Plea deal: legitimized authorities and evidentiary valuation

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Abstract

This study investigates the provisions of the Lei n. 12.850 (2013), specifically with regard to the authorities legitimized to sign a plea deal agreement, as well as the criteria adopted by the Brazilian Supreme Federal Court (Supremo Tribunal Federal – STF) as for the evidentiary valuation resulting from such collaboration, by having the agreements signed within the scope of the Brazilian Car Wash Operation (Operação Lava Jato) and already submitted to the Brazilian Constitutional Court as a reference. We analyze the disagreements revealed in the confrontation between authorities belonging to the Public Prosecutor's Office (Ministério Público – MP) and the Judiciary Police, their impact on future agreements and, subsequently, the evidentiary value deriving from them. Recent decisions point out a worrisome empty evidence in accusations made as a result of the Car Wash Operation, which can hinder the scope of this institute, namely in what it seeks to be – a substitute to the due process of law.

Key words public policy; corruption; organized crime; plea deal.

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Colaboração premiada: autoridades legitimadas e valoração probatória

Resumo

Este estudo investiga os dispositivos da Lei n. 12.850 (2013), especificamente no que se refere às autoridades legitimadas para fins de celebração de acordo de colaboração premiada, bem como os critérios adotados pelo Supremo Tribunal Federal (STF) quanto à valoração probatória decorrente de tal colaboração, tendo como referência os acordos celebrados no âmbito da Operação Lava Jato e já objeto de apreciação pela Corte Constitucional. Analisamos os desencontros revelados no confronto entre autoridades do Ministério Público (MP) e da Polícia Judiciária, seus impactos nos acordos futuros e, na sequência, o valor probatório deles decorrente. Decisões recentes apontam um preocupante vazio probatório nas denúncias elaboradas em decorrência da Operação Lava Jato, com potencial para limitar o alcance do instituto, nomeadamente naquilo que almeja ser – substituto do devido processo legal.

Palavras-chave políticas públicas; corrupção; crime organizado; colaboração premiada.

Colaboración premiada: autoridades legitimadas y valoración probatoria

Resumen

Este estudio investiga las disposiciones de la Ley No. 12.850 (2013), específicamente con respecto a las autoridades legitimadas para firmar un acuerdo de colaboración premiada, así como los criterios adoptados por el Supremo Tribunal Federal de Brasil (STF) en cuanto a la valoración probatoria resultante de dicha colaboración, al tener los acuerdos firmados dentro del ámbito de la Operación Lavado de Autos de Brasil y ya objeto de apreciación por la Corte Constitucional brasileña. Analizamos los desacuerdos revelados en la confrontación entre autoridades pertenecientes al Ministerio Público (MP) y a la Policía Judicial, su impacto en futuros acuerdos y, posteriormente, el valor probatorio que se deriva de ellos. Decisiones recientes señalan un preocupante vacío probatorio en las denuncias elaboradas como consecuencia de la Operación Lavado de Autos, que puede obstaculizar el alcance de este instituto, es decir, en lo que pretende ser: un sustituto del debido proceso legal.

Palabras clave políticas públicas; corrupción; crimen organizado; colaboración premiada.

Introduction

The phenomenon of corruption cannot be delimited or defined as inherent to the State's political organization mode, i.e. ideological, religious and/or market criteria are insufficient for its characterization. In fact, the economic globalization process, mainly as a result of technological advances, leads to the conclusion that there is an immense global market, interconnected and integrated, where commercial and financial transactions occur at a great speed, also allowing corruption acts – either in the public or private sphere – to seek the refinement needed to cross the imaginary frontiers of today.

The political space consolidated, after decades of corruption, what is theoretically named as "coalition presidentialism" – a term coined by Sérgio Henrique Hudson de Abranches (1988) –, that is, parliamentary support for acts of the Executive Branch in exchange of jobs and benefits to the detriment of primary interests of society – due to the weakness of a system characterized by instability, high risk, and whose support is based, almost exclusively, on the current government's performance.

As an example of involvement of public players in corruption acts, we have as a parameter the list of unfair managers for the exercise of an elective position in the State of Ceará, sent to the Electoral Justice through the Audit Court of the State of Ceará (Tribunal de Contas do Estado do Ceará – TCE-CE), totaling 3,586 managers theoretically ineligible, in the 184 municipalities of the state, and out of this total 1,460 managers have a note indicating administrative improbity (O Portal de Notícias da Globo [G1], 2018) – this referring to the 2018 electoral process, without the accruals arising from the list sent by the Federal Audit Court (Tribunal de Contas da União – TCU).

In face of this worrisome reality, the 'magical' ideas of a moralistic nature are aimed at what the people want to hear, as if the coping with such a tempestuous issue found a positive response in the field of individual morality, relegating to a secondary level the public space and the strengthening of citizenship and democratic institutions, with a focus on transparency and social control.

In this context, the Lei n. 12.850 (2013), which defines criminal organization, provides for criminal investigation, inserting, within the national legislative framework, this time in greater detail, the *plea deal* as a means of obtaining evidence.

Therefore, in addition to the ethical discussion about the use of this instrument, something which does not make the theme less relevant, this study addressed the contemporary issue of use and/or abuse of the plea deal as a research method, discussing the authorities legitimized to sign a plea deal agreement and the evidentiary value of testimonies and the evidence resulting therefrom.

If the attempt by the national legal community to restrain any possibility of using imprisonment was not enough, either of a precautionary nature or not, as a coercion mode

for the conclusion of agreements, in a clear violation of inalienable rights, hence unavailable, other concerns arise:

- Who can enter into a plea deal agreement?
- Which benefits can be granted in return for the collaborator?
- What is the evidentiary value of the collaborator's testimonies and the evidence she/he unilaterally produces?
- Is it permissible to set benefits in plea deal agreements outside the legal (legislative) system?

