CORRUPTION AND LATIN AMERICA'S "SERIOUS THREAT": AN ANALYSIS OF ARGENTINE AND BRAZILIAN RECENT REFORMS THROUGH THE CURRENT GLOBAL STANDARDS OF THE OECD

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In order to understand the market's operation and its demands, it is necessary to analyze the events occurred throughout the 20th Century, especially in its second half. The economic crimes acquire an undeniable importance after the crisis of 1929, but are effectively developed after the conflicts of the 70's and boosted after the scandals of the 90's. Nowadays, they are required by some markets, especially in order to control greedy agents. In some way, economic criminal law should not be considered a centralizer or a conservative economic policy, but a demand of neoliberalist policies aiming for the recovery of confidence on business and, therefore, keeping up one of the key factors of its operation. In Europe, the European Council and the European Bank may have their role in fighting corruption. However, Mercosul has no power to incentive regional measures and projects compared to them when it comes to the Latin America. Any other regional organization in Latin America has no impact either. The criminal policy is not exactly democratic in Latin America. Only Chile, México and recently Colombia are part of OECD, but this international organization has a central role on defining internal legislation and public efforts in economic criminal law. By this way, criminal law benefits and privileges for instance transnational companies with non-empirically validated mechanisms of compliance and ethical behavior surveillance.

Keywords: *corruption, criminal procedure, economic crime, Latin America*

INTRODUCTION

Although the legitimacy of corruption crimes comes from the protection of the *res publica,* currently there are more interests to be protected. The seriousness of an act of corruption involving a government agent is undeniable, as when, for example, a politician manipulates a public contract to unduly favor someone. However, when a private person in a relationship between two corporations does the same, what is the social cost of it? Actually, the "grand" corruption occurred in enterprises favors market control by larger legal entities,

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those that possess enough money to cover these extra costs. That is why the market must be protected to be truly free and democratic. However, also the small corruption, which is that one committed, for example, by the employee that asks a bribe to the consumer, also undermines the confidence in the labor environment, is prejudicial to the consumer and restricts the access to the services and consumer goods (Vega Casillas, 2009). This perspective is of first importance, so that there is no inversion in the interpretation and application of the law, with the mere exclusive protection of the company or the creation of extra costs that make the commercial practice of small corporations unfeasible. An accessible and democratic market should be granted.

The United Nations Convention Against Corruption – Merida, 2003 – was a mark in this issue because it disposed about three crucial topics: I) the definition of bribery in the private sector (Article 21)[1]; II) it established prevention policies to the private sector and also the liability of legal entities in the civil, administrative and criminal spheres; III) it fomented the judicial cooperation between the states, including instruments of forfeiture and repatriation of goods. Regarding the interests of the present essay, it should be noted that the bribery in the private sector must be understood as the infraction of a functional duty in the scope of a private entity, with the intention of receiving something as counterpart.

However, there is another thing that currently motivates the modifications in the Latin American criminal law and practice: the international pressure to the adequacy to the Organization for Economic Cooperation and Development (OECD) standards and the harmonization of legal institutes and regulation to ascend to the post of a country-member. The directives are more than an ethic preoccupation, but also a cooperation and fair competition one.

That being said, the present essay aims to analyze the guidelines of the OECD, seeking to understand how they influenced different criminal policy choices in Latin America. Especially, we will study the model proposed by the Argentine legislator, which underpinned the propose of criminalization of private bribery in the country's Criminal Code. After this, we will carry out a comparative study with some of the other systems in South America, finishing with a special attention to Brazil, where such criminalization did not occur, but the enforcement agents behavior changed in the direction to comply with the OECD's guidelines. We will demonstrate that the implementation of a good *corporate citizenship* depends on cooperation and compatible standards in similar markets, which are those with greater commercial relationships.

[1] "Article 21. Bribery in the private sector. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities: (a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting; (b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting" (UNITED NATIONS. OFFICE ON DRUGS AND CRIME, 2003).

1. THE OCDE GLOBAL STANDARDS ON BUSINESS ETHICS

The most important normative of OECD on the subject of corruption is the "Declaration on Propriety, Integrity and Transparency in the Conduct of International Business and Finance", dated 27 May 2010. It declares the adequacy, the integrity and the transparency as fundaments of a more plural and successful market. The grounds for the punishment of corruption is the infringement of the good governance and the damages to the sustainable economic development. The prevention measures should respect the economic and regional particularities of different sectors, guaranteeing efficient and awareness-raising policies.

