CHALLENGES TO TACKLING TRANSNATIONAL CORRUPTION FROM A HUMAN RIGHTS PERSPECTIVE: THE CONSTITUTIONALIZATION OF LAW AS A CONTEMPORARY APPROACH TO TRANSNATIONAL CRIMINAL LAW

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ABSTRACT: In the Rule of Law, human dignity assumes the central role in the legal order. Human dignity is concretized by fundamental rights, which are not confined to just a subjective dimension or to the classical public liberties. In this scenario, the idea of the so-called Constitutionalization of Law gains strength: this concept is based on the expansive force of Constitutional Norms, by which the constitutional values irradiate and bind the entire legal system, including the criminal norms that deal with corruption. Strengthening a human rights-sensitive anticorruption legal framework will promote and strengthen a criminal justice regime that is consistent with the rule of law (SDG 16) to address inequalities, eliminate discrimination, and strengthen respect for the rights of individuals, including greater attention to assisting victims of corruption. Placing the" fight against corruption" in the context of human rights is thus necessary for sustainable and inclusive development, which will not be achieved until equal rights and opportunities are guaranteed. As long as corruption exists - in the form of tax distortions, mismanagement, or both - inequality will continue to undermine the building of solid and prosperous societies

KEYWORDS: transnational corruption; human rights; constitucionalization; transnational criminal law

I. Introduction

In recent decades, the attention and prominence of anticorruption measures have been consolidating the link between the fight against corruption and the protection of human rights[1].

In fact, the themes are interrelated.

The right to good governance can be defined as the "demand for government action based on transparency, accountability, equality, legality, non-discrimination, and participation"[2]. Thus, as the legal regime of human rights contemplates indivisibility and interdependence, the right to good governance is related to (i) the right to information, (ii) the right to equality (preventing the administration from being corrupted to benefit some), (v) legality, (iv) freedom of expression (accepting criticism) and (v) the right to passive suffrage (preventing those involved in practices contrary to the right to good governance from returning to power)[3].

Corruption, as a phenomenon of human civilization, is as old as mankind - but the last years saw the rise of many anti-corruption treaties, aimed at criminalization, prevention

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[1]See in this sense, ABADE, Denise Neves. "Desafios para o enfrentamento da corrupção transnacional a partir do enfoque do Direito Internacional da Anticorrupção". *Publicações da Escola da AGU: Direito, Gestão e Democracia,* v. 12. Brasília: Advocacia-Geral da União, p. 255-276, 2020

[2] CARVALHO RAMOS, André. *Curso de Direitos Humanos, 8ª ed.* São Paulo: Saraiva, 2021, p. 1068

[3] CARVALHO RAMOS, André. *Curso de Direitos Humanos, 8ª ed.* São Paulo: Saraiva, 2021, p. 1068

and cooperation. Thus, it receives attention from the United Nations (UN) – but not only from its offices and commissions specifically focused on criminal matters (such as the United Nations Office on Drugs and Crime, UNODC): also from its commissions focused on human rights issues[4]. Moreover, international bodies specialized in protecting human rights, such as the Inter-American Commission on Human Rights, have also elected the fight against corruption as an important issue to be addressed, since the phenomenon of corruption implies the lack of effectiveness in the implementation of social rights and violation of the collective right to good governance[5]. Thus, anti-corruption actions have a double character: (i) they are a result of the State's duty to protect and implement rights, in particular social rights; and (ii) they are a measure of respect for the right to good governance, also referred to as the right to a public administration with integrity.

All legislation must be interpreted and applied in accordance with the values, principles and rights enshrined in the States Constitutions, as well as in International Human Rights protection treaties – within a context in which the development of criminal law includes the protection of human rights also for its effectiveness. Indeed, the use of the criminal path to effectively confront so-called white-collar offenses is often indispensable. It is increasingly undeniable that conclusion that, for the efficient protection of legal interests and social rights, States are required to criminally typify and punish such behaviors in the criminal sphere.[6]

II. The Constitutionalization of Law, the Fundamental Rights and the Contemporary Approach to Criminal Law

In the 21st century, witness a profound change in Constitutional Law, which began in the 20th century, with respect to the normative force of the Constitution.

