Cooperation agreements and negotiations in Brazilian criminal justice: agreements based on the defendant's guilty plea

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This article presents the current situation of agreements based on a defendant's consent to criminal sanctions in Brazil's justice system. In order to illustrate this scenario, this research exposes basic characteristics of the Brazilian criminal process, existing mechanisms of plea-bargaining and the description of the practical application of collaboration agreements in Operation Car Wash. It concludes that, although there is still no plea-bargaining mechanism that allows a conviction without trial, current options authorize the imposition of criminal sanctions without trial and deviate from the traditional legality principle in criminal procedure of non-adversarial systems. The ensuing tendency towards administratization of criminal justice can also be seen in Brazil, although with some distinctions.

I. Introduction

Unlike most Latin American countries, Brazil has been late in implementing a comprehensive reform of its criminal justice system, governed by a Code of Criminal Procedure valid since 1941 – although with significant changes in some chapters.[1] In addition, with regard to criminal procedure, Brazil still seems to resist the international trend of expansion and generalization of agreements that serve to impose sanctions without the need for full a trial, with all its traditional guarantees.[2]

In recent years, legislative innovations have introduced criminal consensus mechanisms, such as transação penal, suspensão condicional do processo, acordo de não persecução penal and colaboração premiada (cooperation agreement).[3] On the one hand, the first three mechanisms mentioned have limited applicability to minor offenses – with no possibility of imprisonment, but only alternative sanctions – and do not result in a formal conviction against the defendant. However, they completely exclude the need for an oral trial and the production of evidence to convict defendants.

On the other hand, cooperation agreements typically uphold the need for oral proceedings and have the purpose of acquiring evidence, since they impose a duty on the defendant to cooperate with the prosecution - for example, producing evidence for the conviction of codefendants. In this way, the bargaining system delineation is regulated by the Law. Theoretically, there is still a necessary submission to prosecution standards, distinct from the way common law systems exercise their discretion.

However, when one observes Law 12.850/2013, regulating procedural aspects of the cooperation agreement, there are still insufficient parameters, which ignore the law-in-

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[1] On Latin American reforms, see: *Langer*, American Journal of Comparative Law 55 (2007), 617. There is also a study by *Maier/Ambos*, Reformas procesales penales, available at https://www.department-ambos.uni-goettingen.de/data/documents/Forschung/Projekte/Reformas%20Procesales%20Penales/ReformasPPAL.pdf (2.5.2022); for summaries see *Ambos*, ZStW 110 (1998), 225; *Ambos/Woischnik*, ZStW 113 (2001), 334, in Spanish: Justicia, Revista de Derecho Procesal 2-3-4 (2000), 427, available at https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/epapers/Ambos_con_Jan_Woischnik_Las_reformas_procesales_penales_en_Amrica_Latina__Un_resumen__Justicia__Revista_de_Derecho_Procesal_Espaa_Nos__2-3-4_2000__427-483.pdf (2.5.2022).

[2] On this international trend, see *Alkon*, Transnational Law & Contemporary Problems 19 (2010), 355; see also *Turner*, Plea Barganing Across Borders, 2009; *Langer*, Annual Review of Criminology 4 (2021), 377; *Turner/Weigend*, in: Ambos/Duff/Roberts/Weigend (eds.), Core Concepts in Criminal Law and Criminal Justice, Vol. 1, 2020, p. 389.

[3] In this article, to avoid mistranslations and imprecise interpretations, I will maintain the Portuguese terms for the first three mechanisms, with no attempt to translate them – in order to avoid precarious distinctions among them – especially in relation to some other terms in English that may express dissimilar categories of meaning. To exemplify the problem, all four mechanisms are frequently translated as "plea bargaining", with no major concerns about the differences and similarities between the terms. To clarify, I will try to expose here the basic characterizes of each term in chapter 2 of this article. I will translate "colaboração premiada" as "cooperation agreement", as done by *Langer*, Annual Review of Criminology 4 (2021) 377. Nevertheless, the translation of Law 12.850/13 made by the Federal Prosecutor's Office uses the expression "plea agreement" when referring to "colaboração premiada", available at http://www.mpf.mp.br/atuacao-tematica/sci/normas-e-legislacao/legislacao/legislacao-em-ingles/law-12-850-organised-crime (2.5.2022) In my opinion, "plea agreement" could represent a generic expression for "colaboração premiada", "transação penal", or "acordo de não persecução penal". I actually prefer to specify "colaboração premiada" as "cooperation agreement". On the difficulties related to translations on legal research, see *Rinceanu*, Revista de Estudos Criminais 17 (2018), 7.

action perspective. So, the practice of cooperation agreements offers a sharp contrast to the normative framework.[4]

Therefore, the issue of cooperation agreements needs to be analyzed in view of their practical application; to be focused on concrete agreements, especially in complex investigations (e.g. Operation Car Wash[5]), and taking into account the case law which interpreted Law 12.850/2013 and complemented gaps in legal regulations.[6]

In this paper, I will therefore examine the cooperation agreements signed within the framework of Operation Car Wash, between the Federal Prosecutor's Office (Ministério Público Federal [MPF]) and the defendants: Paulo Roberto Costa (Petição 5.210 Supremo Tribunal Federal [STF])[7], Alberto Youssef (Petição 5.244 STF)[8], Delcídio do Amaral (Petição 5.952 STF)[9], José Sérgio Machado (Petição 6.138 STF)[10] and Joesley Batista (Petição 7.003 STF)[11]. These agreements have already been ratified by the Federal Supreme Court and publicly disclosed on the Internet.

Thus, I intend to verify whether the consensual mechanisms and agreements existing in Brazil can be compared to the international scenario of an expansion of negotiated criminal justice and plea bargaining. Besides the analysis of the different mechanisms with a view to the Brazilian cooperation agreements, the question arises whether the agreements made in Operation Car Wash are in accordance with the Brazilian legal regulations. Moreover, the issue of whether or not the current Brazilian scenario conforms to the so-called administratization of criminal justice and convictions will be put under examination.[12] It will be demonstrated that Brazil's mechanisms for negotiation authorize the imposition of criminal sanctions without trial and thus fall outside the traditional principle of mandatory prosecution common to continental European systems.[13] Thus, in essence, Brazil follows the logic of administratization of criminal justice.

II. Foundations of Brazilian criminal procedure

In the first place, Brazil's criminal procedure system is described by the national legal scholars as mixed, because it is structured firstly as a preliminary stage of inquiry and then as a stage of an oral trial[14]. Certain authors argue, from a more critical point of view, that the procedure is, in fact, essentially inquisitorial, since the judge is allowed to produce evidence ex officio[15] when he/she is yet to set out a clear separation

[4] *Bottino*, Revista Brasileira de Ciências Criminais 24 (2016), 376.

[5] About Operação Lava Jato ("Operation Car Wash") it has been stated: "It has become an emblematic operation, without precedent in Brazil, aimed at the pursuit of crimes of corruption, criminal organization, and money laundering, among other infractions. The discovery of connections between public companies, large private corporations, and the political party system captured the attention of the media and public opinion. It influenced – and continues to influence – the direction of national politics." (*Zilli*, in: Bechara/Goldschmidt [eds.], Lessons of Operation Car Wash, 2020, p. 68).

