other means your own recognition.

The fragility of the public spirit is the fragility of a public ethic and of the responsibilities of the political subjects that are shaping the institutions. Democracy presupposes political responsibilities. These responsibilities are shaped by responsible obedience to ethics and law in the public space it occupies. The political subject responds in his intersubjective and institutional mediations. "To hold the political subject accountable is to remind him that he can never be completely exempt from the system in which he participates and from the social and economic violence that this system produces." (GROS, 2017, p.23) Responsibilities must occupy an important space in democracy, on pain of democracy itself succumbing. This is what happens in contemporary Brazil, after the deposition of the legitimately elected President, Dilma Rousseff - the democratic collapse.

Adauto Novaes, in his book "Passionate Sources of Violence", (2017) selects a set of essays by means of which he seeks to answer "What is the role of passionate violence in the destiny of mankind", remembering that violence is a passionate force. And the author leads thought to reflect with Leopoldo and Silva that violence is part of the human, as a dialectic of creation and destruction, present in social relations, who try to hide it and in politics that tries to rationalize it.

What we see in the field of social relations in Brazil, especially in the reception and exposition of the incriminating process and the decision handed down against the political leader Luiz Inácio Lula da Silva, whether mediatic or juridical, is the attempt to conceal and rationalize the

Destructive violence of Brazilian democracy instrumented by the passionate force of the human. Human behind and in the name of institutions.

There is no denying human passion in the Brazilian scenario of establishing violence against Brazilian democracy in the last two years. And in him the hatred and impetus of destruction that drives the man behind the institutions, notably political. Novaes (2017, p. 10) cites Freud and Einstein's dialogue in "Why War" and the consensus among authors that man carries within himself an instinct of hatred and destruction that mobilizes him. And with Alain (2017, p.12) he states that any passion justifies itself. That the true cause of hatred is hate, which grows in the movement itself. This hatred and impetus of destruction is identifiable in the legal contexts that support the scenario of the deconstruction of democracy in Brazil.

The incessant quest to reach the political leader Lula is driven by impulses of hatred and needs recognition of objective existence of certain social actors that interact with him in public space, in institutional spaces.

Bosco recalls that the reality of human existence is intersubjective. Human passions are there. There is no autonomous reality. "To be humanly real, to be a constitutive part of human reality, to be human as such, the individual must be recognized by others" (BOSCO, 2017, p. 14). Lack of recognition threatens the feeling of self, the security of one's own objective existence. The struggle for recognition presupposes the destruction of the other, not by his death but by his dialectical suppression. In this relationship between subjects, in the search for recognition, there is evidence of an intrinsic need to suppress the politician Lula. Bosco states that "the relation of recognition is constitutively a struggle and potentially violent" in which the one who seeks recognition reacts in such a way as to "actually suppress the other that is the source of his anguish of objective inexistence." (BOSCO, 2017, p. 14).).

In this spectacular society the need to destroy the other for recognition itself is present. This is what happens with Lula.

Final considerations

The condemnatory decision against Luiz Inácio Lula da Silva, in addition to the legal aspects of the unlawfulness imposed by the non-substantiation of the practice of crime, for the many reasons already pointed out by so many jurists, of the unconstitutionality shown by consecrated constitutionalists and that we are not allowed to reproduce in that space, Concerns.

The first of these is how much this exemplary decision indicates the broader and more present day installation of a society of spectacle, presupposing the retraction of legal recognitions and therefore a loosening of rights in the contemporary state. We can conclude with the theoretical reflection presented here that the advance of the mediatic scenarios, which is constructed in the decision with the various narratives not related to the alleged crime that is being judged, and which is also constructed in many other situations to justify questions of law are Directly linked to the denial of adequate legal spaces and to the succumbing to the rule of law.

The second basic concern is that this spectacular society imposes itself through violence. Violence against citizens, against the people, against democratic institutions, against the Federal Constitution and against democracy.

Violence that feeds the destruction of the other, especially of the other politician who, in mirroring of what is around himself, is responsible for the human anguish of some public

subjects who are faced with their own objective inexistence within the processes of recognition.

And everything responds to a private logic in which the public space is subjugated, in a process mobilized by the human passions, without discussions on ethics and responsibilities of the political subject.

The exit from this condition of undemocratic domination depends on the capacity of Brazilian society to become aware of this process and to react against it.

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Who is above the law?

Maria Goretti Nagime Barros Costa*

I left my house one morning and ran into a friend. She told me former President Lula had been arrested, having been caught at the airport trying to flee the country. The story was playing nonstop on the television she said, before asking me how I hadn't heard. "The thief! This will be the end of him."

Arriving home, I saw it had resulted from a judicial subpoena raid filmed live from helicopters following the car, seemingly designed to create the air of an arrest. I learned that forced summons were useful when witnesses refuse to testify voluntarily. This had not been the case. It was a subpoena issued without the prior notification stipulated in Article 260 of the Code of Criminal Procedures. Lula was then interrogated at an airport, a location separate from police facilities.

Lula had been caught by surprise, but the Globo Network hadn't. The live helicopter footage of the police cars driving Lula to the airport, while interrupting regularly scheduled programming, seemed to be a scene out of a Criminal Procedure Show.

The judge who signed the summons, Sérgio Moro, routinely gives interviews on this television network. On one such prime time nationwide broadcast, he even requested the public's support for the investigation. A judge asking for public support?

Judge Moro also released telephone wiretaps of Lula to the network, illegal secret recordings without mention of any crime. They included a conversation of Marisa Letícia, Lula's wife, talking to their son. A gossip columnist might have called this a "scoop," but the story only came to light because of judicial power.

The argument used as justification – as it were – was the very confession of the end of the Rule of Law. He said that the presiding operation should not follow the rules, because this was a special situation. Moro argued that the Lava Jet operation "brings unprecedented problems and requires unprecedented solutions."

And the television network – holder of one of the biggest, if not the biggest, fortunes in the country – treats Moro as its representative, a hero. It produces a narrative in this sense and invests in it heavily in a daily effort to hypnotize its viewers. The target audience, who buy this narrative, are the depoliticized.

Just as in the pre-Nazi era, under the false justification of fighting corruption, fascist expressions and movements are coming out of the sewer, being encouraged and naturalized. State agencies involved in criminal prosecution have clearly been influenced by this wave of fascism.

Judge Sérgio Moro was not treated like a hero because he was a judge, i.e., because he was impartial, but precisely because he was partial, representing political opposition to the defendant. He was a hero for displaying his partiality and openly ignoring the law.

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The covers of two magazines belonging to the network's same media group showed Moro facing off against Lula in a boxing ring. His boxing uniform bore the colors of the political party that opposed that of Lula. Astonished by the nonchalant manner the magazines depicted the situation, the population wondered, "If Moro is in the fight, then who is the referee?"

Like the magazines, the entire population knew that Moro would find Lula guilty, with or without a crime.

Research institutes, such as the Datafolha, included Judge Moro in public opinion surveys, placing him as a presidential candidate competing against Lula.

This evident lack of neutrality, however, was not recognized as a problem, but rather became a point of pride: Moro was the embodiment of the ruling class and a true symbol of a fascist movement. "Overriding the law" is a source of pride for members of the exploiting class as well as those who repeat the maxims taught by this class through mass media hypnosis. Consequently, it is common to hear, "I want him arrested, no matter how or why."

According to research institutes IBOPE and DATAFOLHA, at the end of his two terms as President of the Republic, Lula had an approval rate of over 90%. If convicted after an appeal, he would be ineligible to run once again for the presidency of the Republic.

Lula's fundamental rights are no longer being respected. The political group and institutes that have staged a coup d'état to depose a legitimately elected president are the same ones who want to wage *Lawfare* in order to avert Lula's candidacy.

Their intentions were brought into sharp focus by the scandalous coup government's cuts in social programs. Lula is merely a symbol of a project promoting social inclusion. As an example of its management, the elimination of child slave labor in the Northeast region has provoked the wrath of the class that benefited from slavery.

Lula's sentencing took place the day after passage of labor reforms. One cannot ignore the correlation of the facts and the revanchist content that connects the two events.

Everyone knew that Moro would condemn Lula. Many arbitrary facts were committed to the detriment of Lula, creating news for the Globo television network for over a year. When the sentence arrived, the weakness of the accusations was even more striking.

The ruling said that an apartment had been set aside for Lula and his deceased wife. In Brazil there is a lot of bureaucracy before a property can become recognized. One must pay high notary fees and wait for procedures finally to run their course in order to receive a deed, with the necessary registration of the property in the General Property Registry (*Registro Geral de Imóveis*). Much less than the owner, Lula never even had direct or indirect ownership of the property. The property was always in the name of OAS. None of the acts stated in the sentence as "proof of ownership" - visits to the property, willingness to acquire it, reservation of property for future acquisition - even if proved, would serve as proof of property if any citizen wanted to prove possession of an asset before a court of law.

That is why the sentence became a legal joke throughout the country. People asked how a property could be transferred based only on a verbal agreement, acquired merely by visiting it or planning a future purchase, and if money could be laundered without money, etc.

In law school we used to hear jokes about vain, grandstanding judges, judges who decide first and only subsequently work to justify their decision. At the time, however, everything seemed far removed from me or at least well hidden. I never met any legal decision maker who, while

judging a case, would think of giving an interview and thanking the population for its support, would leak to a television network secret wiretap recordings – whose contents revealed no crime – of a person-of-interest’s wife talking to her son. I had of course seen illegal procedures, but now it has gotten to the point that a judge does not even bother to appear impartial. On the contrary, he seems proud of being a symbol of opposition to a person he judges and to have his measures avoid prescribed rules, all while in the spotlight of a nationwide stage; this has become the utter demoralization of the judiciary.

Today, the PSDB, a party opposed to Lula and protagonist of the coup d'état of 2016, posted the results of an opinion poll on its website. The question was "The conviction of former President Lula by Judge Sérgio Moro, in your opinion, shows: ___" Respondents had three possible answers. "1 - That there is no one above the law in Brazil", "2 - That justice was done" and "3 - That it was a political decision."

After an hour on the air, over 94% had responded "it was a political decision." In two hours of airing, the website removed the survey, posting in its place the message, "Sorry, but the poll is no longer available."

For a leader historically recognized for implementing social inclusion and anti-hunger projects to be convicted criminally without evidence in order to sideline him from presidential elections has three visible consequences: increased public discredit of the Judiciary, the separation of law, justice, and society in Brazil, and demonstrating the frailty of the democratic rule of law.

Lula's case: A country on the fringes of the law

María José Fariñas*

For the last three years Brazil has been undergoing a sizable regression in the social, economic, legal and political aspects of its public life. This regression has given rise to a dangerous systemic crisis for the country as a whole. The latest manifestation of this crisis can be found in the sentence handed down by Sérgio Moro against the ex Brazilian President Luiz Inácio Lula da Silva (2003-2010), in the adjudication of the corruption case against him brought by Public Ministry.

It is to be noted that said sentence was handed down one day after a deep “reform” in the labor laws was approved by the Brazilian Senate. This reform significantly curtails workers' rights, coupled with the reversal of social welfare policies that had been enacted by the legislature during Lula da Silva' s presidential tenure.

The format, the content and the context of and surrounding this case-see -including the bias media coverage- point to a “criminal law of author” wherein President Lula himself, and not the facts, is the object of the judgment and of the sentence. Internationally it is thought that we are witnessing an “ad personam” judgment. This state of affairs is further illustrated by the judicial handling of the cases for corruption brought against Aécio Neves and President Michel Temer, both of whom are under heavy STF' s protection. In both cases the amount at issue is much higher and social level.

The proceeding again Lula seem to show a lack or sufficient evidence for a judgment against him; it is to be noted that the Guarujá triplex apartment, upon which the judgment for corruption against Lula da Silva is based, does not appear among the confiscated properties. The intent of this judgment is not to sentence Lula to a jail term; this would make him a “martyr” in the eyes of a large percentage of Brazilian citizens, and in turn would further aggravate the social fissures within Brazilian society. The intent is to keep him from a candidacy in the upcoming presidential elections of 2018.

Having succeeded, a year ago, in impeaching President Dilma Rousseff -and not exactly on the basis of corruption- it is now time to sentence President Lula da Silva in order to definitely obliterate his political career and his favorable electoral options. The obvious aim of these steps is the weakening of the PT and the easing of the path of the *neo liberal* structural reforms already undertaken by the Temer government.

In my opinion, Brazil is suffering from “constitutional anomie”, as the Argentinian “jusfilosofo” Carlos Santiago Nino sets forth in his book *Un país al margen de la ley (A Country on the Fringes of the Law)*. Brazil is, becoming “a country outside of the law”; a country where a culture of non-fulfilment of promises, and impunity prevails. A country where, once power and money are achieved, anything goes; a country full of consent corrupt practices, administrative favoritism, arbitrariness, elitism; of political defense of the oligarchy, of corporate and private interests, and with serious dysfunctions in democratic political representation. All of the above having been further aggravated by the revelation of corruption in Petrobras.

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Under these conditions, the Rule of Law and democracy break down; when the Rule of Law fails, political power devolves into either authoritarianism or anarchy, or a State of Exception; when democracy fails we have societal exclusion, socioeconomic inequality and injustice.

Judge Moro' s judgment against Lula da Silva, as well as recent actions undertaken by the STF and the Brazilian Parliament give rise to considerable concern. On one hand we see a general lack of regard and observance of legal rules, and we especially note the failure of compliance with constitutional norms-given their direct normative effectiveness in favor of private, concrete subjects and interests; on the other, we have ignorance of the purpose of legal rules, which should safeguard the fulfillment of the expectations and rights of the majority.

The citizenry understands the above as lack of “constitutional loyalty” by both public and private power structures. They see these power structures as using the constitutional rules for a purpose different to the one for which they were created. To put it as Gabriel Garcia Marquez would say it: “to circumvent the laws without violating them, or/and to violate them with impunity”. Ultimately the citizenry comes to distrust, and becomes frustrated and disaffected by standards and institutions that should respect and protect the rights of all citizens, that should reinforce these very rights, and therefore should shield both citizens and rights against what Luigi Ferrajolli calls “the wild powers”, referring to both the arcane and the new powers structures arising from the neo-con globalization.

In addition, all is shrouded in perverted calls for political honesty and for fighting corruption, while not caring for eliminating their causes and sources, but only for justifying looked for and per-ordained results. The causes are as follows: the Brazilian political and economic systems are in ruins, they are at their nadir. Brazil is undergoing a serious constitutional crisis: the democratic institution have been co-opted by the private interests of large economic and financial power structures, popular will has been hijacked, and fundamental rights and freedoms are being curtailed. At the same time the major social problems persists because they are caused by a political and economic systems that systematically produce all kinds of inequities. The problem is not one only caused by the lack of personal ethics, the problem lays in a system that supports corruption.

It is not at all clear that the goals are equality, societal inclusion, civil rights, decent work, and the national interest; no one seems to want to seriously undertake to fight against economic crimes nor against political corruption and extortion. Because of these, Brazil is unable to overcome its social and political underdevelopment. Brazil will continue to operate under a constitutional system of laws that live on paper only. A country and a system that allows the use of the Lula da Silva as the “scapegoat” for a corrupt, plutocratic system that is now able to act without any counterweights. It has fallen into the snail’s strategy and corrupts are still unpunished. Brazil does not conform to a Rule of Law model, nor to a democratic state that upholds its laws and its constitution. We must remember that institutions not only gain or lose prestige according to what they do, but also for what is done to them.

The already foreseen trial of President Lula.

Martonio Mont'Alverne Barreto Lima*

Without any surprise whatsoever, the decision of Judge Sérgio Moro, Chief of 13th Federal Court in Paraná, came public on July 12th, 2017, about the case involving former president Luiz Inácio Lula da Silva. He was sentenced to nine and a half years, aside from the interdiction for any public position or office during twice the amount of the sentence, according to line II, art. 7^o of the Law number 9.613/1998: “objectively, former president Luiz Inácio Lula da Silva and his associate Paulo Tarciso Okamoto, were accused by the Federal Public Prosecution of practicing corruption and money laundering crimes and in the sentence the origin or not of the accusation will be examined, not more, not less”, paragraph 56 of the decision. An eventual impartiality of the judge, constantly alleged by the defendant’s defense, is defined as “mere diversionism”, according to paragraph 57 (also paragraphs 65, 138, 148) of the text of the sentence. On July 16, the former President’s defense put into the spotlight embargo claim offerings. On July 19, the “order/decision” from the same Judge became public with the unfounded embargos¹⁶⁷.

Why affirm that this sentence caused no surprise? Are there severe negative consequences to what is still left of the Brazilian democracy with such statement? Could the sentence be exculpatory? I will soon answer and discuss those questions.

The judge Sérgio Moro had already written in 2004, what would be one of the main validation grounds of his decisions, especially when the penalty is not favorable to the “powerful” of the economy and politics. In his writing “Considerations about Operation *mani pulite*”¹⁶⁸, Sérgio Moro did not leave any doubt: public opinion should be involved in decisive manner in cases of prominent political processes:

An independent Judiciary, from both external and internal pressures, is the necessary condition to support lawsuits of the kind. However, public opinion, as the Italian example shows, is also essential for the success of the lawsuit. (...) Maybe the most important lesson of all the episode is that the lawsuit against corruption is only effective with the support of democracy. It is democracy which defines the boundaries and the possibilities of a lawsuit. If democracy can count on public opinion, it has the conditions to advance and present reliable results. If not, there will be no success¹⁶⁹.

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167The sentence has grammatical and typing mistakes: “Petrorás” (paragraph 189, page 34/218). The knowledge of the author of the sentence is not denied: he is a Doctor in Law by the UFPR and a professor in the same university. His mistakes are not worthy mentioning just by being mistakes, which we can all make. They should be mentioned due to the rush for publishing the decision in such a complex case and of great impact in the Brazilian institutional life, as the Judge himself recognizes. (paragraphs 960, 961, pages 218/218)

168Revista do Centro de Estudos Judiciários do Conselho da Justiça Federal, nº 26, de julho/setembro de 2004, pp. 56-62.

169Id. lb., pp. 57/61. Original: “Um Judiciário independente, tanto de pressões externas como internas, é condição necessária para suportar ações judiciais da espécie. Entretanto, a opinião pública, como ilustra o exemplo italiano, é também essencial para o êxito da ação judicial. (...) Talvez a lição mais importante de todo o episódio seja a de que a ação judicial contra a corrupção só se mostra eficaz com o apoio da democracia. É esta quem define os limites e as possibilidades da ação judicial. Enquanto ela contar com o apoio da opinião pública, tem condições de avançar e apresentar bons resultados. Se isso não ocorrer, dificilmente encontrará êxito”

It doesn't seem problematic to conclude what is the author's perception about law and its enforcement: the strength of the law application, even in a democracy, depends more on public opinion than on the maturity of law institutions. That one will "define" this another one. I will not have the necessary space here to debate the partiality of mass media in Brazil and throughout the world, especially in current times. Equally, it shouldn't be presumed that the Judge conducting the Lava Jato Operation does not have discernment about means of communication and their links to economic and political interests, aside from their own and even their role in modern society. What must be registered is that Sérgio Moro does not mention in a single line of his reflection the possibility of partiality in mass media.

In other words: justice will only be made with intense and permanent support of mass media. Since their support to legal actions contrary to their interests is not even imaginable, it is reasonable to conceive that there will be at least a convergence of interest between the Judiciary Branch, which performs the task of suing and judging, and the means of communication, which permanently and intensively inform public opinion of these lawsuits and trials by the judiciary. Also absent in Sérgio Moro's reflection is the comparison of the Italian case, held as a paradigm, and the economic concentration in mass media groups in Brazil. In Italy, there is diversity of information; the Brazilian example is precisely the opposite.

Sérgio Moro did not leave any doubt regarding the side he chose. In his search for consolidating his exposed idea in 2004, he attended several events and received many awards sponsored by mass media openly unfavorable to the *Partido dos Trabalhadores* (PT, the Worker's Party) and former Presidents Lula and Dilma Rousseff as well as awards from their main political adversaries such as the current mayor of São Paulo, João Doria; he determined former president Lula's unnecessary coercive conduction and leaked phone taps – to *Rede Globo* – where the then President, Dilma Rousseff was heard, encroaching the competence of the Supreme Federal Court; Moro was photographed with the main opposition leadership of the PT and their governments. These are just some of the facts which occurred and there are several of them; however, they are primary sources for researchers with a more space for writing. They are all available in websites throughout the world¹⁷⁰.

