TRANSPARÊNCIA INTERNACIONAL
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# BRAZIL: SETBACKS IN THE LEGAL AND INSTITUTIONAL ANTI-CORRUPTION FRAMEWORKS - 2020 UPDATE

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# EXECUTIVE SUMMARY

In October 2019, Transparency International Brazil published the report "Brazil: setbacks in the legal and anti-corruption frameworks" to denounce the serious situation in the country to the world. Twelve months later, it is compelled to publish this update to once again denounce further deterioration of the country's laws and institutions.

# KEY FACTS

- President Jair Bolsonaro is investigated at the Supreme Court for allegations made by his former minister of justice Sérgio Moro of attempts to interfere with the autonomy of Federal Police investigations[1]. His eldest son, Senator Flávio Bolsonaro, is investigated for allegedly leading a criminal organization that hired employees for his office, while he worked as a Rio de Janeiro State parliamentarian, some of them "ghost" employees, and pocketed shares of their salaries[2]. Former Rio de Janeiro city councillor Carlos Bolsonaro, another of President Bolsonaro's sons, is also investigated for allegedly hiring no-show employees[3].
- Political interference in law enforcement institutions is at a high in Brazil, with significant setbacks to the autonomy of the Prosecutor's Office, Federal Police and Judiciary.
- Prosecutor-General Augusto Aras' first year in office was marked by unabashed alignment with President Bolsonaro[4], an authoritarian stance towards internal affairs within the Prosecutor's Office[5] and highly controversial decisions, generating widespread distrust among his peer prosecutors and Brazilian society at large.
- Operation Carwash taskforces of prosecutors have been targeted by Prosecutor-General Augusto Aras' public criticism[6] and attempts to access the investigation database, including confidential information[7]. After much pressure, disagreements with administrative decisions and doubts about the continuity of investigations against high profile individuals, ten prosecutors from the Carwash taskforces in São Paulo and Brasília have collectively resigned[8].
- The Operation Greenfield taskforce, responsible for investigations of grand corruption schemes involving pension funds from state owned companies, as well as the world's largest meat company JBS and the former Brazilian

President Michel Temer, was partially dismantled by the Prosecutor General, resulting in the resignation of its lead prosecutor Anselmo Lopes, who publicly denounced a lack of structure and personnel to fulfill taskforce objectives[9].

- The Supreme Court reversed a legal precedent held since 2016 by voting to bar imprisonments before all appeals are exhausted[10], a decision followed by the release of high profile politicians arrested after second instance convictions, as was the case of former President Luiz Inácio Lula da Silva[11] and his former Chief of Staff José Dirceu (both under Operation Carwash investigations) and former Governor of Minas Gerais Eduardo Azeredo (under the Mensalão Mineiro case)[12], among others. Despite its wide scope, potentially benefiting over 4.800 prisoners, the decision is expected to have significant impact on white-collar crime.
- In September, Justice Toffoli ended his two-year term as Supreme Court President, a tenure marked by rhetoric of a harmonious collaboration between the three federal branches of power and for the highly controversial "Fake News Inquiry" (INQ 4781), an ongoing investigation opened by Justice Toffoli in March 2019 that carried unique and unconstitutional features[13]. The Supreme Court has been responsible for other important decisions hindering efforts against white-collar crime. Several of these happened during Court recesses while the President was in charge of all appeals.
- Before leaving Presidency of the Court in September, Justice Toffoli signed an agreement with the Federal Court of Accounts (TCU), the Office of the Comptroller General (CGU) and the Office of the Attorney General (AGU) to establish new rules for leniency agreements. Up until now, the new model has not been endorsed by the Public Prosecutor's Office. Prosecutors fear the new arrangement could undermine their participation, at the same time granting too much power to government bodies (CGU and AGU) that could eventually lack the necessary political independence for negotiations, particularly when the leniency agreements involve the production of evidence of crimes committed by members of the government[14].
- In September, the Chamber of Deputies installed a committee of experts to elaborate a proposal to reform the Money Laundering Law. The committee, composed of Justices from the Superior Court of Justice, judges, prosecutors, lawyers, and experts in the matter[15], is mandated to deliver a draft bill to be analyzed and then voted on by National Congress. Although the group of experts has barely started discussions, concerns have already been raised,

such as the absence of Brazil's most important anti-money laundering body (COAF) from the committee and, more broadly, that the reform could undermine the country's effort to fight money laundering.

- In 2020, President Bolsonaro maintained public attacks against civil society organizations and the press, key players in efforts to curb corruption and defend democracy. In August, questioned by a journalist about alleged deposits made in the bank account of his wife, the First Lady Michelle Bolsonaro, by Flávio Queiroz, a longtime personal friend and former aide to his eldest son Flávio, under investigation for the "rachadinha" scheme[16], Mr. Bolsonaro said he'd like "to punch" the reporter "in the mouth"[17]. A few days later, discussing environmental policies, Mr. Bolsonaro compared NGOs working in the Amazon to a "cancer" he cannot "kill"[18].
- The COVID-19 pandemic led to a relaxation of procurement rules[19] in order to expedite access to medical equipment and supplies by different levels of government. Although it was imperative to facilitate and accelerate procedures in face of a sanitary crisis of this magnitude, several enforcement operations have uncovered potential cases of multi-million fraud, including acquisition of medical ventilators[20] and setting up of temporary hospitals[21].

# RECOMMENDATIONS

Transparency International presents a list of recommendations for Brazilian authorities and calls for the international community to support the many representatives of Brazilian public institutions, politics, businesses and civil society who are engaged in the country's fight against corruption and impunity (see the "Recommendations" section below).

