THE BRAZILIAN LEGAL FRAMEWORK AGAINST CORRUPTION

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I. INTRODUCTION

Corruption is a major global problem, but it is much more serious in developing countries. Due to its economic effects, corruption is a threat to stability and security of societies. It undermines the values of democracy and jeopardizes the rule of law. According to Gerald E. Caiden,

> Corruption has now become a popular subject in international circles. Not that it is new. Far from that, corruption has been with us since the dawn of government. But finally the world has decided that it has become too dysfunctional for global development for it to go unchallenged. Indeed, it has become so menacing that something has to be done about it. But are we talking about the same thing? Despite different words for it, there are common definitions and what is more there seems to be a remarkable degree of agreement in time and place. Ever since written records have survived, the same kinds of objectionable behavior have been identified, irrespective of language, religion, culture, ethnicity, governance, location, philosophy and social values. These have always been considered unworthy of individuals exercising power over others, epitomized in Lord Acton's dictum that "Power corrupts; absolute power corrupts absolutely." They have disappointed those over whom they have exercised their power.[1]

Caiden is right. As stated in the preamble of the United Nations Convention against Corruption (UNCAC), corruption is no longer a local matter but a transnational epidemic that affects all societies and economies, making essential international cooperation to prevent and control it.

Corruption takes advantage of its invisibility, the culture of secrecy and greed. This phenomenon, very similar in all human societies, is directly linked to money laundering and serious forms of organized crime. Drug gangs, human traffickers, arms traffickers and smugglers of wild animals always pay bribes to public servants to keep their business running. Here is a dauting list of the negative consequences of systemic corruption, according to Caiden (2003):

1. It perpetuates closed politics and restricts access to decision making, thereby impeding the reflection of social change in political arrangements.
2. It suppresses opposition, thereby building up public resentment that needs only a flashpoint to erupt into violence.
3. It perpetuates and widens social divisions further dividing the haves from the have-nots.
4. It obstructs policy change, thereby sacrificing the public interest to narrow, partial and select interests.
5. It blocks much needed reforms and perpetuates poor administrative practices that give offence and reduce performance.
6. It diverts scarce resources away from public amenities and services to private affluence amid general squalor.
7. It contributes to social anomie by shoring up inappropriate arrangements.
8. It undermines trust in public institutions and alienates people.
9. It is dysfunctional to globalization, modernization, and effective governance.
10. It entrenches an international political-criminal network that undermines global security.[2]

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[1] CAIDEN, G. E. (2003), *The burden on our backs; corruption in Latin America*. VIII International Congress of CLAD on the Reform of State and the Public Administation, Panama, Oct. 2003.

So, the problem of corruption is really very serious and the Third World countries, like Brazil, need technical assistance and financing to overcome such difficulties. Such nations also need to be part of the international conventions on the subject. They should also have an adequate criminal legislation, which can ensure the punishment of criminals, asset recovery and preventing further illegal conduct.

Brazil is a rapidly developing market. There is much public money in the economy in several projects and public works. Still — and perhaps for this reason — Brazil faces repeated corruption scandals both at federal and state levels. Much has been done since the democratization of the country in the eighties, through the structuring of the law enforcement agencies and programmes of crime prevention and suppression of corruption, as well as through the adoption of appropriate laws.

II. THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

> "In its resolution 55/61 of 4 December 2000, the General Assembly recognized that an effective international legal instrument against corruption, independent of the United Nations Convention against Transnational Organized Crime (resolution 55/25, annex I) was desirable and decided to establish an ad hoc committee for the negotiation of such an instrument in Vienna at the headquarters of the United Nations Office on Drugs and Crime
> [....]
> In accordance with article 68 (1) of resolution 58/4, the United Nations Convention against Corruption entered into force on 14 December 2005. A Conference of the States Parties is established to review implementation and facilitate activities required by the Convention" (UNODC, 2013).[3]

The Convention highlights are prevention of corruption, criminalization of certain behaviours, cooperation on the national level, international cooperation and asset recovery. According to the UNODC,

