Brazilian Anti-Corruption Structure: Normative Systematization and Institutional Coordination Issues

By Carlos Ragazzo and Fernanda Freitas*

Abstract: This article discusses the challenges of legislative systematization and inter-institutional coordination that have emerged as a result of the anti-corruption movement in Brazil in recent years. We contextualize the forthcoming discussion by presenting a brief history of Brazil's normative framework on the subject, including elements that have proven important for combating corruption in the country. Later, we demonstrate that the formation of this national context on corruption has resulted in deficient legislative systematization, which causes difficulties in the application of the existing laws and rules. Moreover, it has hampered inter-institutional coordination, thus retarding processes, increasing the demands to the courts, elevating the insecurity of those who are subject to the institutions' actions, and so on. In conclusion, although recent developments initiated by Brazil's government and other ancillary institutions have attempted to address these issues, a deficiency is likely to exist in the foreseeable future, especially in terms of the proposed legislative agenda under discussion.

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A. Introduction

In recent years, global concerns regarding corruption have escalated due to its complex social, political, and economic effects. Corrupt acts are not only moral and ethical transgressions but also substantially jeopardize a government's stability, the implementation of public policies, and the provision of services to citizens. They also alter election results, reduce productivity, worsen social inequalities, and impede economic and social development, among numerous other damaging effects.[1]

Corruption is present in all countries, regardless of their size, wealth, or industries, but the above-mentioned effects are more noticeable in the developing nations, where corruption is part of daily personal and business routines. Despite the evident public dissatisfac-

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1 *Jorge Hage Sobrinho*, A articulação interinstitucional como instrumento fundamental de combate à corrupção, em Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro: 10 anos de organização do Estado brasileiro contra o crime organizado, p. 11.

tion with irregularities in the relationship between the public and private sectors, corruption is inherent in the cultures of certain societies, especially those in which political and economic power are directly linked.[2]

For some time now, international news reports have frequently mentioned the corruption in Brazil, especially following the so-called Operation Car Wash, which began in 2014. This operation revealed a network of corruption, bribery, and money laundering involving some of the most influential companies in the country. It investigated and prosecuted criminal organizations run by black market dealers, which led to the discovery of a huge criminal corruption scheme involving the Brazilian construction giant Odebrecht and Petrobras, Brazil's largest state-owned oil company.

The operation became the most extensive corruption and money laundering investigation in Brazil's history due to its multiple stages, the number of people involved, and the economic effects. Brazil's Federal Police has recorded 60 stages of Operation Car Wash, each comprising several measures intended to obtain evidence and arrest warrants. There have been more than 2,400 procedures, including 90 criminal charges against 429 people, 1,237 search and seizure warrants, 227 bench warrants (compelling presence in court), and more than 500 arrest warrants. The average estimated compensation is more than R$40 billion (including penalties), and about R$3.2 billion of the defendants' assets have been frozen.[3]

Operation Car Wash should not be viewed in isolation in the fight against corruption, given that it is just one part of the efforts in recent years to strengthen anti-corruption policies in Brazil. However, despite the positive results of these initiatives, concerns regarding the country's corruption have continued to increase, and indications are that the problem is worsening. For example, in 2018, Brazil slid down nine places from its 2017 position in the Corruption Perception Index (CPI), created by Transparency International, to 105th place, making it comparable to Algeria, the Ivory Coast, Egypt, El Salvador, and Zambia. The fall was relatively abrupt, given that Brazil occupied 69th place in 2012.[4]

2 *Iréne Hors*, Fighting corruption in the developing countries, OECD Observer 220 (April 2000), http://oecdobserver.org/news/archivestory.php/aid/291/Fighting_corruption_in_the_developing_countries.html (last accessed on 19 September 2019).

3 The operation also relies on coordinating procedures abroad, especially against bank accounts held in other countries for hiding assets. The operation has resulted in 754 international cooperation requests involving more than 80 countries. Based on data mentioned by the State's Attorney Paulo Roberto Galvão, a member of the Executive Group of the International Cooperation Office (SCI) Federal Prosecution Office (MPF), before Operation Car Wash, only R$45 million had been returned to Brazil's authorities in the previous 10 years. In contrast, after little more than a year of intense investigations related to Operation Car Wash, around R$450 million were returned, and R $940 million more were frozen abroad for possible restitution to Brazil. Federal Prosecution Office (MPF), http://www.mpf.mp.br/grandes-casos/caso-lava-jato/atuacao-na-1a-instancia/parana/resultado (last accessed on 19 September 2019).

4 The CPI scores and ranks of countries are based on how corrupt their public sectors are perceived to be by business executives, investors, scholars, and transparency experts, all of whom consider aspects of corruption that include bribery, diversion of public funds, excessive bureaucracy, and nepo-

The push for better anti-corruption policies can be linked to the aggravated perception regarding a country's corruption. This relates to the greater public visibility of the problem of corruption in Brazil after the government's actions of the last several years. As corruption becomes more noticeable in a society, it tends to become more rooted in the national consciousness. Therefore, Transparency International considers that the efforts of a country in the fight against corruption may be at risk if the government's actions do not address the roots of the problem. In other words, only legal and institutional reforms that truly change the conditions that perpetuate systemic corruption can be effective in the long run.[5]

Recently, even with the legislative efforts to confront corruption,[6] a more prominent movement to propose new legal mechanisms in Brazil is underway, representing further advances in anti-corruption policies. Despite the accomplishments of Operation Car Wash in uncovering and punishing corruption, Brazil does not seem to have developed the necessary reforms to address the fundamental causes of the problem. Indeed, Brazilian anti-corruption legislation is still the subject of much debate. Therefore, some recent legislative proposals[7] seek to address various aspects of Brazil's anti-corruption system, either by filling its current gaps or improving the existing instruments.

One critique of these measures relates not to their content but to the fact that they contribute to the lack of systematization of the legal environment that supports the fight against corruption. There are many instruments already in force, and most of the proposals tend to expand on this framework without a substantial effort to organize them.