# 1. INTRODUCTION

Despite President Jair Bolsonaro's recent claims, Brazil has not become corruption-free. On the contrary: since 2019, the country has suffered serious setbacks to its legal and institutional anti-corruption frameworks. In the last 15 years, groundbreaking investigations and trials of grand corruption schemes such as the so-called "Mensalão" and "Carwash" projected to the world the image of a country committed to confront systemic corruption and the historical impunity of its corrupt elites. This anti-corruption impulse, however, was not the project of a leader, nor a national plan, nor the result of voluntarism. It was the product of decades of legal and institutional progress, fostered by consolidation of the Brazilian democracy under its 1988 Constitution.

Now this progress is under unprecedented threat. Since an authoritarian-populistic movement successfully hijacked the anticorruption discourse and took power, Brazil entered a beaten path of rapid institutional corrosion – as in so many episodes in global history. In these contexts of democratic deterioration, anti-corruption institutions are often the first to suffer, as they are by essence instruments to hold power to account. This is unfortunately what is happening in Brazil today. The Bolsonaro family, under serious threat from investigations of corruption and other crimes, are responding with growing interference in law enforcing bodies and attacks on their agents. Striving to curb the independence of anti-corruption institutions, they find numerous allies in powerful positions, also seeking impunity, restoration of the status quo and revenge.

In October 2019, Transparency International Brazil published the report "Brazil: setbacks in the legal and institutional anti-corruption frameworks" to denounce the serious situation in the country to the world. Twelve months later, it is compelled to publish this update to once again denounce further deterioration of the country's laws and institutions. TI Brazil expects the international community to take action to defend the remarkable efforts by Brazilian society and its institutions to hold power to account.

# 2. FEDERAL GOVERNMENT

In the last year, Brazil witnessed increasing political interference into several of its control and enforcement bodies, with measures to centralize power and impose oversight on authorities responsible for investigating white-collar crime and other illegal activity. This trend of setbacks, already outlined in last year's report, turned into several crises involving President Jair Bolsonaro and the Federal Police, the Public Prosecutor's Office, the Judiciary and environmental bodies, among other relevant institutions. These conflicts led to credible concerns about the legitimacy of decision taking processes and the potential political interests of numerous public authorities.

Mr. Bolsonaro, his family members and political allies have been under scrutiny in high-profile cases. The president himself is being investigated in an inquiry authorized last April, by the Supreme Court, for allegedly trying to interfere in the Federal Police, an accusation made by the former Judge and former Minister of Justice of Mr. Bolsonaro's government Sergio Moro[22] (see Federal Police section).

In August, it was reported that the now First Lady, Michelle Bolsonaro, received from 2011 to 2016, more deposits in her bank account than previously known from Fabrício Queiroz and his wife, a total of R$ 89.000[23]. Mr. Queiroz, a longtime friend of President Bolsonaro's and a former aid to his son Senator Flávio Bolsonaro, was arrested in June under the investigation of what has been called the "rachadinha" scheme[24]: according to the prosecutors involved in the case, while Mr. Flávio Bolsonaro worked as a parliamentarian at the State of Rio de Janeiro, he and Mr. Queiroz were part of a criminal organization that hired employees for Flávio Bolsonaro's office (some of them "ghosts" or no-show aids) and pocketed shares of their salaries, a criminal scheme that allegedly involved embezzlement of public funds and money laundering[25]. Another son of President Bolsonaro, former Rio de Janeiro city councillor Carlos Bolsonaro, is also under investigation for allegedly hiring a number of no-show employees for his office[26].

It has also been reported that, over a 24-year period, Flávio and Carlos Bolsonaro, and the two ex-wives of President Bolsonaro bought several properties and paid expenses in cash, transactions that totaled almost R$ 3 million in adjusted values[27]. Although not illegal, transactions in cash are vulnerable to illegal practices, such as money laundering, as they are harder to trace[28].

In September, in an unfolding of the Carwash Operation (see Public Prosecutor's Office section) investigating alleged frauds in the "S System" (training and assistance entities partly financed

by fiscal contributions[29]), Frederick Wassef, who served as a lawyer for Flávio Bolsonaro until last June[30], was charged for embezzlement and money laundering[31]. Just a few months earlier, Mr. Wassef had appeared in the headlines for being the owner of the property where Mr. Queiroz, Senator Flávio Bolsonaro's former aid, was living when he was arrested under the "rachadinha" investigations[32].

Under pressure from the press and public opinion, and with several investigations targeting his inner circle, the president has maintained a combative tone, attacking journalists[33] (see section Civil Society and the Press) and participating in public acts that called for military intervention and the closure of National Congress and the Supreme Court[34]. These antidemocratic manifestations involved threats to public authorities and are currently under investigation by the Supreme Court[35] — parliamentarians and supporters of President Bolsonaro have been targeted by the inquiry[36].

## FEDERAL POLICE

In April, President Bolsonaro fired Mauricio Valeixo, the Federal Police's Director-General, against the opinion of the then Justice Minister, Sergio Moro[37], former Operation Carwash judge and a symbol of the corruption fight promised by Mr. Bolsonaro. As denounced in last years' report[38], the corporation had been targeted by increased political interference and had reacted against a 2019 replacement by Mr. Bolsonaro, in its regional office in Rio de Janeiro, responsible for investigations of high profile politicians and people with links to the Bolsonaro family or their allies.

Following Mr. Valeixo's dismissal, and several other battles lost as Justice Minister of the Bolsonaro government[39], Mr. Moro resigned. He denounced the change of the Director-General as political interference and declared that the president wanted access to intelligence reports and to exercise undue influence over the Federal Police[40]. Mr. Moro's declaration led to an inquiry, authorized in April by the Supreme Court, to investigate the veracity of his accusations and potential crimes committed by the president[41].