The answer to such questions may be decisive in analyzing the validity of the method adopted in the Brazilian Car Wash Operation (Operação Lava Jato), where dozens of complaints and investigations are based on mere testimonies of collaborators and evidence produced unilaterally by them, a concern that is accentuated mainly when such proceedings are discontinued in the Brazilian Supreme Federal Court (Supremo Tribunal Federal – STF) and in the Brazilian Higher Court of Justice (Superior Tribunal de Justiça – STJ), as currently occurring, precisely due to lack of evidence stemming from corroboration about the facts reported, revealing several weakness factors in the action of criminal prosecution bodies; exemplifying:

- The action taken by the Public Prosecutor's Office (Ministério Público – MP) and the Judiciary Police has shown to be hasty, failing to deepen the investigation in search of independent evidence;
- The content of testimonies collected in a plea deal agreement proved to be untrue, therefore, in an ethical environment impossible to be valued, becoming useless for any purpose; and
- The institutions involved in the process (MP and Judiciary Police) used the plea deal agreement as the only means of obtaining evidence – disregarding traditional and judicious court instruction.

Any of the above scenarios, if true, can lead to widespread discredit of the Judiciary Branch, the MP, and the Judiciary Police, in a short period of time, as they have revealed STF's repeated decisions – this when analyzing complaints and investigations arising from the Car Wash Operation.

It is worth noticing that the plea deal agreement (also known as an *delação premiada*) is not a new instrument in Brazilian legislation, since it was already provided for in the Philippine Code, at the time of Colonial Brazil. The means employed in its use, as it seems, insist on not perfecting themselves. As in those times, today they also leave sequels, despite the opposing arguments (Dallagnol, 2015).

Authorities legitimized to sign a plea deal agreement

A tempestuous controversy concerns the application of plea deal agreement, which manifests at the very time of defining, in accordance with the legal text, which authorities are authorized to enter into agreements with those investigated/prosecuted and/or condemned, considering the tasks of each of them.

The Lei n. 12.850 (2013, our translation), in its Article 4, § 2, specifically provides that:

> § 2 Considering the relevance of the collaboration provided, the Public Prosecutor's Office, at any time, and the police chief, in the police investigation files, with the manifestation of the Public Prosecutor's Office, may request or represent the judge for granting court pardon to the collaborator, even though this benefit has not been foreseen in the initial proposal, applying, where applicable, Article 28 of the Decreto-Lei n. 3.689, dated October 3, 1941 (Código de Processo Penal).

The Federal Public Prosecutor's Office (Ministério Público Federal – MPF) has rebelled against the model adopted by the legislator, claiming, through the Ação Direta de Inconstitucionalidade 5508 (ADI 5.508, 2016), that plea deal agreements with a police authority violate principles of the Constituição da República Federativa do Brasil (CF, 1988), especially those dealing with the *exclusive exercise of criminal proceeding by the MP.* The ADI 5.508 (2016) states that this situation might also violate the principle of separation of powers and allow the advancement of the Judiciary Police in a specific area of action and constitutionally foreseen for MPF action.

The MPF's arguments can be synthesized, according to the narrative contained in the ADI 5.508 (2016, our translation), as follows:

> The contested excerpts of the law, by attributing police chiefs the initiative of plea deal agreements, go against the due process of law (Constituição da República, Article 5, LIV)[1] , the principle of morality (Article 37, head)[2] , the accusatory principle, the ownership of the public criminal proceeding conferred on the Public Prosecutor's Office by the Constituição (Article 129, I)[3] , the exclusive exercise of functions of the Public Prosecutor's Office by members legally invested in the

1 "Article 5 [...] LIV – no one shall be deprived of liberty or property without due process of law" (CF, 1988, our translation).

2 "Article 37. The direct and indirect public administration of any of the Powers of the Union, the States, the Federal District, and the Municipalities shall obey the principles of legality, impersonality, morality, publicity and efficiency [...]."

3 "Article 129. Some institutional functions of the Public Prosecutor's Office consist in:
I – promoting, privately, public criminal proceeding, pursuant to the law."

career (Article 129, § 2, first part)[4] , and the constitutional police function, as a body of public security (Article 144, especially §§ 1 and 4)[5] .

Ahead:

> These devices must be considered unconstitutional, because they violate the due process of law, both in the instrumental and substantive aspects (Constituição da República, Article 5, LIV) and the accusatory system, as well as for denying exclusive exercise of criminal proceeding granted to the Public Prosecutor's Office and by attributing the MP's role to people unfamiliar with the career (Constituição da República, Article 129, I, and § 2) (ADI 5.508, 2016, our translation).

In this line of argument, the MPF warns about the possibility of circumventing constitutional standards, especially on the exclusive exercise of criminal proceeding, with emphasis on the following excerpt:

> Article 4, §§ 2 and 6, of the Lei 12.850/2013, by attributing to police chiefs legitimacy to negotiate the plea deal agreement's terms with the accused and her/his defender and to directly propose to the judge a grant of court pardon to an investigated person or a collaborating defendant, exceeds the institutional function of criminal investigation police (often improperly named as 'judiciary police'). The latter, as a public security body (Article 144, especially §§ 1 and 4), must act for the criminal proceeding, not in the criminal proceeding. These legal provisions subtract the ownership of criminal prosecution from the Public Prosecutor's Office, since they grant a foreign body to the proceeding parties the prerogative to negotiate plea deal agreement's clauses, whose scope includes not filing a criminal proceeding,

4 "§ 2 The functions of the Public Prosecutor's Office may only be exercised by members of the career, who must reside in the county of the respective jurisdiction, unless authorized by the institution's head."

