

Conclusion

For a long time, large-scale use of cooperating defendants in criminal investigations has been a distinctive feature of the U.S. criminal justice system, whose party-driven model of criminal procedure allows for multiple types of transactions between law enforcement authorities and accused. Over recent decades, this scenario has changed substantially, since a large number of countries have adopted legal reforms that authorize the granting of benefits to defendants who assist law enforcement authorities in the prosecution of former accomplices. Leniency policies have become nowadays a common mechanism around the world, raising important legal questions and causing some bewilderment, particularly in jurisdictions of Continental tradition that understand criminal procedure as an official investigation, and not a dispute between two parties.

In Brazil, the 2013 Organized Crime Act introduced the rewarded collaboration regulation and designed a communication forum allowing enforcement authorities and accused to negotiate and close written agreements. After that, the use of cooperating defendants has evolved rapidly, especially in the prosecution of corrupt practices and corporate malpractice, turning the negotiation of collaboration agreements into a common routine in Brazilian criminal justice.

The legal practice of the rewarded collaboration evolved in a highly inventive manner leading to several innovations that are not established by the Organized Crime Act. Over the years, legal practitioners drew on the rewarded collaboration regulation to establish a comprehensive system of transactions and expanded the negotiation forum well beyond its statutory boundaries. Instead of abiding by the model of simple exchanges established in the Organized Crime Act, procedural participants formulated sophisticated tailor-made arrangements that regulated a wide array of matters and devised customized solutions. Through collaboration agreements concluded at early stages of criminal investigations, defendants and prosecutors established exact imprisonment penalties and created “package deals”, defining a single punishment for a wide range of confessed crimes. Collaboration agreements also established benefits not provided for by law, such as the design of “differentiated” detention regimes that allow the serving of long sentences in private residences, the protection of personal assets from

the rules of legal seizure and the granting of preferential treatment to the cooperator's family members.

Faced with the audacious innovations brought by inter-party arrangements, the Brazilian judiciary chose to give strong support to the inventive practice of collaboration agreements. Adopting a 'contractualist' approach to interpret the rewarded collaboration regulation, courts – following guidelines fixed by the Brazilian Federal Supreme Court – applied principles and doctrines of private contract law to resolve disputes regarding the use of collaboration agreements. In this context, traditional concepts of private law – such as the "*res inter alios acta*" principle and the rule of "*pacta sunt servanda*" – became central elements to substantiate a model of transaction that confers great negotiative freedom upon the procedural participants. From this perspective, the Brazilian judiciary understood that collaboration agreements negotiated by prosecutors and cooperating defendants have no effect upon other accused, who lack the right to question the regularity of the consensual arrangements in court. It also affirmed that collaboration agreements have a binding effect on sentencing by judicial bodies, who must respect the terms set by the parties.

The contractualist approach to collaboration agreements has had major impacts on Brazilian criminal justice. It fostered a system of negotiation in which cooperating defendants can predefine, through written agreements concluded even before the existence of a formal indictment, the exact imprisonment punishment and the conditions under which it is served. It allowed the contractual redesign of Brazilian criminal law through the constant invention of new rights and obligations. It also authorized cooperating defendants to serve imprisonment penalties in advance, before the judicial pronouncement of the verdict and sentence and sometimes even before the opening of a formal proceeding.

This thesis has offered a critical assessment of the Brazilian practice of collaboration agreements and rejected the contractualist approach to the rewarded collaboration regulation. Drawing lessons from the German experience with the crown-witness regulation and with the practice of negotiated judgments, it asserted that collaboration agreements are fact-finding tools for situations of investigative emergencies, and not mechanisms for the consensual resolution of criminal cases. As in Germany, the use of cooperating defendants in Brazil does not appear as an aspect of the parties' broad capacity to dispose of criminal procedure, but rather represents an exceptional measure to overcome otherwise unsurmountable obstacles in the prosecution of serious crimes. Like the German crown-witness regulation, Brazilian collaboration agreements constitute devices for ensuring

the effective collection of evidence and adequate fact-finding in scenarios of investigative emergencies. As an extraordinary reaction to extraordinary circumstances, collaboration agreements must strictly observe the limits set by the Organized Crime Act. Beyond these limits, procedural participants lack the capacity to negotiate and close consensual arrangements.