In fact, the poor coordination among legislative instruments in the anti-corruption context still generates much discussion, especially in cases where there is uncertainty about the application of rules and where it is not possible to accurately measure their reach and ef-

tism, as well as the government's ability to restrain corruption. The lower the number of the country's place in the ranking, the less corrupt it is considered.

5 For more information, please see https://ipc2018.transparenciainternacional.org.br/ (last accessed on 19 September 2019).

6 Particularly Law n. 12.846 of August 1, 2013 (Anti-Corruption Law) and Law N. 12.850 of August 2, 2013 (Organized Crime Act).

7 The first set of proposals was the package "Ten Measures Against Corruption," of 2015. This package was an initiative of the Federal Public Ministry, and it won public support by addressing matters such as transparency, prevention of corruption, recovery of illicit assets, and criminalization of unregistered payments. The anti-crime package proposed early in 2019 by the Brazilian Ministry of Justice is another highlight among the legislative proposals in recent years. It essentially consists of three bills that amend the Criminal Code, the Electoral Code, and the Code of Criminal Procedure. The most substantial package of anti-corruption measures is "The New Measures against Corruption," which comprises 70 proposals of federal bills, constitutional amendments, and administrative resolutions. The New Measures against Corruption was developed by the Brazilian chapter of Transparency International in collaboration with scholars from Fundação Getulio Vargas law schools.

fects.[8] Issues involving legislative techniques are also raised, an example being the very similar conducts that can be considered as one or another infraction, with different consequences under the law.[9]

Systematization problems are not concentrated exclusively in the legislative-normative context of fighting corruption; they are also evident in the institutional structure. Currently, several bodies distributed in the three main centers of power—the executive, legislative, and judiciary—have the legal competence to deal with corruption, and, in some cases, in a concurrent way. Although the fact that some institutions play similar roles under the national anti-corruption policy has certain positive implications, it also presents certain disadvantages, such as slow responses, increased costs, and duplicated measures, not to mention the counterproductive struggle among agencies competing to prove their superiority.

Some initiatives aimed at enhancing institutional coordination exist in Brazil, but there are serious doubts as to whether they are sufficient. Indeed, the country appears to lack a cohesive institutional model for responding to the problem of corruption, as the initiatives in place seem fragmented and nonstrategic, which, in turn, compromises the capacity of the Brazilian government to effectively confront this problem.

Considering the circumstances heretofore described, it is therefore appropriate to investigate the challenges of systematizing the legal framework and coordinating the efforts of institutions in the context of implementing Brazil's anti-corruption policy. For this purpose, the remainder of this paper comprises three main parts. The first describes the developments in Brazil regarding anti-corruption enforcement in recent years. The second presents the aspects of legislative systematization and coordination of institutional actors that require improvement to render Brazil's anti-corruption policies more effective. The third describes the recent efforts of the Brazilian government to mitigate the problems regarding those two

8 One of the main discussions on the subject lies in the differences and similarities of the Anti-Corruption Law and Law n. 8.429/92 (Administrative Improbity Law). In some cases, both laws punish the same conduct related to corruption, but the possible sanctions under each instrument are different. This issue is reinforced by Anti-Corruption Law's express provision that its application does not affect the Administrative Improbity Law-based liability processes.

9 One example of such conducts are the provisions on exaction (*concussão*) (Article 316 of the Brazilian Penal Code) and passive corruption (article 317), which create a distinction in the acts of "demanding" and "requesting" improper advantage. "Brazilian Penal Code, Law n. 2848/40. Exaction Article 316 – Demand, for oneself or a third party, directly or indirectly, even when off-duty or before taking over the position, but because of it, undue advantage: Penalty: incarceration from two to eight years and a fine. Passive Corruption Article 317 – Request or receive on his or her own account, directly or indirectly, even where outside the function or before taking in on, but on account of it, any improper advantage, or accepting the promise of such advantage: Sentence – incarceration from one to eight years and a fine.

§ 1º – the sentence shall be increased by one-third if, in consequence of the advantage or the promise, the official holds back or fails to execute any official action or practice and, by doing so, breaks the official duty. § 2º – If the official acts, fails to act or holds back an official action when he or she gives in to the request or influence of a third party, thus breaking his official duty: Sentence – detention from three months to one year or a fine." (free translation).

issues and discusses other measures that may improve the Brazilian anti-corruption system in relation to these aspects. A final section describes our conclusions.

Although it is not the main scope of this paper, it also seeks to contextualize the issue of the fight against corruption in Brazil, and its shortcomings in terms of legislative systematization and institutional coordination, in relation to the existing political aspects in the country. Especially in the last presidential elections of 2018, the issue of corruption was widely explored by political parties to defend their candidacies.

On one hand, the more conservative party, which eventually elected its candidate, exploited the corruption scandals that came to light during the government of the former presidents, led by the main opponent's party in the presidential elections. On the other hand, the left-wing candidate has upheld the injustice, and even illegality, character of certain actions of the judiciary in the fight against corruption, notably regarding the impeachment of former president Dilma Roussef and the arrest of the party's main leader, the former president Luís Inácio Lula da Silva, for alleged irregularities involving corruption.

Regardless of the consistency of the arguments on either side, the last elections made clear the use of the theme of corruption as one of the central defenses of the candidacies and government plans presented. The use of this theme is verified to attend the interests of the parties, not only in the electoral period, but also in the direction of their works, especially through the positions held in the Legislative power, what can lead to distortions between what would legally seem more appropriate to fight corruption and what is effectively put into practice.

This paper is based on the analysis of applicable anti-corruption legislation, reports, and studies about the Brazilian anti-corruption system by international organizations, as well as studies involving other countries that may benefit from our conclusions. We also considered some data on the developments in anti-corruption enforcement released by Brazilian agencies, as well as the available literature under the corruption theme.