5 "§ 1 The federal police, established by law as a permanent body, organized and maintained by the Union and structured as a career, aims:

I – to investigate criminal offenses against the political and social order or to the detriment of goods, services, and interests of the Union or its autarchic entities and public companies, as well as other offenses whose practice has interstate or international repercussions and requires uniform repression, as provided by law;

II – to prevent and suppress the illicit traffic in narcotics and related drugs, smuggling and misconduct, without harm to the fiscal action and the action taken by other public bodies in their respective areas of competence;

III – to exercise the functions of the maritime, airport, and border police;

IV – to exercise, on an exclusive basis, the Union's judicial police functions.

[...]

§ 4 Civil police forces, headed by police chiefs established in the career, shall, except for the Union's competence, be responsible for judicial police functions and prosecution of criminal offenses other than the military ones."

> proposed filing of a criminal proceeding, and modulation of sanctions, in a clear bending of the *jus persequendi in judicio*, which the Constituição attributes privately to the Public Prosecutor's Office, when the criminal proceeding is public. As a result, they also affect the exclusive exercise of the MP's functions to persons foreign to the career (Constituição da República, Article 129, I, and § 2). Court pardon, for instance, as VLADIMIR ARAS points out, constitutes 'an extinguishing cause of punishment that can only be recognized by the judge after the criminal proceeding has been brought, at the stage of summary acquittal or at the time of the merit judgment, the strangeness of admitting the intervention of a non-party in the criminal process, in potential dissonance with the perpetrator of the criminal proceeding (*dominus litis*).' The hypothesis that a police chief signs a plea deal agreement that includes a non-complaint filing clause reveals a direct usurpation of the attribution of the Private Prosecutor's Office to promote – and, thus, not to promote – public prosecution, thereby violating Article 129, I, and § 2 (ADI 5.508, 2016, our translation).

In an analysis of the controversy, Eduardo Araújo da Silva (2014 pp. 69-71, our translation) warns about the incongruity that the legal model could generate, with regard to an agreement signed by a police chief contrary to the MP's position:

> In fact, if the legal system persists, there is a risk that the Public Prosecutor's Office may oppose the agreement promoted by the police chief and the judge, in turn, approve it, binding her/his final decision. Then, we would have, by transverse means, the hypothesis that the police chief binds the availability as for the application of the criminal sanction or the exercise of the State's *jus puniendi,* via court pardon, against the body in charge of the criminal proceeding, which would imply overt repression of the accusatory functions in court. In a similar case, when discussing the possibility of an agreement between the accused and the judge for the conditional suspension of the *ex officio* procedure (Article 89 of the Lei n. 9.099/95), the jurisprudence of the High Courts has been pacified in the sense of impossibility for another body to resort to public criminal proceeding.

Therefore, the ordinary legislator could not resort to public criminal proceeding in order to grant, to anyone who is not its exclusive holder, the possibility of mitigating the obligation of criminal proceeding, under penalty of violating the accusatory principle and the MP's functions (CF, 1988, Article 129, I, and § 2, first part), the due process of law and the very nature of things. *Only someone who has normative authorization to dispose of it can transact over some right.*

On the controversy, Luiz Flávio Gomes and Marcelo Rodrigues da Silva (2015, pp. 300-301, our emphasis, our translation) resumed the ordinary legislator's impression when the bill that gave rise to the Lei n. 12.850 (2013) was underway, clarifying this:

> The Constitution and Justice Commission and the Citizenship Commission, on October 30, 2012, when analyzing the bill that culminated in the law at stake (Lei 12.850/13), in the Report by Congressman VIEIRA CUNHA, informed the replacement of the term 'agreement' by 'manifestation of the Public Prosecutor's Office' in § 2 of Article 4 of the Lei 12.850/13, which deals with court pardon to the collaborator, based on the fact that "the role of agreeing or not is up to the Magistrate. The argument used by the Commission is poor, since there must be agreement by the member of the Public Prosecutor's Office with the terms of the deal signed between the police officer and the collaborator, and not a mere non-binding *Parquet's* advisory opinion. Incidentally, the Public Prosecutor's Office is in charge of the criminal proceeding, and due to this reason its manifestation by agreement or not with the deal binds the judge. *Anyway, it is clear that the legislator aimed to make non-binding the 'manifestation' of the Public Prosecutor's Office on the deal, something which would be incompatible with the constitutional order.*

Although the law has mentioned the possibility that the police chief enters into a plea deal agreement, this must only be admitted through active participation of the MP's member. Her/his participation in the deal signed with a police chief would be put into practice, through transverse ways, if the police officer binds the exercise of accusatory functions in court. Thus, it does not seem possible to approve a deal that does not have the MP's actual participation or, at least, its agreement. Nothing prevents the MP from ratifying the deal, being careful only to verify the player's willingness.

However, if the police chief makes a deal and the MP's member declares otherwise, it will only be up to the judge, if she/he agrees with the police officer, to apply Article 28 of the Code of Criminal Proceeding (Código de Processo Penal – CPP), and should not approve it in this regard.

When concluding the arguments set forth in the ADI 5.508 (2016, our emphasis, our translation), the MPF claims:

> It is enough to recall, in fact, that the plea deal agreement can occur after the sentence (Article 4, § 5, of the law). Would it be permissible for the police chief to intervene in the proceeding to petition the judge or court in favor of a deal signed by the police, against the procedural position of the Public Prosecutor? Would it be acceptable to appeal against a court decision denying its proposal? The

> negative answer seems to impose itself without difficulty on both questions, given the lack of meaning of this scenario and the procedural turmoil it would cause. **In other words, the legal provision of a deal by a police initiative without participation or consent of the Public Prosecutor's Office implies the permission that a public body (the police) makes an offer that it cannot honor, because it does not have this right. Such a situation renders the individual interested in the legal issue unprotected – because the plea deal agreement also works as a defensive tactic of the defendant or investigated person's interests - and it opposes morality and the principle of constitutional protection of trust, since it is not acceptable for the State to participate in negotiations that it cannot put into practice or that generate opposition of the State itself** (through the Judiciary Branch and the Public Prosecutor's Office).