> Corruption can be prosecuted after the fact, but first and foremost, it requires prevention. An entire chapter of the Convention is dedicated to prevention, with measures directed at both the public and private sectors.
> These include model preventive policies, such as the establishment of anti-corruption bodies and enhanced transparency in the financing of election campaigns and political parties. States must endeavor to ensure that their public services are subject to safeguards that promote efficiency, transparency and recruitment based on merit. Once recruited, public servants should be subject to codes of conduct, requirements for financial and other disclosures, and appropriate disciplinary measures. Transparency and accountability in matters of public finance must also be promoted, and specific requirements are established for the prevention of corruption, in the particularly critical areas of the public sector, such as the judiciary and public procurement. Those who use public services must expect a high standard of conduct from their public servants. Preventing public corruption also requires an effort from all members of society at large. For these reasons, the Convention calls on countries to promote actively the involvement of non-governmental and community-based organizations, as well as other elements of civil society, and to raise public awareness of corruption and what can be done about it. Article 5 of the Convention enjoins each State Party to establish and promote effective practices aimed at the prevention of corruption.[4]

As of May 29, 2013, the United Nations Convention Against Corruption (UNCAC) had 167 parties. Brazil signed the Convention on December 10, 2003. Its ratification dates back to June 15, 2005. But its effectiveness in Brazilian domestic law only occurred in 2006, when the President of the Republic issued

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[2] CAIDEN, G. E. (2003), *The burden on our backs; corruption in Latin America*. VIII International Congress of CLAD on the Reform of State and the Public Administration, Panama, Oct. 2003.
[3] United Nations Office on Drugs an Crime. *UNODC's Action Against Corruption and Economic Crime*. (pubd online, 2013) 〈http://www.unodc.org/unodc/en/corruption/index.html?ref=menuside〉 accessed 28 July 2013.
[4] United Nations Office on Drugs an Crime. *UNODC's Action Against Corruption and Economic Crime*. (pubd online, 2013) 〈http://www.unodc.org/unodc/en/corruption/index.html?ref=menuside〉 accessed 28 July 2013.

Decree 5.687 of January 31, 2006. Seven years have passed and Brazil has not yet implemented all the measures provided for in the Convention.

III. THE BRAZILIAN EFFORTS AGAINST CORRUPTION

Transparency and merit are two concepts essential for good governance, which requires an efficient system of recruitment of public officials. A mandatory merit system was established in 1988 by the Brazilian Constitution (article 37, II). Admission in a public office or position depends on previously passing an exam consisting of tests or tests and academic/professional credentials, in accordance to the nature and complexity of the position, as set forth by law.

Also, the federal government established a system for purchasing goods and services which requires adherence to a mandatory procurement procedure (article 37, XXI, of the Federal Constitution): "*Public works, services, purchases and disposals shall be contracted by public bidding proceedings that ensure equal conditions to all bidders*".

COMPRASNET is the access point to the Brazilian Federal Government's e-procurement system. The portal enables users to view information on all Federal Government purchases of goods and services and to participate in the e-procurement process. This kind of information helps prosecutors to identify and prosecute criminals that defraud public bids.

Brazil's current efforts to tackle corruption are massive. There are many agencies involved in combating bribery and corruption control. In the Brazilian judicial system, the most important role is played by the Public Prosecution Office, at both the federal and state levels, and by the Office of the Comptroller General (CGU).

CGU is the government agency most experienced in promoting cooperation between the public and private sectors. It maintains partnerships with civil society organizations to disseminate best practices in the business world, as well as to promote the education of children in the field of ethics and good governance.

Despite not being a law enforcement agency in the criminal area, CGU assists prosecutors and police in the investigation of crimes of corruption, in a broad sense.

> Apart from being in charge of inspecting and detecting frauds in the use of federal public funds, the Office of the Comptroller General (CGU) is also responsible for developing mechanisms to prevent corruption. The idea is that, besides detecting cases of corruption, CGU has the role of acting proactively by developing means to prevent their occurrence to the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences. (CGU, 2013)[5]

In fact, the existence of specialized authorities is a key factor in the fight against corruption. For this reason, Article 36 of UNCAC provides that States shall ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks. In Brazil, one of these bodies is the Public Prosecution Office.