B. The construction of Brazil's anti-corruption system: Normative and institutional influences

Besides the provisions of Brazil's Criminal Code,[10] which historically concentrated most of the country's rules in anti-corruption matters, during the main part of the 20th century, the nation's legal system has incorporated only a few legal provisions that relate to corrup-

10 The Brazilian Criminal Code (1940) historically concentrated most of its rules on the subject. Currently, the Code comprises a comprehensive set of provisions regarding crimes against the public administration, and it addresses active bribery (Article 333), passive bribery (Article 317), embezzlement (Articles 312 and 31), prevarication (Article 319), breach of secrecy (Article 325), and trafficking in influence (Article 332). Some of these rules were not in the Code's original text and have been included as part of enlarging the scope of the normative criminal scenario.

tion.[11] The Federal Constitution of 1988 started to change this picture and represents the most important contemporary landmark in forming the normative scenario for improving the anti-corruption regulatory system. By establishing a broad structure for controlling the public administration, the current Constitution has provided a great variety of principles that serve as the basis for several rules enacted since 1988.

However, even with these constitutional reforms, corruption was not yet acknowledged as a systemic problem that should be treated in all its complex aspects. Consequently, the perspective that corrupt activities often include multiple actors and intricate schemes was not fully explored by the investigating authorities.[12] From the federal government's view at the time, anti-corruption actions were not a priority, although some institutional enhancements developed during this period would later become important elements in Brazil's system for combatting corruption.

Figure 1: Developments in the anti-corruption fight after the re-establishment of democracy in Brazil

Source: Figure created by the authors based on information from www.transparencia.org.br.

11 An example is Law N. 3.164/57, which is no longer in force but which related to the possibility of seizing, for the benefit of the government, property and assets purchased by a public officer by means of influence or abuse of his or her public function.

12 An exception is made for some significant cases of corruption that dominated Brazil's newspapers during the 1990s, such as the scandal of the "Budget Dwarves," the scandal involving the construction of the Labor Forum of São Paulo, and the case called the "Vampires of Health."

The figure above illustrates some of the most important developments in the legislative and institutional perspectives in Brazil during the years that followed the enactment of the Federal Constitution of 1988. This period brought to the national scene an apparatus of rules that has, until recently, substantiated the fight against corruption, as well as strengthened certain institutions that currently lead anti-corruption efforts (e.g., the Federal Prosecution Service (MPF)) and brought other institutions that play a supporting role into this scenario (e.g., the Federal Attorney General's Office (AGU), the Financial Intelligence Unity (formerly named as the Council for Financial Activities Control) (), and the Public Ethics Commission (CEP)).

However, although a new legislative and institutional architecture began to emerge during the 1990s, Brazil's system was not yet totally ready to deal with the complexity of corruption, which is permeated by heterogeneous elements, non-trivial relationships, and its own dynamics.[13] At that time, there were no institutions fully dedicated to combating corruption, and the existing legislation still lacked a more detailed approach to the subject. Fortunately, this scenario began to change as international efforts concentrated on creating a globalized anti-corruption environment.[14]

Brazil signed on to important international instruments at the beginning of the millennium,[15] and the national government started to develop the measures required to implement them. Accountability is built in to these agreements, as signatory countries are subject to the international monitoring of developments regarding their commitments under such treaties, including peer reviews conducted in phases. Improving countries' normative frameworks is one of the central themes of the international conventions, notably the

13 *Reyes Calderón*, *José L. Álvarez-Arce,* Corruption, complexity and governance: The role of transparency in highly complex systems, Corporate Ownership & Control, 8 (April 2011).

14 At that time, many countries still did not have specific anti-corruption policies, which led to discomfort in the nations that had already dealt with the issue more rigidly, especially in terms of the effects on business relationships involving these nations and their companies.

15 The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997 (the OECD Convention) reflects concern for promoting and strengthening mechanisms for signatory states related to preventing, detecting, punishing, and eradicating corruption in countries. This was the first international instrument on the theme of anti-corruption to enter into the Brazilian legal system. Brazil ratified the OECD Convention on June 15, 2000, and it was promulgated by Decree n. 3.678 on November 30, 2000. The 1996 Inter-American Convention against Corruption (the OAS Convention) had the objective of promoting and strengthening the mechanisms necessary to prevent, detect, and punish corruption and of promoting actions to ensure cooperation between signatory countries. Brazil ratified the OAS Convention through Legislative Decree n. 152, dated June 25, 2002, and promulgated it by Presidential Decree n. 4.410, dated October 7, 2002. The 2003 UN Convention against Corruption (Merida) (the UNCAC) is the most comprehensive of the three texts and includes provisions such as the need to criminalize corruption and effectively apply related legislation, the need to establish international cooperation, and the need to implement measures that facilitate recovering illicit assets resulting from corrupt practices. Brazil ratified the UNCAC through Legislative Decree n. 348 on May 18, 2005, and it was promulgated by Presidential Decree n. 5.687, on January 31, 2006.

OECD Convention. This requirement resulted in Brazil revisiting the existing internal rules and institutions related to anti-corruption efforts.

In Brazil, the years after signing on to such international treaties were marked by several initiatives that changed the scenario in its fight against corruption. The creation of the Office of the Federal Controller General (*Controladoria-Geral da União*, the CGU)[16] in 2003[17] is the highlight.[18] This body is currently at the center of the anti-corruption architecture in Brazil, in charge of assisting the executive branch with the defense of public patrimony and the dissemination of information under the transparency of public management. This institution also takes disciplinary actions, overseeing administrative proceedings against public officials and companies.