Márcio Adriano Anselmo (2016), a police chief of the Federal Police (Polícia Federal – PF), in an article addressing the theme of plea deal agreement and the Judiciary Police, summarizes his position this way:

> In all other legal provisions dealing with the Institute, reference to the terms 'police authority' (Leis 7492/86 and 8113/90), 'authorities' (Lei 9613/98), collaboration with police investigation and criminal proceeding (Leis 9807/99 and 11343/2006). Thus, the position that considers the Public Prosecutor's Office as the sole authority with legitimacy to propose the plea deal agreement is not supported by the legislation.

In conclusive terms, the author clarifies:

> Therefore, we notice that there is no obstacle to the possibility of proposing plea deal agreements in the context of the police investigation, by the authority legally responsible for presiding it. Also, the research phase is the most propitious to put the measure into practice, above all due to the closeness stemming from the contemporaneity of the facts under analysis. *Denying the police chief the legitimacy to enter into such agreements is, in addition to being legal, denying any logical rationality to the criminal investigation system* (Anselmo, 2016, our emphasis, our translation).

As we can see, the controversy installed by discussing the constitutionality of the police officer's legitimacy to sign plea deal agreement is far from any merely corporate discussion.

The crucial point to be discussed is exactly that raised by the MPF, that is, the Judiciary Police is not in charge of criminal proceeding, an exclusive task of the MP, under the terms of Article 129 of the CF (1988), and it also cannot offer what it does not have, in a clear opposition to the principle of morality and trust of a constitutional nature.

Here we clearly find the central point of discord:

- Which of the 'legitimates' is able to offer more and deliver less, the MP or the Judiciary Police?

Negotiating with the most bloodthirsty of the outlaws and, however heinous the crime, offering what is not in its sphere of attribution is the most obvious manifestation of illegality.

This is done by the MP's members, when negotiating with informers what they cannot afford, for instance, punishment, its individualization and amount, the mode and regime of compliance (jurisdiction reservation), prescription, court pardon, allocation of goods and values, etc. – everything with no intervention of the natural judge in the proceedings, often with the simple manifestation of the 'ratifying judge,' which, not always, as seen in practice, is responsible for judging the merits of the case.

The MP's argument lies on the other side of the issue, in our view contradictory in essence, i.e. the police officer cannot negotiate non-filing of complaint, precisely because it has no such attribute. It is a real Gordian knot.

The subject matter was discussed in the STF plenary session, conducted by the Judge-Rapporteur, Minister Marco Aurélio, and it was important, beyond the substance discussed there, to reveal the contradictions inherent to the theme, now seemingly overcome in face of the merit at stake, with annotations considered relevant by us.

By advocating its prerogatives, certainly, the PF, urged to manifest in the aforementioned action, brought to the debate major aspects not yet faced around the institute of plea deal, deserving citation as follows:

> For a correct understanding of the PF's position as for the instrument provided for in the legislation, it is necessary to see the origin of the activity of obtaining evidence from the human being. Regardless of whether the person supplying data to the State acts informally (denunciation call, for instance) or is brought to the records of an investigation or criminal proceeding as a witness, investigated, or defendant, the genesis of that contribution is the same: evidence steeming from the human being. Thus... they have the same measuring criteria, the same vulnerabilities and weaknesses and they need special State's attention so that the right of third parties is not harmed by inadequate treatment of the material obtained or by mistaken evaluation of the competence and motivation of the person providing data (Polícia Federal [PF], 2017, our translation).

In order to clarify the point of disagreement, it affirmed:

> The discrepancy of understanding between the police and the MP, regarding the plea deal agreement lies on the fact that the MP acts by importing models that would not be covered by our legal system, yet (e.g. the U.S., full negotiation of the accusatory body with the investigator and her/his defense, or the Italian, where the MP is a magistracy), establishing in advance penalties, conditions to ensure compliance, fines, in counterpart to the accusation of facts, people, and circumstances, understanding that the Judiciary Branch could not even deeply interfere with this type of contract, under penalty of undermining their possibilities of negotiating the collaboration with any person investigated.
>
> [...]
>
> When applying this model, a single institution (the MP) would hold all roles of the criminal prosecution system, acting as investigator (obtaining material to prove a certain fact), as accuser (criminal proceeding prosecutor), and as judge (establishing penalties and binding fines in the court), unbalancing the balance of arms parity (PF, 2017, our translation).

Having an emphasis on the concern and recognition of the exceptional application of the plea deal agreement, which must be the rule, we always have the following quotation, in the light of the PF's view:

> An example of this view: a preventive prisoner, when signing a 'plea deal agreement' (i.e. criminal transaction) with the MP, covering certain anticipated benefits, would automatically leave the prison facility to comply with the home regime, without the corresponding conviction. If, at the end of an average three-year trial period, it is proven that she/he lied in her/his collaboration and the court applies a lengthy 18-year imprisonment sentence, the investigated person would have already completed, at home, 1/6 of a sentence that should have started in a closed regime. That is, her/his conviction in a closed regime would already begin with a period to achieve the regime's progression to the semi-open mode.
>
> [...]
>
> In this context, except for a better reading, it is noticed that the MP has been applying interpretations that modify the legal text, importing legal theses based on Comparative Law, in order to obtain jurisprudence from the High Courts,

> making changes in the instrumental way how evidence inherent to the plea deal agreement provided for in the Lei n. 12850/2013 is obtained, turning it into a criminal transaction institute, pursuant to the texts presented of the Projetos de Lei n. 4850/2016 and 8045/2010 (CRIMINAL DEAL) (PF, 2017, our translation).