There is an objective element that enables judge Moro's partiality. He himself apologized to Minister Teori Zavaski when the telephone conversation between former President Lula and the then President Dilma Rousseff³ was improperly released to *Rede Globo*¹⁷¹. Even though it is known that the apology is not constituted in any procedural figure to dissipate punishment for magistrate practice infringement, the decision of the Regional Federal Court of the 4th Region caused surprised when Moro's attitude was appealed in that Court. The Reporting's words are clear, dubiousness is not allowed when decided by the non-application of any penalty against Sérgio Moro:

It is known that the lawsuits and criminal investigations from the so called Lava-Jato Operation, under the represented magistrate, are a single and exceptional case in Brazilian law. Therefore, with the gathering of the telephone communication secrecy of the people under investigation in the operation, served to preserve it of successive and notorious

170The pleadings of former president Lula's defense, with a description of facts and juridical argument are available: <http://www.averdadedelula.com.br/pt>

171In paragraph 126, p. 24/218, Judge Sérgio Moro recognizes that he "may have made a mistake" regarding his decision against the secrecy of the recorded telephone conversations between President and Former President of Republic.

obstruction attempts, according to them, guaranteeing the future criminal law application, it is correct to understand that the secrecy of the telephone communications (Constitution, art.5º, XII) can, in exceptional cases, be supplanted by the general interest in justice administration and in the criminal law application. (...) So it seems that the magistrate's view cannot be censored (...) ¹⁷².

Until the present moment Judge Moro's understanding was not reviewed, and was confirmed by the Federal Regional Court of the 4th Region. Amongst all facts there is also the failure of the Brazilian democracy and its Federal Constitution. Our democracy has always had great difficulties in dealing with republicanism in the scope of the Judiciary Branch. The feeling of casts, filled with special privileges, and with a clan politic view has characterized a society of slavery tradition, always with the need of being served. Even conservative views on Brazil can see such reality ³.

How can we explain a judge who feels free to commit illegal acts and widely release this without any repression? It is only the certainty of impunity regarding his actions and the cronyism of superior instances finally captured by "public opinion" that explain the survival of such serious outrages to democracy and the Constitution.

These precedents have made possible the prediction of the decision which condemned former President Lula. It was an announced outcome. There is the sadistic celebration of those contrary to the former President and who do not get tired of saying that "Lula should be in jail" without even knowing what crime he committed and which are the evidences to that crime. Therefore, I will answer the question asked in the beginning of this article: any person knew, since the beginning of this process, that Lula would be condemned. This perception was widely spread in almost all means of communication, almost every day and even more frequently after the presentation of final allegations of the prosecution and the defense. It is natural that in an institutional environment, even if regulated by a Constitution and laws which possess effectiveness and validity, but which allows someone who enters legal action to be already condemned, cannot be characterized as a democratic rule of law. The lack of possibility of a fair trial, without previous condemnation, made by a partial judge, as it is this case which is being analyzed, only weakens the Constitution, laws and democracy.

What the sentence against the former president means is not the procedural defeat which strikes him. The sentence is the final defeat of a new constitutional order that was wanted in our country. It was a modern, leading and interventionist Constitution that offered the necessary mechanisms for Brazil to be less unequal and more generous with its people. After the Constitutional Amendment nº 95/2016, which suspended the existing Constitution and with Lula's sentence, there is not a Constitution anymore, and we no longer have a democracy with a partial Judiciary Power that does not correct itself when needed.

The reactionaries really do have something to celebrate. But those who fought for this Constitution, who gave their lives for democracy, for the independence of powers – especially the Judiciary and Public Ministry – now must watch how the powers of the State can be used to eliminate adversaries. Maybe the mistake came from the progressive Brazilian sectors,

172P.A. CORTE ESPECIAL Nº 0003021-32.2016.4.04.8000/RS. https://gedpro2.trf4.jus.br/form_imprimir.html.asp?codDocumento=8527569, acesso em 30.09.2016, p. 4-5 of 5.

blinded enough to believe that in Brazil, the national “elite” could reach a reasonable civilized level even with a strong model of market economy.

However, those who perpetrated the 2016 coup against Dilma Rousseff as well as the ones who supported them, will also be defeated. What is striking Lula now and the precedent that was opened with the removal of a President hits the target right next to the people who defended the coup once the Rubicon River was crossed. I am not naïve to think that the power of means of communication, in alliance with a judiciary bureaucracy and with an economically dependent elite have learned that what strikes Lula, Dilma and their party also strikes them, as we can see in the cases of Senator Aécio Neves and President Michel Temer. It would be like demanding from those sectors some kind of civilization process that they are incapable of seeing. We do not have in Brazil an elite that appreciates and respects history and its people: it's the exact opposite, they hate the mestizo people that they have to live with. What we have left for Brazil is a country walking with its own legs, with its people. Without this, we will never stop being a country of the future.

The conviction of Lula: a promise fulfilled

Nasser Ahmad Allan*

The conviction in the trial court of the former president Luiz Inácio Lula da Silva did not surprise the legal community. Not even the majority of the Brazilian population. Everyone supposed it would happen.

Not because the investigation of the process has wiped out any controversy over the existence of criminal practice by the former president, but because of what was previously announced: his conviction. Regardless of responsibility, materiality and pre-trial motions, we all knew that the criminal judge would sentence the former president. Something that he promised and fulfilled.

The result of the sentence had been announced even before the Federal Prosecution filed the criminal complaint. Suffice it to recall that on March 16, 2016, the same Judge, Sérgio Moro, illegally lifted secrecy over telephone conversations among the former President Lula and his family members, one of them being held between him and the then president Dilma Rousseff.

The judge took the risk. He broke the law.

Days later, in trying to explain himself formally to the Federal Supreme Court, he showed the partiality, which he always rejected, with which he instructed and judged the criminal case against former President Lula. The judge said in his written statement that despite “the intercepted dialogue [between Dilma and Lula] being relevant in the legal-criminal perspective for the former president Luiz Inácio Lula da Silva, since it indicates the purpose of influencing, intimidating or obstructing justice, with regard to the honorable President of the Republic, there is no indication of it being based on this purpose” (emphasis added). He once again accused former President Lula of criminal conduct in asserting that lifting the secrecy of the telephone conversation recordings was intended to “prevent further conduct by the former president to obstruct justice, unduly influence magistrates or intimidate those responsible for the procedures”¹⁷³.

It should be noted that there is nothing in the content of the widely publicized conversations by the Brazilian press that confirms the statements of the aforementioned judge or indicate attempts by the former president to obstruct the ongoing investigation or to intimidate members of the public prosecutor's office or the judiciary.

After the publication of the recordings obtained through these recordings, we witnessed a succession of events that culminated in the coup d'état, with the removal, first temporary and then definitive, of an elected president, without having committed a crime of responsibility.

The initial acts of this plot resulted in the political use of the recordings by the conservative press, massifying the idea that the appointment of former President Lula to the Minister-Chief of Staff had occurred to give him a “privileged forum”¹⁷⁴. Preliminary Injunctions granted by

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173 Excerpted from: Sérgio Moro apologizes for 'polemics' on Lula and Dilma recordings. El País. São Paulo, 31. Mar. 2016. Available at: https://brasil.elpais.com/brasil/2016/03/30/politica/1459296826_155962.html, accessed on 23. Jul. 2017 (in Portuguese)

174 T.N. - Under Brazilian law, government ministers can be tried only in the “privileged forum” of the Supreme Court.

first instance judges, in a flagrant usurpation of the Supreme Court jurisdiction, denied the validity of the appointment, made by a President of the Republic, of a citizen who, at that time, was not even charged with a crime.

Shortly afterwards, the political representative of the opposition in the Supreme Court granted an injunction suspending the appointment of former president Lula as Minister of State.

It should not be forgotten that in any democratic regime, where the law prevails, a member of the judiciary is also subject to the laws and in committing some illegality should be punished administratively and criminally for his acts, which so far did not occur. On the contrary, the Federal Regional Court of the 4th Region, analyzing the judge's conduct, declared the exceptionality of the case. For exceptional situations, exceptional decisions are legitimate, was practically what they said. Likewise, some of the defenders of the aforementioned judge, adopting the logic of Machiavellian utilitarianism that the ends justify the means, have argued that the illicitness practiced by him decisively contributed to the removal of President Dilma and should therefore be forgiven.

In spite of vehemently denying any political-partisan purpose in the disclosure of the recordings, this judge was quite elucidative in the order he made, asserting that "the lifting [of the secrecy] will provide (...) healthy public scrutiny (...). Democracy in a free society requires that the governed know what rulers do, even when they seek to act protected by the shadows"¹⁷⁵ (emphasized). It seems compelling to conclude that he accredited then President Dilma and former President Lula the practice of actions under the protection of "the shadows", denoting his appreciation about the content of the conversations, heavily overreaching the role assigned to the magistrate, acting as a political actor.

The disclosure of the recordings with the conversations of former President Lula was, in fact, an essential piece for the consolidation of the coup in 2016. I am not sure if at that time the said judge was aware of the dimension of his actions. Taking into consideration his public declarations and academic interventions, he does not appear to be someone with such intelligence and analytical capacity. However, something seems unquestionable: he intended to prevent the obtainment of privileged forum by former President Lula, which would be achieved with the appointment as Minister of State. He intended to be the judge responsible for the investigation and judgment of the future criminal charges against former President Lula.

Nevertheless, why? Why take such a difficult task? The inglorious task of sentencing someone admired by the majority of the country, although displeasing certain segments, among them the caste to which the judge belongs. Perhaps, for vanity, some will say. The answer that sounds most plausible to me, however, is that he intended to guarantee his conviction. One could not run the risk of transferring jurisdiction to the Federal Supreme Court and, consequently, to the Attorney General. It was necessary that the investigation remained in Curitiba. That is exactly what happened.

The disclosure of the recordings took place on March 16, 2016. Almost six months later, on September 14, the Federal Prosecution filed the first complaint against the former president. In a press conference held almost two weeks before the municipal elections, including a power

175 Ibid.

point exhibition, the prosecutors' accusations that the former president was the head of a criminal organization were presented. A fact, incidentally, that was not subject of any complaint, serving only to tarnish his image and honor and publicly attacking the reputation of the former president.

Just over a week later, on September 22, the arrest of Guido Mantega, the former finance minister of the Lula and Dilma governments, was ordered, which was not carried out only because he had his wife hospitalized for a cancer treatment. However, on September 26, in the week in which the municipal elections were to be held, at the request of the Federal Prosecution, the judge ordered the arrest of former minister Antonio Palocci.

Both the complaint against former President Lula and the detention of two of his ex-ministers just before the elections have severely damaged the image of the Workers' Party, which has significantly damaged the performance of their candidates in the electoral process. It seems obvious to conclude that, in relation to these facts, the planning of the actions of the representatives of the Public Prosecutor's Office and the judge was linked to the electoral calendar. Certainly not by chance.

I do not intend here to address the arbitrariness practiced by the judge, denounced by the defense of the former president, during the procedural instruction. Nor will I stick myself to the grounds for it, adopted in the sentence to convict former President Lula. In this book, there will be other authors who will analyze this with greater correctness and resourcefulness, dedicating themselves to the technical and juridical aspects of the case, such as the prescription of the alleged crimes practiced, the conviction based on some circumstantial evidence colliding with the rest of the probative set, etc.

I will restrict myself to the attempt to make explicit that former President Lula has always been convicted. Even before the complaint was filed, he was already convicted. Since the beginning of Operation "Lava-jato" he has been, and still is, the central target of the Unit of Curitiba (composed of members of the Federal Police, the Attorney General's Office and, finally, the 13th Federal Court of Curitiba, which is responsible for the criminal cases resulting from the operation). The investigation, the charges, the instruction of the criminal case and finally, the sentence, characterize a process of political persecution, with clear intention to tarnish the political capital of the former President Lula and his political party and in the last resort, to make it impossible for him to apply for a new presidential mandate, which may occur if the judgment is held in second instance, with the proviso that the trial should happen early enough to prevent him from registering the candidacy.

Whoever it matters, that is, to whom the condemnation of former President Lula has been promised, and what other interests are hidden in these proceedings are issues that have aroused much controversy, but I think it would be difficult to face them without moving ourselves on the sandy terrain of speculation. I believe, however, that the next acts will indicate if there are more involved in this plot, if the calendar of the Federal Regional Court of the 4th Region will also be connected directly to the electoral, or if there are still traces of the Democratic State of Law and the guarantees provided in the constitutional text of 1988. That is yet to be seen.

Using and abusing the compulsory process of a witness

Otávio Pinto e Silva*

The publication of the judgment entered by Judge Sérgio Moro in the trial of the criminal prosecution brought against former President Luiz Inácio Lula da Silva has aroused controversy in the legal community, given the grounds that were used to support the conviction of the defendant for the crimes of graft and money laundering in the so-called “Car Wash Investigation.”

In this paper, I intend to focus my thoughts on a specific point: the views exposed in the said judgment on the instrument of compulsory process of a witness, which is provided in the Brazilian legal system to require a citizen to testify before a judge, regardless of his or her willingness to do so.

As the Brazilian State established the monopoly of criminal prosecution by providing in the Constitution that *“there is no crime if there is no prior law defining it, nor any punishment if there is no legal imposition”* (article 5, paragraph XXXIX), it has to fulfill its duty, through the Judicial Branch, of assessing the different situations of life that involve the practice of offenses and, when called upon, it should take only the appropriate actions (provided for in the legislation) to solve the legal issues brought to its attention.

This calls for a discussion of the principle of due process of law as a political commitment of the State with its citizens, as set out in article 5, paragraph LIV of the Constitution: *“no one shall be deprived of their liberty or property without the due process of law.”*

Carlos Roberto Siqueira Castro explains that the principle of the due process of law is one of the oldest doctrines of legal science that emerged in the Middle Ages, traveled over the centuries and secured its presence in contemporary law with renewed strength. In the constitutional law of the United States of America, the due process of law has undergone profound changes in the court system, which eventually brought about some new features to the relationship of the State with individuals and society, reflecting the view of human beings and the world about freedom and social solidarity in the 21st century. The history of the so-called due process of law shows how it has shifted from a mere procedural guarantee to a substantive principle that limits the merits of state decisions¹⁷⁶.

These views are of the utmost importance, as the prosecution must be perfectly in keeping with the Constitution, which, after all, governs the laws that will be enforced in the resolution of legal disputes and in the punishment of those who commit offenses.

In this regard, Ada Pellegrini Grinover puts it: Procedural law does not stand apart from the Constitution: much more than a mere technical instrument, the legal procedure is an ethical instrument for enforcing legal guarantees. The procedural systems are built on the political and social principles laid down in the Constitution, making up an undeniable parallel line between the constitutional system and the procedural discipline.¹⁷⁷

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176 CASTRO, Carlos Roberto Siqueira. O devido processo legal e os princípios da razoabilidade e da proporcionalidade. Rio de Janeiro: Forense, 2010, p. 5/26

177 GRINOVER, Ada Pellegrini. Os Princípios Constitucionais e o Código de Processo Civil. São Paulo: José Bushatsky Editor, 1975, p. VII.

The principle of the due process of law as included in the Constitution has the meaning of a fundamental right of any citizen. It is not only the duty of a judge to ensure compliance with the procedural rules of law: it is a guarantee provided to the citizens, along with other fundamental rights set out in the Constitution.

As Dalmo de Abreu Dallari puts it, the Constitution is the people's declaration of political will. It solemnly expresses what one wishes for the organization and life in society.¹⁷⁸

It can be said, then, quoting Norberto Bobbio, that the provisions set forth in article 5, paragraph LIV of our Constitution can be classified as "adamant," that is, they determine a certain action that must be taken. It differs from the "hypothetical" legal provisions (those determining a certain action that should only be taken under some specific circumstances). It is adamant because it prescribes an action to be taken even if any failure to take it does not entail any punishment: abiding by the legal rule does not depend on any condition, at least as for the individual to whom the legal rule is directed (the judge).¹⁷⁹

This is one of the difficulties of Law: dealing with vague or indeterminate concepts with a view to assigning some concreteness to them. According to Karl Olivecrona, the purpose of all legal provisions, court decisions, contracts and other legal acts is to direct the conduct of human beings. Therefore, the legal language is a means to this end; it is essential for social control and communication. Words can be filled with emotion or volition, they can work as signification or realization; but the purpose of legal language is that of giving directions.¹⁸⁰

In items 67 to 77 of his judgement, Judge Sérgio Moro presents the arguments to support the validity of the compulsory process authorized by him to take former President Lula to court, although he acknowledges the "legal controversies" of adopting this compulsory process without previously subpoenaing the citizen to be taken to court.

He argues that such procedure was necessary because some wire-tapped conversations *"suggested that the former President and his associates would take action to disrupt the court work, which could put police agents and even third parties at risk."*

He also said that, eventually, time told that such measure was required, as there was a riot at the Congonhas airport, where the former President was taken by compulsory process to testify, *"as political activists were called to the airport to put pressure on law enforcement agents."*

It is true that the doctrine validates the use of compulsory process with the legal nature of a provisional custodial sentence that can be ruled against the victim (in crimes investigated by criminal prosecution), witnesses, and even against the person under investigation or prosecution.

It turns out that the justifications laid down in the judgment are not consistent with the constitutional guarantee of the due process of law, as the Judge himself acknowledges that no subpoena has been served and not obeyed by the former President.

178 DALLARI, Dalmo de Abreu. *Constituição e Constituinte*. São Paulo: Saraiva, 1982, p. 21/30

179 BOBBIO, Norberto. *Teoria della norma giuridica*. Turim: G. Giappichelli Editore, 1958, p. 240/241

180 OLIVECRONA, Karl. *Lenguaje jurídico y realidad*. Buenos Aires: Centro Editor de America Latina, 1968, p. 43/59

In this regard, Article 8 of the Inter-American Convention on Human Rights (also known as the Pact of San José, Costa Rica) establishes, concerning the so-called judicial guarantees, that *“every person has the right to a hearing, with **due guarantees** and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”*¹⁸¹

If it was necessary to seek clarification on factual matters that were under investigation or substantiation, it would have sufficed to just serve a subpoena upon the individual with a set date and time for him to appear and testify before the judge. The compulsory process of a witness can only be adopted in cases of absence or unreasonable failure to obey a subpoena, since it is one of the judicial guarantees given by the Brazilian State to its citizens (and made explicit before the entire international community).

To sum it up, the reasoning laid down in the judgment is not convincing with regards to the indispensability of the compulsory process of the witness. The act of force, broadly covered by the media, was completely unnecessary and improper.

After all, the alleged necessity to ensure security to law enforcement agents can never be placed above the individual guarantees of the citizens without hurting the principle of the due process of law.

181 Decree No. 678, dated November 6, 1992. Available at http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/anexo/and678-92.pdf retrieved on July 20, 2017).

Judiciary activism in Lula's sentence

Paulo Petri*
Fabiano Machado da Rosa**

In the 2015 "The time has come" article¹⁸² published in the Spanish newspaper *El País*, former President Fernando Henrique Cardoso analyzed the Brazilian political scenario contending that in the current stage of our history no room was left for the military to act as promoters of changes necessary for the country, a responsibility now transferred to the justice system – or, in Cardoso's words, "there must not be impossible obstacles for the judge, the prosecutors, the police and the media". More than two years later, the FHC interview remains current and one must wonder if the former president's assertion was a randomly made statement or whether it is part of politically related guidelines observed in today's political-judicial scenario in Brazil.

Former President Fernando Henrique Cardoso certainly did not refer to the phenomenon of the judicialization of politics, in which political agents, notably the Executive and Legislative Powers, transfer their decision-making process to the Judiciary, giving it inappropriate protagonism. FHC's apparent surrender cannot be seen as recognizing judicial protagonism in today's scenario, since it ignores the social tension of this movement. In fact, popular demand for strengthening of democratic institutions and social rights is still in place; however, such demand is counterbalanced by crises in these institutions, as a result of implementing right-suppressing laws devoid of popular interests, passed to preserve the political and economic powers in force – a fact noticeable in the intensity with which reforms are approved and processed in the National Congress. Depleted of political and social meaning, such institutions have increased exponentially, along with the power of the judiciary branch in society, and in addition to the weakening legitimacy of representative spaces, such as in citizenship achievement. This representativeness crisis is discussed in detail by former Minister Tarso Genro's essay *The Foundations of the Rule of Law and the Crisis of Representation*, published in Book 1 of the New Paradigms Institute – INP. This is how the judicialization of rights, politics and social processes comes into play. We are not overlooking this phenomenon – quite the opposite, since it becomes stronger with each day that goes by; however, what FHC advocates, and what we are now experiencing, is another element of this phenomenon, that is, *judicial activism*.

To discuss this modality, we refer to Luís Roberto Barroso's words, as the Minister of the Federal Supreme Court – STF, in his *Judicialization, Judicial Activism and Democratic Legality* article¹⁸³: "judicial activism is an attitude, it means choosing a specific and proactive way to interpret the Constitution, thus expanding its meaning and scope. It is usually installed in situations of Legislative Power retraction, of a certain displacement between the political class and the civil society, preventing social demands to be effectively met". It is precisely in this vacuum that the judicial apparatus of the State is put to practice. In the name of an alleged

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Translated by: Rane Souza

182 http://brasil.elpais.com/brasil/2015/02/01/opinion/1422793512_769635.html. Accessed on Feb 2, 2015.