In the 19th century, there was a debate about the role and influence of the Constitutions in a national legal order. A first reading assimilated the Constitutions to a body of political guidelines, merely indicative. Parliament would be left with the leading role in the production of laws, which would indeed be binding. Thus, the Constitution was seen, initially, as a set of general precepts, whose densification was the responsibility of the Executive and Legislative Branches. The Judiciary was only responsible for the application of the laws, in respect of the principle of separation of the functions of power,

[4]The Committee on the Elimination of Discrimination against Women, under CEDAW - the Convention on the Elimination of All Forms of Discrimination against Women, in General Recommendation number 33 describes the right of access to justice as "a fundamental element of the rule of law and good governance, along with the independence, impartiality, integrity and credibility of the judiciary, the fight against impunity and corruption, and the equal participation of women in the judiciary and other law enforcement mechanisms. The right to access to justice is multidimensional. It encompasses justiciability, availability, accessibility, good quality, provision of remedies for victims, and the accountability of justice systems." CEDAW General Recommendation No. 33 on women's Access to justice, available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf, accessed on July 15th, 2021

[5]The Inter-American Commission on Human Rights stated in its Resolution 1/18 that corruption is a "complex phenomenon that affects human rights in their entirety - civil, political, economic, social, cultural and environmental - as well as the right to development; weakens governance and democratic institutions, promotes impunity, undermines the rule of law and exacerbates inequality" . IACHR, Resolution 1/18, adopted in Bogota, Colombia, in March 2018, available at https://www.oas.org/es/cidh/decisiones/pdf/Resolucion-1-18-es.pdf, accessed on July 15th, 2021.. The same agency published in 2019: INTERAMERICAN COMMISSION ON HUMAN RIGHTS. Corrupción y derechos humanos: estándares interamericanos. Washington, OAS-Documentos oficiales, 2019. Available at http://www.oas.org/es/cidh/informes/pdfs/CorrupcionDDHHES.pdf, accessed 07/15/2021.

[6] As we state in more detail in ABADE, Denise Neves. "Bens jurídicos e direitos: repensando a competência penal nas infrações contra a livre-concorrência" in *Revista Brasileira de Ciências Criminais* São Paulo, n. 172, ano 28 , p. 59-96,out/2020

with the consequent respect for the legislator's freedom of definition and for the public administrator's discretion. From this point of view, Anschütz argued that the Constitution "is not above the legislative power, but at its disposal. In this sense, the constitution is, in fact, 'a law like any other.[7]

Subsequently, the 20th century saw the rise of a new constitutionalism, centered on the normative force of the Constitution, especially after the atrocities of World War II. Gradually, Hesse's expression, the normative force of the Constitution was affirmed, by which constitutional norms are endowed with binding superiority, capable of authorizing their coercive enforcement even by the provocation of the Judiciary.[8] Thus, the normative force of the Constitution was enhanced by the new reading given to fundamental rights and the role of the State. In fact, the liberal theory of the fundamental rights that were established in the 19th century saw them as limits imposed on the action of the State[9]. This view was based on the transplantation of the category of subjective rights from Private Law to Constitutional Law and is supported by Jellinek's Theory of Subjective Public Rights, which characterizes fundamental rights as positive rights and also as a limitation on the power of the State, and then discusses the various statuses in the relations between the individual and the State (*status subiecciones, status negativus, status activus and status positivus*).[10]

Analyzing the German school, Bilbao Ubillos states that this is a theoretical vision "that is elaborated from pre-democratic and decidedly individualistic ideological premises. It is evident that the unidirectional conception of the rights of freedom as rights opposable to the public authorities has its roots in the first Constitutional State, the liberal rule of law, where it finds the ideal ideological framework for its rooting".[11]

With the emergence of the Social State, there was a modification in the reading of fundamental rights, now no longer restricted to the limitation of State's power, but linked to minimum material conditions of existence and to a dignified life.