Therefore, the OECD established different standards and directives for countries to adopt a clear model of economic policy from an economic crisis perspective. About corporate governance, six principles are proposed to achieve investor confidence, business integrity and market stability. They are: I) ensuring the basis for an effective corporate governance framework; II) the rights and equitable treatment of shareholders and key ownership functions; III) institutional investors, stock markets, and other intermediaries; IV) the role of stakeholders in corporate governance; V) disclosure and transparency; VI) responsibilities of the board (OECD, 2016, p. 12).

For now, it is not necessary to deepen into each topic, but yes to understand that: a) there are important roles with sensible responsibilities in the corporations; b) the transparency and equity duties work as shareholder's protection; c) none of the principles worries about the consumers, only with the corporation directors. At that point, a new and very important figure emerges, the "whistleblower", which is an informant who recognizes reprehensible behavior and makes a complaint. He not only shall be protected, but also is essential to the corruption repression, according to OECD (2011: 4). The protection of the informant is truly the most important way to establish a duty of collaboration, because otherwise, employees would be submissive to their superiors. With the abovementioned protection, in case of non-report, they could become participants[2] in the corruption case.

According to the "Good Practice Guidance on internal controls, ethics and compliance", adopted by the OECD on 18 February 2010, which indicates preventive policies to be adopted by the member countries, the forms of corruption are: i) gifts; ii) hospitality, entertainment and expenses; iii) customer travel; iv) political contributions; v) charitable donations and sponsorships; vi) facilitation payments; and vii) solicitation and extortion (OECD, 2010: 3). It is not said that all these conducts are forbidden, but that even the acceptable ones are means to practice illicit business. Actions that are accepted in the local culture, such as hospitality in Arab countries or coffee in Latin America, shall be allowed. The unnecessary and the superfluous should not attract the attention of the regulator.

Concerning the OECD, corruption affects the fair competition and the financial market stability, in addition to inhibiting foreign investments. The economy must keep moving, but also expand and internationalize itself. Although there is no doubt on this point, it is of little use in criminal law, as it is too general. Economic law and securities

[2] It might not be always like this. Considering the complexity of the dilemmas, one employee could feel in a whistleblowing or a crime situation. About this thematic, see: (MIRANDA, 2019).

regulation can prohibit suspicious actions, but criminal law has to understand the broad picture to properly use its sanctions. Corruption not only affects citizens and public services, but also creates environmental risks and kills. The abstract market protection does not offer an exact valuation and its institutes does not allow an adequate and concrete answer.

1. 1. Repercussions on the Sarbanes-Oxley and Bribery Act

Legislation must be understood from its time, its social demand and its abstract solutions. That is why some preliminary considerations show themselves necessary. Firstly, it shall be noted that, in international dynamics, there is a persistent sequence of scandals in the US, which legitimize a sanctioning economic policy and the symbolic use of criminal law (Laufer, 2006: 242). After that, national companies put pressure on first world foreign governments and international organizations, which start to adopt something very similar. With the setting of global standards agreed in that way, the other countries, including the third world ones, have to accept the same regulatory and criminal policies or suffer restrictions from the central countries (Silveira, 2015: 56-62). These dynamics do not apply themselves only to the internationally organized sectors, such as oil production (due to the Organization of the Petroleum Exporting Countries – OPEC).

In the US, the first legislation of transnational importance in economic criminal law was the "Foreign Corrupt Practice Act" (FCPA), of 1977, and it influenced many provisions in the OECD regarding the payment of bribes to foreign public officials. However, the 2002 Sarbanes-Oxley Act (SOx) imposed new transparency obligations through compliance mechanisms and very high penalties of fine and imprisonment (up to 20 years in prison). The SOx defines the importance of external auditors, the responsibilities of directors, requires the opening of financial reports and protection of "whistleblowers".

With the 2008 crisis, it became clear that the audits did not occur with the necessary precision, although some might say that there were simple changes in the relationships between directors and shareholders. Consequently, in 2010 the "Dodd-Frank Act" - also called the "Wall Street Reform and Consumer Protection Act" – was published, creating a consumer protection agency and new rules for private rating agencies.

The market depends on investments, but its stability does not occur with balances and reports. Transparency is a need for control, as is the definition of roles. Market stability is the result of effective control. Thus, it is understood that: a) the definition of roles and external audits only protects investors, but does not guarantee stability; b) transparency depends on effective control by agencies and sanctions; c) market protection is done with consumer protection, even in the financial market; d) public or private agencies must be objectively regulated.