183 <http://www.oab.org.br/editora/revista/users/revista/1235066670174218181901.pdf>. Accessed on Jul 18, 2016.

fight against corruption, rights are subverted, basic principles of law such as the presumption of innocence, ample defense; right to contest and due process of law are relegated as second rate, conveniently manipulated for inquisitorial flare or as a result of the yellow-green voices in demonstrations or of movements financed by large business entities.

However, the heralds of morality from Curitiba have given a new face to the worldwide-studied phenomenon of judicial activism; as such judicial bureaucracy always wants more, using the media spotlight as part of its strategic arsenal. From the outset of this process, police actions have been set up with the mainstream press – what would be the point of not exposing the accused to public execration? All phases of the operations have been followed up by extensive and detailed collective interviews, in which it has become common for prosecutors and chiefs of police to discuss "the crimes committed", solemnly ignoring the guiding principles of law described above, thus behaving as true inquisitors by ignoring the fact that it is the Public Prosecutor's Office responsibility to act as *custus legis*. It is not uncommon to notice some of these public agents rejoicing in the face of intense street demonstrations, which have now embarrassingly disappeared, thus crossing the fine line between law and politics. There has even been a judge who, after a public demonstration, issued a statement saying he felt "touched by this support". Whenever requested to speak (with special predilection for international statements), this judge makes a series of considerations of political nature, knowing that (or at least he should have known) judges do not always serve the will of the majority, neither should they base votes and positions on it, especially because such professionals must rule in *counter-majority* ways whenever necessary. The time when "a judge only speaks on the record" is most definitely gone.

Therefore, seeing that judicial activism derives from a judge's proactive position in interpreting the Constitution, we see that the rights inscribed in our 1988 Constitution are being suppressed, as the aforementioned facts lead us to believe that legal devices from a Constitution different from our own now seem to be in place in Brazil.

The criminal action conducted by 13th Court judge, in Curitiba, which resulted in the conviction of former President Lula, is a well-rounded sample that pedagogically explains how to apply judicial activism. It is astonishing that a criminal proceeding has been instituted only to justify the preliminary will of the accuser, in which a judge is deliberately added to such purpose. The process begins with a previously established result – and there goes the presumption of innocence, with the interrogation portrayed by the press as a confrontation between defendant and judge. Would this not be the instruction stage?

In a reversal of procedural logic, the technical defense is forced to produce evidence of the accused's innocence, regarded by the judge responsible for chairing the process as an obstacle to his pre-established decision, frighteningly made clear in the sentence. Ample defense, right to contest and due legal process are therefore replaced by permanent attempts to restrict professional legal practice in hearings, regular motion denials for production of evidence, use of different parameters in the analysis of testimonial evidence, relativization of documentary evidence, among other measures that favor a criminal procedure of exception.

With the sentence, the only surprise is the tranquility with which the judge ignores the evidence produced in the process, lists subjectivities as a method of analysis and adopts an embarrassing posture of personal justification to apply his decision. Former President Lula will meet him again and, unfortunately, the same prescription will be used. No different outcome is to be expected, however startling it may seem (and is) for the agents of law and for a

democratic society. It will be up to higher authorities to re-establish the law – and we must be vigilant.

The process' unconstitutionality condemning Lula and Brazil to imprisonment

Pedro Pulzatto Peruzzo*

Tiago Resende Botelho**

Condemning popular leaders isn't a new feature in the history of humankind. Judicial partiality and injustice is more recurrent than one could imagine. After all, the occidental juridic tradition finds in the Law the legitimacy of structural forms of oppression, at best to offer a few crumbs to the oppressed.

We also know that images of judges and prosecutors are more tied to the *Iustitia* symbolic image (the God with blinkered eyes) than with the Greek God *Diké* (with opened eyes). Besides admitting that Justice ignores judges and prosecutors living full of privileges and additional stipends, blindfold prevents the understanding that literate men and women are capable of transfiguring the law and pushing lives to indignity.

Revisiting the past is the most viable way for concluding that legal injustices are frequently being practiced. Denouncing them is an ethical duty. If in the past the state was capable of sentencing unjustly and illegally political leaders as Tiradentes, Olga Benário, Mandela e Gandhi, why the practice would change currently? Which are the guarantees that political persecutions against popular leaders are past events?

Under the rule of law, the Constitution should be the limit of state discretion and the guarantee that no human being is persecuted or victim of injustice. The constitutional norm must ensure proper legal processes (5th article, LIV), ban proofs acquired through illegal means (5th article, LVI) and guarantee presumption of innocence (5th article, LVII). However, the fragile Brazilian democracy have been despised with the undue impeachment over the democratically elected president Dilma Rousseff. The process was started by the today's jailed but once House of Representative's leader Eduardo Cunha since 2015. The fear that the anti-democratic scheme is reversed dwells in a Northwest man that challenges his own limits and, for the third time, could be president of Brazil (again through legitimate and democratic elections).

However, there's an issue potentially preventing the man to take office. The processes involving the greater political leader in Latin America are full of obscurities, trunked information, mistakes, judicial abuses, legal thesis contrary to those common in the consolidated jurisprudence, few compromise with the crime's materiality, lots of selective spectacles by the means of communication, and complicit with the *coup* organizers. This

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process placed on a pedestal of heroes criminals as Eduardo Cunha¹⁸⁴ and the “Japônês da Federal”¹⁸⁵ (a Federal Police agent).

The culpability of a President is high? No doubt it is! But what is culpability? It's a disapproval judgment. In this regard, it seems inadmissible to turn a blind eye to the responsibility of those ones acting at the public when ascertaining a crime. The state has the power/duty of applying the penal law for the simply fact of existing the presumption of ethics. However, if any state agent implied in the legal process move away from ethics the application of law is illegitimate.

In the specific case under analysis, judge Sérgio Moro's explicit predilection for a range of corrupt and conservative political figures is the main factor that turns his sentences illegitimate. Furthermore, the practice of illegalities (spectacularization of the process, illegal telephone trapping, and so on) in the course of the process and disregard of witness' statements in favor of Lula bring to the jurisdiction (part of the state power) the intolerable aphorism that the end justifies the means.

This adage is especially intolerable in Brazil, since it criminalizes poverty and diversity since the colonial invasor arrival over indigenous, poor, and minorities in general. Lula certainly is not poor anymore. However, in the prisoner's box it wasn't the presidential figure, but a govern politics that for the first time in history decided to try take care of poverty structurally. One more time poverty was criminalized, because we cannot disconsider the Judiciary Branch. In other words, a penal process led by an arbitrary member of the national economic elite, in a judiciary unable to control own grievances and, more than that, unable to change the *status quo* of colonial heritage, materialized in public figures as Renan Calheiros and Aécio Neves.

Further considerations about the abusive application of plea bargaining is worth. In Brazil, decontextualized and irresponsible repetitions of alien juridic institutions is one of the causes - maybe the most important one - for the current colonial state we live in. Stimulating plea bargaining in a country that translates in the prison system a set of mediaeval dungeons might be understood as a crime of illegal constraint or threat. Another issue worth mentioning is judge Moro declaration of being an specialist in *Mani Pulite*, but not letting clear to the people that consequences as the ascension of the neoliberal and owner of a media empire Berlusconi was possible due to this operation.

It's clear, thus, that it's not corruption, drug trafficking, or smuggling of foreigner containers disturbing aspects in Brazil. Tax frauds and evasion doesn't disturb if the purpose is “strengthening and generating employment”. Arm trafficking also doesn't disturb if the purpose is protecting the latifundio. Things that really bother are kids smuggling to buy the shoes of the propaganda, armed indigenous communities for self-defense or, still, the poor migrant elected president and world reference for fighting hunger.

184 The role of the coup media lead members of Union Force to yell “Cunha warrior of the Brazilian nation”. Available at:

<<http://mais.uol.com.br/view/jinmcm98vmk/forca-sindical-homenageia-eduardo-cunha-em-sp-04020C183464E0A95326?types=A&>>. Accessed in June 18th, 2017.

185 At the news available next, “Japônês da federal”, once condemned to use electronic anklet for facilitating smuggling and, was back to escorting prisoners of Lava Jato. Would this be a way of creating characters and superheros? Available at:

<<http://g1.globo.com/pr/parana/noticia/2016/09/com-tornozeleira-japones-da-federal-volta-escoltar-presos-da-lava-jato.html>>. Accessed in June 18th, 2017.

A judge willing to behave as a superhero has absolutely nothing to contribute with social justice, the Republican goal (3rd article, I, Federal Constitution), economic order (article 170, Federal Constitution), and social order (article 196, Federal Constitution). Moro sentenced Lula as Rafael Braga was sentenced by the Judiciary Branch for having a sanitizing bottle at the demonstrations in June 2013. Zero no strong proofs of criminal materiality and authorship is the common element among them. This is food for outrage!

The sentence that condemns Lula to prison is only one amongst lots of others unjust and illegitimate condemnations delivered by the Judiciary Branch. The poorest citizens in this country face it more frequently. Although delivered individually, its damages to democracy are irreversible, affecting both who commemorates the condemnation and who advocate in favor of the convicted. The democracy was weakened by the violation of the legal process that reaches each one of us. Condemning with no proof, disconsidering witness' statement and the history of a man that has been building democracy is condemning Brazil and the Brazilian people.

Preceding arbitrary acts to the sentence have more to say than the decisory act. Before the sentence could become official, Brazil and the world were aware of its results, but not because proofs were robust and clear-sighted. On the oposite, since practices in the process by judiciary members and the Public Ministry announced shamelessly what was about to come. The history is marked by a disrespectful legal process in the moment Lula was condemned before any official sentence.

The Public Ministry grievance at *Lava Jato* Operation in the 13th Federal Criminal Court in Curitiba intents to sustain that the ex-president committed corruption (articles 317 and 333, CP) and money laundering (1st article, caput, V, Law 9.613/98).

The judicial sentence that condemned Lula in July 12th, 2017, was preceded by countless violations that are worth of analysis. One of the most significant was the coercitive conduction for testimony in March 4th, 2016. Lula never refused to go to an audience. Therefore, the conduction is an afront with the article 260 of the Code of Criminal Procedure and 9th article of the American Convention on Human Rights contents. Moro's excuse was based on "avoiding public order disruption". A judge shouldn't communicate previously the main means of communication about this conduct if the aim was avoiding public order disruption.

Other blatant illegalities were phone interceptions of Lula, his family members, and lawyers. These illegalities injure 5th article of the Federal Constitution and 2nd, 8th, and 10th of the Law 9.296/96. Amplifying the violation, amongst the interceptions there was a talk between Lula and the then president-in-office Dilma Rousseff. Plus, in March 16th, 2016, such audios were cast by the media under the justification of a public interest act, including those with content that had no relation with the process. At the grievance 23.457/PR in March 22th, 2016, by Dilma Rousseff at the Supreme Court, the minister Teori Zavascki claimed that reasons of interpretation were "abusive" and the "conversation public disclosure was unacceptable". In March 29th, 2016, Moro recognized that caused "unnecessary embarrassment" as asked the Supreme Court "respectful excuses".

In face of a clear partiality and foreseen the catastrophic judicial decision, Lula and his defence presented a suspicious exception case at the 4th Federal Regional Tribunal. The case was rejected due to the understanding that the huge media cast and public opinion didn't breach the judicial impartiality. For a matter of justice, the number of argued and proved facts should give to the offender the right of the impartiality beyond doubt. Considering Lula a political

leader of extreme popularity in Latin America and, at the same time, with natural rejections of an ex-president, it would be a natural and human act a judge declaring himself suspect, as well as the Supreme Court. Arguing suspicious is not begging remission, but striving for impartiality, a right of any citizen that feels violated. Lula is not beyond the good or the bad, so magistrates. What's the reason for judge Moro to issue personally Lula's sentence under strong signs of impartiality? The answer varies to each interpreter, but when presenting it, remember we are talking about a decision with Lula's name more than one hundred times. According to semiotics, we could have lot of explanations.

In an anticipated result of the sentence - people already knew the obvious result before it could be promulgated, the ex-president was condemned for a nine years and six months reclusion (article 317, Penal Code) with a surcharge (§ 1st) for improper advantage received from the OAS Group as a result of a contract with CONEST/RNEST and money laundering (1st article, caput V, Law 9613/1998) for masking and dissimulating entitlement and benefits in a triplex apartment.

Regarding corruption and money laundering, it's worth registering that the law applied by judge Sérgio is Moro is inexcusably outdated. Judge Hercules or, better said, Moro condemned Lula based on article articles 317th of the Penal Code and 1st, line V, of the Law 9.613/98. However, since 2012 the line V is revoked.

It's worth reviewing a little Penal Law's basic theory. There are crimes that require the effective injury to a protected public asset to conclude a process: these are the so-called damage crimes (murder, for instance). However, in some cases the attempt or threat of injury are sufficient elements to configure a crime: these are the so-called hazardous crimes. This category includes crimes for a concrete threat (in which there's a threat assessment after the act, as maltreatment) and crimes for abstract threat (in which the presumed threat is judged by the legislator, regardless if the conduct actually caused a threat, as drinking alcohol and driving).

Likewise, there are material (that demand a naturalistic result) and formal (that exempt this external result) crimes. The crime of passive corruption, for instance, is a formal crime, because is characterized as the act of asking or receiving to oneself or the other, directly or indirectly, whether or not in a position but due to it, any advantages. However, although there are crimes discharging the demand of a naturalist result or an effective injury to the protected public asset, the central issue is that in any of these crime categories the proof of a criminal act is fundamental, because without it there's no nexus of causality.

For centuries now the penal law has been built and strengthened as a technique of state power that demands as a fundamental criteria assurance and clarity of the criminal act. In the hypothesis of no clarity regarding the causal nexus or authorship, the principle *in dubio pro reo* must be applied to absolve the convict.

Regarding the apartment, the failed attempt in demonstrating Lula's ownership puts into question the typification of illegal enrichment and money laundering. First, it's impossible to sentence enrichment if there's no proof of titularity or pecuniary benefits derived. Second, an asset must be demonstrated as acquired by bribes or other illegal means. In a worst-case scenario, if Lula had the asset - a never proved hypothesis - he never took hold of it. Furthermore, a nexus of causality between his previous conduct and advantage of it was never proved.

Ruthlessly and trying to weaken even more Lula's advocacy, on July 19th, 2017, abiding a request of the Federal Public Ministry, Moro determined the blocking of assets to repair injuries to Petrobras. Well, a protective measure would have legal support if the Federal Public Ministry would have proven a real risk of Lula dismantling his patrimony. Such risks are out of question: the evidence is a political decision seeking to attack morally and materially the victim. With the blocking of values arbitrarily, the conclusion is that a preference for illegality tries to weaken Lula's legal advocacy.

Celso Antônio Bandeira de Mello stated that: "Disrespect for fundamental rights in the Judiciary has been constant. Judge Moro is, in my opinion, very little qualified to be in office. The magistrature requires equilibrium, serenity and, above all, impartiality"¹⁸⁶. Supporting this perspective, Dalmo de Abreu Dallari indicated that "[...] a sentence with no legal ground turns pronounced the political motivation of this decision and judge Moro's unconstitutional behavior, susceptible to punishment by major organizations in the Magistrature"¹⁸⁷. Equilibrium, serenity, and impartiality are far from being characteristics of the processes involving Lula. Since there's no materiality to the proclaimed thesis and breaking with the legal process, Moro garbs plea bargaining of human beings that, afraid of penalties for their crimes, do whatever is possible to be out of jail.

Current times might be glorious for some people, but history always reserves amnesia to judges that at their time dare to persecute people constructing legacy to the humankind. The struggle against absolute authoritarianism of a partial judicial state will never cease. In poetry Manoel de Barros' saying, "freedom finds its way".

186 Brazil's newspaper (Jornal do Brasil). Bandeira de Mello: Moro isn't able to be a judge. Available at: <<http://www.jb.com.br/pais/noticias/2017/07/19/bandeira-de-mello-moro-nao-tem-habilidade-para-exercer-a-funcao-de-juiz/>>. Accessed in July 18th, 2017.

187 DALLARI, Dalmo de Abreu. Lula and the sentence: no legal basis. Jornal do Brasil. Available at: <<http://www.jb.com.br/sociedade-aberta/noticias/2017/07/15/condenacao-de-lula-sem-fundamento-legal/>>. Accessed in July 18th, 2017.

Judgement against Lula impinge the principle of equality of arms.

Ricardo Franco Pinto*

The destruction of basic principles of Law, more specifically of Criminal Law, is much easier than one could imagine. Generally, a single judgement holds such a power of destruction whether it has the support of the mass media at the service of the dominant power.

As in the case in question (Lula's conviction) and many others known throughout history (Mandela could be the clearest example), it does not matter, strictly speaking, the content of the sentence, but the person one wants to convict.

Thus, some judgements work only as a sort of "backdrop" for what is really at stake, which is the political decision about the fate of a country and the implementation, in the case of Brazil, of ultra-liberal measures, precisely what is happening just over a year.

With the enactment of the 1988 Constitution, at least two of these basic principles were guaranteed: the first, the separation of powers; the second, equality of arms in judicial proceedings.

The first principle (separation of powers), would be guaranteed with the establishment of three of them (in a political evolution of Benjamin Constant's ideas, who stated that there were five powers¹⁸⁸), as before it was adopted in the first republic, with inspiration in the interpretation of Montesquieu.

In the body of the 1988 Constitution, we find the division of powers (executive, legislative and judicial) mainly in two of its articles: art. 2, which states that *the Legislative, the Executive and the Judicial, independent and harmonious among themselves, are the powers of the Union*; and art. 60, §4, which acts as a protective rule of the previous article, establishing that *no proposal of amendment shall be considered which is aimed at abolishing: (...) III - the separation of the Government Powers*".

The importance of this principle lies in the political non-interference (or influence) of one power in another, since it would jeopardize the democratic system. We understand that this principle has been and will be analyzed elsewhere, and we will not refer directly to it in this article.

The second principle, which we will try to analyze with a little more accuracy, is the principle of equality of arms¹⁸⁹. It is also recognized by the Brazilian Constitution in what is arguably the most famous article of the Constitution (art. 5), which establishes that *all persons are equal before the law, without any distinction whatsoever*. Obviously, all those who work with Criminal Law know that this principle is not strictly obeyed (neither in Brazil nor in other countries), but a minimum of respect to it should be observed, so that at least there could be a reduction of procedural inequality between prosecution and defense. However, what does this mean in criminal proceedings? That the weapons in charge of the prosecution (usually the Public Prosecutor's Office) are identical to those of the defense. In addition, this compliance

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188 Constant stated the powers were the following: Real, Executive, Representative Durable (hereditary assembly), Representative of Opinion (elective assembly) and Judiciary.

189 Also called "parity of arms".

with the equality of arms is an obligation of all institutions, but mainly of the judges, and especially of the judge of the particular criminal case, since he/she is the first and most important guarantor that parity be not only perfectly established but also maintained until the end of the procedure.

Unfortunately, it was not what was observed neither in the proceedings nor in the judgement against Lula. We can analyze three examples of the course of the criminal investigation: we first had the famous and childlike presentation of the power point of the complaint against Lula, where the Public Prosecutor accused him of being the head of a criminal organization, calling him “the maximum commander” of the corruption scheme investigated in the Docket known as *Lava Jato*¹⁹⁰. This is an illegal action because a Prosecutor does not have the right to address a Brazilian citizen (or foreigner) without granting him or her any possibility of defending himself or herself. This is a clear breach of the legal duty of all judicial actors (judge, public prosecutor and / or lawyers) to preserve, always, the dignity of the defendant (in this case, of a possible future defendant). This clearly unbalances the equality of arms, since the accusation uses a vast media space to shed these accusations, which causes that the criminal process transcends the limits of the judiciary and obtains the desired impact in society. In other words, a clear media manipulation of the criminal process, since the defense does not have the possibility to use the same weapons, because the media servility is clearly against the interests of the defendant. In this case, against Lula. What measures have been taken by the court judge, responsible for ensuring the equality of arms and the rights of the defendant? None.

The second example is Lula's famous forceful coercion. The Federal Police agents took him to one of the Police Stations without even being notified in advance to declare before the investigating judge. Oddly enough, all the press knew about the forceful coercion, and yet another show was created with the sole intention of conducting a search on his property. A deplorable illegal action, now committed by the judge himself, who had the basic obligation to be partial. At this point, it was already clear that the judge also stands as a prosecutor.

The third example is the leaking of recorded telephone conversations (authorized by the judge) between Lula and his family, and especially between Lula and President Dilma Rousseff, later declared illegal by the Federal Supreme Court, once one of the persons recorded was the President of the Republic (in those cases, only the Supreme Court could rule about the recordings). The violation of arts. 8 and 9 of Act 9.296 / 1996 should have been sufficient to exclude the investigating judge from the case, since he may have committed crimes in acting this way, according to the art. 10 of the same legal provision¹⁹¹. From this point on, removing

190 This operation investigates corruption at Petrobras. (NT: Petrobras is a publicly-held company operating on an integrated basis and specializing in the oil, natural gas and energy industry).