Mr. Bolsonaro tried to appoint Alexandre Ramagem, a police commissioner known for his proximity to the Bolsonaro family[42] and current head of the Brazilian Intelligence Agency (ABIN), as the Federal Police's new Director-General, but the appointment was suspended by Justice Alexandre de Moraes, from the Supreme Court[43]. In the end, Mr. Bolsonaro chose Rolando Alexandre de Souza as the new head of the Federal Police, a name reportedly appointed by Mr. Ramagem[44].

## FEDERAL REVENUE SERVICE

In 2020, President Bolsonaro maintained criticism of the Federal Revenue Service (Receita Federal, RFB), an organ in charge of federal tax collection and combating tax

evasion. The RFB was subjected to several setbacks described in last year's report, including alleged political interference and a ruling that paralyzed an audit into 133 politically exposed persons (PEPs)[45], a suspension ordered under the highly controversial "Fake News Inquiry" installed by then President of the Supreme Court, Justice Antonio Dias Toffoli (see Judiciary section). The audit reportedly involved the Supreme Court Justice Gilmar Mendes and his wife, in addition to Justice Toffoli's wife, in a preliminary investigation[46]. Suspension of the audit was still in place by the publishing date of this report.

In March, after a meeting with top executives in São Paulo, Mr. Bolsonaro publicly declared he was surprised how much the RFB "disrupts" the country's development[47].

The following month, during a meeting convened with a parliamentarian and the son of an influential evangelical pastor, Mr. Bolsonaro reportedly pressured the RFB Secretary-General to find a solution to millions of tax debts owed by churches in Brazil[48], whose political support is relevant to the president. In July and August, National Congress passed a bill with an amendment that exempted temples from a federal tax (the Social Contribution on Net Income, CSLL) and pardoned fines from previous debts with the RFB, an amnesty that was, however, vetoed by Mr. Bolsonaro[49]. Yet, in doing so, the president argued for the exemption, justifying the veto on budgetary liability and hinting that Congress could revert his own veto[50]. Although churches have specific tax immunities in Brazil, audits identify situations in which pastors' remuneration or payments for services resemble profit distribution, which is subject to federal contributions[51].

## ADMINISTRATIVE COUNCIL OF TAX APPEALS

In March, National Congress approved a change in the procedures of the Administrative Council of Tax Appeals (Conselho Administrativo de Recursos Fiscais, CARF), a federal tax appeals board. The board, linked to the Ministry of Economy, is composed by representatives from the fiscal administration and taxpayers (appointed by the productive sector), in equal numbers[52], and is responsible for the administrative review of appeals against Federal Revenue Service's acts[53]. Under the law passed in March, voting resulting in a draw should be decided in favor of the taxpayer rather than, as it used to be, by a fiscal representative[54]. Tax auditors are concerned that this change could impact reporting of potential criminal behavior, including corruption, money laundering and tax evasion, to the Public Prosecutor's Office[55].

## CENTRAL BANK

In January, Brazil's Central Bank (BACEN) released new rules establishing procedures and internal control activities for financial institutions to prevent money laundering crimes[56] (Circular nº 3.978/2020).

Although the norm improved the previous situation, it fell short of including relevant recommendations based on international practices, such as widening the definition of politically exposed persons (PEPs) and imposing stricter standards for handling cases that involve this specific group of people.

In September, a new R$ 200 banknote started circulating in Brazil, shortly after its creation was announced in July, taking by surprise specialists that had been discussing with the BACEN a move in the opposite direction: the restriction on the use of the R$ 100 note[57]. Reportedly, even Brazil's Financial Intelligence Unit (COAF) and the Ministry of Justice weren't consulted about the release of the new banknote[58]. This decision contrasts with trends in other countries of restricting the circulation of large bills, known to facilitate criminal activity.

## FINANCIAL INTELLIGENCE UNIT (COAF)

In 2019, profound changes and political interference challenged the functioning of the Conselho de Controle de Atividades Financeiras (COAF)[59], the Financial Intelligence Unit in Brazil, in charge of collecting, analyzing and disseminating financial intelligence information for the purposes of preventing and combating crimes such as money laundering[60]. The changes started with a short-lived attempt, by President Bolsonaro, to transfer COAF from the finance ministry to the justice ministry. Prevented by National Congress, Mr. Bolsonaro decided, then, to place COAF under the structure of Brazil's Central Bank (BACEN), a modification still in place. Although the change apparently did not interfere with the organ's autonomy, it burdened COAF members with administrative duties and threatened the needed modernization of the electronic system used by obligated subjects, as a budget increase expected when COAF was temporarily placed under the justice ministry may not materialize.

In November last year, the Supreme Court allowed COAF and the Federal Revenue Service to share information with the Public Prosecutor's Office and police without previous judicial authorization[61]. This consequentially overturned a previous injunction by Justice José Antonio Dias Toffoli, then President of the Supreme Court, that had paralyzed investigations for over four months[62]. Justice Toffoli's highly controversial decision, in July 2019, attended a request by President Bolsonaro's eldest son, Senator Flávio Bolsonaro, under an investigation that started with the sharing of financial intelligence reports on suspicious activities (the "rachadinha" scheme, see Federal Government section).

## OFFICE OF THE COMPTROLLER GENERAL/PRESIDENCY

In March, President Bolsonaro published a Provisional Measure (an act with the effect of a law and temporarily validity) suspending deadlines for response to requests made under the Access to Information Law in a wide range of situations imposed by the COVID-19 pandemic: whenever the public authority in charge of the response was quarantined or working remotely and the request demanded his physical presence in the office, and whenever the request involved a public employee or sector primarily working to tackle the pandemic[63]. Justice Alexandre de Moraes, from the Supreme Court, reversed the suspension a month later[64].

