The Lula da Silva Case: background and the effects of his conviction

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Abstract: ***Il caso Lula: contesto ed effetti della sua condanna*** – This article presents an analysis of the case from which the first conviction of Lula da Silva was derived in Brazil, and points out that, despite the importance of Operation Lava-Jato, Brazilian version of the Italian Mani Pulite operation, the results obtained in the Lula case indicate for the erosion of the Constitution in favor of other legal goods, contributing to the feeling that it is a process whose treatment by the justice system is different from the others and that the illegalities of this procedure contaminate it.

Keywords: Fight against corruption; Legality; Erosion of the Constitution; Lula da Silva; Conviction.

1. Introduction

The purpose of this article is to establish an analysis of the famous "Lula Case", which keeps him imprisoned in the present days due to accusations that he received, through acts of corruption, an apartment of the Construction Company OAS, one of the largest Brazilian in this market, repaying this benefit with acts that facilitated the commercial life of that company and, afterwards, will analyse the repercussion of the condemnation for eventual candidacy to President of the Republic.

In this sense and order I'll, firstly, present the Operation "Lava Jato". Secondly, discuss the cult and the profile of the judge responsible for the case, Moro. Lastly, explain the effects of the condemnation of Lula da Silva. For that, I´ll focus only on the Criminal Action No. 5046512-94.2016.4.04.7000, sentenced by the 13ts Federal Justice Court in Curitiba and maintained by the 4th Regional Federal Court.

2. The Operation "Lava Jato"

Initiated in 2014, The Operation "Lava Jato" (OPL) became one of the biggest investigations regarding corruption and public money larceny of the history of Brazil. The Operation turned into a purging and centralising process of a lot of different cases of corruption in the occurred in the whole country, concentrating it in a more peripherical state-capital, Paraná, on the south of Brazil.

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The OLJ initiated with the specific purpose of dismantling a corruption scheme which involved gas stations and car washers - hence the name "lava jato", which is the translated noun in Portuguese for the place where cars are washed. There were suspicions that large sums of money were being illegally moved by "doleiros" – parallel exchange market operators. The most notorious of those, Alberto Yousef, responsible for the movement of billions of reais, was convicted in affiliation with a former executive of Petrobras (the State national company of oil), Paulo Roberto da Costa. After their arrest, they became relevant informers on the case.

From the excessive and illegal use, as we will see, of precautionary prisons and the institute of plea bargain (delações premiadas[1]), characteristic of the modus operandi of OLJ in Curitiba, a gigantic scheme of Corruption was discovered. It involved the main parties of the former political base of support of Federal Government which, didn't only involve the political parties (PT, PMDB and PP, mainly), but also several contractors, among them Odebrecht, OAS , Camargo Correia and Andrade Gutierrez.

As time passed by and investigations advanced, beneficial collaboration agreements and precautionary prisons helped to point out that, the corruption scheme was not only related to PETROBRAS. Several contracts with the State, such as the construction of hydroelectric power plants, infrastructure deals for the World Cup, construction of the underground in several capitals, among others, were affected. It reached practically all political parties at the national, state and municipal level.

It is relevant to recall that an investigation that began, on suspicions of money laundering connected with gas stations, became a *locus* for fighting corruption in multiple sectors, in several crimes, practiced in various states of the federation. On one hand, this shows the magnitude of the objectives meanwhile, also representing clear violations of constitutional and procedural rules, such as territoriality, natural judge, presumption of innocence, right to stay in silence, prohibition of illegal home search, among several other rules.

What interests, in this case, is the outcome of this unlawful epic tale, which the conviction of former President Lula da Silva on level of appeal, by the Federal Regional Court of the 4th Region, and his subsequent arrest.

3. OLJ, Judge Sérgio Moro and the legal inconsistencies perpetrated in a defected process

In 2004, judge Moro, a than unknown judge and former professor of a Federal University wrote an article in which he demonstrated his admiration for the Italian

[1] "(...) a special investigative technique that stimulates the contribution made by a co-author or participant of crime in relation to the others, by the benefit, as a rule, of immunity or guarantee of reduction of the sentence or grant of freedom. This type of collaboration is highly important in the investigation of some kinds of crimes, such as those by criminal organizations, money laundering and corruption, always committed under the cloak of silence " as stated by Cibele. B. G. Fonseca et. al. A Colaboração Premiada Compensa? Brasília: Núcleo de Estudos e Pesquisas/ CONLEG/Senado, agosto/2015 (Texto para Discussão nº 181). Available in www.senado. leg.br/estudos.

Operation Mani Pulite, foreseeing his decisions[2].

Based on the opinions expressed in the mentioned article, we understand the repeated use of (a) precautionary prisons as strategy for this process (instrumental means); (b) the media as a mean of nourishing the support of public opinion, to legitimize the actions of the justice system (political timing); c) the fragility of a non-legal discourse, supposedly legitimized by morality and bad politics; d) violation of fundamental rights and criminal procedure law.