In accordance with Article 127 of the Constitution, the Public Prosecution is a permanent institution, essential to the jurisdictional function of the State, and it is its duty to defend the juridical order, the democratic regime and the inalienable social and individual interests. Among other functions, this body is responsible for initiating criminal prosecutions; to ensure effective respect to the rights guaranteed in the Constitution; and to institute civil investigation and public civil suits to protect public and social

[5] Office of the Comptroller General. *Preventing corruption*. (Brasília, Brazil, 2009; pubd online 2009) ‹http://www.cgu.gov.br/english/AreaPrevencaoCorrupcao/OQueE/› accessed 20 July 2013.

property, the environment and other diffuse and collective interests.

Among the most effective measures to prevent and combat corruption are policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability. In accordance with Article 5 of the UNCAC, the member countries shall endeavour to establish and promote effective practices aimed at the prevention of corruption, by collaborating with each other and with relevant international and regional organizations in promoting and developing the measures referred to in that article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.

According to Article 38 of UNCAC each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. *Cooperation between national authorities and the private sector is also necessary*, in particular financial institutions, relating to matters involving the commission of offences established in accordance with UNCAC.

IV. THE BRAZILIAN LEGAL FRAMEWORK AGAINST CORRUPTION

Article 37 of the 1988 Brazilian Constitution is a key section of the legislative anti-corruption framework.

> **Article 37.** The governmental entities and entities owned by the Government in any of the powers of the Union, the states, the Federal District and the Municipalities shall obey the principles of lawfulness, impersonality, morality, publicity, and efficiency, and also the following:
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> **Paragraph 4.** Acts of administrative dishonesty shall result in the suspension of political rights, loss of public function, prohibition to transfer personal property and reimbursement to the Public Treasury, in the manner and grading established by law, without prejudice to the applicable criminal action.

Every Brazilian criminal law is passed by Congress. The relevant laws applied by the Brazilian courts against corruption are:

a) Criminal Code (1940)
b) the Code of Criminal Procedure (1941)
c) Money Laundering Act (1998)
d) Procurement Law (1993)
e) Law of Crimes committed by Mayors (1967)
f) Organized Crime Act (1995)

The Money Laundering Act of 1998 was amended in 2012 in order to comply with the FATF recommendations. Now the AML legislation serves to process any predicate offence that provides assets to the criminal. There is no longer a closed list of predicate offences.

The financial intelligence unit operates satisfactorily in Brazil. The Council for Financial Activities Control (COAF) is an agency attached to the Ministry of Finance of Brazil. The prosecutors and police receive suspicious transaction reports, which can lead to the initiation of criminal investigations.

Federal Decree 5483 of June 30, 2005 provides for the investigation of civil servants' assets, in order to facilitate asset recovery and the identification of illicit enrichment.

Two other non-criminal laws are important to punish bribery and dishonesty: the Administrative Misconduct Act (1992) and the Freedom of Information Act (2011). Acces to information on public spending is an importat tool for the society to control the government.

Brazil is a member of the FATF and therefore must comply with the 40 recommendations that the authority instituted. Several multilateral instruments against corruption have been adopted since the mid-1990s. Brazil is a part of the most important conventions:
i) the United Nations Convention against Corruption (Decree 5.687 of January 31, 2006)
ii) the Organization of American States Convention against Corruption (Caracas Convention) (Decree 4.410 of October 7, 2002).
iii) The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Decree 3.678 of November 30, 2000).

However, Brazil has not yet implemented all obligations assumed when it signed and ratified these treaties. For example, there has not been the criminalization of bribery in the private sector. Therefore, this country does not comply with Article 21 of the UNCAC:

> 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 offenses, 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.

Moreover, we do not have legislation to regulate properly all special investigative techniques yet. The Organized Crime Act of 1995 is insufficient, so much so that Congress just passed a bill amending the current regulation substantially (Bill No. 150 of 2006). This draft law still requires presidential approval.

When the new organized crime act is in effect, there will be clear rules on plea agreements, controlled delivery, undercover operations, among other special investigative techniques. Thus, Brazil will fully comply with Article 50 of the UNCAC, which provides:

> Article 50. Special investigative techniques
> 1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.
> 2. For the purpose of investigating the offenses covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.
> 3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.
> 4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

Unfortunately, the draft law (organized crime bill) has only a brief provision on task forces but says nothing about the joint investigation teams, which are the subject of Article 49 of the UNCAC:

> Article 49. Joint investigations
> States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

Brazilian law for the protection of victims and witnesses (Law 9807 of 1999) is reasonably good. However, there are not very clear rules on the protection of informants in good faith. Few public institutions maintain programmes to encourage whistleblowing. Another bill, which has already been approved by both houses of Congress, will create a specific programme of collaboration within the Office of the Comptroller General (CGU). This is the new Brazilian Anti-Corruption Law, similar to the Foreign Corrupt Practices Act (FCPA) from the United States.