[6] On the relevant practices, when studying agreements in criminal matters, we may refer to the German example, where the agreements appear in judicial practice before being formally regulated into Law. See *Weigend*, in: Jackson/Langer (eds.), Crime, Procedure and Evidence in a Comparative and International Context, Essays in honour of professor Mirjan Damaška, 2008, p. 39; *Swenson*, Pace International Law Review 7 (1995), 373. Also about the German scenario, before the introduction of agreements, see *Langbein*, Michigan Law Review 78 (1979), 204. But some may say that even at that time there were already informal agreements: *Rauxloh*, Fordham International Law Journal 34 (2011), 296. Regarding the German discussion about the constitutionality of the agreements: *Weigend/Turner*, Germany Law Journal 15 (2014), 81.

[7] Cooperation agreement in criminal actions no. 5026212-82.2014.404.7000 and 5025676-71. 2014.404.7000 and in representation no. 5014901-94.2014.404.7000, all before the 13th Federal Criminal Court of the Judiciary Subsection of Curitiba/PR. Available at http://s.conjur.com.br/dl/acordo-delacao-premiada-paulo-roberto.pdf (2.5.2022).

[8] Cooperation agreement in criminal actions no. 5025687-03. 2014.404.7000, 5025699-17.2014.404.7000, 5026212-82.2014. 404.7000, 5047229-77.2014.404.7000, 5049898-06.2014.404. 7000, 5035110-84.2014.404.7000, and 5035707-53.2014.404. 7000, all before the 13th Federal Criminal Court of the Judiciary Subsection of Curitiba/PR. Available at http://politica.estadao.com.br/blogs/fausto-macedo/wp-content/uploads/sites/41/2015/01/acordodela%C3%A7%C3%A3oyoussef.pdf (2.5.2022).

[9] Cooperation agreement signed in Inquiries no. 4.170 and 3.989 of the STF. Available at http://s.conjur.com.br/dl/delacao-premiada-delcidio-amaral.pdf (2.5.2022).

[10] Plea agreement signed in Inquiries no. 4.215/DF and 3.989/DF and in Complaint 17.623/PR, all of the STF. Available at http://s.conjur.com.br/dl/peca-pet-6138.pdf (2.5.2022).

[11] Cooperation agreement signed with the Office of the Prosecutor General before the Supreme Federal Court. Available at http://politica.estadao.com.br/blogs/fausto-macedo/veja-as-condicoes-do-acordo-de-delacao-de-joesley-da-jbs/ (2.5.2022).

[12] *Langer*, Annual Review of Criminology 4 (2021), 377.

[13] On the differences between plea bargaining in the U.S. system and abbreviated trial procedures in civil law systems, see *Gilliéron*, in: Brown/Turner/Weisser (eds.), The Oxford Handbook of Criminal Process, 2019, p. 703 (704).

[14] *Nucci*, Curso de Direito Processual Penal, 15th ed. 2018, p. 50; *Mendonça*, The Criminal Justice System in Brazil: a brief account, Resource Material, Resource Material 2014, 63 (64).

[15] Under the terms of art. 156 of the Brazilian Code of Criminal Procedure (CCP), the judge may: "I – order, even before the opening of the criminal trial, the anticipated production of evidence deemed urgent and relevant, observing the necessity, adequacy and proportionality of such a measure" and "II – de-

between the investigative and the trial phases.[16, 17] However, in constitutional terms, it is stated that the Federal Constitution of 1988 established an accusatorial system, by determining in art. 129, sec. I, that the Public Prosecution (Ministério Público – MP) is privately responsible for promoting criminal prosecution when a crime is committed.[18]

The first phase of criminal prosecution, although not mandatory, is the preliminary investigation. Strictly speaking, it is not considered a procedural stage, but preparatory[19], and may occur in various forms, such as police inquiry, public civil inquiry, direct investigation by the Prosecution, Parliamentary Investigative Commission, etc.[20] The investigation is essentially carried out in written records, with limited publicity, and its function is to prepare a possible accusation to be filed for the initiation of the trial, as well as to obtain non-repeatable evidence.[21] However, in the broadest sense, it can be stated that "the function of avoiding unfounded accusations is the main objective of preliminary investigation, because in reality, avoiding unfounded accusations means clarifying the fact".[22]

The exercise of the right of defense during the investigative stage is partially restricted. Although in recent years the presence of the attorney and his access to the dossier file has been progressively ensured,[23] there is still no regulation on investigations of the defendant, and the possibility of production of evidence for the defense at such a stage is limited.[24]

Generally, the investigation takes place through a police inquiry and here we point out a peculiar characteristic inside Brazilian criminal procedure: the figure of the police chief officer ("delegado de polícia"). He/she is a senior police officer responsible for conducting the police inquiry and has "relative discretionary power to determine the collection of evidence through the investigation".[25]

There are no maximum terms or deadlines in the Code of Criminal Procedure for the investigations, that may last for months or even years. In the end, the police chief presents a report on the investigation, which is sent to the prosecutor, who will decide whether to file the accusation or ask the judge to dismiss it.[26] Therefore, according to the Law, the police authority has no discretion to decide what to investigate or dismiss, because everything must be submitted to the Judiciary to decide.[27]

There is some debate on the role of the Public Prosecution Service in relation to the police inquiry. It is argued that, as the one responsible for the accusation, the prosecutor must also regulate the investigations, thus having greater control over the direction of the police inquiry. However, resistance from the police chief may occur. The level of authority for the prosecutor in relation to police investigation and the independence of the police chief is still controversial.[28] On the other hand, the Brazilian Supreme Court (STF) has declared

termine, in the course of the trial, or before the decision, measures to be taken to settle any doubt on a relevant matter".

[16] According to arts. 12 and 155 of the Brazilian CCP, the investigative dossier must be fully annexed to the case file and the judge may consider its elements in the sentence, although this cannot be sufficient grounds for conviction on its own: "Art. 12. The investigative dossier of the police must be annexed to the accusation whenever it serves as a basis for it"; "Art. 155. The judge will form his conviction by the free assessment of the evidence produced in the adversarial proceeding, and cannot base his decision solely on the elements gathered in the investigation, except for precautionary, non-repeatable and anticipated evidence". We must point out that Law 13.964/2019 has made some important changes in this respect, like creating the "judgement of guarantees" and setting out the separation of the investigatory and trial dossiers, which we will explain in subsequent paragraphs. But these changes have been suspended in a decision by the Brazilian Supreme Court.

[17] On the allegation of an inquisitorial system, see: *Coutinho*, Revista de Estudos Criminais 1 (2001), 28; *Lopes Júnior*, Direito Processual Penal, 9th ed. 2012, p. 134 et seq.

[18] The Supreme Federal Court has a firm position in favor of adopting an accusatory system, with the separation of the functions of accusation and judging, although, as a rule, this does not prohibit the judge's initiative to produce evidence ex officio. For an exposition of such precedents, see *Vasconcellos*, Direito, Estado e Sociedade 47 (2015), 181.

[19] *Fernandes*, Teoria Geral do Procedimento e o Procedimento no Processo Penal, 2005, p. 35.

[20] *Badaró*, Processo Penal, 5th ed. 2017, p. 121.

[21] *Fernandes* (fn. 19), p. 75.

[22] *Lopes Júnior/Gloeckner*, Investigação Preliminar no Processo Penal, 6th ed. 2014, p. 107 et seq.

[23] For instance, the Supreme Federal Court's Súmula Vinculante no. 14 ("It is right of the attorney, in the interest of the defendant, to have broad access to evidence that, already documented in an investigative procedure conducted by the police, concerns the exercise of the right of defense") and the modification brought by Law 13.245/2016, which expanded the attorney's performance in the police inquiry, available at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/L13245.htm (2.5.2022).

[24] For this scenario, see *Saad*, O direito de defesa no inquérito policial, 2004, p. 198–205; *Choukr*, Garantias constitucionais na investigação criminal, 2nd ed. 2001, p. 124–132; *Tucci*, Direitos e garantias individuais no processo penal brasileiro, 4th ed. 2011, p. 303 et seq.; *Lopes Júnior/Gloeckner* (fn. 22), p. 468.