There're two important moments, in which the concerns presented are challenged. The first is related to the illegal leak of a recorded conversation between Dilma Rousseff, at the time President of Brazil, and Lula da Silva. The recording occurred after judge Moro ordered to suspend telephonic wires. It´s necessary to point that, as affirmed by the Brazilian Constitution (article 102, I, b), he didn't have competence to analyse conversations in which the President was involved because the only Court that could investigate the President was the Supreme Court. Nonetheless, the recordings were leaked to the press, two days before the plenary decision of the Federal Senate on articles of impeachment against Ms. Rousseff, demonstrating the political timing of the actions taken by the investigation.

As expected, the lawyers of Lula da Silva argued the legal violation in the 4th Federal Regional Court. On justifying their decision not to uphold the law, on ground this of being "an unprecedent case (unique, exceptional) on the Brazilian law". It was also mentioned that in such cases "there'll be unprecedent situations, which'll escape the common boundaries of the law, reserved for common cases". Furthermore, the same decision affirmed the existence of a "judicial state of exception", by implying that:

> "It is correct to understand that the secrecy of telephone communications (constitution, article 5, xii) may, in exceptional cases, be overridden by general interest in the administration of justice and in the application of the criminal law. The permanent threat to the continuity of the investigations of Operation Lava-Jato , even though suggestions of changes in the legislation, undoubtedly constitutes an unprecedented situation, deserving an exceptional treatment[3] ".

Such statements would make any public servant blush in the exercise a function if the Rule of Law, the one affirmed at the Article 1 of the Constitution was respected, constituting a clear deviation from the minimum rules for the application of criminal law[4].

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[2] Moro, S. *Considerações sobre a operação mani pulite*. Revista CEJ, Brasília, v. 8, n. 26, p. 56-62, set. 2004.

[3] Administratice Procedure. Special Court, Nº 0003021-32.2016.4.04.8000/RS, Federal Judge Rômulo Pizzolatti. Available at www.conjur.com.br/dl/lava-jato-nao-seguir-regras-casos.pdf

[4] It is hard not to remember the lesson of Carl Schmitt, for whom "the existence of the state maintains here an undoubted supremacy over the validity of the legal norm. The decision frees itself from any normative link and becomes absolute in the real sense", complementing that" the autonomous moment of the decision can be repelled to a minimum; in the exceptional case, the (legal) norm is annihilated" (Schmitt, Carl. *Political Theology*, Del Rey, p.13)

The notoriety of the case and also of the judge, fomented by the media, in cases as the one analysed, become a source of "legal legitimation" of lawlessness, and also to capture the support of public opinion[5], even if it is expressing a clear violation of the functional duties of the judge is overwhelming.

The justification, for the disclosure of the illegally recorded conversation, coincidentally occurred two days before the impeachment trial of Ms. Rousseff, states that "the intercepted (Lula da Silva) was the one that was being investigated and not the authority (President of the Republic)" and that "not even the supreme agent of the Republic has an absolute privilege in the safeguard of his communications, here harvested only fortuitously[67]".

This is a clear case of condemnation by the media prior to the delimitation of the judicial process, which reinforces the perception that such media spectacles serve purposes different to the protection of fundamental rights[8], as we shall see[9].

The third point raised by me concerns the use of moral arguments and administrative morality to justify in which cases the law should apply. It justifies the presumption of innocence as a "pragmatic instrument intended to prevent the arrest of innocents[10]" and points to the requirement that there should be no "moral obstacle to decisions of arrest, especially in cases of great magnitude and in which there has been no public money, especially in a country with scarce resources. "

It is hard to believe that unequal treatment for cases of "large magnitude" has legal provisions. There is a disregard for the Constitution and the presumption of innocence, provided in the constitutional text itself, when it states that "semantic games aside, there is no way to equate the procedural situation of the accused before the judgment with that after the conviction, although this be definitive."[11]. A moral argument against the Constitution and the civilizational advance that the double degree of jurisdiction has presented to us, since the

[5] Such an occurrence is striking in this process and is justified in Moros' article previously analysed on the Italian Operation, by saying that the publicity given to the investigations was healthy and favoured the magistrates. Fomented more confessions and that "more importantly", would have guaranteed "the support of the public opinion to the judicial actions, preventing that the public figures investigated obstructed the acts and mesures of the magistrates". Risks to his honour are said to be secondary, provided "care is taken in the disclosure of facts relating to the investigation, not the abstract ban on disclosure, since publicity has legitimate objectives and cannot be achieved by other means." Cf. MORO, *supra*, P. 59.

[6] Sentence of the Criminal Action No. 5046512-94.2016.4.04.7000.

[7] It closes up based on the precedent of the US Supreme Court (US v. Nixon, 1974), which is a misunderstanding, for one is talking about a constitutional system that, unlike Brazilian or Italian, does not admit the prosecution of authorities by ordinary courts rather than by higher courts, as provided for in the constitutions of these countries.