191 Act 9.296/1996:
(...)

Art. 8. The interception of telephone communication, of any nature, will occur in separate files, appended to the police investigation or criminal proceedings, preserving the confidentiality of the respective investigations, recordings and transcriptions.

Sole paragraph. The joinder only can be done immediately before the report of the authority, in the case of a police investigation (Code of Criminal Procedure, art. 10, § 1) or in the remittance of the process to the judge for the decision according the provisions of arts. 407, 502 or 538 of the Code of Criminal Procedure.

the investigating judge from the procedure was absolutely necessary. Obviously, that did not happen, and since then Brazilian society was well aware that Lula would be convicted, regardless of any procedural issue. The curious thing at that moment is that both the so-called “left-wing” or “right-wing” citizens (and even the “center”) were sharing the same feeling about it. Moreover, everyone was quite right. The opinion among those who work daily with Criminal Law was not different: It was clear that the principles of criminal law were not valid for this “special” criminal procedure, that exceptionality that was always strongly opposed by all the democrats ruled this process and finally that the final aim was the conviction. The objective procedural persecution, divided in investigation, instruction and sentence had been politically changed to public conviction, violation of procedural rights and confirmation of conviction. As we say in Spain, a true *paripé*¹⁹². Lula’s conviction sentence (though poor in legal and argumentative terms) was only a matter of time, but it would never be a matter of justice.

In this book, many authors will analyze in an exhaustive way the sentence against Lula. Nevertheless, we believe it is necessary to draw attention to an issue that would support everything we have argued previously: the sentence is composed of 962 paragraphs (divided into 238 pages); out of these, only five were dedicated to the defense theses. The whole sentence is clearly a self-defense of the judge, rather than an exhaustive analysis of the arguments and theses of prosecution and defense (in this instance the lack of analysis of defense theses). Equality of arms here is only a concept that has long been deprecated in this process.

After the sentence, Lula's lawyers filed a motion for clarification, and the judge (who in the course of the proceedings has always treated them without due respect and politeness) refused to admit that there were contradictions or gaps in his judgement. Nothing new, not surprisingly. Then, he ordered the seizure of goods of Lula, in another decision not only controversial, but also very absurd and without any legal support. Why do we state this? Because in the decision on the motion for clarification, the judge clearly recognizes there was no harm to *Petrobras*, thus expressing:

“This court never stated in the sentence or anywhere that the values obtained by Construtora OAS¹⁹³ in the contracts with Petrobras were used to pay the undue advantage to the former President. Moreover, in the course of the proceedings, this Court, by denying unnecessary expertise required by the Defense to trace the origin of the resources, had already made it clear that there was no such correlation (items 198-199). Neither corruption nor money laundering,

Art. 9 A recording that is not of interest to the evidence will be destroyed by judicial decision, during the police investigation, the criminal procedure or even after, at the request of the Public Prosecutor or of the interested party.

Sole paragraph. The destruction will be attended by the Public Prosecutor's Office, with the granted presence of the accused or his legal representative.

Art. 10. It is a crime to intercept telephone, computer or electronic communications, or break the secrecy of justice, without judicial authorization or for purposes not authorized by law.

Penalty: imprisonment, from two to four years, and fine.

192 NT: the Spanish word *Paripé* means “put on an act”.

193 NT: Brazilian group OAS S.A. provides heavy and civil construction services, including engineering, planning, execution and management services for the building, transportation, infrastructure, oil and gas, sanitation, concessions and energy sectors

having corruption as a prior offense, require or would require that the amounts paid or concealed came specifically from Petrobras' contracts".

Curiously, if we quickly analyze paragraph 880 of the conviction, we find a very clear contradiction:

"Even though part of the material benefits were subsequently made available during 2014, arising from credits originated from Construtora OAS' contracts, signed on December 10, 2009, considering here only the CONEST / RNEST joint venture's¹⁹⁴ contracts, constitute an undue advantage made available due to the position of a federal public agent, not only for the then President, but also for the executives of Petrobras"

In addition, in relation to this blatant contradiction, we would ask: "so what have we decided?"

This is just one of the many reasonings that we could make to prove that the principles of law to which we referred at the beginning were and continue to be clearly broken. The principle of equality of arms is broken so that Lula can be convicted and the principle of the separation of powers is broken so that he can be prevented (through a criminal conviction) from disputing the Presidency of the Republic in 2018, reestablishing democracy in the country.

We know that opposing arguments will be raised in relation to the ones we have just stated, although we also know that they are always the same, curiously: that we cannot be literal, that this over-refinement is not necessary. I could even agree, if we were dealing with purely political issues. But we are facing a judicial process, and even more, a criminal one, where all questions must be exhaustively analyzed, never in an *en passant* way as the sentence "analyzed" (in five paragraphs) the defense theses. In addition, if we act differently, we would not be in accordance with the Law, much less seeking Justice. What would be sought would clearly be a "fitting" between a sentence of accusatory theses and decisions previously taken.

This whole process, as Eugenio Aragão said in a recent interview, is a true "chicanery".

194 Joint venture composed by the Brazilian enterprises Odebrecht and OAS.

The due process between justice and politics

Roberto de Figueiredo Caldas*

This brief article aims to present, in a simple and accessible language, some of the reasons why a large part of the national and international legal community received with apprehension the content of the conviction sentence handed down against former President Luiz Inácio Lula da Silva, in July 2017. My analysis is based on the jurisprudence of the Inter-American Court of Human Rights, more specifically on the interpretation given to due process.

The due process of law comes from the Anglo-Saxon legal system and has spread to other systems, such as ours, of Roman-Germanic origin. Lately, the term "due process" is increasingly used without the adjective "legal" because the institute has not only been established in law, but also in national constitutions and in international conventions and treaties, especially of rights humans

Due process is a legal principle and fundamental guarantee recognized as a human right. It is a set of minimum procedural or judicial guarantees, including, but not limited to, the right to a "competent, independent and impartial tribunal" (Article 8.1 of the American Convention on Human Rights - ACHR), to a simple and rapid process (Article 25.1 of the ACHR) and to ample defense. Substantial safeguards against violation of fundamental rights are also contemplated in the due process, "even when such violation is committed by persons acting in the exercise of their official functions" (article 25.1 of the ACHR), including judicial functions, as, for example, the content of sentences, which must be reasonable and proportionate.

Due to its great importance, due process is one of the issues most frequently faced by the Inter-American Court of Human Rights. Precisely for this reason, over time and through the settlement of subsequent contentious cases and the formulation of some advisory opinions, the Court has been building a respectable collection of binding precedents on due process, of juridical relevance for the whole American continent.

When investigating and prosecuting crimes, any crimes, such minimum due process postulates must always be inflexibly respected. Due process is the exact part of Juridical Science, about which there can be no invention. This is for the good and protection of every person before the Judiciary, for the good of the rule of law, democracy and human rights. Even in cases examining, for example, the most serious crimes against human rights or crimes against humanity, the rigorous application of due process can not be ruled out.

Corruption and related crimes are also very serious, although they are not universally classified as lese humanity. In several countries of the world, particularly in Latin America and Brazil, there is a serious situation of corruption in public spaces, in the bidding processes, procurement, construction, works, services, job filling, political agreements, election campaign financing, legislative process, tax inspection, policing, social security benefits, legal proceedings, frauds of all kinds that undermine public confidence in state agents and government officials, deplete the treasury and greatly reduce social investments. In other words, corruption affects the life of society directly by putting in risk the population, particularly those in vulnerable situations, more dependent on state investments in social

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rights, such as health, education, security, public transportation, housing, food, social assistance, among others. It is very important to investigate and combat such crimes; this is an unquestionable point. However, the State, be it represented by police, public prosecutor, magistrate or administrative authorities, can not underestimate the imperative sequence of the rules legitimating due process. Such rules guarantee the equality of all before the law and confirm the validity of the democratic principle in state institutions, which shall act impartially regardless of the preferences or individual orientations of the public servant.

Acknowledging the importance of the issue in question, in April of this year, we held an expert conference on "Judicial ethics and the fight against corruption: independence and judicial responsibility and the role of specialized organizations"¹⁹⁵ at the headquarters of the Inter-American Court in San José, Costa Rica. The discussion focused on the Sustainable Development Goals, also known as the United Nations Agenda 2030, which have as their central objectives the elimination of hunger and poverty and the promotion of general well-being. Among the various items in the Agenda, it is worth mentioning Objective no. 16¹⁹⁶, which is to "promote peaceful and inclusive societies for sustainable development, providing access to justice for all and building responsible and effective institutions at all levels." The achievement of this objective will be accomplished through the implementation of several goals, among which we highlight 16.3¹⁹⁷, which aim to promote the rule of law and ensure equal access to justice for all, and 16.5¹⁹⁸, which seeks to reduce significantly corruption in all its forms.

In order to strengthen judicial institutions, both the processing of cases of corruption before the Judiciary, and corruption, ethical deviation and conflict of interest within the judicial structure, whether of the police, of officials or of judges, were discussed. It was also discussed the importance of implementing codes of ethics and/or conduct in the Judiciary, inspired by art. 11 of the United Nations Convention against Corruption¹⁹⁹, promulgated by Brazil on 31.1.2006.²⁰⁰ Among the conclusions of the Conference, the following stand out²⁰¹:

195 The conference was co-organized by the Inter-American Court, the German Cooperation, and the Judicial Integrity Group of the United Nations Office on Drugs and Crime (UNODC), with the participation of judges and national administrative authorities from America, Africa and Europe and Specialized Agencies of the Organization of American States (OAS) and the United Nations (UN), as well as the Ibero-American Commission on Judicial Ethics.

196 To complete text, see: <http://www.un.org/sustainabledevelopment/es/peace-justice/>.

197 "Promoting the rule of law at the national and international levels and ensuring equal access to justice for all".

198 "Significantly reduce corruption and bribery in all its forms".

199 "Article 11. Measures relating to the judiciary and prosecution services

1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

2. Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service."

200 To complete Promulgation Decree text, see: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/decreto/d5687.htm

201 To complete text of the Communication of the Inter-American Court on the Conference, see: http://www.corteidh.or.cr/docs/comunicados/cp_16_17.pdf.

1. Judicial integrity is a prerequisite for sustainable development and respect for the rule of law and contributes to political stability, legal security of citizens, private investment and global economic progress.
2. "The importance of integrity, transparency and accountability within the judiciary, as well as the independence and impartiality of judges as preconditions for access to justice on an equal footing, to enable human rights to be effectively protected," was emphasized.
3. The need to implement international norms and standards on judicial integrity and the rule of law was emphasized and to promote the adoption of the Ibero-American Code of Judicial Ethics and the Bangalore Principles on Judicial Conduct, in addition to the jurisprudence of the Inter-American Court of Human Rights Human as guides for judicial reforms.
4. During the event, it was highly emphasized that the fight against corruption or ethical deviation can not be selective, that is, only with regard to a political, ethnic, religious group, etc., otherwise the credibility and legitimacy of Institutions of persecution and judgment will be undermined. That is to say, once a standard of judgment has been used for a group, it must serve everyone without any kind of selectivity. In particular, judges must strictly abide by the law.

With this in mind, it follows that the realization of human rights, the rule of law and judicial integrity are the real antagonists of corruption. The inclination and passion of a member of the judiciary for a cause imply, necessarily, that he or she should not be able to act in the process. Abdicate from judging the case for an impediment or suspicion, for the best respectability and legitimacy of the decision, is a logical and necessary command. Because only the impartial judge can make a judicial decision with the elements of balance, whether in the analysis of evidence, or in the reasonable conclusion, prudent and strictly connected to those same evidence. Otherwise it is the judge himself, and not only his sentence, that will be object of reprobation in the public sphere.

Going back to the case of former President Lula's conviction, the subsequent acts of Judge Sérgio Moro, prolator of the sentence, were objects of public challenge and ethical-disciplinary questioning before the National Council of Justice last year, without any scolding against him recognised. Some public facts already showed the animosity of the magistrate in relation to former President Lula and the then President Dilma Rousseff, that is to say, those elected nationally in the last four presidential elections by direct elections, expression of representative democracy in the country and social pact then in force.

All are equal before the law and it is this equality that must operate to judge from the simplest of people to a former president. In the latter case, this is a particularly sensitive cause because it involves a person who is the object of the majority social choice, that is, the one in which the population has placed hopes in the conduct of the nation. And in the particular situation of former President Lula, it refers to a politically active individual, pointed by recent polls as the number one popular preference for next year's presidential election in any scenario of opponents. It is well known that a condemnatory criminal decision removes him from the electoral race, that is, it prevents society from choosing him, which is why it is even more necessary to have a consistent statement of reasons for any decision affecting his political rights.

The Charter of the Organization of American States, founder of the entire inter-American human rights system, states in its preamble that representative democracy "is an indispensable condition for the stability, peace and development of the region." For the Inter-American Court, similarly, "representative democracy is decisive throughout the system of the Convention."²⁰²

The cases involving the highest representatives of a nation are always very important. These are called hard cases. In cases such as these, the good-judge - impartial, non-partisan, zealous and cautious - must agree on the examination of the evidence, apply the rules of the game and follow the jurisprudence. The judge can not neglect or innovate, and if he does, casuistry, exception and arbitration prevail, not justice. Therefore, the condemnation of former President Lula generated surprise, even perplexity, because the evidence of the alleged crimes was not presented in the sentence. And this conviction can prevent the candidacy of the popular favorite.

In this sense, it is important to give value to the good behavior pattern of the magistracy and to take into account the previous signs of abuse, inclination and arbitrariness. Such a measure would avoid having to disqualify the product of the magistrate's work, that is, the later decision just published, as many are doing, among them several authors of this collective book.

For the narrow space of this article, I will analyze a single and serious act practiced by the judge who affronts the terms of sentence of the Inter-American Court of Human Rights, pronounced in international condemnation against the Brazilian State itself in the 2009 case *Escher et al*²⁰³. Still in the investigation phase, on March 16, 2016, in clear violation of due process, Judge Sérgio Moro released a telephone conversation between the then President of the Republic, Dilma Rousseff, and former President Lula. Against the clear letter of the law, the measure exposed the people investigated and recorded for public trial, when this type of evidence should remain confidential.

On that day, in the morning, the court judge himself had decided to close the telephone interception, apparently because he would lose jurisdiction to the Federal Supreme Court because former President Lula was appointed minister of state, having a forum prerogative. The recording of the conversation between the then President Dilma and the former President Lula was made at 1:32 p.m. At 3:34 p.m., the judge was notified by a letter from the Federal Police about the recording, and at 4:21 p.m. he decided to raise the confidentiality of the entire proceedings, including the conversation between the two, and determined its wide dissemination to the press. Without deadline, without hearing the parties, the people recorded, or the Public Prosecution Service.

The case resembles in everything the condemnation of Brazil by the Inter-American Court in 2009, in which the process of interception, monitoring and disclosure of telephone conversations of Arlei José Escher and four other persons by the Military Police of the State of Paraná was examined. More specifically, the Escher case is inserted in a context of social

202 Corte IDH. Caso Castañeda Gutman Vs. México. Exceções Preliminares, Mérito, Reparações e Custas. Sentença de 6 de agosto de 2008. Série C No. 184, par. 141, e Caso Yatama Vs. Nicaragua. Exceções Preliminares, Mérito, Reparações e Custas. Sentença de 23 de junho de 2005. Série C No. 127, par. 192.

203 Corte IDH. Caso Escher y otros Vs. Brasil. Exceções Preliminares, Mérito, Reparações e Custas. Sentença de 6 de julho de 2009. Série C No. 200.

conflict related to agrarian reform in several Brazilian states, including Paraná. The victims were members of two social organizations, ADECON (Community Association of Rural Workers) and COANA (Avante Conciliation Agricultural Cooperative Ltda.), linked to the movement of landless workers. It happened that members of the Military Police presented to a judicial authority a request for interception and monitoring of a telephone line, installed inside COANA, alleging that in such place they were performing criminal practices. This request was answered quickly. The victims had their private conversations recorded, and some of them, edited in a biased way, were distributed and broadcasted in various media, among them in the program National Journal, Rede Globo Television.

The Court held that, with such measures, the Brazilian State violated the rights to privacy, honor and reputation recognized in Article 11²⁰⁴ of the American Convention, in relation to Article 1.1, in detriment of the victims, for the interception, recording and disclosure of their telephone conversations. Furthermore, the State violated the rights to judicial guarantees and judicial protection recognized in Articles 8 (1) and 25 of the same instrument, in relation to the criminal action brought by the victims against the former Secretary of State Security, due to the lack of investigation of the responsables for the first disclosure of the conversations, and lack of motivation of the administrative decision regarding the functional conduct of the judge who authorized the telephone interception. It should be noted that this case also occurred in the State of Paraná, where the Court's ruling was widely publicized, which is why it is broadly known within the legal community.

The Court examined the issue and assessed the Brazilian legislation as perfectly harmonized with the American Convention. Both Article 5, XII²⁰⁵, of the Constitution, and Law 9.296/96²⁰⁶, which regulated the constitutional provision, both fully in force since the facts of the case without change, are consistent with the Inter-American norm.

Thus, based on this binding precedent of the Inter-American Court, which corroborated the conventionality of the exceptional law, with the cautions that, since the law restricts the inviolability of communications, it must be applied with the utmost care, zeal and parsimony, we can observe that several violations of due process were perpetrated cumulatively in the context of the criminal prosecution of former President Lula. Otherwise observe: i. There was no judicial decision authorizing the telephone recording, so it is an unlawful measure (article 1 of Law 9.296 / 96), ii. The judge was not competent to record and much less divulge a

204 Article 11. Right to Privacy

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

205 CF, XII - The confidentiality of correspondence and telegraphic communications, data and telephone communications is inviolable, except as last resource, by court order, in the cases and in the form established by law for the purpose of criminal investigation or criminal procedural instruction;

206 Law nº 9.296/96:

Article 8°. The interception of telephone communication, of any nature, will occur in separate files, appended to the records of the police investigation or criminal process, preserving the confidentiality of the respective diligences, recordings and transcriptions.

Article 10. It is a crime to intercept telephone, computer or telematic communications, or break secrecy of justice, without judicial authorization or for purposes not authorized by law.

Penalty: imprisonment, from two to four years and fine.

conversation of the President of the Republic, bearing in mind its forum prerogative (article 1), iii. it is unlawful to disclose voice recordings and their transcriptions, which are confidential as a rule (articles 1 and 10), iv. several recordings of conversations of diverse people were divulged, including personal conversations, without any use as proof, that had to be disabled to protect the intimacy of these people (article 9), v. a conversation of minister of State was recorded and divulged, also with forum prerogative, for which the judge was evidently incompetent (article 1º), vi. It is illegal to publish mass recordings, since any breach of confidentiality must be justified and have an objective authorized by law (article 10).

Because it is so serious, both at the national and international levels, the breach of confidentiality and the disclosure of data obtained by telephone monitoring in an improper manner is considered a crime, according to the prescription of art. 10 of Law no. 9296/96 (article 10. It is a crime to intercept telephone, computer or telematic communications, or break secrecy of justice, without judicial authorization or for purposes not authorized by law. Penalty: imprisonment, from two to four years and fine). Therefore, the judge, even in the exercise of his function, even if he has rendered good services to the State, must invariably behave within the strict limits of due process, which is why he should not have continued leading the criminal proceeding. There were several subsequent steps that showed a very unwise and political line of conduct, demonstrating that the judge did not pass the test of impartiality in the concrete case, in an evident, unacceptable and disproportionate violation of due process, guarantor of democracy and human rights.

I conclude with the words I used at the opening of the aforementioned Conference on Judicial Ethics and Corruption, held at the Inter-American Court of Human Rights in April this year:

Let me conclude by emphasizing the need to strengthen existing principles in the current legal system, as well as to develop new legal structures to promote an adequate judicial ethics and to implement effective combating of corruption in practice. The selective and clearly political use of the Judiciary as a mechanism of persecution of certain political groups is not a legitimate instrument of fighting corruption, but a corrupt act in itself.

Lula's conviction: Brazil's most striking case of lawfare

Ricardo Lodi Ribeiro*

Over the last few months, the expression *lawfare*, a portmanteau of *law* and *warfare*, has been used by former Brazilian president Luiz Inácio Lula da Silva's attorneys to refer to the criminal charges that are being filed against him. The term *lawfare* appears in an environment where legal institutions are being excessively used to harass political adversaries. It was originally coined by John Carlson and Neville Yeomans in 1975²⁰⁷, as they considered it a tactic of peace, in which war was replaced with legal battles and the "duel is between words rather than swords." US Air Force colonel Charles Dunlap²⁰⁸ spread the expression in 2001 as a strategy of misuse of law to accomplish an operational objective as an alternative to traditional military means. In the political realm, according to Jean Comaroff and John Comaroff,²⁰⁹ it translates in the process of using violence and power inherent in the law to produce political outcomes. One of the most frequent ways it has been used is by shunning an adversary through the excessive use of the legal system rather than following constitutional electoral processes.