In the UK, the first law on corruption was the "Public Bodies Corrupt Practices Act" of 1889. However, with the demands of the 1997 OECD Convention on Corruption, its 2009 recommendations and the pressure from the 2008 crisis, the 2010 "Bribery Act" was enacted. The behavior is described through situations of exchange of benefits due to the violation of functional duties, even if the promise or request is not accepted. By not making a distinction between public and private corruption, the agent could be, according

to Article 3: (a) the holder of any function of a public nature; (b) the exerciser of any activity connected with a business; (c) the exerciser of any activity performed in the course of a person's employment; (d) the exerciser of any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).

In common law, decisions are made through very different criteria from the Germanic tradition, so that the Bribery Act imposes a maximum penalty of ten years in prison or a fine, or even both. The companies are imposed to create prevention mechanisms (Article 7), without limiting the fine, in case of insufficient due diligence. It is not necessary to talk about the jurisdiction challenges provided by the Law, but it is important to highlight the Article 5, which does not recognize any custom as an extralegal cause of exclusion of the guilt, even in abroad territories.

For the judicial analysis of the "insufficiency of preventive diligence" in companies, provided by Article 7, the Ministry of Justice made a manual of good corporate practices with some exemplary cases. It offered parameters to the judges, as well as suggestions of procedures that are appropriate to each business model.

From the Bribery Act, it is possible to conclude that: a) corruption is noticeable in every scope, even in the small corporations, with no legal personality; b) the penalties and fines provided by OECD are not clear, but contains a very high degree of symbolism (which justifies the criminal character of the sanction). This seems appropriate to Common Law, which does not offer legal certainty through the sentence and uses the institute of plea bargain (the sentence of ten years in the Bribery Act is limited to twelve months); c) the concepts are too broad and general in Common Law, being the role of the justice system to make the concrete analysis of the damages and their evaluation; d) the criminal protection is so symbolic, that the jurisdiction is a proof of an alleged capacity to judge, as the capacity to investigate infractions - the key of the control - was not expanded like in the US FATCA - Foreign Account Tax Compliance Act.

2. THE NEW CRIME OF CORRUPTION IN THE PRIVATE SECTOR IN ARGENTINA

The analysis of the article must follow a sequence that allows the identification of all the founding elements, its limits and the articulation with the other institutes of the Law. Thus, we will start with systematic considerations. Private bribery is found in the title of "crimes against the economic and financial order" of the New Argentine Criminal Code project, which means that it is a violation of the rules of the economic system, its structures and the trust between the economic actors (Argentina, 2019). One cannot speak of "system stability", since its existence is necessarily dynamic and depends on high risks and innovations. The Law offers few limits and criminal Law in particular, protects only a minimum trust.

In the 1st Chapter, which deals with the "frauds in commerce and industry", Article 300 of Argentine Criminal Code presents some very distinct behaviors, such as: a) manners to manipulate prices; b) reporting frauds; c) unfair administration; and d) customer manipulation. Although provided for in the same article, they are conducts

with very different victims and protected by distinct means and reasons. With regard to price manipulation, the crime is committed by an *extraneus,* but the administrator is an *intraneus*[3]. The Article 302 deals with bribery between private parties, which is not operated by reason of the company, but by their own desire, and is ontologically closer to reporting fraud and unfair administration. This demonstrates the perspective of the Argentine legislator, according to which corruption in the private sector is a crime committed by employees that spoof the company without the same harm as the directors, who perform "acts contrary to the law or the statutes". It is something like the Transparency International's differentiation between "big" and "small" public corruption, but, in the Argentinean law, the last one receives lower penalties.

In summary, the functionality of the economic system depends on the trust in the minimum structures, which are rules of competition, compliance with administrative law and internal regulations. As in a boxing match, the wrestlers can cause damage to the opponent, but they must respect the rules of the sport, use the equipment conferred by the judges and be healthy.

2.1. The forbidden relation

The Article 302 inaugurates in the Argentine Criminal Code the expression "undue advantage", which does not appear in any other of its criminal offenses. In the chapter "Crimes of corruption of public officials or equivalent", it is provided much more general terms, such as "benefits" (Article 256, paragraph 1), "compensation" (Article 258) or only "advantages" (Article 266. The Project includes "illicit enrichment" (Article 268), so that the public function demands neutrality, impersonality. The public interest is not negotiable. The economic activity is very different, because the company is the harmonization of personal interests. Employees must act for their interests, with their own motivations. The use of one's position is only punishable when his interest is disengaged from the interest of the organization and can create significant damage.