[8] Casara, Rubens R.R. *Processo Penal do Espetáculo* – Ensaios sobre o poder penal, a dogmáticos e o autoritarismo na sociedade brasileira. Florianópolis/SC: Empório do Direito, 2015. p. 11-12

[9] Paffarini, Jacopo. Il presidenzialismo brasiliano alla prova delle inchieste e della crisi del bilancio statale: osservazioni sull'impeachment contro Dilma Rousseff.DPCE Online, [S.l.], v. 31, n. 3, oct. 2017. P. 553. ISSN 2037-6677. Available at: <www.dpceonline.it/index.php/dpceonline/article/view/426>. Date accessed: 02 may 2018.

[10] [10] Moro, Sergio. *supra*, p. 61.

[11] [11] Moro, Sergio, Supra, p. 61;

subjectivation of interpretation according to the personal ideas of a judge and of the judicial persecution can't be taken as secondary.

But there is another alarming moral judgment when stated that "there is no moral obstacle in trying to obtain an acknowledged confession or accusation from the investigated or the accused" considering that "the investigator's own isolation is only done to the extent permitted by law". The problem is that the argument used is forbidden by the art. 132 of the Code of Criminal Procedure. The only reasons to impose or maintain someone arrested in cases like the one is to:

> "the guarantee of public order, the economic order, for the convenience of the instruction of the criminal law, or to ensure the application of criminal law, where there is proof of the existence of the offense and sufficient evidence of authorship".

Become clear that stressing the precautionary arrest to obtain a confession is forbidden. Even when the legal terms laid down in a clearly open normative statement allows the interpreter to choose some meaning to decide, especially the one who has the responsibility to decide, interpret the law against its goals is an act of malice or bad faith.

4. The Lula da Silva Case and the clear procedure irregularities promoted by OLJ

Firstly, it´s important to point again that the case analysed concerns to Criminal Action No. 5046512-94.2016.4.04.7000, in which former President Lula da Silva was convicted of committing two crimes: money laundering and passive corruption. In that case, after the decision on degree of appeal, rendered by the Federal Regional Court of the 4th Region (TRF4), against the decision of the 13th Lower Federal Court (13ª Vara Federal) of Curitiba, his arrest was determined by Judge Moro. I will not discuss other situations and processes, because they are beyond the scope of this article.

The succession of lawlessness occurred in such a discussed case, as we shall see, has different reasons. The first of these concerns the profile of the court judge who subsequently violates the duties of magistrates, provided in Complementary Federal Law 35/1979, which not only requires "serenity" (article 35, I) in the exercise of their duties, but also requires "irreproachable conduct in public and private life" (Article 35, X). These duties are not complied with in several national and foreign media, photos of the referred judge with authorities who have their conducts[12] analysed and also participating in events sponsored by groups of people

[12] There're several photos of Judge Moro's at public events, some sponsored by defendant companies in OLJ. The persons in these photos include the defendants Aécio Neves and President Michel Temer. Available at oglobo.globo.com/brasil/lula-publica-fotos-de-moro-com-aecio-temer-21355071.

also investigated in Operation Lava-Jato, some of them, with claims received before the courts[13].

If this were not enough, it violates the prohibition of "expressing, by any means of communication, an opinion on a pending trial of his or another person, or a derogatory judgment, on preliminary decisions, votes or sentences", of judicial institutions, except for academic purposes or in the exercise of teaching. Interviews by magazines and newspapers, and use of the press are usual for Judge Moro, as pointed by his article and seen on his behaviours, commented above. In doing so, it stresses his impartiality and hamper the role of the defence that has to fight against someone who should be more prudent on the exercise of his role, and limit himself to speaking in the records, as is required, instead of reverberating into a judicial populism[14].

It fulfils a strategy designed to (a) satisfy the dominant group, for whom such characters are prestigious with newspaper weekly covers, commendations, large acess to media communication[15], which (b) strengthens them to the point of, even disrespecting the Law, to have the temporary approval of the higher courts, those with their freedom of judgement undermined by the media that captures the public opinion with its speech.

In this scenario, the state justice system end up gaining strength because there is no interest in confronting public opinion specially in moments where political crisis undermines democratic checks and balances. The Judiciary itself becomes a mentor and hostage of the media, for which only few of its members are brave enough. The ones who apply the law not to contain authoritative advances but the actors who support their authoritative decisions by the papers and magazines are the lead of a crusade against the Rule of Law using Lawfare tactics[16], used abusively in the case in question. As written by Camaroff, the Lula

[13] The weekly newspaper Veja, the best seller in Brazil, has the participation followed by the judge. In his latest appearance, he said: "It was not for the Judiciary to be a guardian of dark secrets," and that the people needed to know about their "non-republican conversations." "I did not expect that [this decision] would have such repercussion and bring so much excitement. I did what I thought was necessary and I thought the contents of those dialogues should be made public, "he commented, comparing the case, given their differences, to that of Watergate in the United States, which resulted in the resignation of President Richard Nixon in the decade of 70 ". Available at veja.abril.com.br/brasil/moro-sobre-politicos-oque-se-ve-e-quase-uma-completa-omissao/.

[14] About criminal populism see G. Fiandaca, *Crisi della riserva di legge e disagio della democrazia rappresentativa nell'età del protagonismo giurisdizionale*, Criminalia, 2011.

[15] Casara, Rubens R.R. *supra*. p. 11.