[25] *Mendonça*, The Criminal Justice System in Brazil: a brief account, Resource Material, Resource Material 2014, 63 (66).

[26] *Badaró* (fn. 20), p. 145–150. Law 13.964/19 has modified the dismissal of the investigation procedure, defining that the prosecutor could dismiss the investigation without submitting it to judicial control, as it would be reviewed by the Public Prosecution Service itself. But this modification was suspended by the Brazilian Supreme Court.

[27] Law no. 3.689, October 3, 1941, Código de Processo Penal (C.P.P.), art. 17: "The police authority may not have the inquiry's files dismissed."

[28] *Lopes Júnior/Gloeckner* (fn. 22), p. 243–249.

the constitutionality of investigations carried out directly by the Public Prosecution Service, even without the police.[29]

The role of the Judiciary in the preliminary investigation phase is essentially to safeguard fundamental rights and limit state investigative powers. Prosecutors and the police cannot make arrests, except in flagrante delicto; nor can they engage in invasive investigative means such as telephone tapping or search and seizure without judicial authorization with a warrant. Therefore, any measure to that effect is submitted to the judge of the case.[30]

It is worth noting that until recently the Brazilian CPP did not display the separation between the judge of guarantees and the judge in the trial phase. Judging competence was determined by the principle of "prevenção" – i.e., the same judge who followed the investigation and eventually decided on precautionary or investigative measures was still responsible for the trial and subsequent decision.[31] However, in December 2019, Law 13.964/19 created the judge of guarantees, determining that they are responsible for decision-making acts in the investigative phase and, subsequently, prohibited from judging the case on trial.[32] Following this, the modification was provisionally suspended by the Brazilian Supreme Court and the judge of guarantees has still not become a reality in juridical proceedings.

Usually, the criminal accusation is initiated by the public prosecutor.[33] For such cases, it is stated that the principle of mandatory prosecution is in force in Brazil. So, provided there is sufficient evidence to indicate the occurrence of a crime (probable cause), criminal proceedings must necessarily be initiated by the prosecutor.[34] Traditionally, there would be no principle of opportunity or discretionary powers available to the Public Prosecution Service.[35]

Concerning the judicial phase, the trial is normally carried out in the first degree by a single judge.[36] The jury is used only for intentional crimes against life, like murder or abortion.[37] The ordinary Brazilian criminal procedure is written, with an oral stage in the "trial hearing", where witnesses, experts and defendants undergo inquiry (art. 400, CCP). However, in general, all other acts are written and, as already explained, the elements produced in the preliminary investigation can also be considered by the judge in the sentence.

Although it is said that freedom should be the rule during the process,[38] Brazil has high percentages of precautionary detainees, around 40% of the total number of imprisoned people.[39] Recently, as decided by the Supreme Court, a detention hearing for the control of arrests in flagrante delicto has become mandatory within 24 hours after the arrest.[40]

It is usual for people to claim that the Brazilian judicial system has an excessive number of appeals. The Brazilian Constitution of 1988 states that "no one shall be considered guilty before the issuing of a final and unappealable penal sentence" (art. 5, LVII). Thus, the enforcement of a sentence can only start after the conclusion of all possible appeals, so that prison before *res judicata* would only be authorized when motivated by precautionary reasons. This position was recently reiterated by the Supreme Court. In a tight vote

[29] STF, RE n. 593.727/MG, Rapporteur Min. Cezar Peluso, 14/05/2015, Diário do Judiciário Eletrônico [D.J.e.] 08/09/2015 (Brazil).

[30] *Lopes Júnior/Gloeckner* (fn. 22), p. 258 et seq. For a comparative approach about this topic: *Kremens*, Revista Brasileira de Direito Proceessual Penal 6-3 (2020), 1585.

[31] On the judge's impartiality and the guidelines to define competence, see *Maya*, Imparcialidade e Processo Penal da Prevenção: da competência ao juiz das garantias, 2011.

[32] Available at http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/lei/L13964.htm (2.5.2022).

[33] *Mendonça*, The Criminal Justice System in Brazil: a brief account, Resource Material, Resource Material 2014, 63 (65).

[34] *Jardim*, Ação penal pública: princípio da obrigatoriedade, 3rd ed. 1998, p. 92–99; *Fernandes* (fn. 19), p. 63; *Batista*, Panorama of Brazilian Law, 1992, 210. The majority of researches argues that Brazilian CCP imposes the principle of mandatory prosecution in articles 42 ("The prosecutor will not be able to dismiss the accusation") and 576 ("The prosecutor will not be able to withdraw the appeal that has been filed").

[35] Recently, Law 12.850/2013 regulated an innovative hypothesis for the prosecutor "not offering the accusation" in specific cases of cooperation agreement, when the defendant is the first to collaborate with Justice and not the head of the criminal organization (art. 4, paragraph 4). Regarding the opportunity principle in Germany, see *Ambos*, in: Ambos/Zilli/Mendes (eds.), Colaboração Premiada: perspectiva comparada, 2020, p. 219.

[36] According to the Brazilian Constitution of 1988 (articles 102 and 105, for instance), there are hypotheses on "privileged jurisdiction" (like parliamentary immunity), in which people occupying functions relevant to the State are directly judged by Court boards, such as State Courts of Appeal or even the Supreme Court.

[37] Decreto-Lei n. 3.689, decree of the 3rd of October, 1941, Código de Processo Penal (C.P.P.), article 74, paragraph 1.

[38] The Supreme Court has repeatedly ruled that automatic precautionary incarcerations cannot exist, neither because of the opening of the trial phase or for the gravity of the accusation. There are two types of precautionary detentions, preventive (C.C.P.) and temporary (Law 7.960/89), which can be motivated by the judge, based on precautionary grounds. However, the C.C.P. ensures that precautionary detention can be motivated by the will to safeguard "public order" (art. 312), an open concept that allows abuses to restrict freedom without precautionary motivation, in addition to the fact that there are no maximum terms determined by law.

[39] Data provided by the National Justice Council for the year 2018, available at https://www.cnj.jus.br/wp-content/uploads/2019/08/bnmp.pdf (2.5.2022).

[40] Supremo Tribunal Federal, Medida Cautelar na Ação de Descumprimento de Preceito Fundamental 347, Plenário, Rapporteur Min. Marco Aurélio, Diário do Judiciário Eletrônico [D.J.e.] 19.2.2016.

(6x5), it declared the constitutionality of art. 283 of the CCP and prohibited the provisional execution of the sentence.[41]

The conviction or acquittal sentence may be reviewed by a State Court through an "appeal".[42] It is a measure that has no major formalities, returning all of the debated issues of the trial for review, in a written manner and without compliance with the principle of immediacy between the judge and the evidence. Although the CCP authorizes the renovation of evidence in the Court, such a provision is almost never used in practice. Therefore, the appeal is decided on the basis of the elements produced by the trial judge in the first instance and documented in the case file.[43]

Then there are special (like the cassation of the European continental systems)[44] and extraordinary appeals, respectively directed to the Superior Court of Justice (for violation of federal law or divergence between State Courts) and to the Supreme Court (for violation of the Constitution). As much as it is possible to file them, these appeals are subject to strict controls and rarely admitted by the higher courts.