The thesis has rejected the concept that collaboration agreements are simple bilateral transactions and the association of these mechanisms with the ideal of a new form of “consensual criminal justice”. Instead, the thesis proposed that the rewarded collaboration regulation represents – like other leniency policies – a form of privatization of investigative and prosecutorial activities. Collaboration agreements transfer to private agents – the offenders – a portion of the activities of gathering, screening and organizing the relevant information and evidence for the prosecution of criminal organizations. These agreements can be understood as public-private partnerships within the apparatus of state prosecution, in which defendants and enforcement authorities establish a durable and stable relationship directed at the successful prosecution of other offenders.

As in other fields, the development of public-private partnerships can bring benefits for the activities of law enforcement authorities, reducing the costs of detecting serious crimes and enhancing instability within criminal organizations. On the other hand, these partnerships generate multiple risks, which arise from the difference between the objectives pursued by public authorities and cooperating defendants and from the informational asymmetry that exists between them. The investigative joint ventures engendered by collaboration agreements have the structure of a principal-agent relationship, creating several opportunities for cooperating defendants to misrepresent facts, obtain excessive benefits and strategically exploit the rewarded collaboration regulation.

From this perspective, the thesis criticized the enormous deference showed by the Brazilian judiciary, particularly by the Federal Supreme Court, towards the inventive practice of collaboration agreements, and contrasted it with the position of the German Federal Constitutional Court regarding the constitutionality of negotiated criminal judgments. Confronted with a scenario of pervasive disregard of legislative regulations by legal practitioners, the German Constitutional Court restricted the transactions between procedural participants to the boundaries set by statute, expressly rejecting the concept of consensual criminal justice and affirming that consensual arrangements must respect the state’s commitment to search for truth, the principle of individual guilt and the duty of transparency and documentation.

Faced with a similar situation, the Brazilian Federal Supreme Court invoked concepts of private contract law to block legal actions by third parties affected by collaboration agreements, prevent adequate judicial control of the practice and validate extravagant transactions, revealing a deference to consensual arrangements in criminal procedure that is extreme even by the loose standards of the U.S. experience. The contractualist approach allowed the use of collaboration agreements as hedging mechanisms and led to an astonishing phenomenon: the redesign of Brazilian criminal law through consensual arrangements.

Over the last years, collaboration agreements generated much vaunted results in the investigation of corrupt practices and corporate wrongdoings, gaining enormous attention. This thesis has pointed out a less prominent facet of the practice of collaboration agreements: its propensity to mislead official investigations, generate erroneous results and produce severe social losses. As well as effective outcomes in the prosecution of macro-delinquency, the massive use of collaboration agreements in recent years generated examples to fill every chapter of a textbook about the risks of leniency policies. Misrepresentation of facts, granting of unfounded advantages to leniency beneficiaries, overreliance of enforcement authorities on cooperating reports and reverse exploitation of the leniency system: all can be found in the Brazilian experience with collaboration agreements.

In its final remarks, the thesis associated the blossoming of the practice of collaboration agreements with the dynamics of “governing through white-collar crime”, in which the prosecution of macro-delinquency constitutes a central tool to restore, in times of severe social crisis, public trust in the economic and political system through the delivery of symbolic results. Viewed from this perspective, the inventive practice of collaboration agreements appears not as an isolated event, but as part of a wider movement to loosen traditional guarantees of criminal procedure and criminal law, curbing judicial control and allowing enforcement authorities to obtain spectacular victories in an alleged war between society and powerful enemies.