The Access to Information Law application was restricted by a decision, in June, to block public access to legal recommendations prepared by different instances of the federal government[65]. On the questionable argument of attorney-client privilege, legal opinions provided by public lawyers, especially concerning the decision to sanction or veto laws, were, in practice, considered secret and, thus, not provided via freedom of information requests. Considering legal opinions often contain more than just legal arguments, this is also an impediment to understanding the policy decision-making process.

Established under the monitoring of the Office of the Comptroller General, the Access to Information Law was a crucial step towards the transparency of Brazilian public administration, but, despite the Supreme Court's decision, in the past several months, the law hasn't been properly enforced, with reports of increasing delays, generic replies[66] and inadequate denials.

## CONAMA AND OTHER ENVIRONMENT INSTANCES

In April, during an inter-ministerial meeting attended by President Bolsonaro, environment minister Ricardo Salles argued that the COVID-19 pandemic represented an opportunity for the government to pass, at once and in large quantities, infra-legal changes to simplify regulation of the environment sector and any other regulation of interest to the government, while press attention was focused on the pandemic[67]. The discussion took place behind closed doors, but a video of the meeting was released, a month later, by the Supreme Court, part of the investigation into Mr. Bolsonaro's potential political interference with the Federal Police.

In September, the National Environment Council (CONAMA), a body responsible for overseeing environmental policy, revoked two resolutions stipulating the protection and use of coastal ecosystems

(the mangrove and "restinga" areas) and of areas surrounding artificial reservoirs, a third establishing parameters for licensing irrigation projects, and substituted a fourth resolution in order to authorize burning toxic waste in rotary kilns[68]. The extinction of two of these resolutions was a specific demand from a political bloc in the National Congress linked to the agricultural sector[69].

The vote to revoke the resolutions took place sixteen months after President Bolsonaro altered CONAMA's composition[70], significantly cutting the number of participants and changing the proportion of its members — with an increase in government participation and a reduction in civil society members[71].

Since 2019, a similar movement has been observed in relation to other environmental councils, with the reduction or removal of civil society participation or even the elimination of the council itself[72].

In past months, other significant episodes point to an attempt to weaken environmental control and enforcement bodies. Of most concern are low rates of budgetary execution of environmental policies[73], the firing of staff responsible for the oversight of an operation to combat deforestation and illegal mining in indigenous lands[74], repeated dismissal of official data on deforestation by President Bolsonaro[75], and a drop in the application of environmental fines[76].

# 3. NATIONAL CONGRESS

## ANTI-CRIME PACKAGE

In December last year, National Congress passed a bill, turned into law the same month, known as Justice Minister and former Judge Sergio Moro's "anti-crime package". The anticorruption dimension of the "anti-crime package", already timid, was further weakened during parliamentary discussions[77]. Although the final text included relevant dispositions, such as extended forfeiture for proceedings from criminal activities and improvements to the public administration whistleblowing system, it also included the controversial creation of the so-called "juiz de garantia" (investigative judge). Basically, it determines that a judge cannot preside over the investigations and trial proceedings of the same case. While there are reasonable arguments that this separation of duties can enhance fair trials, by preserving the impartiality of the judge ruling the case, the reform was approved in a rushed legislative process, without the necessary studies for the implementation of such structural modification in the country's judicial system. Some of the risks relate to further slowing the judicial proceedings and resulting in even higher impunity rates for white-collar crimes.

## REFORM OF THE MONEY LAUNDERING LAW

In September the Chamber of Deputies installed a committee of experts to elaborate a proposal to reform the Money Laundering Law. The committee, composed of Justices from the Superior Court of Justice, judges, prosecutors, lawyers, and experts in the matter[78], is supposed to deliver a draft bill to be analyzed and then voted on by National Congress. Although the group of experts has barely started discussions, concerns have already been raised, such as the absence of Brazil's most important anti-money laundering body (COAF) from the committee and, more broadly, that the reform could undermine the country's effort to fight money laundering.

## DECREASE IN SOCIAL PARTICIPATION

Following the outbreak of the COVID-19 pandemic in Brazil, both the Senate and Chamber of Deputies adapted parliamentary procedure for most activities to be done remotely, including discussion and approval of bills and Provisional Measures. Although the system allows the public to follow the parliamentary debates online, the temporary

procedural changes led to bills and other acts being voted directly in the plenary[79], without previous analysis and approval by the thematic committees, a step that has traditionally allowed for wider debate and social participation. Similar restrictions have also been implemented at subnational levels, with state and city legislative bodies equally reducing transparency and participation levels in law-making processes.

# 4. PUBLIC PROSECUTOR'S OFFICE

In 2019, Transparency International alerted that President Bolsonaro's appointment of Prosecutor-General Augusto Aras was a major concern. The alert derived less from the person of Mr. Aras than in the procedure of his nomination, which broke a key tradition for consolidating independence of the Public Prosecutors' Office.

Although Brazil's 1988 Constitution granted the Public Prosecutors' Office (Ministério Público, MP) a high level of functional and financial autonomy, the process for appointing its leadership remained highly political. It is exclusive presidential responsibility to appoint the Prosecutor-General, from career prosecutors, subject to Senate approval.

Since 2003, however, an important tradition has gained ground. The president would appoint the Prosecutor-General from a shortlist of names selected by an election process organized by the National Association of Federal Prosecutors (ANPR). This practice became an efficient way to select well regarded names and to increase the institution's independence. President Bolsonaro, however, broke this tradition[80] and chose Mr. Aras, a prosecutor who had not even competed in the internal elections. The nomination was confirmed by the Senate in September 2019. Members of the Prosecutor's Office described this decision as a major setback for their institution's hard-won independence.