III. Negotiated Criminal Justice in Brazil

Nowadays, negotiation mechanisms are not generalized in Brazilian criminal procedure, currently being applicable only in specific cases and based on standards regulated by law. In this sense, negotiated criminal justice is defined as a "model that is guided by acceptance of both parties (a consensus between the accusation and the defense) to a plea agreement, generally imposing early resolution, abbreviation or full suppression of the criminal procedure or some of its stages, fundamentally with the objective to facilitate the imposition of a sanction with reduced sentence, which characterizes the benefit to the accused due to the waiving of the trial".[45]

Law 9.099/1995 regulates two negotiation mechanisms for minor and medium offenses.[46] The "transação penal" is an agreement that can be made in the "Juizados Especiais Criminais" ("Special Criminal Courts") for minor offenses called "infrações de menor potencial ofensivo" (crimes with a maximum sanction of up to 2 years, or misdemeanors under Law 3.688/1941). According to article 76 of Law 9.099/1995, in a preliminary hearing, the Prosecution may offer the defendant the immediate imposition of alternative sanctions (social work or a fine instead of imprisonment). Formally, the defendant does not have to confess and the judicial homologation of the agreement is not considered as a conviction. So, it does not count on a criminal record, but if the conditions are not fulfilled, the prosecutor may reopen the case.[47]

The "suspensão condicional do processo" is a mechanism that allows the suspension of the procedure so that the defendant fulfills conditions (alternative measures, without imprisonment) and is supervised for a certain period. It is also regulated in Brazil in 1995 by Law 9.099 (art. 89), but it has a broader application to all crimes imposed with a minimum sanction of up to one year. As in the "transação penal", if the conditions are not fulfilled by the defendant, the prosecutor may resume the course of the trial and request the conviction. If the conditions of the agreement are accomplished, the process is dismissed with no formal conviction registered for the defendant, so it does not count on a criminal record.

In addition to the mechanisms introduced in 1995, the cooperation agreement ("colaboração premiada") stands out among the possibilities for negotiation in criminal matters in Brazil. Having become general knowledge for the population in recent times, certain Laws allow for cooperation agreements for many types of crimes: heinous crimes (Law 8.072/1990), crimes against the financial system (Law 9.080/1995), money laundering (Law 9.613/1998), kidnapping (Law 9.269/1996), narcotics (Law 11.343/2006).

However, amongst this set of laws, there was no regulation for procedural rules for the negotiation mechanism.[48] Thus, in Brazil, cooperation agreement was already authorized before Operation Car Wash, but there was greater insecurity and lack of predictability in carrying out the acts of cooperation by the defendant: each judge adopted a different procedure, with no rule for the concrete benefit after the self-incriminating acts by the defendants.

[41] Supremo Tribunal Federal, Ações Declaratórias de Constitucionalidade 43, 44 and 54, In plenary. Rapporteur: Min. Marco Aurélio. Diário do Judiciário Eletrônico [D.J.e.] 7.11.2019.

[42] *Batista*, Panorama of Brazilian Law, 1992, 210 (223 et seq.).

[43] Audiovisual recording mechanisms for audiences have been structured progressively, so that the Courts might reproduce the judicial acts by audio and video, but this is still not widespread in Brazil.

[44] *Thaman*, in: Brown/Turner/Weisser (fn. 13), p. 949–957.

[45] *Vasconcellos*, Barganha e Justiça Criminal Negocial: análise das tendências de expansão dos espaços de consenso no processo penal brasileiro, 2nd ed. 2018, p. 50. Similarly: "These various procedures have a common feature in that they allow for a resolution of the case based upon consent of the parties", (*Gilliéron* [fn. 13], p. 703). Also: "The expressions "negotiated criminal justice" and "agreements in the criminal process" can be understood in a broad sense or in a restricted sense. In a broad sense, they are used to refer to any agreement that takes place in the criminal process, even if it does not lead to a conviction or acquittal. In a restricted sense, they are used to refer only to an agreement that leads to a sentence that convicts or acquits the defendant" (*Oliver*, Revista Brasileira de Direito Processual Penal 7 [2021], 1261).

[46] "[…] in the field of negotiated criminal justice, the law of 1995 did not only regulate the transaction provided for in the Constitution, but also created the 'conciliação civil' and the 'suspensão condicional do processo'", in *Grinover*, A marcha do processo, 2000, p. 74. However, some may affirm that the civil damage settlement mechanism (art. 72, Law 9.099/95) is not characterized as a negotiation mechanism, as it involves an agreement between the victim and the offender, without negotiation with the State (public prosecutor).

[47] As decided by the Brazilian Supreme Court in the Súmula Vinculante 35 (a consolidation of case law applicable for all Brazilian judges).

[48] *Mendonça*, Revista Custos Legis 4 (2013), 2.

Law 12.850/2013 appeared in Brazil with important innovations for the negotiation system. Although it still presents relevant gaps, the new law regulated procedural aspects of the cooperation agreement in order to provide greater legal certainty. In the following items, the fundamental characteristics of the current legislation will be analyzed.

In 2017, the National Council of the Public Prosecution Service (Conselho Nacional do Ministério Público – CNMP), an administrative control body of the Public Prosecution Service in Brazil, issued a resolution to regulate the "criminal investigative procedure under the responsibility of the Public Prosecution Service" (Resolução 181/2017).[49] In this document, the "acordo de não persecução penal" (non-prosecution agreement) was introduced, authorizing bargaining between the prosecutor and the defendant in crimes with a minimum sanction of up to four years. In exchange for a confession, a possible criminal conviction is avoided by imposing obligations such as repairing the damage to the victim, waiving properties and rights, rendering service to the community, or other conditions stipulated by the Prosecution.[50] The CNMP resolution is a normative resolution without the status of a Law, giving rise to numerous questions about the constitutionality of the mechanism, considering that the Brazilian Constitution (Constituição Federal – CF) determines that only Federal Law can rule on criminal and procedural issues (art. 22, section I).[51]

In December 2019, Law 13.964/2019 expressly included the "acordo de não persecução penal" in the Code of Criminal Procedure, in similar terms to that previously provided for in the CNMP Resolution.[52] Under the terms of art. 28-A, "not being a hypothesis for dismissal and the defendant having formally and circumstantially confessed the practice of a criminal offense without violence or serious threat to others, and with a minimum sanction of less than 4 (four) years, the Public Prosecution may propose a non-prosecution agreement, as long as necessary and sufficient for censure and crime prevention", with the possibility of imposing conditions (alternative sanctions) that do not involve restricting the individual's freedom.

Such a mechanism has a wide scope, since most Brazilian crimes in the Penal Code have a minimum punishment of less than 4 years, leading to an expansion of negotiated criminal justice in Brazil. However, there is still no possibility of conviction or imposition of imprisonment solely based on the defendant's guilty plea outside of the criminal trial.

In several bills currently awaiting approval in Congress, there are proposals to expand the criminal negotiation mechanisms in Brazil. In the new CCP bill ("Projeto de Lei 8.045/2012"), approved in the Senate and under debate in the Chamber of Deputies, an "abbreviated trial" is stipulated, which would authorize the "immediate application of punishment in crimes whose maximum sanction does not exceed eight years", after the confession of the defendant and the dismissal of the production of evidence by the parties. However, there is strong resistance to the legal scholars, where unconstitutional elements have been pointed out in the wake of such a proposal.[53]

Moreover, it is worth mentioning the bill that originated the aforementioned Law 13.964/2019. The federal government elected in 2018 presented a bill with the objective of changing several aspects of Brazilian criminal and procedural legislation, called "Anti-crime package".[54] In addition to the "non-prosecution agreement" described above, the aim was to create a "plea agreement", which would authorize the imposition of criminal sanctions, including imprisonment, for any type of crime, without any limitation by its seriousness or by any sanction that could be imposed. In other words, this would be the creation of a mechanism that would potentially enable the generalization of plea bargaining in Brazil. The criticism presented in the face of this proposal was intense[55] and ended in its exclusion from the final bill that becomes the Law 13.964/2019. In any case, the constant presence of legislative proposals to expand upon negotiation mechanisms demonstrates the tendency to generalize their influence in the Brazilian criminal justice system.