Harvard professor John Comaroff²¹⁰ has been dedicated to researching the lawfare phenomenon, and he believes Brazil's ex-president da Silva is a victim of it, perpetrated by the "Operation Carwash" (Operação Lava Jato) task force in Curitiba, Paraná State, and by Federal Judge Sérgio Moro of the 13th Federal Court of Curitiba. The lawfare in this case was characterized since the aforementioned judge leaked to the press the contents of tapped phone calls between da Silva and the then-president Dilma Rousseff. After the episode, according to the South African researcher, the lawfare became manifest in the attempts to create a presumption of guilt regarding da Silva.

The reality is, it is imperative to acknowledge that, taking advantage of the mainstream media's militant support to the *Lula Hunt*, the so-called *Republic of Curitiba* has been for a long time using the public opinion to allegedly fight corruption, creating an atmosphere of anticipated conviction against the former Brazilian president. In this sense, the peculiar PowerPoint presentation made by Federal Prosecution Service task force coordinator Deltan Dellagnol was quite symptomatic. He displayed da Silva as the center of the entire conspiracy, without presenting any evidence of this whatsoever, but only a firm *belief* in his allegations, as himself infamously declared at the time. Evidently, in addition to all procedural errors made to have the 13th Federal Court of Curitiba obtain jurisdiction over the case, regardless of facts that were spatially restricted to the State of São Paulo, over the course of the proceedings, Judge Sérgio Moro did not reveal himself to be an impartial trier to preside the case, and several times actively performed the role of a prosecutor. And as History shows here and

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207 CARLSON, John; YEOMANS, Neville. In Smith, M. & Crossley, D. (eds.), *The Way Out - Radical Alternatives in Australia* Melbourne: Lansdowne Press, 1975.

208 DUNLAP, JR., Charles J. *Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts*. Humanitarian Challenges in Military Intervention Conference Carr Center for Human Rights Policy. Kennedy School of Government, Harvard University. Washington, D.C., November 29, 2001.

209: COMAROFF, Jean; COMAROFF, John L. *Law and Disorder in the Postcolony* by Review by: Giovanni Arrighi *American Journal of Sociology* Vol. 114, No. 2 (September 2008), pp. 562-564.

210 <http://www1.folha.uol.com.br/poder/2016/11/1829175-professor-de-harvard-ve-presuncao-de-culpa-contra-lula-na-lava-jato.shtml>.

elsewhere, when the boundaries between prosecution and jurisdiction are blurred, the right of defense becomes just a formality to make a previously agreed upon outcome seem legitimate.

In the sentence regarding the triplex apartment in Guarujá, São Paulo State, the attack against the principles of natural justice and due process of law, as well as against the presumption of innocence, is absolutely characterized, leaving no doubt that former president da Silva did not get a fair trial and Judge Sérgio Moro was not impartial.

In this political context, in which the entire media and state apparatus have been driven for years towards a hunt against Lula, few concrete results have been found. Actually, side by side with the political selectivity that drives the movements against Brazil's Worker Party's leader, the inevitable side effects of a rhetorical mockery of coherence against other political forces was far more lethal. Indeed, the conclusion to draw from this is that da Silva's background check came back clear, because with so many investigation efforts going on for so long, in a national landscape where suitcases full of money, bank accounts in tax havens, and irrefutable evidence of plundering of public money abound, not a lot of exciting facts for his executioners were found against the former Brazilian president.

But let us look into it. The Brazilian Federal Prosecution Office (MPF) brought charges against da Silva for corruption and money laundering for his participation in three contracts signed with construction giant OAS which were hurtful to Petrobras. So, according to the MPF, da Silva would be the head of the conspiracy that allegedly would have had hurt Petrobras, a government controlled company, through the aforementioned contracts. His share in this would be the triplex apartment in Guarujá and a renovation carried out by OAS, thus allegedly constituting the crime of corruption. The money laundering aspect of it would be da Silva not transferring the property to himself.

When the charges were made public, different voices in the legal world rose to warn that the story told in the complaint against the defendant was not proven by the documents inserted in the record, nor did it validate that PowerPoint presentation which pointed da Silva as the head of the conspiracy. In fact, what was the point of saying that and not filing charges against him for conspiracy to commit a crime, if not to attack his image in face of the public opinion?

Nevertheless, despite the overt rush to present the accusations, there was the possibility of proving the facts claimed in the charging document during the presentation of evidence. But what happened was far from that. Throughout the entire evidentiary stage, dozens of defense and prosecution witnesses were heard, hundreds of documents were presented, and expert examinations were conducted, and the prosecution was not able to prove its version with the necessary elements to support it regarding the facts attributed to da Silva. Such was the case that Judge Sérgio Moro actually stopped working with the Prosecution Office's theory, innovating in terms of the description of the facts in the charges. That alone would be enough to prevent a potential conviction. But it came to a point in which, giving the motions for clarification of judgment filed by the defense against the adverse judgment, he recognized the money received by OAS from Petrobras could not have been used to make payments for da Silva's own benefit. That would inevitably dismiss the only connection, even if tenuous, to set jurisdiction in Curitiba.

To constitute the crime of corruption in which the former Brazilian president would have gained improper advantages and taken ex officio action to favor OAS, the prosecution would have to prove that da Silva acted while in office to benefit the company in exchange of

improper advantages. However, after the production of evidence, da Silva's involvement in the episode was not successfully proven. Moro then felt contented with the possibility that the former president could influence the appointment of Petrobras directors, as if appointing someone for a position could make the person who appoints them responsible for all future illegal activities in which the appointee engages. Regarding the alleged advantage da Silva would have gained, the judgment points to facts that took place entirely in 2014, when da Silva was no longer president.

The attempt to prove that the activities in which the president took part in 2009 were gradually paid off in improper advantages in 2014 was successful, even though the great distance between the two aforementioned time frames required great effort of argumentation and use of evidence. Hence, the defendant's participation in the illegal activity could not be proven, nor could the advantage he allegedly gained or the chain of causation between the two things.

Despite the testimonies of all defense and prosecution witnesses, Judge Moro came to a decision based on the "informal collaboration" of Léo Pinheiro, a former OAS president whose surprising change of deposition gave him startling advantages in his sentence. That is, after spending more than a year denying da Silva's involvement in the conspiracy, Pinheiro "informally" collaborated with the court and received immunity. He did not have to go through the legal proceedings of a plea bargain, nor did he have to prove his claims. And there we have the institution of a plea bargain where the collaborator does not have to prove anything. Just by changing his deposition, the construction executive managed to save himself from spending the rest of his days in prison.

As for the alleged advantages offered to Brazil's former president and faced with compelling evidence that the apartment was never owned by da Silva or his family, Moro stretched the facts to decide that, even though the property was never transferred to him, he would be the "de facto owner," even though it was very clear da Silva and his family never had the property's tenure. Well, the tenure is the externalization, on the factual level, of one of the owner's faculties. If he did not have the tenure of, did not use, enjoyed or have the property available, it is not possible to argue he had the "factual ownership."

In the narrative created by Moro, there was no other legal reason that could possibly explain why OAS insisted on offering the triplex apartment to da Silva or why it was renovated. The judge would rather draw the conclusion that it could only be the result of a corruption scheme. The problem with a conviction without supporting evidence, based solely on a judge's beliefs, is that he risks disregarding other narratives, including the one presented by the defense, which maintained the arrangements were regarding Brazil's ex-first lady Mrs. Marisa Silva's negotiations with the property development's former owner, Bancoop, to buy a membership interest. Not only is the defense's narrative much more likely than the prosecution's, it is up to the latter to prove their version of the facts is correct by presenting supporting evidence. In any case, Judge Moro's conclusion that "the only possible explanation" for the triplex apartment being offered to da Silva and for the renovation carried out in it was to pay bribes seems to demonstrate one thing: even without enough evidence, the judge's belief that the defendant is guilty was unshakable, and that was apparent regardless of the outcome of the production of evidence.

As for the money laundering charges, even though the facts presented by the prosecution were proven – which is not correct – what we have here is a legal impossibility. Money

laundering is when someone tries to make money coming from illegal activities look legal. But when that person receives assets as payment from actions tainted by corruption, there is no separate crime. Even if the ownership of the asset is concealed, we would be facing a conduct included in the definition of the crime that sanctions corruption itself. By accepting the judgment's theory, money laundering would follow any illegal activity, and that would be a complete legal nonsense.

As da Silva was clearly convicted without evidence, one cannot help but pointing out that the long history of affirming the Rule of Law is connected to the dedication to constitutional principles such as due process of law, presumption of innocence, and natural justice. These principles are being relegated in the name of a discriminating, politically-driven fight on corruption, which could risk producing very harmful outcomes to Brazil's own democratic history. In this sense, if successful, the lawfare that is now targeting da Silva will definitively outline the ruin of the Welfare State – a ruin promoted since president Rousseff was impeached. The coup promoted by the Brazilian parliament based on very peculiar financial law categories enabled the dismantling of an embryonic system of social protection to the country's most vulnerable populations. But the harassment against da Silva, who is the front-runner in the 2018 elections, aims to make him ineligible and bury the greatest risk to the market society project, as suggested by Karl Polanyi²¹¹, in which the economic and social systems separate and the latter is subject to the interests of the market, in a path paved since Dilma Rousseff was removed from office. Therefore, while the lawfare against president Rousseff was extremely serious, as it made it possible to establish an illegitimate government that will be in office until 2018, the effects of the lawfare against da Silva are expected to last much longer. For this reason, we consider that, even though the impeachment became an extremely powerful instrument to promote a blow against the institutions in order to overthrow the cosmovisions chosen by the Brazilian people in 2014, the *Lula Hunt*, aimed at tainting his image and making him unable to run in the elections, is intended to take away from voters the political options that were betrayed by the Brazilian Congress in 2016. Let us hope higher courts do not allow it.

211 POLANYI, Karl. *A Grande Transformação*. Trans. Fanny Wrobel. 2. ed. Rio de Janeiro: Elsevier, 2012, p. 45 and 77.

July bonfires*

Rosa Cardoso da Cunha

July has always been associated with the tardy bonfires of St. John's festivities. Now we will see in it the fiery hatred of the sentence that burned publicly the freedom and assets of the former president of the republic, Luiz Inácio Lula da Silva. The sparks of this hatred anticipate a fire, the spread of which is unpredictable, especially in the highly polarized scenario of social networks.

On July 12th Judge Sérgio Moro condemned the most beloved and popular leader in the country's history, Luiz Inácio Lula da Silva, to deprivation of liberty for 9 years and 6 months of imprisonment, heavy fine, obligation to compensate for the damage at very high rates and restriction of political rights. Six days later the punishment continued with R\$606 thousand frozen in his bank accounts, the seizure of 4 properties and the confiscation of 2 cars. The next day 9 million were commandeered in his private pension plans.

The judgment of Judge Moro contradicts dominant technical conceptions regarding the crimes invoked and the evidence presented. In laymen's terms it is counterintuitive, that is, its conclusions violate the common understanding of the facts. The sentence also consolidates a movement aimed at the development of a "Lavajato criminal law", which is already advanced in the field of procedural law.

It's noticeable the extension of the jurisdiction of the court presided over by Judge Sérgio Moro - of the 13th criminal court of the federal court of Curitiba - in relation to the prosecution and judgment of controversial cases related to that criminal action, considered to be the founder of the chain of lawsuits that constitute local justice (the founding criminal action was based on a money laundering operation, which was consummated in Londrina/PR, the case was assigned to Judge Sérgio Moro and has since made up its judicial district for cases under his decision).

Added to this, there is the expansion of task forces led by prosecutors and the federal police that were working in Curitiba, the creation of "new paradigms" procedures for the imposition of provisional measures (Coercive conduction (bench warrant), temporary arrests, pre-trial detention) and the encouragement of plea bargains through the use of imprisonment and the threat of long sentences.

The sentence imposed by Judge Moro to Lula da Silva advances, however, the perspective of the development of Lavajato's material criminal law, which refers to the definition and application of crimes and penalties. This condemnation loosens the primary concept of substantive criminal law, in terms of the law and the constitution, which is of the "type of criminal offence". The Lavajato criminal law renders irrelevant the meaning of type of criminal offence, thus invalidating the principle of legality and its corollaries.

* This is a divulgation text on the conviction sentence (218 pages) that the Judge Sérgio Moro determined to the former President of the Republic, Lula da Silva. It addresses the factual issues and legal provisions that the conviction invokes. It is intended for an audience that wishes to have a minimum of information about the discussion that has been and will remain on the agenda regarding the interpretation and legal solution to be given to the case. It does not contain a technical analysis of the crimes attributed to the former President: corruption and money laundering.

The disqualification of the type of criminal offence as identification of a crime, given its function of guaranteeing the citizen against the will of the authorities, and the fact that it contains the objective description of the wrongdoing prohibited by law (the *mala prohibita*) equals the choice to not use the criminal law in place, that is, to deny it. This is what happened.

In the conviction sentence under analysis Judge Sérgio Moro condemned former President Lula da Silva adopting to a larger extent the speculative version of the facts contained in the complaint. The sentence's narrative is sinuous, acrobatic and foolish. However, even dismissing the facts that occurred to tell what supposedly happened, it does not present a story that fits the crimes attributed to Lula da Silva: corruption and money laundering.

It is worth remembering some narrative developments that intend to justify the conviction for the crime of corruption:

1- In 2009, the Construtora OAS SA formalized three contracts with Petrobras, agreeing in exchange to pay a bribe in the approximate amount of R \$ 87,624,971.26. (Question: What is Lula's participation in this agreement and what evidence exists of his participation?);

2- This arrangement made possible the creation of a "general checking account for kickbacks" between the OAS Group and agents of the Workers' Party - PT (Question: What is Lula's participation in this agreement and what evidence exists of his participation?);

3- The representatives of OAS and PT, Leo Pinheiro and João Vaccari, implemented an unregistered accounting in the scope of this account (Question: what is Lula's participation in this agreement and what evidence exists of his participation?);

4- In 2009, OAS Empreendimentos SA, an OAS Group company, assumed an undertaking initiated by BANCOOP (Co-op of the Bankers Union), regarding the construction of a condominium in Guarujá, in which Mrs. Marisa (and Lula, as her husband) had quotas of a small apartment. On the occasion of the transfer of this undertaking to the OAS, its president, Leo Pinheiro was informed about the shares owned by Mrs. Marisa/Lula by Vaccari and, shortly afterwards, that a triplex apartment should be reserved for the couple;

5- Until the end of 2013 Leo Pinheiro did not have confirmation from the former President Lula of his interest in the reserved property, which he and Mrs. Marisa did not know. In January of 2014 the couple visits for the first time the triplex and suggest adaptations/renovations that would make its use possible. The renovations were made till mid-2014, in order to please and interest the couple in their acquisition, however former President Lula never formalized with Leo Pinheiro the decision to occupy the building or the costs and legal procedures to acquire it.

6- The Guarujá triplex, through an accord between Vaccari and Leo Pinheiro, which took place in 2014, was linked to the general checking account of kickbacks devised in 2009. There is no news of how and when former President Lula expressed his opinion about the accord, but Leo Pinheiro says he never dealt with him about this connection.

Considering the issues being presented here, which are not exhaustive, we realize that it is technically unsustainable to claim that the fundamental requirements that characterize corruption have been met. Highlighting three of these requirements, namely, extortion, the official act and the intention to receive or extort an undue advantage. In relation to these requirements, let's see, then, how they apply to Lula.

As for the extortion, it is not known if and when Lula received it or even if he requested it, since he never dealt with any of the people deposed in the process, or even with Leo Pinheiro on the subject of acquiring or occupying the triplex, without the payment of its costs;

Regarding the official act, it is not clear which act Lula practiced to configure it: if it was the final appointment of Directors for Petrobras, after the common appointment made by the political parties that participated in the government, formalized by Petrobras' Board of Directors, as the sentence at some moment states, it is technically unacceptable speculation. In fact, what can be deduced from an appointment, which is an act of regular office, practiced at the time when Lula was President of the Republic, which corresponds to a graft in relation to something that was only decided in 2014? How can you relate the appointment of a Director to a triplex that only comes in to play in 2014 and, at that time, was not even in Lula's contemplations?

In relation to the fraud of receiving or requesting something illegal, we ask: what action by Lula led to this being deducted? At what point in the process was this subjective question discussed and proven?

It is true that a portion of the population agrees with Lula's condemnation by Judge Moro because they want him to be punished for the totality of the work and, particularly, because of his political project.

Considering, however, that part of the population, favorable or against Lula, but disarmed of prejudices in relation to his judgment as a citizen, these people do not understand how an apartment visited only once by the former President (twice by Mrs. Marisa), and which he had never had the keys to, in which he had never stayed at, a property that has not been registered as his property, can constitute grounds for a conviction of undue advantage.

For a layperson, it is also difficult to understand that four years after leaving the presidency questions related to the conditions of Lula da Silva's existence can be linked to his status as a public servant, related to his former position as President of the Republic (emphasizing that passive corruption must be practiced by a public official).

Lastly, the whole spider web that the sentence built to relate Lula's conviction to past dealings made at Petrobras, and an imaginary slush fund, all of which Lula did not participate in and for which there is no proof of his complicity, everything is very fragile, improbable and artificial. Similar arguments apply to the crime of capital laundering, embodied in the so-called "triplex laundering." I refer, therefore, to the question that if we disqualify the fact that the triplex belongs to Lula, both in fact (possession of the triplex) and in law (registration of the property of the triplex), the conviction that Moro imposed on him for "laundering" this good is vacated. Note that it is Moro himself who acknowledges in the sentence that there was neither possession nor property.

In the universe of criminal policies faced by criminals, Lula's conviction is still associated with a criminal policy known as the "enemy criminal law". In its origin, this right corresponds to a proposal systematized by the German criminal scholar Günther Jakobs and made public in 1999. It proposes a criminal law model different than the one that applies to the citizen, one that is designated for the enemy, that is, to a person who is considered dangerous to the stable functioning of society.

The citizen's right guarantees, among other things, the right to due process and ample defense, and the presumption of innocence. For the enemy, however, one should impose a

restricted due process, the presumption of guilt, secret inquiries, telephone interceptions not deferred by the Judiciary, illegal prisons, production of illegal evidence, etc.

In addition to other characteristics, the enemy criminal law replaces the correlation between conviction and fact, valid in the criminal law applicable to the citizen, for the correlation author and conviction. The enemy is then judged for what he is, or for the stereotypes that are built about his image, and not for what he has done. The enemy is demonized.

In Brazil, for a variety of reasons the proposal of the enemy criminal law did not have greater prestige in the first decade of this century. Right from the outset a criminal law focusing on the image of an enemy would not be well received after a dictatorship that lasted until the 80s. The National Security doctrine was aimed at fighting head on the revolutionary war and the internal enemy (the subversive), which could be any person who by acts, ideologies or opinions contradicts established policies or authorities. Brazil, too, did not have any terrorist attacks at the beginning of this century, such as the USA and European countries, to adopt the enemy criminal law theory.

Leading from the lavajato criminal law, in its Curitiba version, the fight against corruption and a couple of other crimes articulated to its practice, assumes a fundamentalist nature and the purpose of redeeming the moral integrity of the country. Aside from incorporating the characteristics of the enemy criminal law, the lavajato's justice is accredited to the Italian experience of the Clean Hands, with adjustments promoted by the American intelligence and the globalization operated in international forums for cooperation.

In this version, legal operators seek to create a direct and immediate connection with the public opinion and, thus, bring the suspects and accusations into the mainstream media's spotlight, even against legal norms and institutional hierarchies.

Identified the main enemy to be condemned and demoralized – In this case Lula and the PT – allied political forces protect themselves while they still can from the anti-corruption crusade. And then, lavajato gets to its point: to remove, destroy and to incinerate the head, the LEADER. That's what we're watching.

Punitive power and the manifest speech of punishment: a vertical decision of power

Ruben Rockenbach Manente*

The present article aims to analyze, from the perspective proposed by critical thinking in the criminal field, the decision pronounced by the 13th Federal Court of Curitiba/Paraná, on July 12, 2017, which declared as partially founded the complaint filed by the Federal Public Prosecutor's Office, within the framework of the so-called "Operation Car Wash", to condemn, among others, the former President of the Republic Luiz Inácio Lula da Silva (a) for a crime of passive corruption (article 317 of the Criminal Code) for the receipt of an undue advantage from the OAS Group as a result of the contract of the CONEST/RNEST consortium with Petrobras; and (b) for a money-laundering crime (article 1, caput, item V, of Law No. 9.613/98) involving the concealment and dissimulation of the ownership of the "triplex" apartment 164-A, and for being a beneficiary of the reforms carried out (item No. 944 of the condemnatory penal sentence).