The Law under analysis brings a relationship of exchange between responsible agents. Firstly, it is not a case of co-responsibility, since the verbs "require" and "offer" indicates a crime which does not demands a material result, but in which there are two agents to be determined, the passive and the active of the bribery. The passive one is the "manager, administrator, employee or collaborator of a company or private legal person of any kind", a person who holds a special trust of the private legal person and whose interest will be in conflict over bribery. The active subject can be anyone who does business with the corporation, such as a director, administrator, employee or collaborator from another company, a consumer, a shareholder, a national or foreigner investor, among others, which can be a natural or legal person. They cannot hold a position of special trust in the corporation of the passive subject, so their penalties can be elevated in case they are an *intraneus.*

[3] The Article 301 deals with the violation of a public system of surveillance on gambling games, which does not belongs correctly to this chapter. It would be more adequate its allocation on "crimes against public order" or "crimes against public administration".

It is thus clear that a non-profit agent can be fired, but the criminal relevance only exists in cases of wayward actions against the company interest. Bribery between private parties is not like in public service, which the civil servant cannot enrich with his function. The inefficient employee or director may be removed by its own performance. Corruption in the private sector is different from the public corruption, in which the official cannot obtain profits through his influence. In the private sector, we must differentiate the inefficient employee from the criminal. For that, the code of conduct is a very important instrument, since it helps to define the objectionable behaviors. A director that offers gifts in order to obtain a good deal or benefit of both companies does not harm the confidence, but on the contrary, he complies with it. This behavior cannot be considered corrupt under Article 302 of the Argentine Criminal Code.

There are two species of benefits provided by the letter of the Argentine Law in the crime in analysis. The benefit offered, accepted, requested or received by the subject can be presented in the form of money, objects, dues or other advantages of any kind (even services). When the Code uses the terms "for himself or for a third party", it does not mean that this last one is a straw man. The intermediary, fungible or not, is an instrument to obtain the benefit. The "third party" mentioned by the Law is someone of the interest of the corrupt agent, someone with another relationship resolved in other terms, e.g. a creditor or a son.

The second form of benefit, which is a consideration for the first, offered or provided by the corrupt agent, occurs in the scope of the corporation victim of the crime. It is the favoring "in the acquisition or sale of merchandise, contracting of services or in commercial relations. If it is external to the company, there is no relevance to the crime, e.g., the marketing director who uses his influence to convince his employees to buy chocolates from a friend. There is an abuse of authority, but that no corruption. The same happens to the employee who offers personal data from another employees in exchange of some advantage. They are cases of abuse of a function which are not reached by the legislator. It is not the work environment or any people that are protected by the Argentine criminal law, but the company-employee trust relationship itself.

The crime of corruption has a very important internal element to define the illicit, which is the infraction of a personal duty. A public agent corrupts himself with the sale of his own acts, an "act of occupation", something from his legal competence scope. It is not his choice, not being he the guarantor if the corporation's plan does not dispose in this way. Is the guarantor omits himself to be usurped in his functions then he is the author of the corruption in which a third party is benefited (being this last one, usurper of the functions, is the participant, so *extraneus* than the corporation agent).

In summary: a) there are always two agents in the crime, the corrupt and the corruptor; b) the victim is the company, but it can also be the corruptor or his company; c) the "undue benefit" can be of any nature, including services or favors to third parties; d) the consideration is an corrupted "act of occupation", an behavior with vitiated will that directly harms the company.

2.2. The repressive system

As said before, criminal law is symbolic, it might communicate relevance and need of respecting market structures. It cannot be different, since trust is a fundamental element for investments and maintenance of consumption, and criminal law is the most serious public instrument. However, trust is neither objective nor totally rational. Economic criminal law does not need to be burdensome, because it is vexatious *per se*. Even if there is no imprisonment, the process itself is already painful for the involved parties. In this point, the Argentine legislator was very cautious.

The penalty for the passive or active corruption obey the same parameters, in terms that the judge must consider the relations of trust that were violated. Abstractly speaking, the penalties must be compatible, but, particularly, they shall be proportional to the guilt, whose *quantum* will be determined by normative criteria offered by the organization itself. Thus, the prison sentence can be from six months to four years, while the penalty of fine (alternative) can be from two to five times the amount obtained by agent (the benefit obtained by the corrupt or the consideration obtained by the corruptor). However, in some cases, the prison penalty can be suspended (Article 26), with the application of the measures from the Article 28. Regarding this, it must be noted that these measures do not show themselves adequate to the crime of corruption in the private sector, since there isn't any situation of violence or relation with drug crimes – even though we can imagine a hypothetical situation where an agent practices corruption to maintain an addiction.