IV. Cooperation agreements in Brazilian criminal procedure

After analyzing the general scenario of negotiation in Brazilian criminal justice and its movements of expansion, we must specifically examine the rules of the cooperation agreements. Initially, the current regulatory framework will be presented, based on Law 12.850/2013. According to Brazilian Supreme Court case law and selected agreements signed in Operation Car Wash, we will subsequently describe the practical outlines that have effectively determined the realization of agreements in cases of white-collar crimes prosecution.

The Brazilian cooperation agreement has characteristics that are partially distinct from a plea bargain. It is defined as

[49] Available at https://www.cnmp.mp.br/portal/images/Resolucoes/Resoluo-181-1.pdf (2.5.2022).

[50] For further reading, see Cunha/Barros/Souza/Cabral (eds.), Acordo de não persecução penal, 2018.

[51] *Vasconcellos*, Boletim – Instituto Brasileiro de Ciências Criminais 25 (2017), 7 et seq.

[52] Available at http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/lei/L13964.htm (2.5.2022).

[53] *Prado*, in: Prado/Martins/Carvalho (eds.), Decisão judicial, A cultura jurídica brasileira na transição para a democracia, 2012, p. 54 et seq.; *Freitas*, in: Pinto/Gonçalves (eds.), Processo & Efetividade, 2012, p. 22 et seq.; *Casara*, in: Coutinho/Carvalho (eds.), O novo Processo Penal à luz da Constituição, Análise crítica do projeto de Lei nº 156/2009, do Senado Federal, Vol. 2 2011, 155 et seq.

[54] On the anti-crime package, check the April and May special editions of IBCCRIM's Bulletin, available at https://arquivo.ibccrim.org.br/noticia/14463-Boletim-IBCCRIM-lanca-duas-edicoes-especiais-sobre-Pacote-Anticrime (2.5.2022).

[55] *Vasconcellos*, Boletim – Instituto Brasileiro de Ciências Criminais 27 (2019), 27 et seq.

a "means of investigation",[56] so it would have an evidence-driven purpose, in which the accused would be encouraged to collaborate with criminal prosecution for the determination of truth.[57] According to Law 12.850/2013, the defendant who makes a cooperation agreement must waive his right to remain silent and assume the duty to tell the truth.[58] The collaborator's statements (and confession) are not themselves sufficient to justify a conviction (art. 4º, paragraph 16),[59] so that the normal course of criminal proceedings is maintained with the prosecution's duty to produce evidence and fragilize the presumption of innocence.

However, the cooperation agreement is also classified as a "procedural legal transaction",[60] in which the defense receives a benefit (reduced sentence or even judicial pardon, for example) in exchange for collaboration with the State. It occurs with the waiving of important fundamental rights, such as the right against self-incrimination and to self-defense in a broad sense.[61] Therefore, although it presents certain distinctions, the cooperation agreement may be defined as a mechanism of negotiated criminal justice.[62]

Initially, we analyze the normative regulation provided for in Law 12.850/2013, and then, based on the empirical analysis of agreements signed in Operation Car Wash, verify that the practice (law-in-action) does not have to comply with the limits determined in the Law. So, we may argue that the mechanism has changed to a wider agreement, more similar to plea bargaining in a broad sense.

According to art. 4º of Law 12.850/2013, the possible benefits and duties for the defendant's collaboration are determined on such grounds:

> "Article 4. The judge may grant judicial forgiveness, reduction of up to 2/3 (two thirds) of the imprisonment punishment or substitution of it for a restriction of rights punishment, under the request of the parties, for the accused who has collaborated effective and voluntarily with the investigation and the criminal proceedings, as long as such information produces one or more of the following results:
> I – the identification of the other co-authors or the other participants in the criminal organisation or their committed criminal offences;
> II – the revelation of the hierarchical structure and the distribution of tasks within the criminal organisation;
> III – the prevention of criminal offences stemming from the criminal organisation's activities;
> IV – the complete or the partial recovery of the product or the profit stemming from the criminal organisation's activities;

[56] *Brandalise*, Prawo W Działaniu 41 (2020), 12.

[57] "The cooperation agreement, as a means of obtaining evidence, is intended for the 'acquisition of entities (material things, traces [in the sense of signs or tracks] or statements) endowed with probative capacity', which is why it is not evidence in itself." (STF, HC 127.483/PR, Plenário, rel. Min. Dias Toffolli, D.J.e. 27.8.2015. p. 21). In this sense, the amendment brought by Law 13.964/19, inserted as art. 3º-A in Law 12.850/13, states that "the cooperation agreement is a procedural agreement and a means of obtaining evidence, which presupposes public utility and interest".

[58] "In Brazil, the right to remain silent is a constitutional guarantee: 'the arrested person shall be informed of their rights, among which there is the right to remain silent' (1988 Constitution, Article 5, LXIII). Therefore, the interrogation of a suspect or a defendant is not preceded by any oath. Moreover, there is no punishment even in the case of a proven lie. Despite the reference to the 'arrested person', it is unanimously accepted that any suspect or defendant, whether or not arrested, has the right to remain silent. The Code of Criminal Procedure adds that silence may not carry a value against the defense; in other words, presumptions against suspects who refuse to testify are explicitly prohibited (Article 186). In synthesis, there are virtually no legal limits to the right to remain silent. In fact, if the suspect or defendant prefers, they are allowed not to show up for questioning, according to the majority of Brazilian judges. There is an exception created by the new Organized Crime Act (Federal Statute n. 12.850/2013), which says that the defendant who makes an agreement with the prosecutor must waive his right to be silent and has to tell the truth." (*Mendonça*, The effective collection and utilization of evidence in criminal cases: current situation and challenges in Brazil, Resource Material 2014, 58.

[59] *Brandalise*, Prawo W Działaniu 41 (2020), 12 (37-39).

[60] "[…] the cooperation agreement is a procedural legal transaction, since in addition to being expressly qualified by the law as a 'means of obtaining evidence', its object is the cooperation of the accused for the investigation and for the criminal procedure, an activity of procedural nature, even if this legal transaction has the substantial effect (of material law) concerning the reduced sanction to be attributed to this collaboration" (STF, HC 127.483/PR, Plenary, rapporteur: Min. Dias Toffolli, D.J.e. 27.8.2015, 23-24). See also: *Zilli*, in: Ambos/Zilli/Mendes (fn. 35), p. 46.
According to *Mendes*, "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" (*Mendes*, Leniency Policies in the Prosecution of Economic Crimes and Corruption, 2021, p. 321).

[61] According to *Anitua*, such mechanisms "have as a common feature granting the State (which is represented by the Judiciary or the Public Prosecution Service) the possibility of reducing the sentence or even pardoning the accused based on pacts or agreements" (*Anitua*, in: Anitua [ed.], Ensayos sobre enjuiciamiento penal, 2010, p. 154. See also *Brito*, Delação premiada e decisão penal: da eficiência à integridade, 2016, p. 127–133.

[62] *Vasconcellos*, Colaboração premiada no processo penal, 2nd ed. 2018, p. 23–28; *Marques*, Revista Magister de Direito Penal e Processual Penal 60 (2014), 47.