The institutional strengthening in the Brazilian scenario is not only related to the creation of specific agencies to deal with corruption. Other relevant measures have also played an important role in creating an environment that supports the development of a more definitive anti-corruption policy in Brazil. One noteworthy effort is the formation in 2003 of the Brazilian Strategy for the Fight Against Corruption and Money Laundering (ENCCLA), which is a specialized network under the scope of the Ministry of Justice for the articulation of the goals of several institutions in combating corruption and money laundering in the national system.[19]

Legislative efforts during this period were also evident. For instance, measures related to public sector transparency were addressed through the 2011 Access to Information Act. However, the most prevalent legislative instrument on combating corruption was the Brazilian Anti-Corruption Law, approved on August 1, 2013. This law took into account the international obligations that Brazil had assumed[20] and the social mobilizations of 2013, during which Brazil's citizens protested *en masse* against some of the country's structural problems, including political corruption. The law is considered the main response to the requirements of the international conventions on anti-corruption and represents an important ad-

16 Throughout its history, the CGU has undergone some changes in its nomenclature and attributions, but its current activities include functions such as public audit, prevention, anti-corruption, and ombudsman.

17 Law n. 10.683/03.

18 The 2000s also brought to the country's system other important institutions, such as the Department of Assets Recovery and International Cooperation (*Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional*, the DRCI). Created in 2004 under the Ministry of Justice, this body centralizes and coordinates Brazil's efforts to cooperate internationally on criminal matters, and it has been playing an important role in disseminating information on asset recovery and combating money laundering and transnational organized crime.

19 The ENCCLA brings together institutions that operate in isolation with respect to corruption and promotes the alignment, integration, and interaction of such institutions through several types of initiatives.

20 Based on the OECD Evaluation Report of 2010, Brazil failed to present certain measures required by the OECD, such as an internal law regarding the liability of legal entities for transnational bribery.

vance in consolidating into a single norm several recommendations and strategies in the fight against corruption.[21]

Brazil's Anti-Corruption Law includes the possibility for the administration to mitigate sanctions in exchange for effective cooperation in investigative and administrative proceedings, by means of the so-called leniency agreements that were notably inspired by the Brazilian antitrust legislation,[22] although substantial differences exist.[23] Aiming at more favorable consequences and business continuity, these agreements enable companies to offer information and the means that allow public powers to identify other infringing companies or other unlawful acts.[24]

2013 was an important year in the fight against corruption not only because of the enactment of the Anti-Corruption Law but also because Brazil approved the Organized Crime Act, which defined criminal organizations and established the procedures and penalties for the crimes committed by such organizations. The complexity of corruption usually involves the action of sophisticated organizations, which is why the Organized Crime Act directly affects the national anti-corruption scenario.

This law had a significant influence on the enforcement in this area. Aside from its award-winning collaboration in reaching the complex organizations involved in corruption, it brought about the arrangement of plea bargaining, which has become fundamental in unfolding the investigation of corrupt acts.[25] This instrument is a legal benefit that may be granted to a person under investigation for a criminal action who confesses and agrees to collaborate in the criminal investigation. If such a person discloses others involved in the infraction, it may result in a reduction or elimination of the penalty for that person.

21 The most evident innovation embodied by this law is the provision of objective responsibility—both civil and administrative—for companies that practice acts that harm national or foreign public administration. Thus, the simple proof of the existence of unlawful conduct and its causality is deemed sufficient to prove the agent's responsibility. This means that if any company's agent acts corruptly, even though not a partner or administrator, the company may be held civilly and administratively liable.

22 Leniency agreements are not a new instrument in the national scenario, having been part of antitrust regulations since 2000, but with regard to corruption, Article 16 of Brazil's Anti-Corruption Law is the first specific rule to consider the possibility of leniency agreements.

23 "While leniency in the Brazilian Antitrust Law grants criminal immunity to individuals, the same does not happen in the new Anti-Corruption Law, which applies only to legal entities" (*Leopoldo Pagotto*, *Ana Paula Bartol Teixeira*, The Brazilian Anti-Corruption Policy in Motion, Business Law International 17 (2016), p. 119).

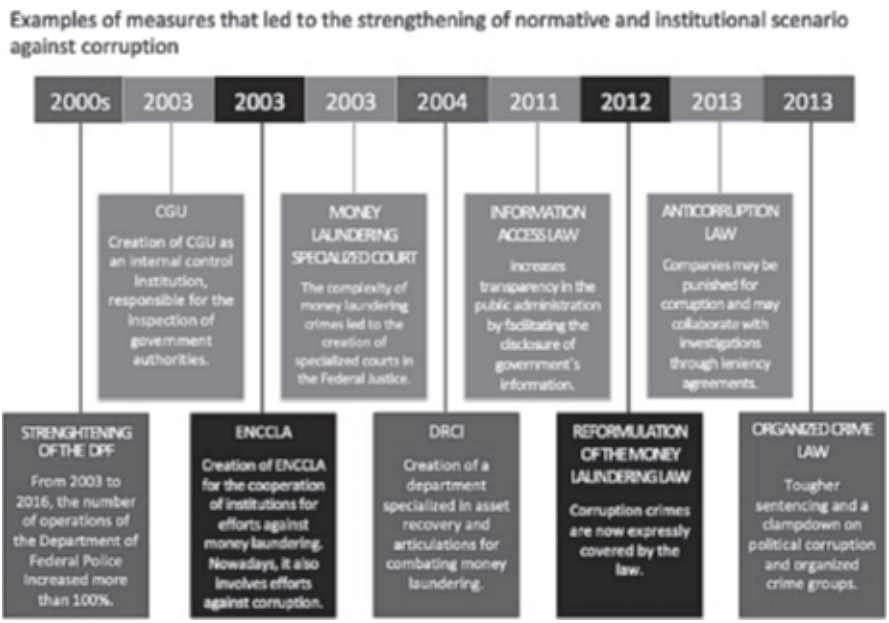
24 *Rafael Jardim Cavalcante*, O Controle Externo da Lei Anticorrupção, in: Jorge Munhós/Ronaldo Pinheiro de Queiroz (eds.), Lei Anticorrupção e Temas e Compliance 2017, p. 424.

25 The award-winning collaboration is not a new instrument for the Brazilian legal system. It is provided for in some criminal laws, among which the Law on Injured Crimes (Law n. 8.072/90) stands out. In any case, the award-winning collaboration envisaged in the Organized Crime Act has a greater influence on combating corruption given that it reaches the complexity of the agents involved in this type of crime.