Therefore, the application of the fine would generally be the most appropriate and proportional penalty, in terms of positive general prevention, without neglecting the reparation of the damages caused to the company and other victims. For that, the Argentine Criminal Code allows the forfeiture of the assets from the natural and legal persons (section 2), even without the conviction (since the illicit origin be proved, according to Section 5), by demonstrating at least some awareness or duty of knowing that this action is performed against the companies interests. There is a clear concern with social pacification and attention to the victim (Article 32), which is something positive.

With the application of a prison sentence or a fine, the agent (a natural or legal person) shall be disqualified for "the exercise of industry or commerce" for four years (and there is no distinction or weighing in terms of proportionality, as it is a measure of purely negative special prevention, which is very questionable).

Concerning the legal entities, the penalties provided by the Argentine Criminal Code are, according to the Article 39: I) a fine of two to five times the undue benefit effectively or potentially obtained; II) total or partial suspension of activities up to ten years; III) suspension of the right to contract with the State for ten years; IV) loss of benefits granted by the State; V) payment of the costs of the judgment.

It is important to highlight that in the cases of corruption, one cannot claim ignorance or impossibility to identify the concrete agent who made an undue offer or paid an illicit amount, but in this case, the borders of the guilt must be adjusted. The director, agent or employee who participated shall respond for his actions and so the legal person that was privileged.

3. THE LATIN-AMERICAN SCENARIO

In Argentina's commercial relations scenario, it is important to understand that Mercosul is a bloc of economic integration that favors the consumer market of each country and the industrial sector of its members. This demands a protection of the consumer and the economic and financial systems that are well articulated and harmonious, even to guarantee the proper investigation of actions, the containment of damages and the reparation of the victims. For example, the legislative changes in Spain, with the creation of many new criminal offenses, was a consequence of the need for harmonization in the European Union, after the conclusions of the European Parliament and the work of some entities such as the GRECO - Group of States Against Corruption (Gómez de la Torre, 2015: 43-46). It is not necessary, for now, an exhaustive analysis of the cooperation's mechanisms of the bloc, but yes to analyze the criminalization of the corruption in the private sector in other countries as a first step in guaranteeing the reparation of damages.

In Brazil, there are currently three projects of criminalization of the corruption in the private sector, which are the PLS 236/12 (New Criminal Code), PLS 455/16 and *Projeto de Lei da Câmara dos Deputados* 3.163/2015[4]. None of them, however, appears to be in the position to be approved in a near future. It is important to highlight the existence of the Law 9.279/96, which deals with private corruption as a means of violating industrial patents (Article 195, IX to XI). This criminalization, which has, by the way, a trivial penalty (up to one year), was intended to reach a very little scope of behaviors against the fair competition. In 2013, a New Law was approved in the scope of the public corruption (Law 12.846/13), extending the Administrative sanctions to the legal persons. The criminal responsibility of these entities in Brazil, however, remains restrict to environmental crimes.

There is a project in the Chamber of Deputies of Uruguay (Carpeta n. 2257 of 2017), elaborated by Daniel Peña Fernández, with three new types of corruption on private sector: a) bribery of officials of international organizations; b) bribery in private business activity; c) use or improper use of privileged information (Camara de Representantes. República Oriental del Uruguay. Comisión de Constitución, Códigos, Legislación General y Administración, 2017: 1). All these cases contain the passive and active agents of corruption. In the explanatory memorandum of the project, it is presented that the ratification of the United Nations Convention against corruption (Mérida, 2003) provides for the legislative adaptation and that there is a lack of penal regulation for the private sector in Uruguay.

In Brazil, the main economic criminal laws were passed in leftist governments, but Uruguay's private sector corruption bill is from a neoliberal party. This proves the impact of global standards and their importance for the markets, particularly the Mérida Convention. At the beginning of Covid-19 crisis, the President Luis Lacalle Pou announced new substantial measures to Uruguayan Penal Code, expanding the limits of police lethality,

[4] For a detailed analysis of these projects, see: (Januário, 2020).

as well to the Criminal Procedure Code, expanding the competence of a shorter judicial procedure[5].

Paraguay was considered one of the countries with the worst private corruption index in 2009 by the Global Corruption Report (position 138 out of 180 countries included), developed by Transparency International (2009: 204). Its policy of strengthening oversight institutions was considered insufficient and that is the main reason to join the Open Government Partnership (OGP), strengthening a position of transparency by the government[6]. In the following years, Presidential Decree No. 4771, dated August 2, 2010, created the National Integrity Plan (PNI), with a view to reducing corruption in state bodies. This allowed the country to have a better evaluation by Transparency International in 2016 (123 out of 176, with a much higher score than in previous years).