It should be noted, at first, that this analysis does not intend to personify the criticisms of the aforementioned judicial decision in the person of the magistrate who rendered this sentence, but rather, in view of the theoretical framework that guides our action, to question the legitimizing discourse of punishment understood as the official theoretical foundation of the points of meaning of criminal penalty that served as the basis for the Federal Justice of Paraná, being a judicial agency of the penal system, to justify the punishment of nine years and six months of imprisonment, in an initial closed regime, for crimes of passive corruption and money laundering to Luiz Inácio Lula da Silva (item 948 of the decision).

A model that represents a vertical decision of power that is not willing to solve conflicts, ie, that it does not intend to avoid, reduce, repair or restore the damage caused by someone (despite the fact that the media strategy used by the "Car Wash Task Force" sell us the idea of the possibility of eliminating corruption). On the contrary, as a rule, one simply determines the incarceration of the criminalized person for a certain period of time, whereas the behaviors that are the object of "combat" continue to occur normally (see the example of the consequences of the war on drugs and terror. Or, the very impeachment of President Dilma Rousseff to "return" the governability to the Country).

The great "trap" promoted by the punitive model is precisely to hide what interests it most: the exercise of vigilance and control over all of us. Although their legitimating (manifest) speeches affirm that punishment is the only way out of fighting the emergency and the enemy ("corruption" and the Workers' Party, respectively), the fact is that the narrative itself serves as a justification for creating a state of collective paranoia that authorizes the unlimited and unrestrained exercise of punitive power (latent purpose).

It is enough to see that all promises to protect society against the enemy and their crimes were not fulfilled by state coercion, on the contrary, served as a basis for increasing the restriction of freedom, of criminalized subjects or not, deepening social verticalization and flexibility of constitutional guarantees (selective leakage of sensitive data and unrestricted use of "award-winning cooperation agreements", for example).

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However, in spite of the non-fulfillment of all the promised, punitive power continues to exist and is increasingly strengthened as an instrument of regulation of the conflicts existing in the social fabric. The punitive model does not need to "deliver us from evil and sinners" for us to believe in its existence. It exists because it gives us hope; because with it everything becomes easier to solve.

In his eternal journey through the "sertão"²¹² Riobaldo already knew of these pitfalls of discourse in trying to explain the difference between God and the devil to his interlocutor, the outsider. In one of his dialogues, the "sertanista" wanders: how could God not exist?! With God existing, everything gives us hope. A miracle is always possible, everything is solved. But if there is no God, we will be lost in the *coming and going* of life, and life will be dumb. And with God, it is less serious if you neglect things a little, because in the end it works. Don't you see? What is not God, is a demon state. God exists even when *he is not*. But the devil does not have to exist *to be* - we know he does not exist, that's when he takes over everything.²¹³

In Riobaldo's words, the punitive power does not have to work to exist, we know that it does not work, but then it takes over everything, after all, as the character concludes: "the devil in the street, in the middle of the whirlwind".²¹⁴

The punitive model, both in the example brought from the literature and in the reflexes produced after the attacks of September 11 in the United States,²¹⁵ becomes the motor of human relations, replacing democratic and political actions as managers of the social fabric by a permanent state of police with a clear tendency towards absolutism. Such a device of vengeance is instrumented by the State through agencies of the penal system that deal with the exercise of punitive power, acting in a specific or nonspecific way on it.

This is because the speeches that justify the penalty are put into practice by several agencies/judicial institutions of the penal system (police, penitentiary service, criminal courts, among others), in our specific case, the 13th Federal Court of Curitiba/Paraná in the criminal action No. 5046512-94.2016.4.04.7000/PR that culminated in the conviction of former President Luiz Inácio Lula da Silva for crimes of passive corruption and money laundering.

The institutional component of rights, Joaquín Herrera Flores teaches, is very relevant, since every institution is the legal, political, economic and/or social result of a certain way of understanding social conflicts. For this reason, "we understand institutions as spaces of mediation in which the ever-provisional results of social struggles for dignity are crystallized,"²¹⁶ without forgetting, of course, that speaking of "institution" is the same as dealing with the relations of power that excel in the concrete historical moment in which we live.

Similarly, we must not forget that the criminal system is the set of agencies involved in the criminal issue, that is, a system in the sense of a set of entities and their relations both

212 ROSA, João Guimarães. Grande sertão: veredas. Rio de Janeiro: Nova Fronteira, 2001.

213 Idem, p. 76.

214 Idem, p. 27.

215 In this sense: ZIZEK, Slavoj. Bem-vindo ao deserto do Real: cinco ensaios sobre o 11 de Setembro e datas relacionadas. Translation by Paulo Cezar Castanheira. São Paulo: Boitempo, 2003.

216 HERRERA FLORES, Joaquín. A reinvenção dos direitos humanos. Translation by Carlos Roberto Diogo Garcia; Antonio Henrique Graciano Suxberger; Jefferson Aparecido Dias. Florianópolis: Fundação Boiteux, 2009, p. 128-129.

reciprocally and with the environment, or, in Zaffaroni's words, "it is not a set of organs of the same tissue that converge in a function (...) each of these agencies has its own sectoral interests".²¹⁷ Thus, each agency has its own sectoral interests and its own quality controls in its operations, after all, "they have discourses outward, which highlight their noblest manifest (official) purposes and discourses inward, which justify for their members the disparity between their manifest purposes and what they actually do (latent purposes)".²¹⁸

Such "sectoral interests" are clearly present in the condemnatory decision under analysis, since its official discourse (*outward*) against corruption (in item 961 of the criminal sentence the judge uses the saying "no matter how tall you are, the law is still above you") legitimizes its manifest purpose (*inward*) of unrestricted exercise of punitive power to justify the merits of the accusation that the ex-President Luiz Inácio Lula da Silva would have consciously participated in the criminal scheme, including knowing that Petrobras' Officers used their positions to receive an undue advantage in favor of political agents and political parties (item 07 of the decision).

The aforementioned undue advantage would have been embodied in the provision to the ex-Chairman of the 164-A "triplex" apartment at Condominium Solaris in the city of Guarujá/SP, without payment of the corresponding price (item 12) under the central argument that "the criminal scheme that victimized Petrobras and involved fraudulent bidding adjustments and the payment of undue advantage to Petrobras agents, political agents and political parties was proven" (item 835), and that, in this criminal articulation, "the former President Luiz Inácio Lula da Silva had a relevant role in the criminal scheme, since it was incumbent upon him to indicate the names of the Officers to Petrobras' Board of Directors and the requests of the Federal Government were answered" (item 838). The evidence which leads the magistrate to condemnation is astounded at the fact that "it seems a little strange that, given the magnitude of the criminal scheme, illustrated by the fact that Petrobras had recognized about six billion reais in accounting losses with corruption in the balance sheet of 2015, the ex-President didn't have any knowledge, especially since the criminal scheme would also have involved the use of kickbacks in corruption in Petrobras to finance electoral campaigns, including the Workers' Party by which the former President was elected and elected his successor" (item 801).

The disparity between the manifest and latent purposes of punitive power is projected again in the conviction at the time of the first phase of the dosimetry of the sentence (article 59 of the CP) of former President Luiz Inácio Lula da Silva, in relation to the crime of passive corruption,²¹⁹ when the basic penalty is fixed in five years of imprisonment (3 years above the legal minimum) due to three (of the eight!) "negative vector of special disapproval", one of them being "negative analysis as a personality" (item 948). That is to say, although the criminal record, social conduct, motives and behavior of the victim are favorable to the accused (although the term used in the sentence was "neutral"), the basic sentence is increased by three years in total discrepancy with the provisions of law, dogmatics and jurisprudence.

217 ZAFFARONI, Eugenio Raúl. Manual de derecho penal. Buenos Aires: Ediar, 2011, p. 10.

218 Idem, p. 10.

219 Punished with imprisonment from 2 to 12 years and fine.

The sentence thus reveals that the punitive model is a discursive instrument that provides the basis for creating a state of collective paranoia that serves for those who operate the power to exercise it without any limit.

The criminal sentence and the agnostic theory

Sergio F. C. Graziano Sobrinho*

The theme proposed in this article is the content of the condemnatory criminal sentence handed down in the proceedings of the Criminal Action number 5046512-94.2016.4.04.7000/PR that process in 13th Federal Branch of Curitiba, delimited in appearance of its evidentiary content, namely, to understand the mechanisms by which the sentencing magistrate formed his conviction and attributed to Ex- President Luiz Inácio Lula da Silva the practice of crimes of passive corruption and capital(money) laundering, condemning him to a sentence of 9 years and 6 months of reclusion(incarceration).The central objective of this article is go through, from the point of view of the grounds of the sentence, which connections – principle of correlation – were established by the magistrate among facts, accusatory narrative and the evidence produced by the prosecution and the actual condemnation to, after all, minimally, to understand its final content.

It is important to analyze the point at which the magistrate uses arguments to substantiate his conviction, in particular, that Lula practiced criminal offences for having participated consciously of the criminal scheme in which Petrobras Directors used their positions to receive undue advantage in favor of agents and political parties and, beyond that, he would also have received, the accused himself, values embodied in the provision of an apartment without payment of the corresponding price. Here is a first point that must be illuminated, avoiding a subliminal obscurity, otherwise let's see: the terminology "Availability" is used beginning in the judicial sentence, so that at the end, there is understanding, common sense, between the imputation made by the prosecution (Public Ministry) and the condemnatory sentence(Judge).

The argument and its presentation form are sophisticated, but attention is needed, because the judge becomes agnostic in relation to the law itself, this because he positions himself indifferently to the normative text, because he ignores and exempts himself from the minimal dogmatic reflection; with the firm intention of wielding his argument, and adequates it to the elements of the criminal type "corruption". The sophistication of the argument is in these two points: a) There is no a generic type "corruption", but two criminal types, the passive corruption(317 article from Penal Code, practiced by public official) and the active corruption(333 article from Penal Code, practiced by individuals); b) both criminal types, passive and active corruption, do not have the terminology "available", since the actions foreseen in these types contain five conduits: request or receive undue advantage and accept promise of advantage(passive corruption) and offer or promise undue advantage(active corruption). Lula was accused for the practice of passive corruption, that is, he should have requested or received an undue advantage, or have accepted a promise of undue advantage. According to the sentence, the company OAS would have left at the disposal of Lula embodied values in the triplex apartment, however he said "no", for to this day this apartment is not in his name, neither is he undue its possessor.

It is worth mentioning another historical passage of the legal artifact produced in that criminal process, which clarifies – from the dogmatic point of view, but not the political and ideological point of view of the sentence – our discussion in this article. Let us see: in the Declaratory

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Embargoes proposed by the defense of Ex- President Lula, the judge(court) asked to express his(its) views on the evidence in the file and the relationship between the complaint and the judgment, clarifies: “ This judgment never stated in the sentence or anywhere that the values obtained by the Contractor OAS in the contracts with Petrobras were used to pay an undue advantage to the Ex-President.”

For the purposes of this debate, the decision in the Declaratory Embargos is revealing, this explains why, for example, if OAS made available the triplex apartment, renovated, furnished and decorated to the of the family of Ex-President Lula, this would be sufficient to characterize the crime of corruption(generic, which does not exist). However, this same judgment also recognizes, for example, i) that Petrobras did not suffer any loss from contracts entered into with the Company OAS; ii) that the amounts received by OAS in connection with the (legal) contracts entered into with Petrobras did not serve to pay illicit advantage to Ex-President Lula; iii) that Ex-President Lula did not commit the crime of passive corruption, because this crime requires that the public official solicit, receive or accept promise of illicit advantage , however, as seen, none of this existed.

Finally from a dogmatic point of view, it should also clarified that if the company’s directors made the triplex apartment available for any illegal purpose, they could have committed some crime, but it is neither automatic nor obligatory that the supposed beneficiary to whom would have made available the apartment has committed the crime of passive corruption, this because the existence of a crime does not necessarily presuppose the existence of the other. Offering money (active corruption) to the policeman to avoid a traffic ticket does not automatically and compulsorily mean that the policeman has committed the crime of passive corruption , as it would only occur if it were only if the policeman had received the value offered.

To finish, some reflections on the points raised here. In a very clear way it must be said, first of all, that this is only a point of view on a tale of a long sentence. Long sentence, which is smaller in content and higher in ostentation. Deep, it is shallow. In its completeness, it is empty. It was an attempt at a piece of work but it was no more than a draft. It wanted to stay registered got into the trash of history. It did not aggregate, but it lacerated bodies and minds. It will be proscribed soon. Possible will be quickly forgotten, it is enough that some movements give it the kick it deserves. Trying to erase the brightness of a star is the plague round by those who live in darkness, or, as Márcia Tiburi says, the judge in Curitiba is more of “a dull self” that survives by trying to erase someone else’s.”

The condemnatory sentence handed down against the Ex-President Luiz Inácio Lula da Silva can be analyzed in several other aspects including the psychoanalytic one, especially its narcissistic content, were it not for our scenario of hatred against the less favored social classes. Certainly this judicial decision came in the midst of the democratic excess that overflowed the chalice and authorize it by public acclamation, although it was manipulated in a kind of collective unconscious completely intoxicated.

The creation of a new typical element in the scenario of penal dogmatic is absurd, yet the utilitarian thought in which the ends justify the means is in the logic of the overflow of water contained in the chalice. This is one of the most frequent vectors in the criminal justice system, which indicate the low degree of democratization of a society, especially since the frequent failure to observe violations of fundamental constitutional guarantees reveals the institutional fragility that we are experiencing day by day. In the wake of says João Ricardo Dornelles “we

live a great historical challenge(...) Contemporary fascism is infinitely more complex and sophisticated." Let us prepare ourselves, for there will be a long historical period. We must resist.

An all is fair game to condemn Lula: Léo Pinheiro and the case of the informal award-winning collaborator

Tania Oliveira

Adopting new mechanisms for the prevention and repression of organized crime, the Brazilian criminal procedural law incorporated the figure of the whistle-blower, whose creation has as its main purpose the facilitation of investigations of the criminal fact in all of its complexity. Although it appears in several diplomas, the prize award is effectively outlined in the Brazilian Law No. 1.850 / 2013, also known as the Criminal Organizations Law (COL)²²⁰.

From a theoretical point of view, when organizing the COL, the Brazilian legislator chose to create the figure of the award-winning collaboration as a means of proof for any kind of crime - a fact that raises debates in the legal environment questioning the whole essence of the Rule of Law in Brazil. Mainly because, in these cases, the State transfers the duty of investigating the crime and starts to rely on the words of those who commit such illegal actions, often offering waivers or discounts to possible future sentences. It happens that, at the moment when the State was given the monopoly of the criminal persecution, it must be prepared to succeed in such task. Its failure cannot, under any circumstances neither under any pretext, be compensated by the bargaining for the alleged elucidation of crimes.

With the outbreak of the so-called "Car Wash Operation" by the Brazilian Federal Police in March 2014, the agreements related to the collaborations became one of the most debated issues in the public spheres, and also among lawyers. The criminal procedure associated to this operation seems to have been transformed into a dangerous game where no one knows where the search for truth starts or ends, who owns the responsibility for investigation, and where no one is capable to correctly point out those who among the collaborators are bluffing and those who are not. The accusatory frenzy turned the investigation into a true media spectacle, with selective leaks of confidential testimonies, making impossible to fully rely on their veracity or their limits.

The professed confidentiality of the agreements related to the collaborators' testimonies has become a trap, in which people are "notified" of their presence's in testimonies by the press, and cannot defend themselves once unfamiliar with the content of the "accusations." On the other hand, people who are accused in those testimonies have been officially denied access to the contents of the accusations, in clear violation of the full defense right, and also, maculating the adversarial principle.

From a practical point of view, based on precedent findings in the Brazilian criminal procedure, testimonies provided by collaborators under these or any other operation do not serve as an only evidence in a plea for guilty. It should be considered a support to the criminal investigation once what is affirmed by the collaborator might be true or not. It is therefore imperative that the collaborator also provides further elements that can be considered proofs and support the information provided in testimony. Without further elements, a testimony becomes a mere statement with no legal validity. The question, as it appears in the case of the Car Wash Operation, is that those involved in the investigations must be really careful when analyzing the veracity of the testimonies, and must find ways to deal with what is,

220 Originally "Lei das Organizações Criminosas", in Portuguese, and available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12850.htm

afterwards, interpreted as fake information. When convictions are built on the basis of a statement of a person who was previously accused of misconduct, corruption or committing a crime, and sees collaboration as a means to get away from a criminal conviction, deviations may arise and the collaboration institute is then misused.

The case of businessman José Aldemário Pinheiro Filho, also known as Léo Pinheiro, is a special chapter in the Car Wash Operation novel and its only apparently legal collaborations. The facts show that the misuse of the collaboration-tools goes beyond imagination, and worse, the actors involved in the investigations who are part of the Car Wash Operation disregard the absence of characteristics that these collaborations require in order to be considered legally valid.

Indeed, Léo Pinheiro testified to Judge Sérgio Moro in the case of the Criminal Act 5046512-94.2016.404.7000/PR, on April 20, 2017. In the condition of co-defendant, he had no obligation to speak the truth, in the midst of a possible future agreement that would lead to an award-winning collaboration with the Brazilian Federal Prosecution Office²²¹ within the Car Wash Operation.

The lawyers of former president Lula submitted a request to Judge Sérgio Moro so that the Federal Prosecution Office could clarify the status of the negotiations related to the collaboration agreement of Jose Adelmário Pinheiro Filho and Agenor Franklin Magalhães Medeiros, as well as the benefits offered to both. In rejecting the defense's claim, the judge stated that the matter had already been the subject of the interrogation hearings in which the defendants stated that they were trying to conclude an agreement but the process was not finalized yet. Therefore, Judge Moro argued that once no benefit could have been offered at that point he would deny Luiz Inácio Lula da Silva and his defenders access to evidence already documented.

The Binding Precedent number 14 of the Brazilian Supreme Court is unquestionable on the right of defense: *"It is the right of the defender, in the interest of the defendant, to have full access to the evidence that, once already documented in an investigative procedure carried out by a body with competence of criminal police, are related to the exercise of the right of defense."*²²²

It became clear that the abovementioned defendants namely, Pinheiro and Medeiros, gave testimony so that the investigative bodies could check whether there was an indication of misconducts potentially attributable to former President Lula and those would be a condition to unlock the agreements with the Federal Prosecution Office - which were under negotiation for several months. Thus, Léo Pinheiro's testimony was the conditioning factor to adjust the pact. That leads us to the conclusion that the "information" he provided about former president Lula would qualify him to receive the benefits of the agreement. The paradox is that, not being committed to speak the truth, testifying under the condition of defendant, Pinheiro would not be charged with any crimes in case he didn't act with veracity. While lying, he

221 In Brazil, the Federal Prosecution Office is known as "Ministério Público Federal". More information available, in Portuguese, at: <http://www.mpf.mp.br/>

222 Available in Portuguese at:

<http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=14.NUME.%20E%20S.FLSV.&base=basesSumulasVinculantes>

sought to legitimize himself to obtain the benefits of the collaboration agreement with the Federal Prosecution Office, without the risk of jeopardizing his own defense process.

Despite this fact, Pinheiro's defense claimed, in the opportunity of the presentation of legal documents²²³ related to the current investigation on both Pinheiro and Former President Lula, the cognition of the validity of his collaboration and the application of the pertinent criminal provisions related to obtaining benefits, and further asking to reducing the penalties by two thirds and a change to a more favorable criminal regime.

During the 218 pages of the sentence condemning former President Lula to 9 and a half years in prison, Judge Sérgio Moro, makes first all sorts of considerations justifying why he would not be able to consider the testimony of Léo Pinheiro as award-winning collaboration. But he further affirms in his sentence that:

"Although late and without the formalization of the agreement of collaboration, it is necessary to recognize that the condemned José Adelmário Pinheiro Filho contributed, in this criminal action, to the clarification of the truth, providing both testimony and documents.

(...)

"Being his testimony consistent with the rest of the evidence, especially in regard to the documentary evidence produced and having it, the testimony, evidentiary relevance for the trial, the granting of legal benefits is thus justified." (pages 209-210 of the Case's Sentence)

The judge further affirms that while deciding whether Pinheiro would benefit from his (non-binding) collaboration or not, he relied on the parameters of the collaboration agreement made between the Federal Prosecution Office and Marcelo Bahia Odebrecht, President of Odebrecht. He was doing so once he considered that both Odebrecht and Pinheiro practiced very similar crimes under almost the same material and personal conditions.

There are several types of errors and distortions in the process of considering what kind of "evidence" was obtained with the testimony of Léo Pinheiro.

Firstly, what can be understood of this experience is that both Judge Moro and the Federal Public Prosecutor have acknowledged an award to a defendant who was never considered, bearing in mind the formalities needed, a collaborator and the absence of a signed agreement between parts is an additional proof of that.

They further agreed to grant Léo Pinheiro other benefits by the very moment Pinheiro affirmed that a property located in the city of Guarujá, in the cost of the Sao Paulo State, belonged to former President Lula²²⁴. By doing so, they have, beyond the known Brazilian criminal procedures, created an inexistent figure of the informal award-winning collaborator. Additionally, they have also openly ignored the provisions of art. 6, of the Brazilian Law number 12.850 / 2013 that regards to award-winning collaborations.