> V – the location of the victim, if there is one, with his/her physical integrity preserved.
> Paragraph 1. In any case, the personality of the informant, the nature, the circumstances, the graveness, and the social repercussion of the criminal action, as well as the efficiency of the information, shall be taken into consideration in order for the benefit to be granted."[63]

The legislation structures a limited negotiation system, with specific benefits and foreseeable results, that is, with a limited margin for bargaining.[64] Considering the reduction of sentence by up to 2/3 as a first possible benefit, Law 12.850/2013 seems to impose that the agreement would only indicate the reduction of punishment agreed by the parties, but the judge would still determine the final sanction.[65] In addition, the results of the agreement are defined as the defendant's possible collaborations. Thus, there is the establishment of an apparently exhaustive regime of possible benefits and outcomes, which would tend to indicate the consolidation of a limited model for negotiations. Accordingly, there would be a verifiable reduction in flexibility for sentencing with regard to the principle of mandatory prosecution in Brazilian criminal procedure.

The standard procedure for the cooperation agreement, under Law 12.850/2013, would involve a negotiating phase between the parties, followed by the formalization of the agreement, which must be sent to the judge for approval. Such an agreement, in practice, is structured similarly to a civil contract, with clauses that regulate the obligations and benefits for the involved parties.

The original regulation of Law 12.850/2013 determined that at the time of the agreement's ratification the judge must analyze "regularity, legality and voluntariness" (art. 4º, paragraph 7), and may "refuse to approve the agreement if it does not meet with the legal requisites, or he may adjust it to the particular case" (art. 4º, paragraph 8).[66] In the final stage of the trial (the sentence), the judge must analyze the effectiveness of the collaboration carried out by the defendant (art. 4º, paragraph 11).[67] If the defendant complied with the terms of the agreement and performed effective collaboration, he has an individual right to the benefit determined, where the judge maintains the agreement.[68]

In this sense, the Brazilian Supreme Court laid down in habeas corpus 127.483: "[…] if the subjective right of the collaborator to the reduced sanction is configured by completely fulfilling their obligations, they have the right to demand it in court, including by appealing the sentence that fails to recognize it or applies it in a way that does not abide by the original agreement".[69] It is also worth mentioning that the judge cannot participate in the negotiations of the agreement (art. 4º, paragraph 6), in order to protect impartiality,[70] and that no one shall be convicted of a crime or imprisoned in a decision based solely on the declarations of an informant that made a collaboration agreement (art. 4º, paragraph 16).

In contrast to the system prescribed in Law 12.850/2013, the agreements formalized in Operation Car Wash have innovated in several aspects, such as the provision of "different regimes for the execution of the sanction", the release of assets resulting from illicit activities, the provision of immunity to family members of the defendant, the waiver of the right to appeal and the imposition of generic duties to the collaborator. From the analysis of the agreements that are the object of this research, it is possible to verify the characteristics that have determined Brazilian negotiation practice in collaboration agreements.

As an example, in one of the agreements, it was established that, upon reaching the amount of 30 years of imprisonment in final sentences, the sanction imposed would be fulfilled "in imprisonment for a period not exceeding 5 (five) years and not less than 3 (three) years", with subsequent progression "directly to home arrest, even if the legal requirements are not met" (clause 5, items I, II, III and V, agreement in Petição 5.244 STF). Similarly, in another collaboration, a house arrest sentence was imposed for one year (with ankle monitor); zero to two years of imprisonment in partially severe conditions; and subsequent progression to an open regime (clause 5, item I, agreement in Petição 5.210 STF).

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[63] Translation of Law 12.850/13 made by the Brazilian Federal Prosecution Service, available at http://www.mpf.mp.br/atuacao-tematica/sci/normas-e-legislacao/legislacao/legislacao-em-ingles/law-12-850-organised-crime (2.5.2022).

[64] According to *Zilli*, "the contracting parties cannot extend the rewards beyond those indicated by law", because "here reigns the principle of the legality of the content rules" (*Zilli*, Boletim – Instituto Brasileiro de Ciências Criminais 300 (November 2017), 4.

[65] *Carvalho*, in: Bedê Jr./Campos (ed.), Sentença criminal e aplicação da pena, 2017, p. 519 et seq. Similarly, stating that only after sentencing the judge must apply the concrete punishment predefined in the agreement: *Fonseca*, Colaboração Premiada, 2017, p. 125.

[66] Art. 4º, paragraph 8 was modified by Law 13.964/19, which excludes the judge's power to make the agreement adequate for the case. Nowadays, the judge may only refuse the agreement and the parties may modify it, if they wish.

[67] *Pereira*, Delação premiada: legitimidade e procedimento, 3rd ed. 2016, p. 147.

[68] "In ratifying the agreement, the judge does not limit himself to declaring its legal validity, but also, in a way, assumes a commitment on behalf of the State: in the event of collaboration under the agreed terms and for it to be effective, in principle there must be granted to the defendant the advantages promised to him", see *Canotilho/Brandão*, Revista Brasileira de Ciências Criminais 133 (2017), 150.

[69] STF, HC 127.483/PR, Tribunal do Pleno, rapporteur Min. Dias Toffoli, D.J.e. 27.8.2015, p. 63. See also: STF, QO PET 7.074, Tribunal do Pleno, rapporteur Min. Edson Fachin, D.J.e. 29.6.2017.

[70] *Coura/Bedê Junior*, Revista dos Tribunais 969 (2016), 150 et seq. On the judicial participation in agreements, see also *Turner*, American Journal of Comparative Law 54 (2006), 501 et seq.

In a different agreement, also within Operation Car Wash, the sentence was imposed as house arrest for one year, with progression to partially severe conditions for a period of up to two years and open conditions for the rest of the restriction of liberty (clause 5, item I, agreement in Petição 5.210 STF). In a critical perspective, some Brazilian researchers affirm that differentiated imprisonment regimes were introduced in complete deviation from the regime provided for in the Penal Code (Código Penal – CP) and the Law of Penal Execution (Lei de Execuções Penais – LEP), thus creating an "à la carte penal execution".[71]

In addition, Brazilian negotiation practices have also authorized clauses that allow the maintenance of assets obtained from illicit activities in the hands of the defendant or his family. Within the scope of Operation Car Wash, an agreement was signed allowing goods/financial gains from crimes to remain with the collaborator's family members, such as armored cars and proprieties, under the justification of characterizing "security measures during the period in which the collaborator would be detained" (clause 7, paragraphs 3, 4, 5, and 6, agreement in Petição 5.244 STF).

These provisions were challenged before the Brazilian Supreme Court by codefendants incriminated in the cooperation agreements. However, in habeas corpus 127.483, the Court upheld their legality for three reasons: a) the Mérida and Palermo Conventions[72] authorize such measures in a teleological interpretation of their regulations; b) based on the logic of "who can offer more, pays the least", there would be no obstacle to other types of benefits, like a pardon or the discharge of the indictment; and, c) considering that the collaborator has the right to protection, which will be guaranteed by the State at a later stage, there is no reason to prohibit the pertaining immediate measures.

In addition to the obligations provided for in article 4 of Law 12.850/2013, which must be specified in the cooperation agreement, practice in Operation Car Wash has introduced a clause providing for a "permanent" and "generic" duty for the defendant to collaborate. For example, it requires the collaborator to "cooperate whenever requested, through personal attendance at any of the Federal Prosecution Service's branches, at the Federal Police or at the headquarters of the Federal Tax Office, to analyze documents and evidence, recognize people, provide testimonies and assist specialists in expert analysis" (clause 10, c, agreement in Petição 5.244 STF; similarly, clause 12, paragraph d, Petição 7.003 STF). Thus, the defendant becomes an auxiliary to criminal prosecution, with the aim of using his knowledge to facilitate the interpretation of documents. There has also been a clause of "general duty to cooperate", which expands on the list of obligations for the collaborator, making the list provided for in the agreement non-exhaustive (clause 10, paragraph 1, agreement in Petição 5.244 STF; clause 15, sole paragraph, agreement in Petição 5.210 STF; clause 8, agreement in Petição 5.952 STF; clause 15, agreement in Petição 6.138 STF, clause 14, Petição 7.003 STF).