This new reading demands the recognition of a double dimension of fundamental rights. The first, called subjective dimension, is traditional and originates from the perspective of subjective rights, since it sees in fundamental rights claims by which every individual can demand from the State the concretization of positive law. The second dimension, called objective by the doctrine, recognizes that fundamental rights contain an order of values that irradiate effects over the entire legal system, also generating duties of protection for the State. In the words of Queiroz, "fundamental rights are constitutional rights that should not, in the first place, be understood in a 'technical' dimension of

[7] See *apud* SILVA, Virgílio Afonso da. *A Constitucionalização do Direito.* São Paulo: Ed. Malheiros, 2005, p.111.

[8] HESSE, Konrad. *A força normativa da Constituição*. Tradução de Gilmar Ferreira Mendes. Porto Alegre: Sergio Antonio Fabris Editor, 1991.

[9] QUEIROZ, Cristina M.M. *Dreitos Fundamentais: teoria geral.* Coimbra: Coimbra Editora, 2002 e ANDRADE, José Carlos. *Os direitos fundamentais na Constituição portuguesa de 1976*, 2ª ed. Coimbra: Almedina, 2001.

[10] The *status subiecciones* implies the subjection of the individual in the face of the State in certain situations; the *status negativius* implies the recognition of the individual's zone of freedom, in which the State must respect the autonomy of the will; the *status actiivus* implies recognizing the rights to participate in the formation of the will of the State Power; finally, the *status positivus* implies the recognition of the individual to claim the protection of the State (access to justice). See JELLINEK, George. *Sistema dei diritti pubblici subbiettivi.* Milano: Sociteà Editrice Libraria, 1919.

[11] BILBAO UBILLOS, Juan Maria. *La eficácia de los derechos fundamentales frente a particulares. Análisis de la jurisprudência del Tribunal Constitucional.* Madrid: Centro de Estudios Políticos y Constitucionales, 1997, pp. 233-234.

limitation of the power of the State. They should rather be understood and understood as defining and legitimating elements of every positive legal order".[12]

The new social constitutionalism also endorses the critique of the *limiting view of fundamental rights as a right of defense*. As Bilbao Ubillos reflects, with the transformation of the liberal state into the social state of law " the fiction that linked the enjoyment of freedom in the social sphere to the mere affirmation of the principle of juridical equality is unmasked. The theory of fundamental rights in the social state starts from the realization that the legal guarantee of freedom, in the abstract, is insufficient in many cases to ensure in itself the real freedom of each and every citizen (...)".[13]

The new paradigm of the Social Democratic Rule of Law leads us to reflect on the phenomenon of the Constitutionalization of Law. At first, we see, in line with Guastini, that there are multiple meanings about what "constitutionalization of Law" means.[14]

At first glance, it is possible to consider the "constitutionalization" of Law the phenomenon of inclusion in the Constitution of themes previously only referred to in ordinary legislation. Thus, the Portuguese Constitution of 1976, the Spanish Constitution of 1978 and the current Brazilian Constitution (1988) are clear samples of this. Constitutionalization-inclusion" consists of the absorption of a new theme into the text of the Constitution, or a theme that was previously governed by ordinary legislation. We speak, therefore, of the phenomenon of constitutional normative creation, or even of the normative transfer to the Constitution of a theme previously restricted to the laws. There is an upward movement in the material division between the Constitution and the laws, which diminishes the power of the ordinary legislator to conform, unimpeded, the subject matter covered by constitutional rules.[15]

However, the doctrine also refers to the Constitutionalization of Law as a phenomenon of "irradiation of the effects of constitutional norms (or values) to the other branches of law".[16]

Thus, the principles and rules of the Constitution begin to condition both the validity and the interpretation of the other rules of the legal system. Therefore, the phenomenon of the Constitutionalization of Law has repercussions in the activity of the entire Public Power: both in its production (Legislative Power) and in its application and interpretation (Executive and Judiciary Powers). Therefore, the Legislative Branch must act in conformity with the Constitution, which limits its freedom of conformation in the normative elaboration that follows the Constitution and also imposes on it duties to act in order to materialize the constitutional programs (binding on the legislator). The Executive