[16] "The designation of Lawfare lies in an environment in which legal institutions are abusively used for the persecution of a political adversary. It was originally conceived by John Carlson and Neville Yeomans, in 1975, who considered it a peace tactic, in which the war gave place to the dispute by laws where one had "a duel of words instead of swords". The statement was disseminated by US Air Force Colonel Charles Dunlap in 2001 as a misuse of the law to achieve an operational goal as an alternative to traditional military means. In the political sphere, according to Jean Camaroff and John Camaroff, it translates into the process of using violence and the inherent power of law to produce political results. One of the most frequent forms of its use is the removal of an adversary by the abusive use of the legal system in substitution for the electoral processes constitutionally in force ". Cf. RIBEIRO, Ricardo Lodi. Ribeiro, Ricardo Lodi. A condenação de Lula: o maior caso de lawfare do brasil In: Proner,

da Silva case clearly shows the use of the media to shake the presumption of innocence, a strategy used in the procedures by both, the prosecutor of the republic and the judge of the dispute[17].

The situations described are so overwhelming that the professor of the University of Coimbra, the most notorious foreign constitutionalist known in Brazil, José Joaquim Gomes Canotilho[18], who was assisted by Prof. Nuno Brandão, affirmed the iliac behaviours practiced in the OLJ. It was pointed out the violation of the"principle of legality in criminal law, the principle of jurisdiction, the principle of the natural judge or the principle of legality of procedural promotion - and fundamental rights of persons. "

From now on I´ll analyse: a) the question of the natural judge and evidence; b) non-compliance with the principle of presumption of innocence; c) illegality of the sentence, the court judgement and coercive conduction decision, and; d) the effects of the conviction for possible candidacy of Lula da Silva.

4.1 The clear violation of the principle of the natural judge and the absence of evidence to condemn Lula da Silva

The Brazilian law establishes strict rules of jurisdiction in criminal matters, starting with the Federal Constitution, which states that the principle of the natural judge is a constitutional guarantee (article 5, XXXVII and LIII).

In the Brazilian federal architecture, procedural rules are necessarily enforced in federal laws but the Courts itself can adjust the competence of their judges to apply the law. The 13th Federal Court of Curitiba has a history of expanding its competencies by the orders of the Federal Regional Court of the 4th Region, which got Gustavo Badaró, in a detailed article[19], to say that one would not be talking about a natural judge, but rather a "supernatural judge" given the

Carol et. al. (Org). Comentários a uma sentença anunciada: o processo Lula. Bauru: Canal 6, 2017, p. 436.

[17] As mentioned at his interview to the daily Folha de São Paulo. www1.folha.uol.com.br/poder/2016/11/1829175-professor-de-harvard-ve-presuncao-deculpa-contra-lula-na-lava-jato.shtml.

[18] To whom was requested an opinion, by the Portuguese Public Prosecutor's Office, to analyse the legality of a request for international cooperation made by the Brazilian Public Ministry on the OLJ. The complete section says that "The public order clause must integrate the ideology of the fundamentality postulated by the rule of law principle (article 2 of the Criminal Procedure Code). It would therefore be incomprehensible for anyone of the Portuguese judicial system, unlike the Attorney General's Office, to admit that to "turn a blind eye" to disloyal and misleading practices that violate fundamental principles of the juridical-constitutional order national law - such as the principle of legality of the criminal law, the principle of jurisdictionally, the principle of the natural judge or the principle of legality of procedural promotion - and fundamental rights of persons pursuing criminal proceedings in a foreign State for which their cooperation is sought . Providing assistance in this case would mean, finally, to deny the state law protection of foundamental rights that must constitute the watermark of the actions of the Portuguese public authorities. Cf. CANOTILHO, José Joaquim e BRANDÃO, Nuno. *Colaboração premiada e auxílio judiciário em matéria penal*: a ordem pública como obstáculo à cooperação com a operação Lava Jato. Revista de Legislação e Jurisprudência. Ano 146. N. 4000, 2016, p. 20.

[19] Avaliable at: portal-justificando.jusbrasil.com.br/noticias/358591929/a-garantia-do-juiz-natural-a-13-vara-federal-de-curitiba-e-o-juiz-sergio-moro

extension of its powers by procedural rules since 2003. To have an idea when created through Resolution 20, dated 05.25.2003, of the Federal Regional Court of the 4th Region, it was specialized in crimes against the national financial system and the laundering of assets, rights or values. Thirteen years later, after seven more court rulings, its assignments became:

> "(a) crimes against the National Financial System and (b) the laundering or concealment of assets, rights and values; (c) crimes committed by criminal organizations; (d) the crimes with trial by jury; (e) request, s for passive legal cooperation in criminal matters, both by means of a letter rogatory and by means of direct cooperation with judicial intervention, sent to the Federal Court of the 4th Region, within the scope of the Judicial Branch of Paraná; and, (f) finally, the execution of the sentence of the prisoners who are in maximum security prison[20] ".

In synthesis, there´s an open competence for cases in a region the is maintained in the 13th Federal Court of Curitiba that besides of concretizing the specialization of the crimes referred became the all-in-one court for those crimes.