Faced with such a scenario, there are those who defend a wide possibility of clauses (benefits and duties) to be accorded in the agreements, although not authorized in the current legislation. It is said that an analogy in bonam partem must be admitted, outlining the following criteria: "(i) the benefit cannot be expressly prohibited by law; (ii) there must be relative legal coverage, allowing the analogy, although adaptations to the specific case are possible; (iii) the object of the agreement must be lawful and morally acceptable; (iv) it must respect fundamental rights and human dignity; (v) there must be reasonableness (adequacy, necessity and proportionality in the strict sense); and (vi) there must be the legitimacy of the Public Prosecution Service to grant the benefit".[73]

On the other hand, there are those who call for a "culture of legality of benefits",[74] in order to ensure the correspondence between what is proposed in the agreement and the subsequent realization of the benefit in the sentence. So, "the Public Prosecution Service cannot offer to the collaborator a 'prize' that is not expressly authorized in the law", in addition to the fact that "this limitation refers not only to the type of benefit (prize), but also to its extension, even if temporal".[75]

Undoubtedly, it can be said that the cooperation agreements made in Operation Car Wash and analyzed in this study provided for clauses with benefits and duties different from those authorized by Law 12.850/2013. In other words, the practice of Brazilian cooperation agreements, at least in the aforementioned operation, exceeded and disregarded the limits defined in the legislation. Thus, in practice, a "bold view" ("visão arrojada") of the cooperation agreement regulated in Law 12.850/2013 was adopted, since the possibilities for negotiations had been greatly expanded.[76]

In December 2019, Law 13.964 was enacted, which inserted and altered relevant provisions for cooperation agreements. With regard to the theme explored in this paper, the new legislation amended paragraph 7 of art. 4º, expressly stating that, at the time of homologation of the agreement, the judge must analyze "II - adequacy of the agreed benefits to those provided for in the *caput* and in paragraphs 4 and 5 of this article, being null and void the clauses that violate the defining criteria of the initial conditions of enforcing the sentence of art. 33 of Decree-Law No. 2.848, of December 7, 1940 (Penal Code), the rules of each of the conditions provided for in the Penal Code and Law No. 7.210, of July 11, 1984 (Law of Penal Execution) and the requirements for the

[71] *Lopes Junior's* preface in *Vasconcellos* (fn. 45), p. 14.
[72] Available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf and https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf (2.5.2022).
[73] *Mendonça*, in Moura/Bottini (eds.), Colaboração premiada, 2017, p. 104.
[74] See *Queijo*, O direito de não produzir prova contra si mesmo, 2nd ed. 2012, p. 259.
[75] *Jardim*, Revista Eletrônica de Direito Processual 17 (2016), 3.
[76] On adopting such terminology, see *Cavali*, in: Moura/Bottini (fn. 73), p. 257.

progression regime not covered by paragraph 5 of this article".[77]

It is clear, therefore, that Law 13.964/2019 was intended to determine a limited negotiation model in cooperation agreements, in the sense that benefits should not be offered in discordance to the system of punishments and conditions regulated in the Penal Code and in the Law of Penal Execution. In other words, it was intended to change what had been accomplished in the practice of the agreements described above. Undoubtedly, it is a relevant modification, which will be widely debated by legal scholars and in the Courts.

V. The mechanisms of Brazilian criminal agreements in the face of the international trend of expanding plea bargaining and the administratization of criminal justice

The international expansion of mechanisms like plea bargaining is a subject of intense study worldwide. *Langer* develops an analysis about the introduction of criminal agreements in civil law systems (Germany, Italy, Argentina and France)[78] in order to argue that such importations do not reproduce the common law model in its precise terms (even without completely denying the American influence), and maintains the hypothesis that there is, in fact, a phenomenon of fragmentation and divergence in civil law systems.[79]

Additionally, his criticism is emblematic concerning the "legal transplant" metaphor, used predominantly in texts of comparative analysis.[80] The author points out its limitations, especially because it represents a simple "copy and paste", which reduces the complexity of the transformative phenomenon.[81] Thus, he proposes the definition of "legal translations", considering that adversarial and inquisitorial systems are different procedural cultures, so that the transfer of mechanisms becomes a fact to be analyzed regarding the language and the tradition of the importing field.[82]

In a more recent study, *Langer* describes the administratization of criminal convictions, based on statistical data that demonstrate the advancement of bargaining models and trial-avoiding around the world. The author analyses the concept of "trial-avoiding conviction mechanisms", which includes any procedural instrument that allows a criminal conviction without trial. Thus, it excludes from that analysis mechanisms like the collaboration agreement, since they would not impose a conviction without trial.[83] Likewise, in relation to Brazil, Langer affirms that "transação penal" is not similar to plea bargaining because it does not impose a conviction without trial, considering that, if the agreement is breached by the defendant, the criminal prosecution resumes its course, which may end in a criminal conviction.[84]

In addition, *Langer* develops the conceptual outlines of the administratization of criminal convictions phenomenon, which he defines based on two characteristics: "(a) trial-avoiding mechanisms have given a larger role to nonjudicial, administrative officials in the determination of who gets convicted and for which crimes, and (b) these decisions are made in proceedings that do not include a trial with its attached defendants' rights".[85] Although we do agree that the current Brazilian negotiation instruments cannot be defined as "trial-avoiding conviction mechanisms", we may affirm that they do conform to those two characteristics, in order to characterize the phenomenon of administratization of criminal justice in similar terms.

As explained above, in Brazilian criminal justice nowadays there are possible agreements between prosecution and

[77] See at http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/lei/L13964.htm (2.5.2022).

[78] For instance, it is indicated that the author sets out differences between the systems among themselves and in relation to the American model, such as the judge's probative powers in face of the parties' agreement in Germany, the limitations and consequences of patteggiamento in Italy, the possibility of acquittal and the need for confession of all offenders in Argentina and characterization as an alternative mechanism to jurisdiction in France (*Langer*, in: Thaman [ed.], World Plea Bargaining, Consensual procedures and the avoidance of the full criminal trial, 2010, p. 3 [50]).

[79] "Thus, while American influences on the civil law world have been undeniable, at least in its formal criminal procedures, they are not producing a strong Americanization, or adversarialization, of the civil law, but rather its fragmentation. This fragmentation is due at least in part to the fact that the inquisitorial systems have 'translated' American adversarial influences in different ways" (*Langer* [fn. 78], p. 79). Also supporting the fragmentation thesis, in the terms proposed by *Langer*, see *Armenta Deu*, Sistemas procesales penales, 2012, p. 288.

[80] See also *Grande*, in: Brown/Turner/Weisser (fn. 13), p. 67–88; *Vieira*, Revista Brasileira de Direito Processual Penal 4 (2018), 767. Also, regarding the agreements in international criminal procedure: *Ambos*, Treatise on International Criminal Law, Vol. 3, 2016, p. 433–444; *Damaška*, in: Thaman (fn. 78), p. 81.

[81] See *Langer* (fn. 78), p. 39–42.