Minister Marco Aurélio, rapporteur of the ADI 5.508 (2016, our emphasis, our translation), rightly pointed out that:

> As the police is the only institution whose main function is the duty to investigate, it is paradoxical to promote a restriction of the duties provided for by law. Removing the possibility of timely and expeditious use of the means of obtaining evidence, known as plea deal agreement, is actually weakening the criminal prosecution system, disregarding the principle of insufficient protection.
>
> [...]
>
> The moment in which it is takes place is relevant so that the authority in charge of establishing the agreement is established, pursuant to the provisions of the law and the Constitution: during investigations, it is a responsibility of the police officer, in a concurrent activity and under the supervision of the Public Prosecutor's Office member; once the criminal proceeding is instituted, there is an exclusive right of the Accusatory body.
>
> [...]
>
> The argument that the Public Prosecutor's Office has the exclusive legitimacy to offer and negotiate plea deal agreements, which is considered to be an exclusive property of the public criminal proceeding, does not have a constitutional basis.I never get tired of repeating that a price is paid for living in a democratic rule of law and this price is modest: unrestricted compliance with the legal order in force, especially the constitutional one. **In Law, the means justifies the end, but not the opposite, regardless of the good intent involved.**

On the occasion of the paradigmatic trial, Minister Gilmar Mendes highlighted:

> The problem arises when one enters the field to negotiate the collaborator's premium at stake.

> The law foresees as possible premiums court pardon or non-prosecution of the criminal proceeding – Article 4, head, and §§ 2 and 4 – and easing of the criminal sanction – reduction or replacement of the custodial sentence, Article 4, head, and § 5.
> The negotiation of such effects by the police chief might represent a provision on the public criminal proceeding and, therefore, entry into the institutional function exclusive to the Public Prosecutor's Office in order to promote the public criminal proceeding (Article 129, I, of the CF).
> But the law provides that the premium at stake is assessed and applied by the judge. Thus, the head of Article 4 states that the "judge may" grant "court pardon" or reduction or replacement of custodial sentence. The benefit is assessed by taking into account "the collaborator's personality, the nature, the circumstances, the severity, and the social repercussion of the criminal fact and the effectiveness of this collaboration" (§ 1).
> Ultimately, the strict interpretation of the law is in the sense that the benefits are those provided for in the legislation, which are dosed by the judge at the trial stage (ADI 5.508, 2016, our translation).

Going on with his reasoning, Minister Gilmar Mendes brought to light the crucial point of the terms of a plea deal agreement (accusation) recently signed by the MPF, which, in our opinion, could, in a short time, nullify all agreements, or at least the clauses that go beyond the MP's functions, as noted.

Regarding this aspect of the institute, Minister Gilmar Mendes (our emphasis, our translation) claims:

> If the agreement is signed by the police chief, it cannot specify the applicable sanction. At best, the police chief could agree that he represents by adopting a certain premium, without binding the Public Prosecutor's Office or the Court. The police chief is not in charge of the criminal proceeding, she/he cannot resort to it. **In fact, according to the letter of the law, not even the Public Prosecutor's Office can go so far, although this practice has been adopted within the scope of the Federal Public Prosecutor's Office. I open a parenthesis to register that the Plenary of the STF, in the Pet 7.074, rapp. Min. Edson Fachin, judged on 06.29.2017, did not state that the MP can agree on the premium at stake.** The Court's conclusion was that once the agreement is signed, it has a binding effect. **It was not possible to assert the legality of clauses not provided by law.** Only its approval was effective. In other words, it has not been said that the judge must approve an agreement that assesses the premium or provides for a benefit not provided for by law; but that once approved, the premium at stake must be observed.

> [...]
>
> **I have argued that, under current legislation, the Public Prosecutor's Office cannot negotiate the sanction to be applied**. Even so, there is no doubt that the Promoter's bargaining power is greater than that of the police chief. The Promoter may commit her/himself to request the application of a certain sanction and to appeal if not sufficiently applied. The police chief, in the worst case, may launch a non-binding manifestation, expressing her/his opinion on the future premium at stake.
>
> [...]
>
> On the other hand, the law is clear in stating that the judge applies and assesses the premium at stake (Article 4), taking "into account the collaborator's personality, the nature, the circumstances, the severity, and the social repercussion of the criminal act and the effectiveness of collaboration" (§ 1) (ADI 5.508, 2016, our translation).

Minister Celso de Mello, subsequently in the trial, registered:

> It is up to the magistrate, if and when there is a conflict between the positions of the MP and the police officer, this point should be subject to court's analysis. It is up to the Judiciary Branch to approve the agreement. And when this is ratified, it is up to the Judiciary Branch to verify if the clauses agreed are proportional.

The parallel construction between what the two institutions (MP x PF) advocate concerning the best way to make viable the collaboration agreement, and by whom, may be summarized in the clause that provides for the 'benefits' to be given to the collaborator, provided that this collaboration, constructed as illustrated, for didactic purposes, in Box 1.

Box 1 – PF's position x MPF's position

PF's position	MPF's position
The COLLABORATOR is aware that, depending on the effectiveness and efficacy of the collaboration, the results achieved, and, in case of conviction, at the discretion of the respective competent court, she/he may benefit, alternatively, with court pardon, reducing up to 2/3 of the custodial sentence or by replacing the custodial sentence by restriction of rights.	Taking into account the COLLABORATOR'S background and personality, the severity and social repercussion of the facts she/he practiced, the potential usefulness of the collaboration provided by she/him and, particularly, the accessory nature of the behaviors in which she/he engaged, once the conditions imposed in this agreement have been fulfilled in order to receive the benefits, and provided that at least one of the results provided for in clauses I, II, III, and IV of Article 4, of the Lei 12.850/2013, the FEDERAL PUBLIC PROSECUTOR'S OFFICE proposes to the COLLABORATOR and commits her/himself, in any event that has already been instituted or is to be initiated, whose object coincides with the facts revealed through the collaboration now agreed upon, or the collaborations agreed between the FEDERAL PUBLIC PROSECUTOR'S OFFICE and José Sergio de Oliveira Machado, Daniel Firmeza Machado, or Expedito Machado da Ponte Neto, in the form of clause 4, not to denounce or, in any way, even if by addition or re-ratification, propose a criminal proceeding in their favor by facts contained within the scope of this agreement or the abovementioned agreements, and they are punishable for any offenses described in any annexes to this agreement or the agréments mentioned above and may be imputed to them suspended for the duration of this agreement and terminated with the respective expiration.