Besides, in 2014 it has begun a major reform of the penal and penitentiary system, including projects to prevent corruption, money laundering and new criminal procedures, but until today no concrete proposal has been presented. The working group is formed by members of the three powers.

It is possible to conclude that in Mercosul[7] there is a real concern with global standards, even when the legislative procedure seems to be slow, demanding new reforms in the judicial structure and new institutes (such as the criminal liability of legal entities, which neither does it exist in Uruguay and Paraguay). There is much more that could be presented, such as the Law of Access to Public Information and Government Transparency (Law n.5189/2014) of Paraguay, but in Mercosul the public corruption has still been the main subject, for the media, for legislators and public opinion (concerned with their needs as health, education, security, that have so many issues).

In terms of an economic blocks, the European Union has a highly developed prevention and harmonization policy, while Mercosul published only one political manifestation (the "Comunicado Conjunto" of June 29, 2011), a formal desire to work together to confront corruption in its different forms (Leal; Granato, 2015: 214). Mercosul is missing the opportunity to define its own standards, its personal politics, choose its collective challenges and its own way. The one that is perceived is an individual challenge to all countries in adapting to European standards or United States institutes without a strong voice that could show its needs to other nations, a voice from Latin-America with effective solutions to their economic and social projects.

Three other countries outside Mercosul, but with very close economies have the same classification of corruption between private agents, which are Colombia (Article 250-A of the Penal Code, added by Ley n. 1.474 of 2011), Peru (Article 214-A and B of the Penal Code, published in Decreto Legislativo n. 1.385, of 2018.) and Chile (Article 287 bis and ter of the Penal Code, additional by Ley n. 21.121/2018). The distinctions are: I) the reform in Peru included as "corruption within private entities" the behavior of "unfair

[5] The key points of the proposal to modify the Uruguayan Penal Code presented by Lacalle Pou can be found at: (INFOBAE, 2020).

[6] The plans of action can be found at: (Open Government Partnership, no date).

[7] It is important to highlight, however, that of Venezuela was suspended and Bolivia did not completed its admission process.

administration", also included in Colombia (article 250-B), which had existed in Chile since 1996 (provided for in article 312 of the Argentine Penal Code, changed in article 300, section 4); II) the penalties are very different, being between four and eight years in Colombia, up to four years in Peru, and five hundred and forty-one days in Chile; III) until today there is no criminal responsibility of the legal entities in Colombia and Peru (there is an administrative responsibility).

4. THE BRAZILINA SCENARIO: MANY WAYS FOR THE SAME AGENDA

Despite the absence of new definition of crime, Brazil saw at the last couple of years many changes in its criminal system and criminal procedure law. The famous "Carwash Operation" have promised to "clean up public institutions" and to reinforce a new corporate culture of compliance. Integrity became the center of this speech and most of political parties was somehow stroke because of illegal finances and undeclared funds. Important figures were jailed and 2018 elections showed a common desire for change. Anticorruption measures were the only propose of many new figures, or even old (but, not so popular before) figures, just as the elected president Jair Bolsonaro. "Carwash Operation" was so important that the elected president invited its most symbolic man to become his "Ministry of Justice", the former federal judge Sérgio Moro, responsible for the first criminal sentence against a former president in Brazil.

However, the role played by the prosecutors in Brazil is even more determinant to a new criminal policy orientation. In 2013, the Law 12.846/13 ("Anticorruption Law") created an option to companies and the Law 12.850/13 (defines "organized crime") created the same option to its directors to collaborate with the investigations. A soft version of plea bargain that must be approved by a judge as relevant to prove the occurrence of crimes. In those cases, the defendant will receive some benefits on his sentence. That was determinant when "Carwash" raised to public attention, because many politicians, corporate managers and directors started to talk about a plenty of different frauds and schemes with political parties, elected figures and other companies. Many high directors were jailed during process and day-by-day new documents were reveled, even spreadsheets of bribery paid in different countries.

Despites that, prosecutors went to attack proposing legal reforms. It was argued that Brazilian justice system has too many guarantees and that corporate crimes should have a shorter way to punishment. The "10 anticorruption measures" ("10 medidas anticorrupção") were endorsed by many public institutions and officers, but it did not reach the minimum number of signatures to be accepted by Brazilian congress. There were many problems on its text, but the main propose was to reduce criminal procedures guarantees (including on nullity system, measure n.7) and empowering the process by the use of prison during process (measure n.9).