223 Full content is available in Portuguese at <http://politica.estadao.com.br/blogs/fausto-macedo/wp-content/uploads/sites/41/2017/06/A-TROCA-.pdf>

224 Also known in Brazil as the "Triplex Case". Triplex makes reference in portuguese to a three-floor apartment.

On the 211th page of the sentence, Judge Moro manages to introduce arguments to justify his innovative measures. While reaffirming over and over the obvious - the fact that granting an award to a collaborator must be directly related to the confirmation of the appealing court - in his own terms, he ensured the close collaboration of Pinheiro, as well as his obligation of speaking the truth.

*"The granting of awards is still conditional to the **continuity of the collaboration, only along with the truth** of facts in all other criminal cases in which the convict is called to testify.*

*In case it is observed that there is either a **lack of cooperation or that the condemned person is noticeably absent from the truth**, all benefits the condemned has been awarded with should be revoked." (my emphasis)*

There was a deliberate confusion promoted by Judge Moro in his sentence, when turning a testimony from a defendant that did not effectively commit to speak the truth nor has signed any collaboration agreement with any of the parts involved in the process in an award-winning collaboration. The act of only demanding that the defendant, and later condemned, Mr. Pinheiro commit to speak the truth in future interrogations is simply absurd. By doing so, Judge Moro managed to deviate from the most basic principles of the criminal law in Brazil.

If there was ever a disagreement that interrogations are procedures that are considered means of defense, is its absolutely unquestionable that every person who is under investigation has both the constitutional right to remain silent and the right not to produce evidence against him or herself.

Léo Pinheiro was already sentenced by Judge Moro to 16 years and 4 months of imprisonment in another lawsuit for active corruption, money laundering and criminal organization. He was arrested for the first time in November 2014, and put under house-arrest by the Brazilian Supreme Court. He has also testified many times.

During almost 3 years of investigation, he always denied any involvement of former President Lula in the case of the three-floor apartment the Federal Public Prosecution Office said he owned. During these years, Léo Pinheiro's intentions to formalize award-winning agreements were successively rejected for failing to mention the former president in any form. In September 2016, 15 days after the Public Prosecution Office denied a deal on the agreement because of the lack of "useful" information, Pinheiro was arrested by Judge Moro and two months later he received a new sentenced where his criminal penalties increased in 10 years.

In April 2017, more than two years after his first arrest, Pinheiro decided to provide new information to Federal Prosecutor Deltan Dallagnol with a new testimony that both Dallagnol and Judge Moro considered a full collaboration with the work of the Brazilian Justice. In his testimony, he reaffirmed Dallagnol and Moro's thesis that the real owner of the three-floor apartment in the coast of Brazil was President Lula. And he said he believed that Lula was the owner of the apartment because he had probably received that apartment as bribery from the company Léo Pinheiro was a former director of, the OAS Building Company.

One of the main characteristics of the story that Léo Pinheiro told the justice years later, in 2017, is its unlikeliness. One must not forget that this last cooperation came after years of Léo Pinheiro being under pressure, while arrested and with his criminal penalties increased in 10 years, a while before. It may sound a bit awkward that the testimony of the other 73 witnesses

that were heard in 24 sessions, along with the documentation provided by President Lula's lawyers, were subject of analysis in only 29 paragraphs of Judge Sérgio Moro's sentence.

Judge Moro clearly stated that Léo Pinheiro's words should be understood as a full cooperation with investigations - and reaffirmed that it is absolutely out of question its absence of characteristics that have permitted it to be considered legally valid. But if we all took into account the testimony provided by Léo Pinheiro, we could be seduced to use the same criteria of the abductive logic adopted by Deltan Dallagnol in the final allegations presented in this very same criminal procedure. What are the factual hypotheses that explain the evidence? Was Pinheiro's statement fabricated? Was it a result of an agreement between the parts who wanted to condemn former President Lula in this "all is fair" game? Was the creation of the figure of the informal award-winning collaborator built up only to support the condemnation of the former President Lula? Are all answers above correct?

"- Elementary, my dear Watson".

Moro's sentence: "checkmate" & bounced check

Tarso Genro*

Those who read Judge Sérgio Moro's sentence convicting former Brazilian president Luiz Inácio Lula da Silva without the high passions of the current political dispute of which it is part may understand the supportive compliments some of his corporate peers have paid him in unusual promptness. But they would hardly be convinced that such a decision could prosper in a neutral court, without using "exceptional reasons," which have been guiding – so far – the criminal claims against Brazil's former leader. Lack of logical basis, inductive-analytical reasoning in the examination of testimonies without collating them with supporting evidence, the selection of relevant and irrelevant facts according to an already defined option for conviction, and, of course, a political bias, followed by a media massacre consistently sponsored by most of mainstream outlets – actually promoted to the condition of "*ex officio*" prosecutor through arbitrary headlines.

Adopting this method and criminal-procedural vision, all defendants who were allowed plea bargains – I mean those accused of gaining financial benefits from the construction firms –, regardless of the defense they present, shall be unappealably convicted. The reason for that is simple: the judge's belief no longer needs to be based on the proceedings, but may emerge from a programmed or voluntary belief that is not in the records, and therefore is informed by the realm of politics and partisan contestation. This is the same for any party or any company deemed as corrupt. However, Brazil's Federal Supreme Court (STF) signals something different. As proceedings unfold against the protagonists of the coup and the "advocates" of reforms, the country's highest court revalues principles of presumption of innocence, full defense, and non-exceptional due process of law.

But those who think Judge Moro is a dilettante in the legal matter, who was "mistaken" in an important judgment, are wrong. His election by the media oligopoly as first man of the law, pressing the STF to change historical interpretations on constitutional guarantees – to superimpose a political process' needs over the guarantees of the Rule of Law (because "the country urges" to fight corruption) – allowed Moro to have the political status to "checkmate" the country. And so he did, because all the alternatives conveyed in his judgment whether prolong Brazil's current crisis or make immense room for impunity, or even delegitimize even further the political sphere if they make da Silva unable to run for president in 2018.

On the first hypothesis, they "prolong" the crisis through a crisis in the Judiciary, as his decisions to maintain endless arrests start to find echo in other instances, therefore demonstrating how discriminating they are. On a second hypothesis, they make "immense room for impunity," because the High Court of Justice (STJ) and the STF's eventual rebuttal – to re-establish the guarantees of presumption of innocence and the *res judicata* for the execution of the sentences – shall directly benefit the next generation of defendants, whether they are guilty or not – coming from the coup –, who are already being released or have not faced trial yet. On the third hypothesis, if da Silva's exclusionary sentence is simply confirmed or appealed against, whoever is elected president in 2018 will have no legitimacy to rule. Therefore, whatever the decisions of higher courts (because the entire process was just a

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Translated by: Rane Souza

series of exceptions and selectivity) from now on – whether they confirm the judgment, override it to acquit da Silva or increase his sentence –, they will aggravate the political crisis, shake the trust in the justice system even more, escalate the extremism in the country's current class struggle, and enable a media oligopoly to control the national agenda. That is the very media oligopoly which produced the fascist incrimination – *in abstracto* – of political parties and politicians, treating honest ones, the ones who committed the perverted betrayal of using slush funds, and the ones who lived and survived the school of bribery and crime as if they were all the same.

Moro's sentence – weak and damning with no evidence, previously decided in the realm of information spreading – “checkmates” a Republic that does not have a political elite in the parliament able to resist the decay that two parties specially, the PMDB (Brazilian Democratic Movement Party) and the PSDB (Brazilian Social-Democratic Party), have been promoting in our democracy in crisis. But the sentence is also a bounced check, paying for a service to the right-wing liberalism protecting the reforms, as its majority in Congress may fall on the unpredictable gallows of unlawful processes or the trial of the sovereign people, deceived by them to pass the reforms, as if they were actually concerned about corruption. A “checkmate” mixed with a bounced check repeating as farce the Berlusconi era's “clean hands” in Italy, which were only able to make those hands even dirtier.

The conviction of President Lula as a violation of international human rights law

Tatyana Scheila Friedrich

Larissa Ramina

"Justice, blind to one side, is no longer justice. It must look equally to the right and to the left."
(Rui Barbosa)

The need to establish a minimum of rights and guarantees to individuals regardless of their origin, nationality or link to a specific country consolidated the International Human Rights Law. The atrocities committed by the Nazi-fascist regimes have shown that the rights envisaged internally would not be sufficient because an arbitrary state authority could appear at any moment and simply withdraw all the rights of the population, due to a personal form of thought and justification. Thus, after the World War II, that legal branch has been affirming itself, from the struggle involving people, organizations and states engaged in its promotion.

International Human Rights Law consists of three very broad strands, including International Humanitarian Law, which deals with the protection of persons in situations of armed conflict, International Refugee Law, which seeks to protect human beings who are persecuted and fit into the concept of "refugee" and International Human Rights Law itself, which encompasses a wide range of individual and collective rights, both in the field of civil and political rights and in the field of economic, social and cultural rights, in addition to those related to bioethics. The third strand includes rights related to the subject of justice, including the procedural safeguards related to persons who are subject to administrative and judicial proceedings, which are relevant to the present study.

Regarding the situations involving legal proceedings, the central principle, which gives rise to all the guarantees of the jurisdiction and that therefore must be respected by all involved, including the judging authority, is the principle of due process of law. It incorporates the values that are essential to any judgment: ample defense, contradictory, double degree of jurisdiction, legal reasoning, natural judge, parity of resources, presumption of innocence, prohibition of illicit evidence and real truth.

The sentence handed down by Judge Sérgio Moro of the fourth branch of the Federal Court of Curitiba in July 2017, in the case in which former President Luiz Inácio Lula da Silva was found guilty and sentenced to nine and a half years for passive corruption and money laundering, presents several inconsistencies and serious violations of this basic principle and its dimensions, provided both in international texts in force at regional level and in those of a universal character.

The topic of human rights has always been a concern in the Americas, where the first international human rights document emerged: the American Declaration of the Rights and Duties of Man, promulgated in April 1948, at the time of the creation of the Organization of American States itself. The Universal Declaration of Human Rights was adopted by the UN General Assembly a few months later, in December of the same year. According to Lindgren Alves,

"The American Declaration differs from the Universal Declaration in terms of content because it is not just a bill of rights. It establishes not only the rights inherent in all human beings endowed with innate attributes of dignity, freedom and equality. Because of the equally

congenital attributes of reason and consciousness of the human person, it also establishes correlated duties to these rights.

According to the second paragraph of its Preamble: "If rights exalt individual freedom, duties express the dignity of that freedom." Thus, the document is adapted to the traditional legal doctrine according to which to each right corresponds a duty."

Regarding access to justice, the American Declaration states in its article 18 that "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." Subsequently, article 26 deals with the presumption of innocence of the accused and with principles that must govern the testimony, the trial and the determination of the sentence, as follows:

*"Article XXVI. Every accused person is presumed to be innocent until proved guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment."*At this point the irregularities in the whole process can be verified at the testimony of Former President Lula, for example, when videos showed the judge's actions with strong bias, bad will towards his defenders and interruptions of the interventions. The sentence imposed, of nine years and six months, can be considered infamous, since it is common knowledge the irony of that judge to call, in the private sphere, the defendant by the denomination of "nine", in reference to the fact that Lula has only nine fingers due to a work accident in the past. A real aggression to the honor of the human being.

The Universal Declaration of Human Rights was adopted at the UN General Assembly on December 10, 1948, and dealt with human rights in a comprehensive way, with the merit of bringing together civil and political rights as well as economic and social rights, within an universalist and indivisible conception.

In the same direction as the American Declaration, article 10 of the Universal Declaration deals with law related to judicial process: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." The following article deals with the principle of *in dubio pro reo*.

"Article 11.1 Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."

The judge's attitudes in the media, prior to the sentence, his public statements, the presence and manifestation in various events to talk about the process, the proximity to the members of the Public Prosecution involved in the case, the photos depicting personal relationship with President Lula's political opponents and the fact of having direct family members linked to a political party that always made electoral and governmental opposition to the Former President were statements that easily lead to the perception of existence of an intention to convict the defendant, by personal motivation, independent of the process records. This entire context breaks with the requirement of independence and impartiality of the judge and with the presumption of innocence, foreseen in the articles transcribed.

In the area of Human Rights Conventions, as international treaties ratified by States, therefore binding, procedural principles are also envisaged. The Universal Declaration has always been

a world reference in terms of human rights, but in order to overcome its lack of legality, two treaties were signed in 1960 under the auspices of the UN: The Covenant on Civil and Political Rights, addressed to individuals, the rights holders, and the Covenant on Economic, Social and Cultural Rights, addressed to the States Parties, which undertake to provide positive benefits in order to implement them.

The International Covenant on Civil and Political Rights (New York Pact) establishes in its art. 14, § 1, that "All persons shall be equal before the courts and tribunals". On this equality, it is important to demonstrate the partiality in the sentence by not treating President Lula equally and, on the contrary, increasing the penalty for being a Former President of the Republic.

At the Organization of American States, Resolution III of the Fifth Meeting of Consultation of Ministers of Foreign Affairs of the American States, held in 1959, recommended to the Inter-American Council of Jurists the drafting of a Convention on Human Rights and a system of Protection of Human Rights. Thus, the Inter-American system ceased to be merely declaratory and became more effective with the emergence in 1969 of the American Convention on Human Rights, which came into force in 1978. Among the various rights provided for therein, article 8th states:

"Article 8. Right to a fair trial. 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. (...)"

Regarding the first part of the article, the guarantee of a "competent, independent, and impartial tribunal", it has not been observed in the case analyzed here. The jurisdiction of Judge Sérgio Moro was questioned by the defense in view of the fact that he is pursuing innumerable actions that would not fall within his competence, which should be attached specifically to the case of Petrobras. Then, there is a clear effort by the aforementioned judge to link disconnected facts to Petrobras issues and thus to personally judge the case involving Former President Lula.

The requirement written in the second part of article, related to the innocence presumption so long as the "guilt has not been proven according to law" is another critical part of Judge Sérgio Moro's decision, since President Lula has never had ownership, possession or even the key of the triplex apartment (object of the case). Likewise, there is no proven economic benefit derived from this good and, without it, it is not possible to set up an act of corruption or money laundering.

Thus, the principle of the natural judge exists in order to avoid bias in the decisions, by excluding the possibility of the parties and their lawyers personally choosing the judges, and by excluding the possibility for the judges to initiate the cases that concern them, without the initiative of the parties.

The "Rome Statute", an international treaty that created the International Criminal Court (ICC), signed in 1988 in Rome, entered into force on the 1st. July 2002, after the 60th deposit of the instrument of ratification. It was a milestone in the history of international law because for the first time an international court was established to try war criminals and perpetrators of genocide and crimes against humanity when they are not tried by their national courts.

Finally, the world was ready to create a permanent tribunal and get rid of the courts of exception, established by the victors in the postwar period or by the UN Security Council to try specific situations. Brazil ratified the Treaty of Rome and deposited the instrument of ratification in 2002.

In the text of the Statute, there are several procedural principles, referring, for example, to the guarantees of a fair trial recognized by international law, as described in article 17, 2. Article 66 brings the presumption of innocence and its item 3, is very clear: “3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.” The doubt, the debate, the existence of different positions between the judges, therefore, must lead to the innocence of the defendant and not to his condemnation.

This extract of the sentence shows that article 66.3 has not been respected, as it states that there are some doubt in Brazilian judicial decisions regarding the need of an ex officio act, which President Lula never did. “In Brazilian jurisprudence, the issue is still subject of debates, but the most recent judges tend to accept that the configuration of the crime of corruption does not depend on the practice of the act of office and that there is no need for a precise determination of it.” (p. 866)

In view of all the above, it is demonstrated how Judge Sérgio Moro's sentence violates several international human rights provisions. As a public agent of the Brazilian State, as a professional of the Judiciary Power and as a citizen, the judge has the obligation to respect them, guaranteeing human dignity. Since this has not happened, his sentence must be reviewed.

In the words of Antonio Augusto Cançado Trindade, the Brazilian former President of the Inter-American Court of Human Rights and current judge at the International Court of Justice,

“It is, of course, for the domestic courts to interpret and apply the laws of their respective countries, with international bodies specifically exercising their oversight function, within the terms and parameters of the mandates assigned to them by the respective human rights treaties and instruments. However, it is also incumbent upon domestic courts and other State bodies to ensure the implementation of international standards of protection at the national level, which highlights the importance of their role in an integrated system such as the protection of human rights, in which conventional obligations shelter a superior common interest of all States Parties, the protection of the human being.”

The court of appeal must rule a decision to guarantee “the protection of the human being”, quoted above, reviewing the unreasonable decision that violates procedural principles provided by International Human Rights Law.

Convictions prevail in Lula's guilty sentence

Valeir Ertle

Brazil has flabbergastedly witnessed the discourse of prevalence, which is the new argument used by the ruling class to dictate their political and economic interests, such interests are against constitutional and legal guarantees. In the labor realm, the *prevalence of negotiated terms over legislated ones* was used as the backbone to pass backward-looking laws, which confront rights conquered in Brazil's long and unfinished civilizing process.

In the criminal realm, in this specific case, there is prevalence of convictions on individual rights and constitutional guarantees, as well as, political and ideological convictions. The best, the most popular, and the most widely celebrated President of Brazil, Luiz Inácio Lula da Silva, was convicted without proof of crime. Such conviction shows how innocents may be found guilty due to the prevalence of political-ideological convictions over the presumption of innocence, unless proven guilty, which is foreseen in the Brazilian legal framework.

The strategic alliance of a group of prosecutors, powerful media companies, and political party factions with a politically engaged judge has led to the destruction of Brazilian companies working at core domestic sectors and innocents wrongly convicted, while actual criminals are benefitted by plea agreements with no evidence.

Big House masters rely on the enemy's criminal law as a fundamental reference. The ideas of German indoctrinator, Günter Jakobs, have been spread worldwide for over twenty years now. Based on such ideas, Lula has been regarded as the enemy of the State, and, as such, is treated in a discriminatory and unequal fashion. However, Lula is an innocent victim. Instead of being convicted, he should be decorated for the public policies implemented and providing supplies and strengthening the Brazilian Federal Police during his terms in office.

Former President Lula is not regarded as a citizen with rights. In spite of the persistent, emphatic, and systematic campaign against his accomplishments and renowned political leadership carried out by *Rede Globo* – articulated with persecutors and the judge Sérgio Moro, polls rank him first place in the presidential run. Lula is treated as an enemy that must be annihilated to make sure the ruling proprietary class, which is greedy and submissive to international capital interests, keeps its position. Extremist right-wing intellectuals have found a source of inspiration for actions against their rivals in the enemy's criminal law. What the world has witnessed in Brazil is no other than the implementation of this biased and Nazi-inspired theory.

Based on that theory, punishment to the enemy is anticipated, for this reason, punishment is supported by convictions, not by evidence; it is disproportional, and stems from suppressing judicial guarantees. Therefore, the systematic use of arrests prior to trial and blackmail to force people to negotiate plea agreements whose benefits are directly linked to and reliant on meeting the needs of the political and economic forces. Those forces intend to destroy Lula so that he does not run for president. In such a context, the differences between investigators and judges is completely eliminated, the former is nearly in charge of leading the latter.

In this scenario supported by political-ideological interests, media engagement is core. The persecution motivated by a conviction without proof of crime prior to trial serves the purpose

Translated by: Rane Souza

of destroying the enemy, socially and politically dismantling him. In a country where the Big House grows richer by using the State, where ruling class thieves and the corrupt elite face no punishment, common sense is an easy prey to authoritarian attacks widely supported by the Brazilian media.

Americans have long been resorting to the enemy's criminal law to justify their attacks worldwide. The Guantanamo Bay Detention Camp is one example, among many others. Military dictatorships used and abused of that peculiar way of overlooking the most basic rights of a human person. They state that a certain human being is the enemy of the State based on political convictions and political, ideological, and financial interests, and the most elementary legal guarantees are suppressed.

The attempt to send Lula to jail and the way the processes against him have been conducted show wide adherence of prosecutors, judges, the media, and right-wing party factions to that theory. Such theory is used in an effort targeted at destroying and blocking Lula's prospects of running in the next presidential elections because the right-wing is wide aware of Lula's prestige and of how hard it would be to defeat him at the ballot.

Federal Police operation names resemble advertising campaigns. Lula's sentence to 9 and a half years without proof of crime looks like a great fit for the communication actions that followed suit. It is not a coincidence that, on social media, there are plenty of jokes that relate the sentence to how many fingers the ex-president has got.

During the Inquisition, he who did not comply with the State and the Church rule was considered an enemy. Similarly, in Nazi Germany, Jewish people were arrested and sentenced to death. Military dictatorships in Latin America were no different as they allowed for militants fighting the regime to be arrested, tortured, and murdered because they were regarded as enemies of the State. Thus, Lula has fallen prey to a relentless persecution by sectors of the ruling and business elite and political parties captured by the right-wing that do not want a leader who does not belong to the ruling class to take office as President of Brazil, especially an ironworker from Northeastern Brazil, who has done more work for the people and Brazil than all other presidents before him.