[12] QUEIROZ, Cristina M.M. *Direitos Fundamentais: teoria geral.* Coimbra: Coimbra Editora, 2002, p. 39.
[13] BILBAO UBILLOS, Juan Maria. *La eficácia de los derechos fundamentales frente a particulares. Análisis de la jurisprudência del Tribunal Constitucional.* Madrid: Centro de Estudios Políticos y Constitucionales, 1997, pp. 263.
[14] GUASTINI, Riccardo. "A 'constitucionalização' do ordenamento jurídico e a experiência italiana" in SOUZA NETO, Cláudio Pereira e SARMENTO, Daniel. *A constitucionalização do Direito – fundamentos teóricos e aplicações específicas.* Rio de Janeiro: Lúmen Júris, 2007, pp. 271-293.
[15] SILVA, Vírginio Afonso da. *A Constitucionalização do Direito.* São Paulo: Malheiros, 2005, p.47. Na doutrina espanhola, ver GARCÍA DE ENTERRÍA, Eduardo. *La Constitución como norma y el Tribunal Constitucional*. Madrid: Editorial Civitas, 1994; GARCÍA DE ENTERRÍA, Eduardo. "La constitución española de 1978 como pacto social y como norma jurídica" in *Revista de Direito do Estado*. Rio de Janeiro: Renovar, v. 1, n. 1, 2006, p. 3-23.
[16] SILVA, Vírginio Afonso da. *A Constitucionalização do Direito.* São Paulo: Malheiros, 2005, p.38. Ainda, ver GUASTINI, Riccardo. "A 'constitucionalização' do ordenamento jurídico e a experiência italiana" in SOUZA NETO, Cláudio Pereira e SARMENTO, Daniel. *A constitucionalização do Direito – fundamentos teóricos e aplicações específicas.* Rio de Janeiro: Lúmen Júris, 2007, pp. 271-293, em especial p. 272.

Branch, as a manager, must also base its conduct on the constitutional precepts, imposing limits on administrative discretion.

Therefore, the premise that we start from in the present article is the idea of the Constitutionalization of Law, based on the expansive force of constitutional norms, by which the material content of its norms and, consequently, the constitutional values, irradiate and bind the entire legal system, including the criminal norms that deal with corruption.

As far as fundamental rights are concerned, we see that, parallel to the phenomenon of constitutionalization of Law, there has also been the "jusfundamentalization of the Constitution", which consists of the insertion, in constitutional texts, of a broad list of fundamental rights.

The superior valuation of fundamental rights is a mark of the most contemporary constitutional texts, with several provisions that allow the deduction of the differentiated normative force of fundamental rights.

However, the jusfundamentalization of Law goes beyond the insertion, with material superiority, of fundamental rights norms in the Constitution. There is also a jusfundamentalization of the rest of the legal system on behalf of the expansive force of the Constitution itself. Thus, there is an impregnation of constitutional principles that bind the interpretation of the entire legal system. As Solozábal Echavarría clarifies, "the precepts that contain fundamental rights consist of main rules that refer to the entire legal system. They are, insofar as they are enshrined in the Constitution, at the head of the Constitution, and are the object of protection in its various disciplines".[17]

Associated with this recognition of the radiating effect of fundamental rights is the assumption of their objective dimension. It is recognized that fundamental rights, besides their subjective dimension, also have an objective dimension, resulting in the so-called "double dimension" of fundamental rights[18]. For Carvalho Ramos, fundamental rights "should not be understood only as a set of legal positions granted to their holders, but also as a set of rules that impose behaviors aimed at the protection and satisfaction of those subjective rights granted to individuals".[19]

Thus, the jusfundamentalization of Law requires that every interpretation be in conformity with fundamental rights. Capitant, in the same sense, emphasizes that fundamental rights constitute, nowadays, the supreme reference norms that tend to govern the production and interpretation of norms in all other areas of Law.[20] In line with this, Canotilho maintains that "... fundamental rights, conceived as a system or order, would constitute a systemic reference point (Bezugssystem) for the theory of the constitution and the State".[21]

Bringing this vision closer to the theme we are dealing with, we see that the jusfundamentalization of Law is an essential topic for understanding the criminal

[17] SOLOZÁBAL ECHAVARRÍA, Juan José. "Algunas cuestiones básicas de la teoría de los derechos fundamentales", *Revista de estudios políticos*, nº 71, 1991, pp. 87-110, available at http://www.cepc.es/rap/Publicaciones/Revistas/3/REPNE_071_094.pdf.