However, more than that, we must pay attention to the rules of territorial jurisdiction of the court for the processing of Lula da Silva.

An argument, used by the judge[21] to justify its competence, is that there would be a criminal scheme in Petrobras S.A and that the first case would have been distributed to the 13th Federal Branch of Curitiba. This argument is not very consistent since we are talking about a company that operates in more than 20 countries, in all Brazilian states, in various fields (mining, fuel production, distribution and sale of fuels, etc.). To carry forward such an argument would be to believe that any and all acts of corruption in a company of such magnitude would have as pre-defined that Federal Branch.

With regard to the crime of passive corruption, according to the article 70 of the Code of Criminal Procedure (CPC), the place of consummation of a possible crime establishes the jurisdiction of the court[22]. Lula da Silva exercised throughout his term of office, a function in Brasília, where the federal court submits the Federal Regional Court of the 1st Region and not of the 4th Region, such in Curitiba. The same can be said about the money laundering crime that, according to the accusation, would have generated benefit to the defendant in the city of Guarujá, in the State of São Paulo, where the apartment that would be of Lula da Silva is located. That is, it would be submitted to the Federal Regional Court of the 3rd Region, another jurisdiction division of the federal courts.

In both cases, the judge of Curitiba was not competent. Recently, in another lawsuit, in which Lula da Silva is accused of receiving a property in Atibaia, also in the State of São Paulo, the Supreme Federal Court itself removed the

[20] Badaró, *supra*.

[21] "Was distributed the first process that had as object crimes related to the criminal scheme of Petrobras, the first ones, incidentally, consummated in Londrina/PR, making it foreseeable for all the others." *Defence of Incompetence*

[22] "Jurisdiction shall, as a rule, be determined by the place where the offense is committed, or, in the case of an attempt, by the place where the last act of execution is practiced."

jurisdiction of the 13th Circuit Court of Curitiba and referred the evidence to the federal court of the State of São Paulo, where "in theory, most of the facts narrated by the collaborators would have occurred[23]."

It seems to me clearly that the mediatic turbulence of the case has weakened, and nowadays the judicial authorities, for so long hounded by the ostensive media, start to return to their usual understandings based on the law and not on the will of the media or on the morality of this or that judge protected by the media.

A more disturbing matter concerns the duty to annul the acts practiced, since one is speaking of absolute incompetence, according to article 564 of the Code of Criminal Procedure[24]. The clarity of the device is absolute. This is a case of absolute nullity, which, consequently, must be decided by the higher courts, remaining to know if there will be enough autonomy to apply the law in, given the pressure exercised by the media.

Another alarming issue concerns the participation of Lula da Silva in the crimes attributed to him prove that there is a relationship between such apartment (Triplex) and Petrobras S.A. The sentence itself states that Lula da Silva's counterpart would be through "indefinite acts of office, to be practiced as soon as opportunities appear[25]". It was not proven what actions or acts Lula da Silva would have practised to facilitate the life of the contractor.

And the only one to testify about the participation of Lula da Silva in the scheme of corruption is the same one that obtained with the plea bargain the benefits of reducing his own condemnation. Restating, the defendant's proof of practice is based on "INDETERMINATED legal acts", which are not known and did not happen, because they could happen at any moment, "as soon as opportunities appeared" and the only one to testify about that was the same person who obtained benefits in his sentence.

It means that the sentence is not based on evidence of Lula da Silva's participation in the acts of corruption practiced by the directors of Petrobras SA. On one hand, it can't be proven that he'd have given orders or that he'd have indicated the directors of the company. On the other, it is not proven that the acts practiced by him benefited the defendants, because they lack determination.

This is not to say that the defendant's the absence of participation has been proven. We want to show that the way in which the process develop itself, with excessive speed, the evidence produced, the characters involved, among others,

[23] As stated by the judge Dias Toffoli from the Supreme Court(Emb.Decl. no Quarto Ag.Reg. na Petição 6.780).

[24] "Article 564. "Nullity shall occur in the following cases: I - for incompetence, suspicion or bribery of the judge".

[25] Item 865 reads as follows, once more, founded on US precedents: "It is enough for the configuration that the payments are made by reason of the position even in exchange for indefinite official acts, to be practiced as soon as the opportunities appear. Citing comparative law, "it is sufficient that the public agent understands that he or she was expected to exercise some influence in favour of the payer as soon as the opportunities arose" ("v. DiMasi", No. 11-2163, 1st Cir. 2013, in the same sense, eg, "US v. Abbey", 6th Cir. 2009, "US v. Terry", 6th Cir. 2013, "US v. Jefferson", 4th Cir. 2012, all US Courts of Appeal)". Available in lula.com.br/sites/default/files/anexos/sentenca_-_12.07.pdf

present a lot of situations of excessive deviation from normality, little proof and many ways of seeing a reality that is not proven in the sentence.

In similar terms, it is also surprisingly that Lula da Silva has been convicted for an apartment that he never owned or had any document in his name, neither was never in possession of such a property, which continued of the company that would have provided the apartment as bribe[26].