The award-winning collaboration has been essential in Operation Car Wash and is one of the operation`s trademarks. Out of a total of 163 convictions in the operation, about 41%, or 67 convictions, occurred through plea bargaining.[26] This practice allows for a greater rationalization of the efforts involved in the process, considering that once the veracity of facts provided by the informers has been confirmed, access to other offenders and the identification of other crimes are facilitated.[27]

These collaborations, together with other legislative and institutional instruments established in recent years in Brazil, reveal numerous developments in the anti-corruption fight in the country after the signature of international treaties at the beginning of the 2000s.

Figure 2: Developments in the anti-corruption fight after the international treaties



Source: Figure created by the authors based on information from www.transparencia.org.br.

The figure above consolidates the main legislative and institutional measures enacted since the signature of the international treaties. These initiatives denote that, in recent years,

26 Data obtained by the website JOTA, https://www.jota.info/justica/lava-jato-curitiba-condenados-delatores-15042019 (last accessed on 19 September 2019).

27 Despite criticisms of abuse in using the instrument through the discretion granted the responsible authority and of its real effectiveness—which may deserve greater attention—these agreements between public prosecutors and informers allowed for the unfolding of investigations in Operation Car Wash.

Brazil has undeniably expanded its anti-corruption apparatus and has committed itself to combat bribery and corruption in the public administration.[28] However, the use of these mechanisms has revealed some challenges with the country's current anti-corruption structure, especially regarding legislative systematization and institutional coordination.

C. The problems of normative systematization and institutional coordination

At the same time as the new design represents a breakthrough in combating corruption, it also results in some difficulties that deserve attention. To understand how the Brazilian corruption legislation is currently organized involves grasping a complex patchwork of separate laws and regulations.[29] While the previous section includes examples of laws enacted under the federal scenario, corruption provisions are also seen at the state and municipal levels and in the institutions of the public administration that amend their normative acts.

In any case, it is not necessary to look to lower-level legislation to find situations that raise doubts in terms of anti-corruption efficacy because, even at the federal level, some issues are still under discussion. One example lies in the duplications found in the Administrative Improbity Law and the Anti-Corruption Law. The latter provided for a series of specific sanctions but indicated that their application would not affect the responsibility processes of the Administrative Improbity Law.[30] This brought some uncertainty, since a company that has benefited from an act considered as corruption by both the Administrative Improbity Law and the Anti-Corruption Law may be subject to the penalties under both regulations.

In the same way, an act of corruption under a public bid that is also used to cover up a cartel can be sanctioned under the administrative sphere based on the Anti-Corruption Law, the antitrust legislation, legislation enacted by the Federal Court of Accounts (TCU), and the Public Procurement Law, as well as other legislation that may apply, such as that enforced by the Federal Revenue Service concerning taxes that may not have been duly collected as a result of the fraudulent transaction.

28 *Michele Sciurba*, The Impact of Corruption in Developing Countries by the Examples of Brazil and Equatorial Guinea, Visegrad Journal on Human Rights 5 (2017), p. 218.

29 This structure raises doubts about whether it is possible to infer that Brazil has a legal system covering corruption or just some normative instruments that coexist in the matter of corruption.

30 Article 30, I, of the Anti-Corruption Law.

Different from countries[31] that have opted to concentrate anti-corruption functions in one main oversight institution or agency,[32] Brazil's system has been formed by several institutions with complementary or, sometimes, competing roles.[33]

Figure 3: Brazil's main institutions for the fight against corruption

Source: Figure created by the authors.

31 *Gabriela Ibarra*, Institutional Multiplicity and Coordination in the Fight Against Corruption: Comparative Study Between El Salvador and Guatemala, Master in Anti-Corruption Studies Program (2017), p. 11.

In Brazil, the Federal Prosecution Service (MPF) acts in a preventive and repressive manner in crimes against the federal public administration related to damages to public assets, services, or the objectives of the federal government. The Federal Police (DPF) is a permanent body subordinated to the Ministry of Justice empowered to investigate corruption cases that involve federal funds or federal entities.[34] As already mentioned, the CGU is the internal control body of the federal government responsible for carrying out activities related to the defense of public assets, including preventing and combating corruption. Therefore, there are at least three federal entities at the forefront of combating and controlling corruption on the federal level.

Other various agencies also play important roles. For instance, the Administrative Council for Economic Defense (CADE) can investigate and punish anticompetitive conduct in violation of the economic order, which may be directly related to acts of corruption, as can be seen by the several leniency agreements signed under CADE's jurisdiction involving companies investigated in Operation Car Wash. The Federal Revenue, in turn, has attributions related to the repression of activities against the tax order, which are often related to acts of corruption. In addition, the Brazilian Securities and Exchange Commission (CVM) has been analyzing situations arising from the criminal sphere of Operation Car Wash under the prism of fiduciary duties of publicly held companies' directors and board members, such as those involving the improper use of company cash resources and fraudulent records on balance sheets.

The individual performance of these institutions faces constant challenges. One is related to the inherent inclination of institutions to seek specialization for the development of their activities, which leads to fragmentation of the public sector landscape. From another

32 The model of concentration of functions related to corruption supervision has been promoted in some countries under the premise that this structure would avoid the problems of coordination among various agents, reducing the possibility of confusion of roles and competition over financial, human, and technological resources, as well as mitigating the competition on media recognition that is common when there is more than one institution taking care of some specific matter. The institutional multiplicity scenario has been defended based substantially on the idea that the more oversight on corrupt acts, the better. The argument is made that having several institutions with specialized functions would increase the possibility of effectively investigating and punishing corruption, in addition to making corruption a high-risk and low-benefit crime, thus acting as an inhibitory factor for potential offenders. It is not our objective to defend the greater consistency of one or the other model, and we start from the premise that both have their advantages and their difficulties. In fact, there is no perfect system to fight corruption, and there is no preconceived formula to determine which of the institutional arrangements brings more advantages to a country since each nation has its origin, culture, political framework, and economic features, which makes it unlikely that an anti-corruption model can be accurately repeated.