[18] As to the objective dimension of fundamental rights, see, among others, VIEIRA DE ANDRADE, José Carlos. *Os direitos fundamentais na Constituição portuguesa de 1976*, 2ª ed. Coimbra: Almedina, 2001, p. 149. HÄBERLE, Peter. *La libertà fondamentali nello Stato costituzionale*. Trad. Alessandro Fusillo e Romolo W. Rossi, Roma, La Nuova Italia Scientifica, 1996, p. 116. MENDES Gilmar Ferreira. *Direitos fundamentais e controle de constitucionalidade*, 1998, p. 214, and SARMENTO, Daniel. *Direitos fundamentais e relações privadas*, Rio de Janeiro : Lúmen Júris 2004, p. 371.

[19] CARVALHO RAMOS, André de. *Teoria Geral dos Direitos Humanos na Ordem Internacional.* 7ª Ed., São Paulo: Saraiva: 2019.

[20] CAPITANT, David. *Les effets juridiques des droits fondamentaux en Allemagne.* Paris: L.G.D.J., 2001.

[21] CANOTILHO, J.J. Gomes. *Direito Constitucional.* Coimbra: Almedina, 1993, pp. 505 - 506

prosecution of corruption, since the rules of substantive and procedural law on the subject do not always directly contemplate fundamental rights. Therefore, the irradiating effect of fundamental rights is essential. Given the predominance of the infra-constitutional status of the rules that incriminate acts of corruption, the reading of fundamental rights is essential.

This constitutional reading of the ordinary rules (legal or conventional) is in the core of what was referred to above as one of the facets of the jusfundamentalization of Law. More specifically, there are those who argue that this is a true "constitutional filtering", a phenomenon through which "the entire state legal system should be read under the optics of the constitutional axiology, materiality and jurisdiction"[22]. The normative force of the Constitution and of its fundamental rights imposes itself, then, requiring a re-reading of the criminal prosecution of corruption, so that the values, content and binding force of fundamental rights may be accepted.

III. International anti-corruption law: foundations and instruments

In general, corruption consists of the improper exercise of public power for private gain or, in other words, corruption is the abuse of public authority for private benefit[23]. It starts from the premise of the illicit use of state power for the benefit of an individual, generating direct or indirect losses to all members of society.

The genesis of international anti-corruption law is in the detection of unfair competition practices arising from bribes paid to foreign public officials to obtain a competitive advantage over rival companies in the 1970s. In the early years of that decade, a large scheme of corruption of foreign authorities (in Holland, Italy, Germany, Japan and Saudi Arabia) was discovered on the part of the American company Lockheed, which thus obtained large contracts for the acquisition of military aircrafts.[24]

In reaction to this scandal, in 1977, the Foreign Corrupt Practices Act was enacted in the US[25]., which led to the first investigations of corruption - even if transnational, i.e., carried out by U.S. agents outside the borders of that country. The FCPA fostered the inclusion of the fight against transnational corruption on the agenda of international

[22] SCHIER, Paulo Ricardo. *Filtragem Constitucional. Construindo uma nova dogmática jurídica.* Porto Alegre: Sérgio Antonio Fabris Editor, 1999, em especial p.25.

[23] The possibility of the existence of private corruption is not excluded, consisting of the abuse of power in private entities for the illicit benefit of an individual, which can generate negative social impacts. The private corruption, however, will not be addressed here. ALTAMIRANO, Giorleny D. "The impact of the inter-american Convention against corruption". In 38 University of Miami Inter-American Law Review, 2006-2007, p. 487-548, p. 488.