Therefore, the persecution and unfair condemnation is articulated with the soft coup that ousted Dilma Rousseff from the presidency and has put in her place a legion of corrupt politicians, who, in spite of being accused, denounced in plea agreements, and furnished abundant evidence of their crimes are still free and undamaged. The partiality of sectors of the Judiciary branch is appalling. The judge Sérgio Moro is an example of such partiality as he does not punish people against whom there is plenty of evidence, however, he has sentenced Lula on the grounds of political-ideological convictions with no proof of crime whatsoever. To friends and Lula's rivals, the presumption of innocence is a given; to a respected citizen who is regarded as his enemy of social-economic class, persecution, duress, attacks to one's reputation, resorting to strategies of uninterrupted war until defeating the enemy for good.

Another significant aspect as regards Lula's persecution is how swiftly proceedings are handled. Proceedings keep pace, in an absolutely and controlled fashion, with the calendar and the agenda of right-wing parties. Lula was convicted with no proof of crime in the case of an apartment that has never belonged to him. Nevertheless, an upcoming sentence is to allow Lula no time, not even to catch his breath. It is not an operation; it is an actual war with successive attacks because it is meant not only to punish, but also to dismantle who Lula is,

what he has done, and what he would be able to do for the Brazilian people. The aim is to prevent Lula from running for president.

We are confronted by a process which is not meant to restore the social order and put corruption to an end; it is meant to treat Lula not as a right-holder human being, but as a threat to be extirpated. Hence, investigators, judges, the media, and political parties support the sentence; they have paired as if they were a single army. Such army is largely similar to DOI CODI (Department of Information Operations - Center for Internal Defense Operations: Brazilian intelligence and repression agency during the military dictatorship (1964-1985)) or Hitler's SSS (Protection Squadron) in Germany. Within such army, the aim is not adopting the elements of criminal law, telling investigators apart from judges. All ranks are mixed and they report to a single command.

The current context, marked and instructed by the enemy's criminal law, in which facts are not investigated and evidence is not collected. There is prior conviction the moment the enemy is established. Upon setting who the enemy is, the next step is to comply with an agenda that meets the political needs of tarnishing Lula's image and dismantling accomplishments supporting Lula's recognition and leadership. Everyday wearing may lead to one's physical destruction. There is systematic accusation and no evidence is furnished. The defendant has to prove his innocence, however all efforts are made to overlook furnished proof of innocence, such was the case of the apartment and the croft trials. The Judiciary branch is subordinate to the logic of conviction prior to trial, therefore it resorts to the enemy's criminal law to sentence people.

Ultimately, the false presupposition that the more prominent the leader, the harder it is to find proof of crime is used to decide on sentences based on conviction. Yet, such false presupposition only applies to foes. There are plenty of evidence against corrupt politicians and businesspeople who belong to the Big House, however, there is no punishment to them, not even when proof of crime is furnished. In those cases, political-ideological convictions are used for other purposes.

History has already acquitted many defendants, such as Lula. Sooner or later, the fact that Lula is innocent will be acknowledged. It is up to the Brazilian people and true democracy advocates in the country to attain such acquittal as soon as possible so that Lula has the time to run and win the next elections. His win is crucial to enable the working class and Brazil to resume the path towards sustainable development with income distribution, equality of rights, and opportunities for all.

Conviction for real property ownership: without possession or title

Weida Zancaner*

Celso Antônio Bandeira de Mello**

1. Anyone who reads the decision issued by Judge Sérgio Moro will be startled by how he attacks and seeks to belittle the attorneys for former president Lula, with the clear intent of defending himself, as may be seen most notably in items 105 to 148 of said text.

By personalizing his decision, the judge places himself in the role of one of the parties by litigating as if he were an attorney in the case. He breaks with the principle of impartiality, violates the principle of legality, and taints the authority which he has been entrusted with.

The guarantee that a case will be judged according to the laws and the Constitution is dependent on the neutrality of the judge involved. The possible lack of neutrality is addressed in articles 144 and 145 of the Code of Civil Procedure, concerning disqualification for bias and recusal, and the manner in which a judge may be removed from a case is regulated in article 146 of the same Code. Not only the text of the decision, but the whole manner in which this case developed demonstrated a manifest partiality on the part of the judge.

Those that believe the principle of impartiality is to be found outside of the Constitution are mistaken. Though it is not expressly mentioned, the former is grounded in the latter along two lines: a) as a general principle of law, in accordance with article 5, paragraph 2, of the Constitution; and b) as one of the aspects of the principle of equality, a fundamental precept of the rule of law, provided for in the main clause and section I of article 5; the main clause, section II, and section XXI of article 37; and article 175.

The general principles of law constitute the substrata of the culture of humanity, which implies that any failure to observe them represents an affront to the legal system itself, as Eduardo Garcia de Enterría teaches:

*"It is worth recalling in this regard that the general principles of law are a condensation of the great substantive legal values that constitute the substrata of the legal framework and of the reiterated experience of the life of the law. Thus, they are not an abstract and indeterminate invocation of justice or moral conscience or of the discretion of the judge, but rather an expression of substantive law, technically specified as a function of concrete legal problems and resulting from the very logic of the institutions involved."*²²⁵

Moreover, article 5, section LXXVIII, paragraph 2, provides that "The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties to which the Federative Republic of Brazil is a party."

Brazil is a signatory of innumerable treaties, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights (Pact of San José, Costa Rica), in which the impartiality of a jurisdiction is established as a fundamental right of the accused.

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225 GARCIA de ENTERRÍA, Eduardo e FERNÁNDEZ, Tomás Ramón. Curso de Derecho Administrativo. Vol. I, reimpressão 3ª ed. Madrid: Ed. Civitas, 1981, p. 400.

An affront to the fundamental right of the accused to be judged impartially may be shown in several ways: from the judge's use of disrespectful words or body language; the adoption of an intimidating or aggressive posture towards a party, witnesses, or the attorneys; as well as by *issuing unjustified reprimands of the lawyers, making insults and inappropriate comments regarding the litigants and witnesses, and making statements that belie a prejudgment of the case*²²⁶, etc.

The other line on which the principle of impartiality is grounded is the principle of equality, of which it is but one aspect. Thus, José Afonso da Silva is correct when he states that jurisdictional equality arises from the principle of equality before the law, *as an inviolate constitutional guarantee connected with democracy*²²⁷. Without impartiality, judges and courts become dictatorial and the principle of legality is obscured through neglect by the very branch charged with applying it.

The principle of legality does not simply seek the mere formal structuring of the state apparatus, its organic composition, and its means of operation. What all evidence suggests was and is the goal is above all to establish protections and guarantees for all of the members of the body politic. Strictly speaking, it seeks to give them a double guarantee, that is:

(a) On the one hand, that no state action may impose any *limitation on, harm to, or onus on its citizens*, without such restrictions or impositions being previously authorized by law, nor *deprive them of or reduce any advantages or benefits* to which they would otherwise be entitled under the law, were it to be observed; and

(b) On the other hand, that all citizens be *guaranteed equal treatment*, such that, if the law is violated or is itself unconstitutional, they are assured of the possibility of recourse to an independent and impartial judge to decide the conflict.

2. Indeed, though the point is obvious, it is worth remembering that legality was established as a characteristic of the rule of law, above all as the most adequate means of preserving another value; precisely that which was intended to be consecrated above all else: equality

It was not by accident that the motto of the French Revolution was "Liberty, Equality, and Fraternity", instead of "Liberty, Legality, and Fraternity."

The rule of law abhors self-interested acts and violations of equality because those attack at the root of the basic objective which the principle of legality seeks to preserve. Indeed, what that principle is after is a single rule that applies to all who are covered by its scope and effects, thus impeding persecution and favoritism by any branch of government, as well as, it is worth noting, the arbitrariness whose elimination is precisely the maximum objective of the rule of law.

In short, a violation of the principle of equality, *ipso facto*, goes against the very reason the principle of legality exists, as Black has stated in his monumental "Handbook on the Construction and Interpretation of Laws: "It is a rule of construction that which is implied in a

226 Comentários aos Princípios de Bangalore de Conduta Judicial. Tradução de Marlon S. Maia e Ariane E. Kloth. Brasília: Conselho da Justiça Federal, 2008. P. 69, Apud ROCHA, Sílvio Luís Ferreira da. A Imparcialidade do Juiz, in O Caso Lula. Obra coletiva, coordenadores Cristiano Zanin Martins, Valeska Teixeira Zanin Martins e Rafael Valim. Editora Contracorrente, p. 178.

227 SILVA, José Afonso da. Curso de Direito Constitucional Positivo. 6 ed. revista e ampl. 2ª tiragem. São Paulo: Editora Revista dos Tribunais, 1990, p. 194.

statute is as much a part of it as what is expressed"²²⁸. Thus, that which is implicit in a principle is as much a part of it as that which is explicit.

3. Indeed, this value – equality – that the legal order seeks to shelter, is imprinted in the text of the National Constitution, *not only implicitly in the principle of legality, but expressly so*, both in the opening text of the title on “Fundamental Rights and Guarantees” (article 5), as well as a quality of the basic canon of the state. It constitutes an independent grounds for the protection of the governed and, thus, a sufficient basis to subjectively justify those who have suffered harm arising from its violation by some governmental act and who therefore seek to challenge said abuse.

The decision convicting former president Lula is shocking on its face, not only because it does so without any support in the evidence, but also because it runs head on against the law. It attempts to justify that conviction by imaginatively attributing title to a given property while there is in fact no document attesting to said title or even possession. Moreover, the attribution of title to the former president ignores the legal norm according to which ownership of real property is demonstrated by reference to the title record. In the face of such a record, clearly, title may not be placed upon another simply due to the desire of the accuser to do so, in this case the judge, without violating the law.

It was not only the judge, but also a party turned state’s evidence who ascribed title to the property to the former president. It is unheard of that the mere statement of X or Y individual is sufficient to grant someone ownership of a thing. This is even less so when the statement in question is made in the context of a plea bargain agreement, that is, one without a commitment to tell the truth and motivated by the desire to improve the standing of the defendant making it. The word of such an individual is already unburdened by any supposed disinterestedness or a true and faithful desire to collaborate with the advancement of the legal order. Rather, at the very least, it comes imbued with the suspicion of an ulterior motive.

Nor was sufficient evidence provided, or even an attempt made to so provide, that said property was the fruit of a bribe paid to facilitate a transaction with Petrobras.

In the circumstances alluded to above, it is clearly the case that the evidence mentioned may not in good conscience be taken as true and sufficient grounds for any conclusion, much less so in the context of a legal proceeding, not to speak of when the subject is a criminal matter. This is true for the conviction of any defendant, but is all the more so when the party has, as in this case, a track record, a history, which includes numerous honorary doctorates (27 in all), titles that it is well known are only conferred after a thorough analysis of the person and conduct of the recipient. Those doctorates have been granted by Harvard University, the University of Salamanca, and the University of Coimbra, to mention only the most prestigious.

It is intuitive that if one had to rely on the word of a confessed criminal, a person more than a little interested in stating that which he believes will please those sitting in judgment of him, or on the word of a man replete with national and international honors, *many of which were conferred when he was already out of public office*, one would choose to rely on that of the latter. This was not the understanding of the judge in this case, however, who, according to the facts that are known, chose to convict the former president either out of an extremely

228 BLACK, Henry Campbell. Handbook on the Construction and Interpretation of Laws. West Publishing Co., Saint Paul, Minn., 1896, pág. 67)

peculiar sense of justice or out of a complete lack of impartiality. Apparently, it was the result of a preconceived desire to harm one who was relying upon the presumed fair-mindedness of he who was to judge him.

The law in Brazil has died.

Wilson Ramos Filho*
Ricardo Nunes de Mendonça**

Some time ago, more precisely from the beginning of the year 2015, we stated that the Law had died. "Murdered".

Sérgio Moro's judgement in the Criminal Docket no. 5046512-94.2016.4.04.7000 / PR, is the latest expression that the promises of constitutionalism and the postwar "guaranteeism", transferred to Brazil, have been dissolved.

There will be, definitely, more qualified people to perform technically the criminal and criminal procedure analysis of the judgement passed by the "omnipotent" magistrate of the 13th Federal Court of Curitiba, although the offenses against principles, concepts, rules and elementary categories strike the eye of any legal professional who is minimally aware of the guarantees set forth in the Brazilian Federal Constitution and in Human Rights Treaties that Brazil is a signatory of, such as: i) due process of law; ii) adversarial process and full defense; iii) respect for the natural judge; iv) prohibition of the courts of exception; v) presumption of innocence; vi) distribution of burden of proof; vii) non-use of the process as a tool for political persecution and practice of lawfare, etc.

The analysis of the judgement, however, will not be attached to the field of Criminal Law. In fact, it will not even be attached to the field of law. And whether the most famous and celebrity Brazilian judge likes it or not, his synthesis in the "triplex case" will be the object of thorough analysis of sociologists, historians, communicators, trade union leaders and representatives of organized civil society, among others that are concerned with Democracy and do not bow to the hegemonic power of capital.

For all those who are committed to the interests of the victims of the hegemonic system and with Human Rights as processes of struggle for dignity²²⁹, Sérgio Moro's judgement is a chapter of the class struggle and of the parliamentary, judicial and mass media coup that began in 2015. This is not a mere technical act that ends a stage of a criminal action, but a political act disguised as a jurisdictional act that has as scope to meet powerful interests inside and outside Brazil.

In this matter, the Sentence is the high point of a sordid judicial-political campaign in order to attack the greater political leadership of the Brazilian left, the former president Lula.

It is an inseparable part of the coup. It is yet another component of this process of annihilation of liberal democracy that had previously existed in Brazil - yes, the verb is conjugated in the past tense - in which a shameless elite imposes, day by day, by force, in a State of Exception,

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229 HERRERA FLORES, Joaquín. "La Reinención de los Derechos Humanos". Andalusia: Ed. Atrapasueños. Librería asociativa-editorial-materiales didácticos. p. 22.

the greatest attack on the rights of the Brazilian population, in particular the poorest part of it, according to the UN²³⁰.

Lula symbolizes what this elite rejects: the worker who struggles, daily, for dignity. The union leader, who, once President of the Republic, transformed the Brazilian social reality and for the first time in history removed the country from the world hunger map.

The President who included the poor in the public budget and who extended the access of the historically excluded to direct salaries, through state policies of incentive to full employment, and indirect salaries, through policies of income distribution and access to housing, education and health, such as *minha casa, minha vida, bolsa família, FIES, ciências sem fronteiras*, etc.

A President who tried to fulfill, albeit in part, the constitutional duty to promote the progressive eradication of misery and poverty, with the reduction of social inequalities.

Currently, perhaps the only political leader capable of reversing the framework of deconstruction of social rights in Brazil.

For these reasons, it is necessary to remove him from Brazilian public life for good. Defeated in the last four presidential elections, the national right-wing does not admit the idea of the “lathe operator” to return to the most prominent position of the Republic. As Lula said, the coup does not conclude if he can run for the next presidential election in 2018.

And the judge who (i) constrained the ex-president's freedom in manifestly illegal forceful coercion; ii) violated the phone confidentiality of the accused's lawyer; iii) authorized - in an unconstitutional and irresponsible way, according to the Supreme Court - the publication of private conversations of a former President of the Republic and the then President of the Republic, with the clear purpose of setting the country on fire and also to curry favour with a published opinion, oligopolized and viscerally committed to the coup in progress; is aware that Lula's presence in national political life is an immense obstacle to the concretization of the conservative and capitalist political project to which he has adhered.

For that reason, after all the plot of abuse of the process with a clear political end that was observed until the delivery of the sentence, there was no doubt that Sérgio Moro had no alternative but to convict Lula.

In his decision, the judge of the 13th Federal Court of Curitiba confirmed his commitment with the Brazilian right-wing to annihilate the PT²³¹ and avoid the risk of Lula thwarting social retrogression plans with a new victory in the 2018 elections.

As well quoted by Jessé Souza, Sérgio Moro “(...) represents the incorporation of the speech that was lacking for the protesters of June 2013 ignited by the media. The anti-corruption abstract flags of that June days became concrete with Operation *Lava Jato*. Now the elite Party articulation was complete: The Party of economic prey not only had its usual arms in the media and in Congress, but it had an engaged and motivated social base and a powerful and concrete speech (...)”²³², that is, the old discourse on “fighting corruption”.

230 In this regard, see the article published on the website of the British newspaper The Guardian, <https://www.theguardian.com/world/2016/dec/09/Brazil-austerity-cuts-un-official>, accessed in 20/7/2017.

231 NT: Worker's Party (In Portuguese: Partido dos Trabalhadores).

232 SOUZA, Jessé. A radiografia do golpe : entenda como e por que você foi enganado. Rio de Janeiro: LeYa, 2016. p. 119.

Sérgio Moro personified the character of the “heartthrob” and “soap opera hero” that “will refound Brazil”, “no matter who it hurts”²³³. With this status and in the position of leader of the Brazilian right-wing and yet as the great opponent of Lula, he could not act in a different way, under penalty of suffering all the hatred and violence of those who would feel deceived by him. It would be something like *venire contra factum proprium*, given the magistrate’s conduct throughout the entire process of lawfare he has undertaken and continues to undertake against Lula.

Conviction, therefore, is not surprising, since it was long overdue. In fact, it is not the first time in the history of mankind that under the aegis of a violated constitutional order, part of the Judiciary serves interests outside of those who should move it.

We have said on other occasions that the same political forces that promoted the 1964 Coup have now rediscovered themselves in order to attack democracy, and among them, there have been, as now, no shortage of judicial actors committed to the project of seizure of power in default of the will of the people and the ballot boxes.

Moreover, it is not, as Moro suggests in his long-winded and tiresome attempt to justify the unjustifiable, “mere diversionism” of the defense, but of legal-political objection to the obvious and undeniable conduct of political-jurisdictional warfare, which he set out to conduct.

In fact, if there is someone who uses “diversionism” in criminal proceedings, it is the judge who, in 218 pages - a dissertation - could not objectively indicate and without appealing to fantasies and poor legal sophisms the supporting evidence that confirm the thesis of the Federal Prosecution. It should be noted that even the traditional media that supports him, and that are the most interested in Lula’s conviction, could point what the supporting evidence of the crime he would have committed. We wonder why.

Moro and the prosecutors that are part of the *Lava Jato* operation do not hide that they have their side in the class struggle and it is not the working class one. They are in tune with a corporate discourse on one side - and not all, obviously - from native servants and members of the Brazilian middle and upper classes who, desperate, realized that at the ballot boxes they would not win and that they were already tired of one defeat after another.

Unlike what they chant in their blatant speeches, they are not impartial. In fact, no one is. The difference is to be or not to be aware of it and, above all, not to deceive or to lie for purposes other than what one claims to pursue.

Therefore, the conduct of Sérgio Moro throughout the process belies all the discourse embodied in his sentence. The way he continues to act, mediatically and politically - because there is no doubt that he is part of a politicized judiciary that sits in spheres beyond his constitutional competence - leaves no doubt that he has taken, on his heart, the role of commanding actor of the Brazilian right-wing in this process of capital conflict with liberal democracy.

Moreover, there is no doubt that this sentence is of concern to every jurist committed to human rights in Brazil, because it means the peak of the deconstruction of the constitutional

233 SOUZA, Jessé. op. cit. 120.

guarantee. From now on, no one is safe from arbitrary conviction or can believe, with some security, in the false promise of civil and political rights and guarantees opposable to the State.

Exceptional judgments that, at the request of the prosecutors, use contested and heterodox methods of restricting freedom - shared criticism (only today, it is true) even by the Minister Gilmar Mendes²³⁴ - that confuse Law and Morals (and a certain morality, important to say), that appeal to the Criminal Law of the Enemy and rely on the opinion published to justify their arbitrariness, who abuse lawfare, who believe they have power for everything including publicly talks, as did the then president of the supreme court (in lower case) Minister Ricardo Lewandowski in a lecture given in Curitiba, at Unibrasil University, "that the 21st century is the century of the Judiciary," despite the undemocratic and non-republican nature of such an assertion, convict without supporting evidence, as did Sérgio Moro, lead us to believe that, unfortunately, the Law has died. Murdered.

Nevertheless, as social tensions are not null and void, on the contrary, they form the class struggle, this chapter of combat does not end the conflict. There is, and always will be, hope and struggle. In addition, history will be relentless with those trying to deconstruct democracy and human rights in Brazil. We consciously will continue on the right side of history.

234 See, for example, the following journalistic article whose headline is, in English, "STF has to discuss prisons that Moro has determined, says Gilmar Mendes", available on the internet, <http://www1.folha.uol.com.br/poder/2017/02/1856558-stf-tem-que-discutir-prisoas-que-moro-determinou-diz-gilmar-mendes.shtml>, accessed in 20/07/2017.

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