For now, however, Brazil does not entirely meet Article 39, No. 2, of the UNCAC, which requires that each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.

On the same subject, one must bear in mind Article 33 of the UNCAC. By reading it one can see that Law 9807 of 1999 (Victms, Experts and Witness Protection Act) is actually unable to meet all the nuances of proper protection to whistleblowers.

> Article 33. Protection of reporting persons
> Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offenses established in accordance with this Convention.

For this reason, Article 126-A of Law 8112 of 1990 states that no public official can be held responsible, in any civil, criminal or administrative proceeding, just because he/she reported to the proper authority his/her suspicion that another employee is engaged in criminal activity.

Note that this new and future legislation (Bill No. 39 of 2013) is not of a criminal nature. It is a law that imposes civil and administrative penalties for companies. Thus, it is intended to meet the provisions of Article 26 of the UNCAC. Currently, in Brazil there is only criminal liability for legal persons who commit environmental crimes. It is what provides the Law 9605 of 1998.

> Article 26. Liability of legal persons
> 1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offenses established in accordance with this Convention.
> 2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.
> 3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offenses.
> 4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Another problem concerns the fragility and benevolence of the statutes of limitations. Prosecutions, even when serious crimes are engaged, are impeded very quickly. Prosecutors have little time to

investigate and prosecute the defendants. Brazilian courts are almost always buried in a mountain of lawsuits, which increases the difficulty of prosecution. These factors cause large ratios of impunity in the criminal system. Thus, it is safe to say that Brazil does not comply with Article 29 of the UNCAC and does not establish a long statute of limitations period:

> Article 29. Statute of limitations
> Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offense established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

Regarding international cooperation, Brazil has two central authorities in criminal matters. The first and most important is the Department of Assets Recovery and International Legal Cooperation (DRCI), which belongs to the Ministry of Justice. The second one is the International Cooperation Office of the Attorney General's Office (ASCJI/PGR).

Brazil is part of several bilateral treaties on international cooperation in criminal matters. It is also part of the Inter-American Convention on Mutual Legal Assistance in Criminal Matters and the Convention of the Community of Portuguese Language Countries (CPLP). Thus, the country is able to provide assistance in obtaining evidence for the freezing of assets and repatriation of money.

V. INITIATIVES TO IMPROVE THE LEGAL FRAMEWORK ON THE FIGHT AGAINST CORRUPTION

In addition to the initiatives listed in this article that reveal Brazil's efforts to tackle corruption and adapt to the UNCAC, there are other measures that should be mentioned. The President has just signed the law on conflicts of interests in the public administration (Law 12813 of 2013). The bill on the regulation of lobbying has been queued since 2007. The criminalization of illicit enrichment is also on the agenda of Congress.According to Article 20 of the UNCAC,

> Article 20. Illicit enrichment
> Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

VI. CONCLUSION

By investigating and prosecuting criminals, the law enforcement agencies help defend public assets. Other state agencies contribute to enhancing management transparency through internal control activities, public audits, corrective and disciplinary measures. It is essential to promote transparency in public spending, public procurement and public agreements. It seems right to affirm that the only way to improve compliance with anti-corruption laws is through internal and international cooperation. Without it no politics will be effective against corruption. Moreover participation of society is mandatory. Article 13 of UNCAC makes this very clear.

We cannot disregard the media's role in exposing corruption. As Johann Fritz states, corruption is a watchdog of democracy. And the press is the eye of the citizen. Despite the efforts of the international community, the indices of corruption are still very high across the globe. Depriving children of their schools and people of decent health services, corruption kills many people every year. For that reason, the implementation of the United Nations Convention against Corruption will be indeed a real achievement in the global fight against corruption. There is full commitment and willingness of Brazilian authorities towards the enforcement of this and all other international conventions against bribery.