[24] This scandal reverberated in Brazil, due to the extradition requested by Italy of an individual for swindling and corruption due to his involvement in the Lockheed Italy scandal, in which he allegedly paid two Ministers of State and other high officials several bribes to secure the sale of 14 Hercules C-130 aircraft. After intense debate over whether the Italian Constitutional Court was an "exceptional court" or not, the extradition was, with votes to the contrary, granted. See SUPREMO TRIBUNAL FEDERAL, Extradition 347, Applicant State Italy, judged on December 7, 1977. See more on the subject at ABADE, Denise Neves. *Direitos Fundamentais na Cooperação Jurídica Internacional.* São Paulo: Saraiva, 2013.

[25] One of the best known cases of FCPA's incidence is the Lockheed-Takla case, which involved the payment of a bribe of 600,000 thousand dollars by the American company Lokheed to the Egyptian public authority in a bidding process. The company was ordered to pay a fine of nearly $25 million, meaning double the potential gain the company expected to make. See details at <http://fcpa.shearman.com/?s=matter&mode=form&id=38> 4 Como bem observado por CARVALHO RAMOS, André de. "O Combate Internacional à Corrupção e a Lei de Improbidade" in *Improbidade Administrativa, 10 anos da Lei nº 8.429/92,* (Sampaio, José Adércio Leite; Costa Neto, Nicolau Dino de Castro e; Silva Filho, Nívio de Freitas; e Anjos Filho, Robério Nunes dos, orgs.), Belo Horizonte: Editora Del Rey, 2002, p. 1-34

organizations, since its efficiency would depend on the combined efforts of the various states involved through international commitments.

Beginning in the 1990s, the fight against corruption began to move away from the concept of action against unfair competition to embrace the approach of defending internationally protected human rights, in particular the diffuse right to good governance.

The human rights grammar was introduced into the issue because it has been proven that corruption has a negative impact on several essential rights.

First, corruption hinders the availability of resources to be used in the realization of social rights. In turn, corruption undermines the strengthening of democracy, since, by allowing the governmental decision-making process to be illegitimately influenced by corrupting groups, it erodes trust and transparency in the relations between rulers and ruled. Third, corruption threatens equality by allowing unequal treatment for odious reasons (the payment of the bribe to the public official). Finally, corruption affects the proper functioning of public administration, affecting the diffuse right to an administration with integrity.

The importance of linking the fight against corruption to the violation of rights can be measured in both its preventive and repressive aspects. Regarding prevention, the culture of respect for human rights disseminates the diffuse right to a good administration, which helps to transform the acts of corruption into a socially harmful conduct, instead of being considered an inevitable and socially supported practice. The existence of the so-called Brazilian "jeitinho" (or "way") demonstrates, for Rosenn, a certain accommodation of social groups with corrupt practices aimed at promoting behaviors of non-submission to the law, which, in the long run, constitutes "serious obstacles to development".[26]

Respect for the right to equality is violated by acts of corruption, since the illicit influence of state agents through the acts of private individuals generates unjustified asymmetric treatment. The reaffirmation of equality and respect for legality prevents the commission of acts of corruption and facilitates repression by encouraging testimonials or other forms of collaboration to expose practices that are invariably clandestine.

Also, from the preventive point of view, respect for various rights, such as freedom of expression, of association, or even of information, contributes to revealing acts of corruption, which has repercussions, in the long run, in the formation of an anti-corruption culture in society. The existence of private associations aimed at monitoring state acts or even a free and independent press increases the likelihood of uncovering illicit practices, discouraging potential perpetrators.

Regarding the repression of acts of corruption, the link with the protection of human rights helps to reveal the social gain that comes from the creation of anti-corruption mechanisms in a given society. Not only does it increase the protection of social rights, but it also prevents the use of acts of corruption aimed at using public agents in acts of oppression, as seen in the use of corrupt police officers in death squads or militias.