33 *Maíra Rocha Machado*, *Bruno Paschoal*, Monitoring, Investigating, Holding Accountable and Sanctioning: Inter-Institutional Interaction in Cases of Corruption, Novos estudos CEBRAP 35 (March 2016).

34 *G. France*, 2019. Transparency International Anti-Corruption Helpdesk Answer, Brazil: Overview of Corruption and Anti-Corruption, https://knowledgehub.transparency.org/assets/uploads/helpdesk/Brazil-Country-Profile-2019_PR.pdf. (last accessed on 19 September 2019).

perspective, some overlap of attributions among institutions can be seen, leaving a gray zone of intertwined competencies and shared spaces of action in the exercise of their powers. This situation is seen, for example, in the execution of leniency agreements. It has not yet been possible to guarantee to companies seeking leniency that one institution will respect what has been agreed to with another.[35] As long as there remains debate about the scope and the conclusiveness of the existing agreements (i.e., the company's exposure to penalties imposed by other institutions based on the same facts), the use of such an instrument may face a lack of confidence about its effectiveness. In practice, companies tend to only go to the authorities for the execution of leniency agreements if they have a high degree of certainty that they would be subject to some punishment and that such agreement may benefit them with the reduction in such penalties.

Considering the many situations of joint performance by Brazilian institutions involved in the anti-corruption fight and the diversity of possible actions (administrative, civil, and criminal), inter-institutional coordination becomes an important element for the achievement of a better overall quality of internal policy and coherence in decision-making, as it brings enhancements through the combination of multiple perspectives and the exchange of specialized knowledge.[36]

D. Dealing with normative systematization and institutional coordination

The huge tangle of laws and regulations that is a characteristic of the Brazilian normative system, which is often accompanied by inaccuracies, duplications, and legislative technique problems, is also reflected in the context of the national anti-corruption policy. One of the most serious effects of this situation is the insecurity of the legislation recipients concerning the consequences of the application of the existing legal provisions. This is especially so in relation to the authorities, who may find themselves with no clear direction regarding their attributions, available instruments, and limits for their actions. The insecurity also applies

35 In this context, there are the leniency agreements signed by the MPF since 2014 within the scope of Operation Car Wash. As already mentioned, the Anti-Corruption Law brought the possibility of negotiating and signing leniency agreements and placed the CGU as the competent body for entering into such agreements within the Federal Executive Branch, as well as in the case of harmful acts committed against the foreign public administration. This scenario raises some doubts and questions about the MPF's legal attribution on this matter. At the end of 2018, the AGU obtained two decisions before the Federal Regional Court of the 4th Region that reaffirmed the CGU's competence for carrying out leniency agreements. Both cases analyzed administrative wrongdoings against two construction companies under the scope of Operation Car Wash. The companies argued that by signing agreements with the Federal Public Ministry, they could not be held liable for such acts in actions promoted by the Union. The AGU argued that agreements entered into by companies with the MPF are ineffective with the Union, which can pursue its legal proceedings, in particular for obtaining full compensation for damages suffered.

36 Administrative Conference of the United States (ACUS). Improving Coordination of Related Agency Responsibilities, https://www.acus.gov/recommendation/improving-coordination-related-agency-responsibilities (last accessed on 19 September 2019).

to those whose acts are considered legal offenses, as they can face uncertainties regarding the applicable procedures and expected results.

The lack of clear bases for characterizing some situations of irregular practices and the applicable legal consequences may even render certain legal instruments innocuous. This is because, in practice, some of such institutes tend to not be invoked by their potential recipients, as may occur in the case of leniency agreements and other instruments, the application of which depends on the initiative of the companies involved in corrupt practices.

It is becoming increasingly evident that the success of Brazil's objectives in combating corruption depends on the enhancement of the effectiveness of the applicable legal regulation through some level of legislative systematization. Therefore, measures to improve the form and content of legislation, such as the simplification, organization, and reduction of uncertainties in the regulatory array, would create favorable conditions for a more effective application of the various legal instruments.

In general terms, this systematization process comprises the collection of laws and other legal acts regulating a range of similar actions and the conversion of that set of legislation into an integrated and ordered system.[37] Some practical goals[38] of legal systematizing would include (1) eliminating repeated laws and conflicts, (2) identifying those areas that remain unresolved at the legislative level, (3) eliminating rules that are not effective in practice, (4) refraining from drafting laws and other legal acts concerning only narrow matters, (5) eliminating internal conflicts arising from differences in the understanding of the multiple concepts involved in some matter, (6) increasing the level of compliance with the law (e.g., by public officials, companies, individuals, judges, and other authorities),[39] and (7) facilitating adherence to international legal organization undertakings.

Currently, there does not seem to be a movement to deal with the issue of the deficient normative systematization concerning anti-corruption in Brazil. The main legislative proposals recently presented consider some isolated initiatives, but they are not likely to be a definitive solution for the problem.[40] Although there are proposals that address issues such as normative clarity and ambiguity, they do not solve the problem of the existence of vari-

37 *A.N. Kozyrin*, Forms of Systematization of Tax Legislation, Pravo, Zhurnal Vysshey shkoly ekonomik 4 (2017), pp. 73–82.

38 *L.M. Dobrobog*, Systematization of Legislation as Immanence of Process of Formation of Branch of Law, The Scientific Papers of the Legislation Institute of the Verkhovna Rada of Ukraine 3 (2015), p. 5.

39 *A. B. Pychak,* Legislative Support of Innovation Activity in Ukraine: Problems and Ways to Overcome Them. Efektyvna ekonomika 10 (2018), http://www.economy.nayka.com.ua/pdf/10_2018/4.pdf (last accessed on 19 September 2019).