4.2 The disrespect to the presumption of innocence and the principle of equality

The Brazilian Constitution, influenced in this aspect by the Portuguese Constitution, established a system for the realization of the presumption of innocence that deserves to be discussed. The guilt of someone for the constitutional text depends on the exhaustion of all available resources[27], when the arrest can thus be decreed, apart from precautionary cases. It is a guarantor system, built in a country where approximately 40% of the entire prison population, the third largest in the world, is imprisoned without a final sentence.

About the matter, José Afonso da Silva[28], in a pro bono legal opinion, pointed many of the illegalities reffered in this paper. About the presumption of innocence, Professor José Afonso da Silva stated:

> "It is necessary to recognize that the Constitution has established an express limit for the principle of presumption of innocence, which is the res judicata of the conviction. This goes beyond any argument based on the suppressive effect of the resources. (...).
> Apart from this, with due respect, there are no arguments regarding criminal jurisdiction that must meet important values not only to the[29] accused but also to society, facing the reality of our intricate and complex criminal system "

Regarding the subject of the imprisonment of the sentenced, in 2016, the Supreme Court, decided in the Habeas Corpus 126,292 the permission of the anticipation of the execution of the sentence from the decision of second degree, by a score of 6 in favour and 5 against. It overruled the guarantor position from the court in 2009, in the Habeas Corpus 84.078.

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[26] Item 810 of the sentence.

[27] *"Article 5. Everyone is equal before the law, without distinction of any kind, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security and property, in the following terms. Constitutional Amendment 45/2004)*: LVII - no one will be guilty until the *res judicata* of a criminal conviction "; LXI - no one shall be arrested except in flagrant or by written and reasoned order of competent judicial authority, except in cases of military transgression or properly military crime, as defined by law;

[2828] The most mentioned professor of Constitutional Law Professor mentioned by the Supreme Court as mentioned in the research of Bruno Lorenzetto and Ricardo Kenicke, available in www.conjur.com.br/2013-jul-06/jose-afonso-silva-doutrinador-citado-supremo-adis.

[29] José Afonso da Silva, Pro Bono Legal Opinion for Lula da Silva, available in www.conjur.com.br/2018-abr-02/jurista-afonso-silva-critica-prisao-antecipada-parecer-stf .

Before his arrest, Lula da Silva filed Habeas Corpus (HC 152,752), and the days that preceded the trial were worthy of films. The press, public opinion, the military[30], the parties, all aware that one of the ministers had changed positions, anticipated a new change of position of the court, the third in 9 years, generating a 6 X 5 in the direction of prohibition of imprisonment before all available remedies have been exhausted, when the judicial decision has become final.

That day, the country stopped to watch the session of the STF, which is daily televised - another Brazilian soap novel, and the legal community surprised, saw a show of movements that didn't reflect the importance of the court. Beginning with the judgment of the Habeas Corpus of Lula da Silva by the court plenary (11 ministers), and not by one of the STF organs (2 fractional organizations, with 5 ministers each) as usual, who until then had been judging all HCs of the OLJ defendants. And the reason for this was that the judge Edson Fachin, seeing himself defeated, which would lead to the release of Lula da Silva, eventually led to the plenary, instead of treating the defendant in the same way as the others, in a cleae violation of the principle of equality stated on the article 5, *caput*, of the Constitution.

As expected, Minister Rosa Weber had the deciding vote. In 2016, when the Court stated its new jurisprudence, she decided contrary to the majority and many times maintained its position contrary to the anticipation of the arrest before the *res judicata*. However, surprisingly in that session, her confused vote was casted, saying that she continued with the position to prohibit the arrest before the *res judicata*, but that the subject-matter:

> "(...) must be revisited in the exercise of the abstract control of constitutionality, that is to say, in the Declaratory Actions of Constitutionality, reported by Min. Marco Aurelio, in which this Supreme Court, in accordance with the principle of legal certainty, IN PROL OF THE BRAZILIAN SOCIETY shall express, as a collective voice, as guardian of the Constitution, if the case, another reading of art. 5, LVII, of the Fundamental Law. Such a precept, with meridian clarity, consecrated the principle of the presumption of innocence, no one denies it, situated in its final term - the moment of *res judicata* - meaning and scope, points of burning disagreements, hermeneutical disputes "(emphasis added)

That is, she would judge by prohibition in other pending cases of concentrated or abstract constitutional jurisdiction but, in Habeas Corpus, would

[30] On the day before the trial, a political demonstration of the country's highest military was seen, in a clear political manifestation, without any reprimand to date. He claimed to be "worried" about the situation, being followed by other military personnel who, in support, affirmed to be ready to the apply use of force. Cf. Twitter, April 3, General Villas Boas: "In this situation that Brazil is living, it only remains to ask the institutions and the people, who are really thinking about the good of the country and future generations and who is concerned only with personal interests?" followed shortly after by "I assure the Nation that the Brazilian Army believes that it shares the desire of all citizens to repudiate impunity and respect for the Constitution, social peace and democracy, as well as being attentive to its institutional missions" . At this moment, the past promptly came to memory, generating a fear of the return of a military dictatorship by a coup d'état, as it happened on March 31, 1964.

not do so. Incidentally, such actions of abstract control, are more of year awaiting judgment by lack of interest of the president of the court in put them into discussion.