In 2019, the former Ministry of Justice and former federal judge Sérgio Moro proposed a new legal reform, expanding the possibilities of plea bargaining, including the possibility to spare the criminal procedure, starting the punishment right after the ratification of the agreement by a judge. That meant that prosecutors could bargain about

the facts and penalties without the necessity of having all the evidences. Not everything was approved, but the result was brought by the Law 13.964/2019: a) if prosecutors intent to sue a defendant for a crime with a minimum sanction below four years in prison, they might propose a reduced penalty without a process (art.28-A, Criminal Code); b) at Law 12.850/13, new provisions to protect the confidentiality of the agreement were created and a direct benefit is mentioned for those who inform authorities about crimes that were not disclosed yet (not necessarily involving "organized crimes"); c) to investigate money laundering, the police and prosecutors gained amplified investigation, allowing monitoring and the use of covered agents (Article 1st, §6º, Law 9.613/98). The Brazilian Congress imposed many new limitations for judges (mainly the enforced distinction between the judges who presides the investigation and the one who sentences those accused), but the role of prosecutor was extended.

As explained before by William S. Laufer (1999: 1392), the U.S courts did not need the criminal corporate liability when prosecutors may sue only directors and employees after companies allocated the guilty by compliance programs. The problem is: should companies go unpunished because they had compliance programs to shift damages? Should prosecutors decide against the ones they would present their charges? Should the criminal policy be designed by prosecutor's interests on efficiency (acting by their chances to win) or should the criminal policy be oriented by what could be better for public interests? The central question is, then: who is legitimated to say which is the public interest?

The "Vaza-jato" scandal (a reference to the "Carwash" name in Portuguese, "Lava-jato", meaning something close to "Carwash Leaks"), a leakage of prosecutors' private messages about "Carwash" operation in Curitiba brought to light the prosecutors' interests on selling books and becoming famous, but a particular strategy was revealed: the prosecutors wanted to make a huge case against a smaller bank to push the bigger to the ropes (Rossi, 2019). The "systemic risk" is described as "a weapon" to be used on negotiations with the board. "Carwash" could not stop for many reasons revealed by those messages leakage, but, most importantly, the link between different companies and political agents was built by demand of defendants for sanction's benefits. However, it became so long that allowed prosecutors to choose their favorite targets.

It is clearly another internal compliance with the OECD standards. Brazil did not live a great scandal of private corruption, like other countries, so it becomes difficult to legitimate the creation of this specific new crime. Otherwise, the flexibilization of criminal procedures may give to the prosecutors the power to implement the same penal expansion through market, a broader surveillance and allow an integrity enforcement speech. In 2014, OECD (2014) published a report about Brazilian new Corporate liability law, saying that Brazil had "closed a loophole" in its legislation, but the numbers of investigations was too low compared to the country's size. The recommendations were, for example, to create a more proactive system of investigation, to clarify the procedures to impose sanctions, to encourage self-reports (by the companies) and to establish whistleblowing programs.

The "Vazajato" scandal motivated a new legal reform in the abuse of authority legislation (Lei n.13.869/19, that replaced a very soft law from the dictatorship times in Brazil). This controversial Law established that judges and prosecutors should be liable for

using the judicial mechanisms by personal interests. It is applicable for legislative, executive and judicial agents, but it was celebrated by some society segments as a victory against the use of public power to pursuit enemies or protect friends. It was a clear message for what was exposed and many other scandals that occurred[8]. In the other side, many authorities claimed it could undermine the investigation and prosecution activities, due to its lack of certainty, mainly about when one investigation or prosecution was acceptable or abusive. The OECD (2019) response to this reform was that it was a "seriously threat" for Brazilian "law enforcement capacity to investigate and prosecute foreign bribery", despite the system effectiveness has never been evidenced before.

Currently, a strange relationship seems to be clear: OECD needs to enforce integrity and good corporate citizenship, creating a secure space for investments, but all of this depends on fear and over discretion to use judicial institutions, including easy mechanisms of confiscation personal goods and monetary values (OECD, 2014: 31). This relation and the consequences to Latin American countries' democracies and fundamental rights are now raising some good questions about how much can these countries keep giving up their legislative sovereignty to OECD's standards[9]. It looks clearer now that the internalization of those standards should be better thought and worked inside Latin America (Miranda, 2019: 66-72).

In Brazil, companies that are now negotiating their plea guilty and handing over politicians to authorities are the same that financed many other authoritarian strategies (Souza; Alencar, 2018), like military overthroughts over 1950s and 1960s[10]. It looks clear, by now, that things have not changed for real and that the country needs to start a serious race for effective and democratic way to fight corruption, avoiding both infractions to fundamental rights and empty speeches that mean no real change in corporate behavior (Saad-Diniz, 2019: 163-166).