Source: Prepared by the authors.

The relevant differences in the work of the institutions legitimized to sign plea deal agreements are observed without much effort, something which authorizes us to state that: a) the PF's work is closer to the promise of benefits and the provisions contained in the Lei n. 13.850 (2013), apparently not invading the jurisdiction of the Judiciary Branch or violating the principle of jurisdiction reservation, since the measurement (quantum) of the benefit are defined by the competent court, in the conviction, and complying with requirements, such as the collaborator's personality, the nature, the circumstances, the severity, and the repercussion of the criminal fact and the effectiveness of the collaboration; b) the MPF's work departs from the letter of the law, delivering the premium *a priori* and based on *contra legis* clauses, something which may lead to future nullities by compromising the plea deal agreements and the institute itself.

The controversy between the MPF and the PF seems not to have ended, despite the STF's decision; in the words of Vladimir Aras (Campos, 2018, our translation):

> According to the regional Republic prosecutor and director of Legislative Affairs of the National Association of Republic Prosecutors (Assuntos Legislativo da Associação Nacional dos Procuradores da República – ANPR), Vladimir Aras, the decision is not against the Public Prosecutor's Office, but against the public interest, as the potential collaborator may have greater bargaining power. "This bargain will resonate to the benefit of those who offer the information, which will become evidence. But now the collaborator can offer fewer documents and get the best price for the service she/he will deliver to the state, which in this case is the information," claims the prosecutor.

The argument does not seem to be valid in practice, since it is still more attractive for the collaborator/informer to sign an agreement with the MP, since it is up to the institution, by express constitutional provision, to propose, on an exclusive basis, the criminal proceeding, and now it is allowed, exceptionally, to have access to such a proceeding.

The understanding of the Federal Prosecutor Rodrigo De Grandis (Revista Consultor Jurídico, 2018, our translation) brings greater insecurity:

> It is extremely chanceful that a lawyer signs the agreement exclusively with the police. Of course, if I were a lawyer, I would not sign. In which circumstances would her/his client remain during this situation of uncertainty?

In conclusion, at this point, we see that, at one and the same time, the MP and the police authority are prone to violate eternity clauses specified in the CF (1988), invading spheres of competence and function of other authorities and powers, which, in the end, can bring insurmountable nullities in face of the plea deal agreements signed under the Car Wash Operation, with serious and severe damage to society and democracy, as we have already experienced.

The conflict between corporations, in the words of Minister Marco Aurélio, dates back to previous periods, as revealed by the Orientação n. 04/2014, from the MPF's 7ª Câmara de Revisão (Ministério Público Federal [MPF], n.d., our translation), in these terms:

> ADVISES the Federal Public Prosecutor's Office members to, in compliance with their functional independence, militate for not knowing a precautionary measure request formulated by a police officer directly to the court, without prejudice to plead the precautionary measure, in the very petition, when they deem it pertinent.

Evidentiary value of the plea deal agreement

Starting from the premise that the plea deal agreement is a means of obtaining evidence, under the terms of the regency legislation, we inquire:

- What is the evidentiary value of the collaborators' testimonies?
- Is it possible to apply the cross-corroboration method?
- Can the complaint be received only on the basis of statements by the collaborating defendant?
- After all, what is meant by corroboration rule?

Badaró (2015, our translation), facing the tempestuous issue of procedural valuation of plea deal agreements, reports this way:

> The law does not define the nature of evidence from which the corroboration elements in the accusations' content will come. In principle, therefore, corroboration may occur through any means of evidence or means of obtaining evidence: documents, testimonies, expert reports, telephone interceptions...
>
> Yet, an interesting issue is whether it is enough to justify a conviction relying on two or more accusations with concordant content. This is named as *mutual corroboration* or *cross corroboration*. That is, the accusations' content provided by co-defendant A, imputing a criminal fact to co-defendant B, is corroborated by another accusation, by co-defendant C, who also attributes the same criminal fact to B.

The links and possibilities of manipulating the plea deal agreements, which in essence involve multiple investigated persons/defendants, especially if applied within the framework of the law against criminal organizations, turns the concern into a serious procedural issue, in order to bring the magistrate closer to the inexorable possibility of error, at the risk of convicting innocent targets of accusation, although there are cross-accusations against them.

Given the relevance of the theme, Badaró (2015, our emphasis, our translation) presents this reflection:

> Thus, it should not be admitted that the extrinsic corroborating element of another plea deal agreement is characterized by the content of another plea deal agreement. Since there is a high probability chance of a court error, risk management must be directed towards freedom. *In this, as in other cases, one must choose to acquit a guilty target of accusation, if there was only a cross-*

> *accusation against her/him, at the risk of condemning an innocent target of accusation, although against her/him there was cross-accusation.*

And Badaró (2015, our translation) concludes: "the 'naked' accusation, i.e. without confirmation element, is in itself not suitable to justify condemnation."