Twelve months after Mr. Aras' nomination, the new Prosecutor-General's acts confirmed such concerns. His office became a major source of setbacks not only for the fight against corruption, but for Brazil's democratic regime[81]. Mr. Aras' unabashed alignment with President Bolsonaro[82], authoritarian stance[83] and highly controversial decisions generate fears that the Prosecutor-General's Office might not only revert to the old system of shielding political allies, but also move onto more dangerous ground: intimidation and suppression of political adversaries[84].

Widespread perception that proximity between Mr. Aras and the president is greater than it should be is based on frequent meetings between the two men[85], the president's comment that he could appoint Mr. Aras for a seat at the Supreme Court (see more in Judiciary section) and a sequence of actions undertaken by the Public Prosecutor's Office favoring Mr. Bolsonaro's political circle or challenging his adversaries.

With one year in office, Prosecutor-General Aras' acts have been systematically aligned

with the Bolsonaro government[86], even when contradicting his own past decisions. This was the case of the highly criticized "Fake News Inquiry" (INQ 4781) installed by former president of the Supreme Court Antonio Dias Toffoli in March 2019 (see Judiciary section). In August last year, Prosecutor-General Raquel Dodge, Mr. Aras' predecessor, criticised the inquiry, requesting its closure by the Supreme Court. Her petition, on request of the National Association of Prosecutors (ANMP), denounced the inquiry as an authoritarian act that severely violated the Constitution[87]. One month after taking office, Mr. Aras reversed his predecessor's position and expressed support, in October 2019, for the validity of the inquiry. Seven months later, however, the inquiry reached several of President Bolsonaro's supporters with search and arrest warrants. Mr. Aras now changed position again, this time petitioning the Supreme Court for suspension of the inquiry[88].

In August this year, in another very controversial case, this time involving President Bolsonaro's eldest son, the Prosecutor-General's office argued against a complaint questioning the "privileged forum" granted to Flávio Bolsonaro[89] at the level of the Justice Tribunal of Rio de Janeiro, a rule that allowed his case to be heard by a special instance of the Court rather than by a first instance judge. Senator Flávio Bolsonaro is investigated for allegedly hiring, while working as a Rio de Janeiro State parliamentarian, no-show employees and pocketing shares of their salaries, a scheme known in Brazil as "rachadinha" (see more in Federal Government section). Under current interpretation of "privileged forum" by the Supreme Court, Flávio Bolsonaro's case was expected to be heard by the first instance judge, as he would only hold this privilege — and only at the level of the Supreme Court — regarding potential crimes committed in the course of his present mandate, as a Senator, and not previous ones[90]. This legal conflict is however, new, and is expected to be discussed by the Supreme Court.

Also in August, Rio de Janeiro state governor Wilson Witzel, former political ally of President Bolsonaro, currently an adversary, was temporarily removed from office under allegation that he and his wife participated in a corruption scheme involving contracts with businessmen from the health sector[91]. Mr. Witzel denied the allegations, saying he and other state governors were "victims of a possible political use" of the Public Prosecutor's Office. He accused the prosecutor responsible for the case, Lindôra Maria Araújo, an ally of Mr. Aras, of having a close relationship with the Bolsonaro family[92].

Although there seems to be solid evidence against Mr. Witzel, the fact that Ms. Araújo, based at the Prosecutor General's Office in Brasilia, had previously circulated an order to federal prosecutors across the country, requesting that all reports, procedures or documents involving state Governors should be submitted to her

office, raised concerns about politically driven investigations[93]. Her proactive request for investigation or intelligence gathering on specific office holders was deemed highly unusual. There have been press reports that at least eight governors are being investigated[94]. Just one day prior to a Federal Police raid on Governor Witzel's office, Carla Zambelli, a member of parliament close to President Bolsonaro, announced in an interview that several police operations against governors were about to happen – raising suspicions of leaked information. President Bolsonaro and his sons have been in a political battle with the state Governors, to whom they try to attach responsibility for social distancing measures and their economic consequences in the COVID-19 pandemic.

The major point of conflict in Mr. Aras' mandate, however, lies in the way he has been dealing with the Operation Carwash (Lava Jato) taskforces of prosecutors. In June, the Curitiba taskforce formally questioned a visit by Ms. Araújo (appointed last January by Mr. Aras as the new coordinator of the Public Prosecutor's Office Carwash working group), in which she asked for access to information, procedures and to the taskforce database, including confidential information, without official request or justification[95]. In July, Mr. Aras secured a preliminary ruling signed by Justice Antonio Dias Toffoli of the Supreme Court, in which the judge determined transfer of the taskforce database to the Prosecutor-General's office, in order to evaluate the existence of investigations regarding authorities protected by "privileged forum"[96]. Toffoli's highly controversial decision, granted during court recess, was reversed a month later by Justice Edson Fachin, rapporteur of the case, who argued that information he had received did not mention any authority protected by "privileged forum" who had been charged[97] (see more in Judiciary section).

Combined with the effort to concentrate information in his office, Mr. Aras has publicly criticized the Operation Carwash taskforces, saying that it's time to "correct directions", to put an end to the "*lavajatismo*" (a term used by those who criticize the excesses of the operation) and that a "box of secrets" cannot exist inside the Public Prosecutor's Office[98].

It is true that the Prosecutor's Office has institutional weaknesses with regard to information management, with poor security and access control, resulting in frequent leaks and data vulnerability. However, Mr. Aras' authoritarian attempts to access specific investigations' databases do not contribute to a much-needed debate on the development of proper information governance rules and systems. On the contrary, they threaten one of the most important features of the Prosecutor's Office, as established by the Brazilian 1988 Constitution: the high degree of autonomy granted to individual prosecutors and the absence of hierarchy in relation to the Prosecutor-General.