40 Among the normative suggestions is the creation of the National Council of State as a permanent body linked to the National Congress, with the attribution of concentrating normative administrative production on topics such as corruption prevention, transparency and publicity, bureaucratization, fiscal policy, public tenders, and bidding and other contracting processes. Although this proposal addresses issues such as normative clarity and ambiguity, it does not solve the problem of the existence of various rulemaking bodies that lead to the multiplicity of legislative instruments.

ous rulemaking bodies, which leads to the multiplicity of legislative instruments on the subject.

However, as previously mentioned, the difficulties in enforcing the national anti-corruption policy are not restricted to the legislative sphere, as they are also present in the aspect of institutional cooperation. Decentralization in the enforcement of corruption involves several institutions that perform detection, investigation, prosecution, and decision-making, and the lack of integrated action of such entities leads to inefficiencies that can undermine government planning to combat corruption.

The success of the authorities' actions in combating corruption necessarily involves the adoption of strategies of close cooperation among the multiple agencies to minimize duplicated procedures,[41] reduce contradictions, and increase accountability in the implementation of the anti-corruption policy.[42] Such coordination may also make the agencies more resistant to undue influences and manipulation by interest groups, especially due to the expected constructive monitoring.[43]

Cross-agency coordination mechanisms may vary immensely by country, and the definition of the ones to be applied under some anti-corruption structure is highly dependent on the nation's specific context. However, in general terms, such mechanisms would comprise measures in three main areas: (1) the establishment of a legal framework[44] for joint decision-making and cooperation in solutions that can benefit the institutions involved,[45] (2) the sharing of information and knowledge that may favor the development of accountability processes,[46] and (3) the formation of high-level coordination units as centralized bodies existing in parallel with the other institutions of the legal system that deal with the various perspectives of corruption.

41 The existence of duplicated functions and procedures is not always seen as a problem of anti-corruption policies, especially considering that the existence of two or more institutions with a certain competence may provide greater assurance that policy objectives will be met, to the extent that the failure of one institution may be compensated by another institution that shares the same competence.

42 *Guy Peters*, Pursuing Horizontal Management: The Politics of Public Sector Coordination, Lawrence, KS 2015.

43 *Matthew Jenkins*, Interagency Coordination Mechanisms: Improving the Effectiveness of National Anti-Corruption Efforts, in: Transparency International Anti-Corruption Help Desk Answer, https://knowledgehub.transparency.org/assets/uploads/helpdesk/Interagency-coordination-mechanisms_2019_PR.pdf (last accessed on 19 September 2019).

44 Although such institutional arrangements may be governed by formal mechanisms established in legislative instruments such as laws and decrees, it is also possible to establish coordination measures through instruments such as memoranda of understanding, technical notes, and other types of agreements entered into directly between institutions.

45 *Guy Peters*, Pursuing Horizontal Management: The Politics of Public Sector Coordination, Lawrence, KS 2015.

46 *Maíra Rocha Machado*, *Bruno Paschoal*, Monitoring, Investigating, Holding Accountable and Sanctioning: Inter-Institutional Interaction in Cases of Corruption, Novos estudos CEBRAP 35 (March 2016).

In terms of the mechanisms of joint activities, the task forces play the leading role in Brazil.[47] They are the recognized mechanisms of the coordination of institutions at the operational level, which require day-to-day interactions in coordinating agencies performing similar or different functions. These forces are characterized as temporary groupings of units, involving the mobilization of material and human resources from two or more public institutions in a strategic action for executing a particular operation. In Brazil, task forces comprised of individuals from the DPF, the MPF, the Brazilian Federal Revenue, and other agencies have become a common method of investigating elaborate corruption schemes. A considerable number of task forces have arisen to combat organized crime, such as in the Anaconda Case, Case CC5 (or Banestado), and the Mensalão Case, which had huge repercussions in the internal scenario due to the numbers and great visibility of the public agents involved. Operation Car Wash is the largest corruption and money laundering operation that Brazil has ever witnessed, considering its size, the financial resources involved, and its political importance, with its results recognized internationally in some aspects.[48]

The second point, sharing knowledge and information, is usually addressed in Brazil through the harmonization of the instruments of cooperation among various institutions that make up the national anti-corruption system.[49] The first major initiative on the subject was implemented in the 2016 edition of Interministerial Ordinance CGU/AGU n. 2.278, which defines the procedures for the enactment of leniency agreements with companies involved in acts harmful to the public administration and the attributions of the CGU and AGU in this process. In December 2018, TCU and CADE entered into a technical cooperation agreement for the sharing of technologies aimed at detecting anti-competitive practices in public bids, as well as for conducting training, joint actions, and exchange of information

47 The task forces are the result of the process of complexification around organized crime in recent years, which often goes beyond the borders of a single country and comprises a rich range of offenses and offenders. This scenario requires authorities to combine the specializations of existing institutions in the system and members with different skills, as well as to use sophisticated investigative strategies such as wiretapping, telephone secrecy, signal and data interception, and agent infiltration, employing operational intelligence techniques. For a deeper understanding of the task forces in Brazil, see *Januário Paludo*, *Carlos Fernando dos Santos Lima*, *Vladimir Aras*, Forças-Tarefas: Direito Comparado e Legislação aplicável. Brasília: Escola Superior do Ministério Público da União (2011), p. 28–33.

48 International Transparency granted to the team of the Brazilian Car Wash the Prize against Corruption 2016. Also, in 2018, members of the MPF received the prize named "Special Achievement Award" during the 23rd Annual Conference of the International Association of Prosecutors (IAP), in Johannesburg, South Africa, for their performance during Operation Car Wash.

49 International cooperation is also part of the current government's agenda. In early 2019, the current Ministry of Justice and Public Security led the signing of memoranda of understanding and cooperation agreements with other countries. In this context, Brazil signed with (1) Israel, making an agreement for cooperation in public security, prevention, and combat against organized crime; (2) Latin American countries that form the Police Community of the Americas (Ameripol), a police cooperation agreement, and (3) Argentina for a new extradition treaty, guaranteeing a speedier process between the two countries for information exchange and facilitation of pre-trial detention requests.

and knowledge, including the sharing of documents and materials to subsidize the treatment of matters under their jurisdiction.