Seeking to register more comprehensively the doctrinal view on the theme, Vasconcellos (2017, p. 216, our emphasis, our translation), didactically, affirms:

> Plea deal agreement, as a mechanism that aims to facilitate criminal prosecution by granting benefits to the accused person, is the subject of numerous doctrinal critiques. In consideration of its weaknesses, one of the main devices designed to try limiting it is the imposition of the *corroboration rule.* **Recognizing the reduced reliability in the informer's statements, it is determined that conviction cannot be based exclusively on her/his incriminating versions.**

There is no other concern but the recognition that accusations made to third parties and the informer's confession, due to her/his collaboration in exchange for benefits, must be taken with extreme caution, starting from the premise that they may be untrue and stem from a ruse, having legal relevance only and only if corroborated by other independent evidence.

The consequence of this is that the corroboration rule, due to elements external to the plea deal agreement, is of singular and primary importance, leading its non-occurrence, that is, when no independent evidence exists, reliable and coming from a variety of sources, to the imperative need of recognizing the innocence of those accused and, also, to criminal accusations based exclusively on the collaborators' testimonies failing to be even received, not even through the trick of cross-accusation.

The theme of valuation of the informers' testimonies was faced in two distinct opportunities by the Segunda Turma of the STF. The first when judging the merit of the Ação Penal 1.003/DF (Supremo Tribunal Federal [STF], 2018b, our emphasis, our translation), where Senator Gleisi Helena Hoffmann was accused, with the following statements being highlighted in the vote of Minister Dias Toffoli:

> It is noticed that all arguments provided by the Minister-Rapporteur are based on the collaborators' testimonies, **in light of which the other evidence submitted to the case is analyzed.**
> Hence, it is worth pointing out that **the terms of collaboration, in the circumstances of the case, do not find support in external corroboration**

> **elements,** something which contradicts the view that has been adopted by this Supreme Court:
>
> 8. Plea deal agreement, as a means of obtaining evidence, has the ability to authorize the initiation of preliminary investigation, in order to acquire material things, traces or statements with evidentiary force. This, in fact, constitutes its true evidentiary vocation. 9. However, **the testimonies of a collaborator who gained a premium, without other suitable corroborating evidence, do not have density enough to back up a positive judgment on the admissibility of the accusation, which requires the presence of the *fumus commissi delicti.* 10. The** *fumus commissi delicti,* **which is based on a conviction likelihood discretion, is translated, in our legal system, into evidence of the existence of the crime and the presence of sufficient evidence of authorship.** 11. If "no conviction shall be handed down on the basis only of the statements made by a collaborating player" (Article 4, § 16 of the Lei n. 12.850/13), it may be concluded that such statements alone do not authorize the formulation of a conviction likelihood discretion and, as a consequence, they do not allow a positive discretion on the admissibility of accusation. **12. In the species, we do not see the presence of external corroborating elements in testimonies by collaborators who gained a premium, but simple generic records of travels and meetings** (Inq. 3.998/DF, 2ª T., Rel. p/ Acórdão Min. Dias Toffoli, DJe de 9/3/18).
>
> In this case, reference is made only to the note '1.0 PB,' contained in the personal agenda of Paulo Roberto Costa, **who cannot be considered an external corroborating element.**

Regarding the production of corroborating elements by a collaborator's unilateral initiative, Minister Dias Toffoli, in the Inquérito 3.994/DF (STF, 2018b, our emphasis, our translation), registered that

> [...] the jurisprudence of this Court, as mentioned above, is categorical in excluding from the concept of an external corroborating element documents prepared unilaterally by the collaborator her/himself. In this sense: although, in their parallel accounting practice, the collaborators who gained a premium have made personal notes that supposedly might translate undue payments to federal Congressmen, **a note unilaterally made in a private manuscript does not have the power to corroborate, on its own, the collaborator's testimony, even for purposes of receiving the complaint. If the collaborator's testimony needs to be corroborated by various sources of evidence, it is clear that a particular note of her/his own, alone, cannot serve as a validation instrument** (Inq. 3.994/DF, 2ª T., Rel. p/ Acórdão Min. Dias Toffoli, DJe de 6/4/18).

In a previous opportunity, the STF decided, with the winning vote of Minister Dias Toffoli – Inquérito 3.994/DF (STF, 2018b, our emphasis, our translation) –, in the following terms:

> In my opinion, if the collaborating defendant's testimonies, **without other minimally consistent corroborating evidence,** cannot lead to conviction, **they also cannot authorize the initiation of criminal proceedings,** because they suffer, to paraphrase Vittorio Grevi, from the same relative presumption of lack of trustworthiness. The plea deal agreement, by express legal determination (Article 3, I, of the Lei n. 12.850/13), is a **means of obtaining evidence,** just as the environmental capture of electromagnetic, optical, or acoustic signals, the interception of phone and telematic communication services or the removal of financial, banking, and fiscal secrecy (clauses IV to VI of the legal provision concerned).

The judgments cited above represent an evolution in the STF's view on the evidentiary value of the plea deal agreement, with an emphasis, in what is relevant, on the section quoted below, extracted from the case of the Inquérito 3.984/DF (MPF, 2017), rapported by Minister Edson Fachin, which reflects a prior STF's view, in the following terms:

> [...]
> 5. In the light of prior cases judged by the Brazilian Supreme Federal Court, the content of testimonies collected from plea deal agreement does not prove to be effective for conviction in itself.
> Understanding on Article 4, § 16, of the Lei 12.850/2013. It is, however, sufficient evidence of authorship for the purpose of receiving the complaint (Inq. 3.983, Rel. Min. TEORI ZAVASCKI, Tribunal Pleno, DJe de 12/5/2016). There is, in this case, a minimum evidentiary substratum of materiality and authorship.
> 6. Complaint received. Dismissal of one of the 'agravos regimentais,' affecting the others (Emb. Decl. no Inq. 3.984/DF, 2ª T., Rel. p/ Acórdão Min. Edson Fachin, DJe de 16/12/2016).