This is a situation in which the freedom of a citizen is worth less if analysed in Habeas Corpus than in the form of abstract jurisdiction. This decision authorized the issuance of an arrest warrant for Lula da Silva, going against the Constitution.

It is confirmed that the reservations and treatment that violate the principle of equality are evident in the case under discussion.

4.3 The beneficial collaboration agreements(plea bargain), coercive conducts and other illegalities that point out to the principle of the Democratic Rule of Law

The reading of the statements reveal moments in which it's hard to legally assume the rule of Law. The main witnesses heard by the accusation to incriminate the accused Lula da Silva, Mrs. Léo Pinheiro and one of his employees are heard in the process as witnesses, as such, they may not lie. However, it's mentioned in the proceedings[31] that, while providing the information to the court, they are negotiating a deal with the Public Prosecutor. It means that there would be an instrumental way of constructing the truth, according to which, depending on what they said, they would come to plea deals with their own processes.

It would depend, therefore, on what they would say to the court so that the Public Prosecutor's Office which could grant a beneficial agreement, promising to diminish their future penalties. Otherwise, such "negotiation" would not materialize. Of course, these negotiations came to fruition, as they achieved results in court that granted them what was promised. This is clearly a *modus operandi* that is unethical, illegal and encourages partiality not only of the informers, the prosecution and, perhaps, even of the court.

The illegalities and violations to the principle of the legality and legal reserve in this case are so clear that Canotilho and Brandão[32] affirmed:

> "On the legal perspective, the most worrying aspect is the overstepping of boundaries by collaboration agreements into normative innovation tools, *praetor* and *contra legem*, violating the law of the parliament on the definition of crimes and penalties. Thus, in the pre-sentencing moment, one may not agree to a benefit only possible after a moment after the sentencing (i.e. the progression of execution regimes of liberty restriction sanctions). It´s also forbidden to grant a benefit only admitted after the ruling of the sentence (i.e. judicial pardon)".

[31] Submission of Lula da Silva, his defense, p.40, when the public prosecutor admitted that they were negociating a plea bargain with the ons who were testifying: "Yes, there are ongoing negotiations, there is no formalized agreement and the guidance to speak the truth and to collaborate initiates comes from defence that I am assuming now, not only in this case but in others, is her right". Available in lula.com.br/sites/default/files/anexos/937_alegacoes11.pdf

[32] Canotilho; Brandão. *supra*. p. 30.

The analysis of the Portuguese professors is perfect: "everything" is promised to the informers, including what hasn't legal provisions or is beyond the determined, if there're. For example, the execution regime of the legal sanction, even before the conviction, if in the interest of the Criminal Law. Only a process perturbated by the press and public opinion allows such illegality or the courts to close their eyes to what has been happening.

Another unusual moment of such process is revered in the use of the coercive conduction of Lula to give testimony. Article 201, §1. of the CPP stipulates that if he is "summoned for that purpose, to cease to appear without a just cause, the offended person may be brought before the authority". That is, there must be not only the subpoena, but also the absence of a just reason to stop appearing. This was not the case, again, with Lula da Silva, who was taken one morning, without being subpoenaed previously, to give testimony at the Congonhas airport, in the city of São Paulo, with a wide exposure of all Brazilian media[33], to testify, for 6 hours[34].

The violation of the Code of Criminal Procedure is not only clear, but the use of coercive conduction, as referred to, creates a new situation of precautionary detention without legal provision. Due to this practice, a citizen may be "trapped" for hours at the pleasure of the police, ministerial and judicial authorities, under the justification of the risk of losing evidence or protecting the defendant's physical integrity without a judicial guarantee to defend his right. Abuses that unlike prisons, can't find any constitutional remedy, because habeas corpus or other remedies can't be filed, given the rapidity and surprise of coercive conduction as used for its demarcation.

The appointed illegality made Judge Gilmar Mendes[35], of the Supreme Court, to affirm that:

> "I do not understand it, it one's only coercively conducted, or, as said in the past, under a stick, the citizen who resists and does not appear to testify." And Lula was not subpoenaed. I believe that this argument was actually given to justify an act of force (...) This implies a setback, not an advance .... We magistrates are not legislators, we are not vigilantes".

Afterwards the Supreme Court, by decision of Judge Gilmar Mendes, prohibited the use of such coercive conducts, given the abuse they had been creating[36].

[33] The situation of illegalities is such that an actor from the Lava-Jato film (Ary Fontoura), whose sponsors are unknown, reported to the press that he had access to the videos recorded by the Federal Police (!) Of Lula da Silva's coercive conduction. Lava Jato's movie costed 15 million reais, has a secret investor and debuts in July "In: www1.folha.uol.com.br/ilustrada/ 2017/ 02/ 1857844-filmeda-lava-jato-custa-r-15-mi-teminvestidor-secreto-e-estréia-em-julho.shtml.

[34] g1.globo.com/sao-paulo/ noticia/ 2016/ 03/ termina-o-depoimento-de-lula-na-policia-federal-em-sao-paulo.html.