The last point, the creation of a centralized unit to ensure institutional coordination, still requires greater progress. Currently, there is no entity in Brazil responsible for conducting concentrated anti-corruption system control. Although the CGU's powers have been extended with the addition of the Anti-Corruption Law, its functions have not yet been sufficient to characterize it as a coordinating institution of the anti-corruption system as a whole, especially because its operations are restricted to the federal scenario.

Since 2003, coordination efforts have been the focus of the ENCCLA, which, as mentioned, is a unit for discussion and action planning on anti-corruption and money laundering within the government. The ENCCLA is an articulation network that represents the joint efforts of institutions, both governmental and nongovernmental. It is formed by experts from more than 90 entities of the executive, legislative, and judicial branches in federal, state, and municipal jurisdictions, as well as the Public Ministries and associations that act in the prevention and fight against corruption and money laundering. As the ENCCLA is not an executive body, it does not have the powers to directly implement the proposed actions, but it has the function of monitoring those initiatives.

Numerous results were achieved during the more than 15 years of interaction between the main actors of the Brazilian state in the works carried out by the ENCCLA.[50] Its activities of institutional coordination are usually on the annual agenda of planned actions. In 2018, the ENCCLA presented the Anti-Corruption Guidelines Plan, consisting of 70 guidelines based on eight pillars related to the fight against corruption. One of them addresses the need for strong and articulated institutions, based on the premise that the fight against corruption is the responsibility of all (international organizations, foreign states, the Brazilian state, and society as a whole).

It is undeniable that, in recent years, Brazil has seen numerous developments in its inter-institutional coordination. However, as some of the initiatives mentioned in this section are still very recent, it has not yet been possible to identify most of their results in practice. The actual effectiveness of such measures will depend not only on the existence of the instruments established but also on the actual implementation of the agreements contained therein, which only time can prove. In any case, considering the sophisticated forms that corruption takes and the various institutions involved in dealing with it in Brazil, the actions of institutional coordination that have already taken place tend to represent only an initial stage of the multiple possible efforts.

50 Among the actions developed during 2019, there are three that are directly related to the matter of inter-institutional cooperation: (1) the creation of communications flow of cases of international bribery (Action 02/2019); (2) a diagnosis of the quality, comprehensiveness, and timeliness of information provided by financial institutions to judicial, police, and ministerial institutions through a specific system (Action 10/2019); and (3) the integration of notaries and registrars in combating and preventing money laundering and corruption (Action 12/2019).

In addition, the legislative proposals[51] that are intended to address the challenges of institutional coordination do not offer details on how this collaboration would be implemented, or what specifically constitutes the institutions' roles in making the adjustments they deem necessary for the intended collaboration. As a result, the current proposals do not seem to be sufficient for organizing the inter-institutional collaboration system in Brazil.

E. Conclusion

The Brazilian anti-corruption system has developed on the basis of its needs and experience, whether due to international demands or the multiple scandals in recent times. The lack of planning around a specific policy on corruption has resulted in the existence of institutions with concurrent (or, in some cases, even coincident) attributions, the introduction of instruments that sometimes do not provide the security necessary for their use, and regulation that is often confusing owing to different repercussions for the same conduct in several different rulings.

Although the recent legislative agenda has been concerned with complementing the anti-corruption instruments available in Brazil, it may not be adequate for addressing two of the main obstacles hindering the development of the national anti-corruption policy: the need to institutionalize the mechanisms of coordination and the systematization of the fight against corruption. Regardless of the adoption of measures in other areas, in a scenario lacking the instruments to address the aspects of inter-institutional coordination and the improvement and simplification of legislative systematization, it is likely that the institutions' responses to the intended actions against corruption will remain slow, especially in more complex cases.

International experience has shown that several countries have felt the need to develop new institutions to improve the enforcement in cases of corruption. For example, in England, the Serious Fraud Office has been instituted as a specialist prosecuting authority to tackle cases of top-level fraud, bribery, and corruption. The legislative proposals in Brazil exploit this aspect in some way to strengthen the role of the CGU as the central body of the Brazilian anti-corruption system, especially through the development of mechanisms that

51 The New Measures Against Corruption outlines the creation of the National System for Fighting Against Corruption and Social Control (*Sistema Nacional de Controle Social e Integridade Pública*, the SNCSI), designed as a combination of institutions and related instruments at all levels of administration (federal, state, and municipal) for expanding the reach of the country's social control policies. Institutional coordination is also envisaged in the proposal to create the National Council for Debureaucratization (*Conselho Nacional de Desburocratização*) as the central body and coordinator of the National System for Debureaucratization (also to be created) (Measure 10). One of its objectives would be facilitating cooperation among the different spheres and levels of public power to promote the integration and articulation of the actions for debureaucratization in a coordinated manner throughout the national territory. The New Measures Against Corruption also brings some proposals related to the sharing of information and the disclosure of public databases.

facilitate its action. However, perhaps it is premature to conclude that the CGU will be able to centralize all the activities necessary to fight corruption in Brazil.

The reflection on institutional coordination and normative systematization is necessary considering the complexity of corruption in Brazil. The national political landscape, which brings political parties' representatives to use the theme of corruption with the sole purpose of attacking their opponents, also presents challenges. Such scenario indicates that the legislative agenda should center on the need for improved planning, organization of the available instruments, and the design of new institutional profiles, all of which would create a better foundation for the advancement of the anti-corruption national policy.

The systematization proposed, if implemented, also tends to provide a positive agenda for tackling corruption. As seen, many of the actions on the topic tend to be used as a means of meeting the interests of the ruling political parties. The existence of procedures and routines determined by law and regulations involving the theme of corruption tends to keep the fight against this type of irregularity in the radar of the authorities in order to attend the public and social interest, reducing spaces for directing the theme exclusively for achieving the intentions and needs of political actors.