It is in this contemporary context that the international texts mentioned below emerged:

IV. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Until the 1970s, corruption was treated as a domestic issue that did not justify systematic international intervention. Since then, the control of corruption has been seen as an

5 ROSENN, Keith S. “Brazil´s legal culture: the jeito revisited”. Florida International Law Journal, 1984, vol I, p. 1-43, em especial p. 43.

international policy objective - not least because the money and actions of corrupt and corrupting groups cross borders and defy the domestic jurisdiction of countries. [27]

It is not by chance that the Organization for Economic Cooperation and Development (OECD) organized in 1984 its first Antibribery Recommendation, in which it asked its member states to commit themselves to repress bribery and corrupt practices that illegally favor a certain company or business. The request was reiterated in a new recommendation issued in 1996, in which the OECD Council called for a ban on the tax deduction provided for in domestic laws - as a kind of "operating expense" - of bribes paid by companies in foreign activities.

Following the trend, an international milestone in the fight against corruption was the Convention on Corruption of Public Officials in International Business Transactions, prepared by the OECD and submitted for signature and ratification by any state, whether a member or not of the organization.[28]

This is an important and pioneering instrument for combating transnational corruption, because it is aimed at curbing acts of corruption committed by multinational companies operating in foreign markets. The focus of this international norm, however, is primarily on the protection of free competition.

In fact, the Convention determines in its first article that "each party shall take all measures necessary to establish that, under its laws, it is a criminal offense for any person knowingly to offer, promise or give any undue pecuniary or other advantage, directly or through intermediaries, to a foreign public official, for that official or for a third party, causing the official to act or fail to act in the performance of his official duties, for the purpose of effecting or hindering transactions or obtaining another illicit advantage in the conduct of international business. The concern of the OECD with the unfair competition that arises from corruption is quite obvious from the definition of the scope of the criminal act and its necessary link with business interests.

V. The Inter-American Convention Against Corruption (IACAC)

On March 29, 1996, in Caracas, Venezuela, within the framework of the Organization of American States (OAS), the Inter-American Convention against Corruption was signed. It was the first generic anti-corruption convention in international law, prior to the UN Convention on the matter (see below).

Its objectives are broad: to prevent, criminalize, and investigate cases of corruption in the public sector, and to encourage international legal cooperation among states on the subject. [29].

Already in its preamble, the States recognize that corruption - which is also one of the means used by organized crime - "undermines the legitimacy of public institutions, undermines society, the moral order and justice, and the development of peoples. It explicitly mentions the strengthening of democracy by fighting the impunity of corrupt agents.

The OAS Convention establishes that the handling of public goods is governed by the principle of publicity, efficiency, and equity (Article III, 5). In other words, in any case of contracting a public service, work, or investment, the efficiency of public spending

[27] See, in this sense JOHNSTON, Michael. "Cross-border Corruption: Points of Vulnerability and Challenges for Reform". *Corruption and Integrity Improvement Initiatives in Developing Countries,* 1998, vol 13.

[28] The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention) was concluded in Paris on December 17, 1997, and entered into force internationally on February 15, 1999.

[29] ALTAMIRANO, Giorleny D. Op. cit., em especial p. 489.

must be questioned. Furthermore, in the case of the establishment of public tariffs or prices, fairness in relations with the user must be taken into consideration, preventing the establishment of abusive tariffs. For the Convention, the public administrator is not at liberty to manage public funds. In fact, unnecessary or superfluous expenses, the realization of useless projects or even the negligent treatment of public affairs are forbidden conducts. [30].

In Carvalho Ramos' summing up, there are four conducts listed as acts of corruption by the OAS Convention. The first refers to the solicitation or acceptance of a benefit to do or not to do an official act. The second conduct is that of the person who offers or grants an advantage to the official to do or not to do an official act. The third conduct refers to the form of embezzlement consisting in the performance of an act or omission to obtain an illicit advantage. And finally, the use or concealment of the benefit of these acts. [31].

It must be emphasized that, according to Article XII of the OAS Convention, there is no requirement that the acts of corruption listed above produce patrimonial damage to the State. The damage, therefore, may be caused by the attempted commission of the act or even, when committed, by the offense to the moral patrimony of the entity, which includes the ideal of honesty and morality in public affairs.