CONCLUSION

There are two important conclusions. The first and hardest one, is that criminal policy is not exactly democratic in Latin America. Only Chile, México and recently Colombia are part of OECD, but this international organization has a central role on defining internal legislation and public efforts in economic criminal law. Of course, OECD is only one of the instruments that could be used by governments and transnational companies to push global standards by their interest. In Europe, the European Council and the European Bank

[8] As an example, the Article 21 of the Law declares to be a crime to "keep prisoners of both sexes in the same cell or confinement space". In 2019, a former judge was declared guilty in an administrative process by the Brazilian Superior Court, because of keeping a 15 years old girl in a cell with 30 grown-up men for 13 days at least. The Judges of the Superior Court considered that this negligence was made on propose, but there was no criminal liability to impose (Pompeu, 2019).

[9] In Latin America, we should never ignore the effect of a peripheral economic role, which means: our structures are not only designed by a few people that want to reach profits. Our structures are designed in obedience to foreigners, which allow that few people reach their own profits. For a critical reading of the "dependence theory", see: (Machado, 1999).

[10] See with details at: (Saad-Diniz; Sponchiado, 2017).

may have their role too. However, Mercosul has no power to incentive regional measures and projects compared to them. Any other regional organization in Latin America has no impact either. Historically, it has been like this in a disarticulated and fragile scenario. Latin America (as well as Africa and other peripheral economies) are not allowed to create their own agenda, even to protect as one their internal market structures or their own regional perspective of integrity. By this, it does not matter if Argentina and Brazil have different strategies to regulate the same regional companies, because there is no interest on letting a fluid cooperation between both. They must only obey local demands of transnational business and any spontaneous change might be read as "serious threat".

The second conclusion is that the criminal law expansion is an expected demand of 2010s neoliberalism, which has an agenda of integrity, compliance culture, accountability and transparency just to artificially select the "greenest", the most "good citizen" and the most "reliable" companies. Small corporations have no opportunity to accomplish big business, but instead, only peripheral ones, which might play a small role with small profits in a long supply chain. By this way, criminal law benefits and privileges transnational companies with non-empirically validated mechanisms of compliance and ethical behavior surveillance. In this scenario, even if smaller companies try to survive, their compliance inefficiency might be considered by law as "serious threat", mainly to public sector, responsible for half of big contracts in Brazil, but currently starting to demand compliance programs as a condition to be able to dispute public contracts. When the consequences are criminal themselves, it is always needed to look to the situation with a bit more caution.

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KORUPCIJA KAO „OZBILJNA PRETNJA" U LATINSKOJ AMERICI: ANALIZA NEDAVNIH ZAKONSKIH REFORMI U ARGENTINI I BRAZILU U SVETLU OECD STANDARDA

Da bi se razumelo delovanje tržišta i njegovi zahtevi, neophodno je razumeti pre svega pojedine ključne političko-ekonomske događaje koji su se odvijali tokom dvadesetog veka, a naročito u njegovoj drugoj polovini. Ekonomski kriminalitet se značajno povećava nakon krize koja se dogodila 1929. godine, a njegovi oblici se ubrzano razvijaju nakon sukoba 70-ih i intenziviraju nakon skandala 90-ih godina dvadesetog veka. Ekonomsko krivično pravo ne treba poistovećivati sa konzervativnom ekonomskom politikom, već zahtevom neoliberalističkih politika čiji je cilj vraćanje poverenja u poslovanje. U Evropi, Evropska komisija i Evropska banka imaju ulogu u borbi protiv korupcije. Međutim, za razliku od njih Mercosul nema moć da podstiče regionalne mere i projekte na nivou Latinske Amerke. Takođe, nijedna

druga regionalna organizacija u Latinskoj Americi nema sličnan uticaj.

Kriminalna politika u Latinskoj Americi nije ustrojena na demokratskim osnovama. Samo Čile, Meksiko i odnedavno Kolumbija, su deo OECD-a, a upravo ova međunarodna organizacija ima centralnu ulogu u definisanju unutrašnjeg zakonodavstva i mera za suzbijanje ekonomskog kriminaliteta. Zbog toga, krivično zakonodavstvo zemalja Latinske Amerike transnacionalnim kompanijama, u smislu odsustva reakcije i krivične sankcije za njihove nezakonite aktivnosti.

Ključne reči: *korupcija, krivičnopravne procedure, ekonomski kriminalitet, Latinska Amerika*