Indeed, taskforce prosecutors have repeatedly denounced what they see as attempts to interfere with their investigations[99]. After much pressure, disagreements with administrative decisions, internal administrative proceedings against one of its members and doubts about the continuity of investigations against high profile individuals, eleven prosecutors from the Carwash taskforces in São Paulo and Brasília have collectively resigned, alleging various reasons, including strong disagreements with Ms. Araújo and Mr. Aras[100].

These conflicts are not restricted to Operation Carwash. In September, another Public Prosecutor's Office taskforce was struck by a resignation. This time, prosecutor Anselmo Lopes resigned from the Operation Greenfield taskforce, dedicated to investigating grand corruption schemes involving pension funds from state owned companies, as well as the world's largest meat company JBS and the former Brazilian president Michel Temer. Mr. Lopes publicly denounced a lack of structure and personnel to fulfill taskforce objectives[101]. This complaint, about the lack of adequate structure for the functioning of the taskforces, was described in an April report issued by an internal commission designated to study the organization and results of all the existing taskforces. The report highlighted the "significant relevance of the work in the taskforce model for the achievement of more effective results" by the Public Prosecutor's Office, as well as the necessary reforms to correct deficiencies to the taskforce model[102].

One of the most important developments to Brazil's remarkable progress in the fight against grand corruption and impunity in the last decade were the legal reforms establishing collaboration and leniency instruments between defendants and investigators. However, these new instruments only developed their full potential when they were followed by another very important innovation in Brazil's law enforcement system: the creation of taskforces, allowing prosecutors to work in teams dedicated to the same grand schemes. The collaboration system creates investigations that grow exponentially, as collaborators provide evidence for other crimes and accomplices, who are likely to also start cooperating and this process goes on expanding the reach of investigations to levels impossible to be handled by individual prosecutors. This is a successful arrangement based on two complimentary legal and administrative innovations – if one of them is removed or weakened, the mechanism collapses.

Both frameworks for collaboration instruments and taskforce investigations are innovations to the Brazilian system. While they have proven extremely efficient, they also have significant deficiencies. This is a complex debate and reforms process. It should be promoted by trustworthy leaders committed to their institutions and public duties, not subject to obscure interests that want the return of the old system of absolute impunity.

# 5. JUDICIARY

As in 2019[103], setbacks to corruption cases occurred this year in different instances of the Brazilian Judiciary. This included significant blows to Operation Carwash. The appointment procedure, by President Bolsonaro, of a new Supreme Court Justice was another major point of concern. It highlighted how replacement mechanisms for the Court can exercise a perverse incentive on the behavior of authorities interested in influencing the nomination, compromising the independence and legitimacy of control bodies.

In November 2019, the Supreme Court reversed an interpretation held since 2016 by voting to bar imprisonments before all appeals are exhausted[104], a decision followed by the release of high profile politicians arrested after second instance convictions, as was the case of former President Luiz Inácio Lula da Silva[105] and his former Chief of Staff José Dirceu (both under Operation Carwash investigations) and former Governor of Minas Gerais Eduardo Azeredo (under the *Mensalão Mineiro* case)[106], among others. Despite its wide scope, potentially benefiting over 4.800 prisoners, the decision is expected to have significant impact on white-collar crime. High profile lawyers acting in such cases are predicted to exploit the complexity and slowness of the appeal process, and problematic rules regarding statutes of limitation[107]. A few months later, in August 2020, the Supreme Court's 2nd Chamber overturned a conviction by former Judge Sergio Moro in an alleged fraud scheme involving the Banestado bank, accepting an argument that there was a breach of impartiality in the process[108]. With the absence of Justice Celso de Mello for health issues, the vote ended in a draw, a result that favors the defendant.

The appointment of a new Supreme Court Justice by President Bolsonaro, with Justice Mello's retirement in October, caused controversial reverberations in the Public Prosecutor's Office. In May, Mr. Bolsonaro declared he could eventually appoint the Prosecutor-General, Augusto Aras, to a seat on the Supreme Court if he had the opportunity to appoint a third name for the bench (Justice Marco Aurélio Mello is expected to retire next year)[109]. This statement aggravated concerns about undue proximity between the president and Mr. Aras (see more in the Public Prosecutor's Office section) and the loss of independence of the Prosecutor's Office.

A similar mobilization happened among Mr. Bolsonaro's allied parties in the National Congress and different instances of the Judiciary. The selection for the seat turned out to be an unanticipated candidate: Judge Kássio Nunes Marques, still to be confirmed by the Senate, a name supported

by the president's eldest son, Senator Flávio Bolsonaro, and a powerful political bloc[110] that aggregates center and center-right politicians (the "Centrão"). The new appointee will replace the most senior member of the Court, a Justice with a moderate profile who has spoken strongly against authoritarianism[111] and in favor of the freedom of the press[112], democracy, individual liberties and the fight against corruption[113].

In the last year, the Supreme Court has been responsible for other important decisions hindering efforts against white-collar crimes. Quite a few of them happened during Court recesses and under Justice Antonio Dias Toffoli. In July, Justice Toffoli ordered the sharing of the Operation Carwash taskforce database with the Public Prosecutor's Office, a decision that was reversed just a few weeks later by Justice Edson Fachin, rapporteur for the case[114]. Access to the database was seen as another threat to prosecutors' autonomy when investigating grand corruption schemes (see Public Prosecutor's Office section).