[82] "Specifically, the transformations that plea bargaining has undergone when transferred to these civil law jurisdictions can be understood either as decisions taken by the 'translators' (i.e., legal reformers) or as a product of the structural differences that exist between adversarial and inquisitorial 'languages'" (*Langer* [fn. 78], p. 5, supra note 78 at 08). In a similar perspective: "Caseload pressures have pushed many civil-law criminal justice systems to develop alternatives to full trials. In this context, they have looked to the U.S. plea bargaining as a possible model. However, they generally have not implemented plea bargaining to the same extent. Instead, each legal system has adapted the practice to meet its own needs and values." (*Gilliéron* [fn. 13], p. 718).

[83] *Langer*, Annual Review of Criminology 4 (2021) 377 (387).

[84] *Langer*, Annual Review of Criminology 4 (2021) 377 (380).

[85] *Langer*, Annual Review of Criminology 4 (2021) 377 (378). On the position of the prosecutor during criminal process, see *Kremens*, Powers of the Prosecutor in Criminal Investigation, 2021.

defense based on the defendant's consent: transação penal, suspensão condicional do processo, acordo de não persecução penal and colaboração premiada (cooperation agreement). In all those mechanisms, the State offers incentives to the accused to facilitate and contribute to the criminal prosecution.[86] In exchange for benefits, such as a reduced sanction, the accused accepts the charged crimes or collaborates with criminal prosecution, producing evidence against other defendants, pleading guilty, refunding illegally obtained assets, etc.

In any case, based on incentives and benefits offered by the State, the accused no longer opposes resistance to the criminal prosecution, which occurs through agreements between the prosecution and the defense in the criminal process. Therefore, we may argue that in Brazil there are some kinds of plea agreements in criminal justice, while "they are characterized as facilitators of criminal prosecution by encouraging the non-resistance of the defendant, with his compliance with the prosecution, in exchange for a benefit/prize (such as reducing the sentence), with the aim of implementing a punitive sanction more quickly and less costly to the State".[87]

Undoubtedly, there are relevant distinctions when comparing to the common-law plea bargaining, which confirms the thesis that such international influences end not in transplants, but translations that conform mechanisms to the premises and culture of the receiving legal system.[88] There is currently no plea bargaining instrument in Brazil that allows a formal conviction to occur without due processing.

On the one hand, the transação penal, suspensão condicional do processo and acordo de não persecução penal have limited applicability to minor and medium crimes, without the possibility of imposing imprisonment, but only alternative sanctions, and without placing a formal conviction against the defendant. In addition, in case of non-compliance with the agreement, criminal prosecution may be resumed in order to make it possible to actually result in a formal conviction.

However, such mechanisms allow the imposition of a sanction based on the consensus of the accused, his agreement and his compliance with the prosecution. In other words, even if there is no formal conviction, the imposition of a sanction without process, without defense and without the production of evidence is authorized, excluding the need for a trial with the defendants' rights attached.[89] There is, therefore, an expansion of the powers of non-judicial actors, especially those of the Public Prosecution Service, which defines the terms of the agreement and, consequently, of the sanction applied. In practice, the judicial control of the agreement is formal and, as a rule, superficial, as it does not enter into the discussion of the defendant's guilt considering the available evidence. Thus, we may say that there is almost no control of the factual basis for the imposition of the sanction.[90]

The cooperation agreement, on the other hand, as a rule, maintains the need for the trial and has an evidence-based purpose, since it imposes on the defendant the duty to cooperate with the prosecution in order to produce evidence against codefendants. However, as pointed out before, in current practice the cooperation agreements have greatly expanded the prosecution powers to dispose and negotiate the criminal sanction, even including different benefits from those authorized in the Law.

Therefore, we do not want to lessen the relevant distinctions between Brazilian consensual mechanisms and foreign examples similar to plea bargaining, but we conclude that the scenario in Brazil allows us to verify a phenomenon similar to that defined by *Langer* as "administratization of criminal convictions", which we may perhaps name here, more generally, as the administratization of criminal justice or criminal sanctions.

With transação penal, suspensão condicional do processo, acordo de não persecução penal and colaboração premiada (cooperation agreement), according to the way these mechanisms are applied in Brazilian practice, there is a strengthening of a larger role to nonjudicial, administrative officials in the determination of who gets convicted and for which crimes; and these decisions are made in procedures that do not include a full trial.[91]

[86] *Anitua* (fn. 61), p. 154.
[87] *Vasconcellos* (fn. 62), p. 26.
[88] See *Langer* (fn. 78), p. 8.
[89] *De-Lorenzi*, Justiça negociada e fundamentos do direito penal, 2021, p. 208-248.

[90] Regarding the factual basis for judicial control in plea bargaining: "Broadly accepted negotiated agreements based on plea bargaining, or other instruments made available to prosecutors allowing for disposition of cases outside of trial inevitably lead to ambiguous determination of the factual basis of decisions concerning the criminal liability of the defendant. While the judgment frequently relies on the evidence already considered as admissible by the prosecutor, the court's responsibility for admitting the evidence becomes limited." (*Kremens/Jasiński*, Editorial of the dossier "Admissibility of Evidence in Criminal Processes. Between the Establishment of the Truth, Human Rights and the Efficiency of Proceedings", Revista Brasileira de Direito Processual Penal 5 (2021), 15. On exclusionary rule and judicial control in plea bargaining, see *Weigend*, Revista Brasileira de Direito Processual Penal 7 (2021), 247. See also *Ambos/Thaman*, in: Ambos/Weigend/Duff/Roberts/Heinze (eds.), Core Concepts in Criminal Law and Criminal Justice, Vol. 2, 2022, p. 334–337; *Thaman*, in: Ambos/Zilli/Mendes (fn. 35), p. 265–268; about the German "crown witness" see *Ambos*, Revista General de Derecho Procesal 51 (2020), at: https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/epapers/Ambos_Testigo_de_Corona_RevGeneralDerProcesal_51_Mayo_2020.pdf (2.5.2022).
[91] *Vieira*, in: Ferrer Beltrán/Vásquez (eds.), Del derecho al razonamiento probatorio, 2020, p. 45.

VI. Conclusion

Finally, we may recall the problems that guided this research paper: May the consensual mechanisms and agreements existing in Brazil be compared to the international scenario of an expansion of negotiated criminal justice and plea bargaining? Can we confirm in Brazil a phenomenon of "administratization of criminal convictions" as described by *Langer*?

1. Transação penal, suspensão condicional do processo, acordo de não persecução penal and colaboração premiada (cooperation agreement), in the terms applied in Brazilian practice, characterize mechanisms that allow the imposition of criminal sanctions based on the defendant's consent, thus establishing a larger role to non-judicial, administrative officials in the determination of who gets convicted and for which crimes through procedures that do not include a full trial.

2. The cooperation agreements in Operation Car Wash, analyzed in this research, stipulated clauses with benefits and duties different from those authorized by Law 12.850/2013, expanding possibilities for negotiation and the power of the Public Prosecution Service. This constitutes a clear setback for the principle of mandatory prosecution classically described as a rule in Brazilian criminal procedures, in line with the principle of legality.

3. By disregarding the limits prescribed by law, the Brazilian cooperation agreement system comes close to a broad and almost unlimited negotiation model, more like a plea bargaining system. In other words, the tendency to expand negotiation mechanisms in the Brazilian criminal process is unquestionable, both through formal legislative bills and informally in practices performed by those who act in criminal justice.

4. Although there are relevant distinctions, which demonstrate not the transplantation to, but the translation of such mechanisms for the Brazilian criminal system, the scenario in Brazil demonstrates a phenomenon similar to that defined by *Langer* as "administratization of criminal convictions". This may be more appropriately called the administratization of criminal justice and criminal sanctions.