In a very recent decision on the same point – valuation of evidence resulting from a plea deal agreement – Minister Gilmar Mendes reaffirms the majority position in the STF (2018a), also with regard to the possibility of closing investigations, even without analogy to the principle of reasonable length of court and administrative proceedings (CF, 1988, Article 5, LXXVIII).

In what concerns this study, the minister registered that

> *[...] prior cases judged by the STF confirm that the collaborators' statements are not capable of substantiating conviction, but they are enough to initiate investigations. However, such elements cannot* legitimize indefinite investigations, without being corroborated by independent evidence (STF, 2018a, our emphasis, our translation).

In fact, as the refined magistrate claims,

> *[...] there are prior cases judged by the STF in the sense that collaborators' statements are not capable of substantiating conviction, but they are enough for the initiation of investigations.* ***However, such elements cannot legitimize timeless investigations, without being corroborated by independent evidence. And, it is worth stressing that the documents produced by collaborators themselves cannot be regarded as independent corroborating evidence*** (STF, 2018a, our emphasis, our translation).

It is precisely in this context that evidence deriving from the means of obtaining evidence named as *plea deal* must always be considered presumably weak, due to their negotiation-driven and interested nature itself, so that, only when corroborated by other independent evidence elements, they are seen as suitable to be received as a complaint and, after being contradicted, to justify a conviction.

Doctrinally, the theme of valuation that lends itself to the collaborators' testimonies (informers) goes beyond the national knowledge, it means bringing to light the view of Chiavario (2012, p. 353, our translation):

> On the basis of the typology adopted by the Italian Code of Criminal Proceeding, the means of evidence (*mezzi di prova*) are distinguished from the means of seeking evidence (*mezzi di ricerca della prova*): the first ones are officially defined as the means suitable by themselves to provide the judge with resulting evidence directly applicable to their decisions; the second ones, on the other hand, do not constitute a source of court conviction by themselves, and are aimed at the "acquisition of entities (material things, traces [in the sense of vestiges or signs] or statements) with evidentiary capacity," which, through them, can be included in the proceeding.

Jardim (2000, p. 93), on the minimum evidentiary framework to receive the criminal proceeding, clarifies that the fair case constitutes

> [...] a minimum framework of evidence that must provide support to prosecution, since the simple initiation of criminal proceeding already reaches the so-called *status dignitatis* of the accused person. Such a support is provided by police investigation or by pieces of information, which must accompany criminal prosecution (Articles 12, 39, § 5, and 46, § 1, of the Cód. Proc. Penal).
>
> Thus, *prima facie* demonstration that prosecution is not chanceful or inconsistent, hence, backed up by a minimum of evidence, becomes necessary to the regular exercise of criminal proceeding. This minimum evidentiary support is related to traces of authorship, material existence of a typical behavior, and some evidence of its antijuridicity and guiltiness. It is only in face of all this evidentiary set that, in our opinion, the principle of compulsory criminal proceeding emerges.

In the same sense, Badaró (2012, p. 270, our emphasis, our translation) argues that:

> While the *means of evidence* are capable of *directly* serving the judge's confidence about whether a factual statement is true (e.g. a witness' testimony or a public deed's content), the means of obtaining evidence (e.g. a search and seizure order) constitute an instrument for collecting elements or sources of evidence, which can convince the judge (e.g. a bank account statement [document] found in a search and seizure order to a household). That is, while the means of evidence lends itself to the judge's direct confidence, the *means of obtaining evidence* only *indirectly,* and depending on the outcome of its realization, may serve to reconstruct the history of facts.

Vasconcellos (2017, p. 89, our translation), after brilliantly detailing the disagreements in the application of plea deal agreements:

> Indeed, the very system of pressure and coercion, inherent to the negotiation-driven criminal Justice, is an unavoidable reason for weakening the evidentiary power of plea deal agreements, since the occurrence of false incrimination and confession increases exponentially, with higher probability chances of convicting innocent persons.

I dare go a little further, by stating that:

• The *golden rule* to be devised and formulated in face of the disagreements and illegalities in the application of plea deal agreements is that arising from the fact that only evidence submitted to the contradictory discretion (cross-examination) may be appraised

at the time of the merit sentence, hence no evidence is produced at the initial phase of criminal prosecution.

Obviously, excepting the precautionary, non-repeatable, and anticipated evidence, in the light of the provisions of Article 155 of the CPP, the collaborator's version is wrapped in a legal void, and this may be considered abusive until its use for the purpose of issuing precautionary measures of a criminal nature, since it does not even show to be enough to evidence the *fumus commissi delicti.*

Final remarks

The controversy concerning the application of plea deal agreements, disciplined in more detail after the advent of the Lei n. 12.850 (2013), can change all legal aspects already consolidated in the national legal system, considering that its adoption derives from a different Justice system, Anglo-Saxon law, where the *Common Law* system is in force.

The introduction of these mechanisms to cope with macro-criminality in the national scenario without concern for its impacts and its compatibility with constitutional standards causes, as always, unimaginable consequences, with values inherent to the human being's dignity and eternity clauses contained in the CF (1988), as the presumption of innocence, the natural judge, and the suitability of evidence, for instance.

Only the exceptional application of this institute, under strict court supervision, can ensure its survival, keeping it away from pernicious experiences ranging from the use of imprisonment and/or threat thereof for the purpose of collaboration to a potential usurpation of power, as a punishment mode, a unique regime of compliance with sentence, desistance of court appeals and *habeas corpus,* among other aberrations that violate the jurisdiction reservation, affecting, even with the best of exemptions, serious and responsible fight against the so-called *systemic corruption.*

There is no investigation, no proceeding, no condemnation detached from the constitutional and legal parameters. Everything remains inebriated, in a sweet illusion of democracy with an exception state.

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