In the same recess, the judge suspended a search warrant of Senator José Serra's office, ordered by a first instance judge regarding investigation of a suspected electoral crime, under the argument that the search request was too broad, and could potentially jeopardize his "privileged forum" as a senator and Supreme Court competence in the case[115]. In the same month, Justice Toffoli also accepted a request from Rio de Janeiro state governor, Wilson Witzel, temporarily removed from office under investigation for corruption, for the Legislative Assembly of Rio de Janeiro to destitute and recreate, under other parameters, a commission composed to discuss his impeachment[116]. Just before leaving the Presidency of the Supreme Court, Justice Toffoli sided with Mr. Aras in favor of closing twelve inquiries already authorized by another judge[117] in the Supreme Court[118]. These inquiries were based on a plea agreement made by former Rio de Janeiro state governor Sérgio Cabral with the Federal Police, whose competence to make this kind of agreement had been questioned, but confirmed by the Supreme Court in 2018. Press reports suggest that in his plea agreement, still under confidentiality, Mr. Cabral, convicted for several cases of corruption and money laundering, implicated relevant authorities, among them judges from the Superior Court of Justice (STJ) and ministers from the Federal Court of Accounts (TCU)[119].

In September, Justice Toffoli ended his two-year term as Supreme Court President, a tenure marked by rhetoric of a harmonious collaboration between the three federal branches of power and for the highly controversial "Fake News Inquiry" (INQ 4781), an ongoing investigation opened by Justice Toffoli in March 2019 that carries unique and unconstitutional features[120]. The inquiry was formally installed to investigate alleged threats and fake news directed at the Court and its members[121], but its generic

object (nicknamed the "end of the world inquiry") allowed it a much wider scope, as was the case with the suspension of auditing procedures opened by the Federal Revenue Service over 133 politically exposed persons (reportedly including Justice Gilmar Mendes and his wife, in addition to Justice Toffoli's wife[122], see more in Federal Revenue Service section)[123]; the censoring of a press article that described an alleged mention to Justice Toffoli in a plea agreement signed under the Carwash taskforce[124] (later reverted by Justice Alexandre de Moraes); and a reported attempt to discover whether Court Justices were under scrutiny by the Operation Carwash taskforce[125]. In June, a majority of the Court endorsed the legality of the Fake News Inquiry[126], with the rapporteur of the legal case, Justice Fachin, under analysis, raising the need to establish stricter parameters for the investigation[127].

Before leaving Presidency of the Court in August, Justice Toffoli signed an agreement with the Federal Court of Accounts (TCU), the Office of the Comptroller General (CGU) and the Office of the Attorney General (AGU) to establish new rules for leniency agreements. Up until now, the new model has not been endorsed by the Public Prosecutor's Office. Prosecutors fear the new arrangement could undermine their participation, at the same time granting too much power to government bodies (CGU and AGU), that could eventually lack the necessary political independence for negotiations, particularly when the leniency agreements involve the production of evidence of crimes committed by members of the government[128]. If it is true that, on one hand, the myriad of authorities with competence to negotiate agreements can result in excessive complexity and uncertainty for potential collaborators, on the other hand, this plurality of institutions involved can also foster procedural integrity, as the different bodies hold each other accountable during negotiations. There is certainly room for improvement in Brazil's leniency agreement system, particularly regarding transparency and procedural standardization. However, limiting participation by the Public Prosecution's Office will not lead to more accountability.

Under another highly controversial decision by a high Court, in July, Fabrício Queiroz, close friend of President Jair Bolsonaro and former aide to Senator Flávio Bolsonaro arrested under the "rachadinha" investigations (see Federal Government section), was granted house arrest on account of COVID-19 risks and his fragile health[129]. His wife, a fugitive from justice at that point, was also granted house arrest in order to "take care of her husband"[130] — both decisions were reversed a few weeks later. Mr. Queiroz and his fugitive wife's house arrest benefits were granted by Justice João Otávio de Noronha, President of the Superior Court of Justice (STJ) at the time, who had rejected other house arrest requests from other defendants with similar allegations of health concerns due to the pandemic[131]. A few months earlier,

in April, President Bolsonaro mentioned in a speech that Justice Noronha had been a case, for him, of "love at first sight"[132]. In May, siding with the Office of the Attorney General (AGU), Justice Noronha suspended judicial decisions ordering Mr. Bolsonaro to hand over his Covid test results[133]. During past months, Justice Noronha has been seen as potential candidate for a Supreme Court seat[134]. In August Justice Noronha passed Presidency of the Court to Justice Humberto Martins, whose son was targeted by Operation Carwash for allegedly trying to influence court decisions[135].

As described last year, the Supreme Court decided, in 2019, to establish the responsibility of electoral courts to deal with criminal cases (such as corruption and money laundering) involving fraudulent campaign financing (campaign slush funds). Initial assessments of this decision show that it had an impact in slowing investigations when compared to federal cases at the beginning of Operation Carwash[136]. The concern that the decision to send cases to electoral rather than specialized courts, could increase impunity was raised in the 2019 report[137], due to insufficient resources and lack of technical expertise in the electoral courts to deal with this type of complex criminal case and the present statute of limitation rules.

# 6. CIVIL SOCIETY AND THE PRESS

In 2020, President Bolsonaro maintained public attacks against civil society organizations and the press, key players in efforts to curb corruption and defend democracy. In August, questioned by a journalist about alleged deposits made in the bank account of his wife, the First Lady Michelle Bolsonaro, by Flávio Queiroz, a longtime personal friend and former aide to his eldest son Flávio, under investigation for the "rachadinha" scheme[138] (see more in the Federal Government section), Mr. Bolsonaro said he'd like "to punch" the reporter "in the mouth"[139]. A few days later, discussing environmental policies, Mr. Bolsonaro compared NGOs working in the Amazon to a "cancer" he cannot "kill"[140].

The Covid pandemic caused changes to social participation in public policy and political decisions, potentially weakening decision making transparency and public debate. As already mentioned, in April, Environment minister Ricardo Salles stressed that the pandemic was diverting media attention[141], allowing space to make controversial changes to environment protection regulation (see CONAMA and other environment instances).