[35] www1.folha.uol.com.br/colunas/monicabergamo/2016/03/1746433-ministro-dostf-diz-que-decisao-de-moro-foi-ato-de-forca-que-atropela-regras.shtml

[36] In which the rapporteur, Min Gilmar Mendes, states that "coercive conduction for interrogation represents a restriction of freedom of movement and presumption of non-

5. The political future of Lula

The conviction of Lula da Silva by the Federal Regional Court of the 4th Region affects, unequivocally his political future. This is due to the approval of Complementary Law 135/2010 that states the conviction by tribunals turns the convicted unelectable, which, in the studied case, may reach about 20 years.

This law, sanctioned by Lula da Silva himself, as President of the Republic, in Article 1, "e", that those convicted by decision "(...) issued by a collegiate judicial body, from the conviction until the lapse of eight (8) years after the execution of the sentence" are unelectable.

Despite the divergences in its appearance, the decisions of the STF, in the joint trial of three actions, in 2012 (Declaratory Actions of Constitutionality 29 and 30 and in the Direct Action of Unconstitutionality 4578) for the constitutionality of the Complementary Law 135/2010 [37] ended up diminishing some of the debates. In the case of Lula da Silva, it should be noted that its application does not occur automatically, which would allow Lula da Silva to present his candidacy even if arrested, to campaign, for example, and, in the meantime, seek a preliminary decision from the higher courts (Supreme Electoral Court or Supreme Federal Court), if the impossibility of his candidacy is confirmed and his registrations denied.

But all this does not elude some unconstitutionalities and unconventionalities of the Clean Slade Act. A brief reference is deserved, in regard to the decree of ineligibility in the light of a collegial decision, without res judicata there is a controversy with the American Convention on Human Rights, which, in Article 23.2, defines that only "conviction, by a competent judge, in criminal matters "may lead to ineligibility. A legitimate reading of such a device requires that the suspension of political rights requires, in addition to a criminal sentence, that it respect the rules of guilt, which in Brazil, as we have seen, requires a final decision[38]. But this was not the Supreme Courts position.

Regarding the decision of the STF, it is worth highlighting the position of Min. Celso de Mello, who pointed out[39] in 2012, that the path followed by Supreme

culpability, to force presence in an act to which the accused is not obliged to appear. Hence its incompatibility with the Federal Constitution, "cf. Claim of Non-compliance with Fundamental Precept 444. Judge Gilmar Mendes bu the Supreme Court.

[37] redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=2243342

[38] In the same sense, vf. Bastos Júnior, Luiz Magno Pinto; Santos, Rodrigo Mioto dos. *Levando a sério os direitos políticos fundamentais*: inelegibilidade e controle de convencionalidade. Revista Direito GV, [S.l.], v. 11, n. 1, p. 223-255, jan. 2015. ISSN 2317-6172. Disponível em: bibliotecadigital.fgv.br/ojs/index.php/revdireitogv/article/view/56807/55344. Access in: May 03, 2018.

[39] "How many freedoms guaranteed by the Constitution will have to be jeopardized to legitimize the judgement by the totality of the Supreme Court members, which, by instituting an artificial anticipation of the final and unappealable decision, completely frustrated the constitutional presumption of innocence?

How many essential values established by the constitutional statute that governs us must be denied in order to prevail reasons based on the public outcry and inescapable criminal pragmatism?

Court leaded towards the collapse of the Constitution, for compromising fundamental rights, in spite of numbers and pragmatism the in criminal order, something that we have seen repeatedly in recent years.

This populist path of jurisprudence, as observed, leads to the collapse of the principle of the Democratic Rule of Law, on a path towards the rupture of what, in our constitutional history, imbued with authoritarian moments, means a new moment in which the authorities judicial - and others in the justice system - end up assuming the role played by the military in the more recent past. It is never too much to remember that moral arguments were also used by the military to substantiate their atrocities against the protection of the human person.

6. Summary

The paradoxes of the case against Lula da Silva, specifically the one being analysed, shows that at various moments we have seen surprising occurrences. Different treatments, spectacularising of procedures and other illegalities that have taken a process in which one considers himself to be such a well-known personality.

The set of illegalities committed can not be supported for the protection of other legal assets such as control of corruption, the will of the people or the protection of society. Perpetuating such deviations will undoubtedly lead us to more moments in which acts of exception under the hungry eyes of society are tolerated, even if we confront the Constitution.

The stated facts are mentioned in documents that deserve analysis and that will show the need to revisit concepts, procedures, legislation, among others.

Until when, will merely statistical data authorize this unacceptable hermeneutic of submission, whose results, as a perverse effect, damage very serious and constitute a frontal violation of the fundamental right to be presumed innocent?

Finally, Madam President, is it possible for a free society, based on a genuinely democratic basis, to subsist without securing the fundamental rights so hard won by the citizens in their historic and permanent struggle against the oppression of power, such as the one which guarantees anyone the irrevocable prerogative of always being considered innocent until a convicted criminal conviction is res judicata?" (www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADC43MCM.pdf).