With less participatory monitoring from civil society and reduced attention from the press to issues not related to the pandemic, there could be an increase in opportunistic measures unduly included as amendments in bills intended to regulate very different matters (a "jabuti", as this maneuver is called in Brazil). In March, such an amendment was included in a bill approved by São Paulo city councilors, and turned into law the same month. It limited the sanctioning power of the Office of the Comptroller of the City of São Paulo by creating a new political instance for appeals against its administrative decisions and enforcement of the Anticorruption Law (12.846/2013)[142]. This episode led to the resignation of Gustavo Ungaro, the municipal control body's chief[143].

# 7. THE COVID-19

The COVID-19 pandemic led to a relaxation of procurement rules[144] in order to expedite access to medical equipment and supplies by different levels of government. Although it was imperative to facilitate and accelerate procedures in face of a sanitary crisis of this magnitude, several enforcement operations have uncovered potential cases of multi-million fraud, including acquisition of medical ventilators[145] and setting up of temporary hospitals[146]. A wide range of prices, unit values that show no reduction even in large-scale purchases, advanced payments by public authorities for materials or equipment that may be defective, delayed or even may not be delivered, and contracting with companies from sectors other than health, are some of the problems observed in government procurement processes during the pandemic[147].

The drain on public resources due to waste, mismanagement or criminal activity highlights the fragility of public procurement processes in Brazil. However, the fact that more cases are being brought to light should also be considered indicative of the country's progress with oversight and investigative bodies, particularly at subnational levels.

An index created by Transparency International Brazil has monitored transparency efforts in public procurement by government entities during the pandemic[148], revealing different levels of compliance, but also the interest of local authorities to improve transparency levels for emergency procurement processes[149]. From the first assessment in May to the third in July, TI Brazil's index registered an improvement of 62% in average scores by Brazilian states and their capital cities.

# 8. RECOMMENDATIONS

## CONSIDERING THESE FACTS AND CIRCUMSTANCES, TRANSPARENCY INTERNATIONAL RECOMMENDS:

### (I) FOR INTERNATIONAL ORGANISATIONS:

- The Working Group on Bribery of the Organisation for Economic Cooperation and Development (WGB-OECD) should adopt stronger measures to secure Brazil's compliance with the OECD Anti-Bribery Convention. The Secretary-General should consider the setbacks in Brazil's legal and institutional anti-corruption frameworks when providing the Council with information on Brazil's membership candidacy to the OECD.
- The Financial Action Task Force (FATF) should consider the issues mentioned in this report for its 4th Round of Mutual Evaluations (Joint FATF/GAFILAT Mutual Evaluation) and closely follow the work of the Experts Committee established by the Speaker of the Chamber of Deputies tasked to propose reforms to Brazil's AML law.
- The International Monetary Fund should consider the facts and circumstances mentioned in this report while preparing the IMF Article IV Review within the new framework for engaging with countries on governance and corruption issues.
- The Implementation Review Mechanism of the United Nations Convention against Corruption (UNCAC) should consider the aforementioned setbacks in the ongoing review process of Brazil's obligations under the UNCAC framework and engage with Brazilian officials for the implementation of its recommendations.
- The Follow-Up Mechanism for the Implementation of the Inter-American Convention against Corruption (MESICIC) should consider the facts stated in this report in the review process of Brazil's obligations under the Inter-American Convention against Corruption and engage with Brazilian officials for the implementation of its recommendations.

### (II) FOR THE BRAZILIAN GOVERNMENT:

- Foster the autonomy of the Federal Police and the Federal Revenue Service and protect them from political interference.
- Fully respect the independence of the Prosecutor's Office and other external oversight bodies.

- Ensure proper administrative and financial conditions for the financial intelligence unit (COAF) to adequately manage the county's AML system and veto any attempt of weakening the anti-money laundering legislation (currently under debate at the Chamber of Deputies).
- Remove from high office government officials who are under investigation for corruption and related offences.
- Fully respect the constitutional rights of the press and refrain from harassing journalists.
- Ensure civic participation and refrain from harassing activists.

## (III) FOR THE NATIONAL CONGRESS:

- Deliberate on and approve anti-corruption reforms, based on proposals by Brazilian experts and civil society groups gathered in the legislative package New Measures against Corruption.
- Ensure that reforms currently discussed to the administrative impropriety law (*Lei de Improbidade Administrativa* – 8.429/1992) do not weaken this vital instrument against corruption.
- Ensure that reforms currently discussed to the anti-money laundering law (Lei 12.683/2012) improve its provisions for the digital age and international cooperation and avoid any setbacks in the legal text.

## (IV) FOR THE PROSECUTOR'S OFFICE AND THE JUDICIARY:

- Foster the independence of the Prosecutor's Office and the Judiciary, as provided by the Brazilian Constitution and the international conventions against corruption and organized crime.
- Preserve and enhance the legal instruments for judicial collaboration and the administrative provisions for joint investigative work with taskforces of prosecutors and other law enforcement agents on grand corruption cases.
- Ensure the participation of the Prosecutor's Office in the leniency agreements and the independence of negotiators, while enhancing transparency and standardization of negotiating processes.
- Enhance data security of judicial files and governance norms and controls for information handling by law enforcing agents, avoiding leaks, privacy rights violations and data vulnerability.
- Preserve case law reliability and legal certainty by ensuring full bench decisions at higher courts.

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Transparência Internacional – Brasil
Associação Transparência e Integridade

Rua Dr. Virgílio de Carvalho Pinto, 445
São Paulo, SP

brasil@br.transparency.org
www.transparenciainternacional.org.br