VI. The United Nations Convention Against Corruption (Mérida Convention-UNCAC)

The United Nations Convention against Corruption (UNCAC), negotiated for years in Vienna, was initially signed by one hundred and eleven countries in the city of Mérida, Mexico, between December 9 and 11, 2003. Comprising 71 articles, it is the largest binding international document dealing with corruption. The text is very broad and includes from the establishment of tools to prevent conduct to sanctions and ways to recover the misappropriated assets.

Certainly the Mérida Convention is a true milestone in the fight against corruption.

Although it is the most extensive, the United Nations Convention against Corruption was not, as seen above, the pioneer to address the issue: it has as precedents other international instruments, such as the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, of the Organization for Economic Cooperation and Development (OECD) and the Inter-American Convention against Corruption, of the Organization of American States (OAS).

It is divided into eight chapters: (i) general provisions, (ii) preventive measures[32], (iii) penalization and law enforcement; (iv) international cooperation; (v) recovery of assets; (vi) technical assistance and exchange of information between agencies; (vii) mechanisms for the application of the Convention and (viii) final provisions.

With respect to criminal matters, the Mérida Convention establishes international criminalization mandates for States parties to criminalize: bribery of national and foreign public officials and public international organizations; embezzlement, embezzlement,

[30] CARVALHO RAMOS, André de. Op. cit., em especial p. 23.
[31] CARVALHO RAMOS, André de. Op. cit., em especial p. 26.
[32]This section includes preventive measures aimed specifically at the judiciary and the public prosecutor's office, as provided in article 11: "Article 11. 1. Bearing in mind the independence of the judiciary and its decisive role in the fight against corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without disregarding the independence of the judiciary, adopt measures to strengthen the integrity of, and avoid any opportunity for corruption among, members of the judiciary. Such measures may include rules governing the conduct of members of the judiciary. 2. Measures similar to those adopted in paragraph 1 of the present article may be formulated and applied in States Parties where the public prosecutor's office is not part of the judiciary but enjoys similar independence".

embezzlement or other forms of misappropriation of assets, influence peddling, abuse of office, and illicit enrichment of public officials, as well as bribery and embezzlement in the private sector; laundering of proceeds of crime, concealment of crime, and obstruction of justice. It requires States parties to establish (i) criminal, civil and administrative responsibility of legal entities; (ii) that in the mentioned criminal modalities it is possible to punish the different forms of participation and attempt and (iii) that the knowledge, intention or purpose required as an element of a crime typifying observance of the convention may be inferred from objective factual circumstances.

Therefore, there are significant repercussions of the Merida Convention in the criminal field. First, the Convention requires countries to have different types of crimes relating to acts of corruption, if not already provided for by national laws. The Convention is considered innovative because, in addition to requiring the criminalization of the so-called "basic forms of corruption," such as bribery and embezzlement of public funds, it also seeks to criminalize new forms of corruption, such as trading in influence, protection and cover for acts of corruption, obstruction of justice, money laundering, and legalization of illicit assets obtained through corruption. The Convention also addresses corruption in the private sector. Its stipulations concerning criminal classification are innovative international criminalization mandates that oblige states to legislate criminally.

In the field of criminal procedure, the States Parties agreed to establish international cooperation frameworks in all aspects of the fight against corruption, which generated norms on the prevention, investigation, and punishment of criminals. To this end, there was provision for international legal cooperation and mechanisms for the collection and transfer of evidence that can be used in trials in other countries, as well as provision for the extradition of those responsible. There is also the duty to adopt measures to facilitate the tracing, freezing, seizure, and confiscation of the proceeds of corruption.

The United Nations Convention against Corruption also innovates by providing for the obligation of States to continually reflect on the effectiveness of anti-corruption measures adopted. In this regard, Brazil has committed itself, for example, to periodically evaluate legal instruments in order to determine whether they are adequate to combat corruption (art. 5).

VII. Conclusion

A new approach to the concept of corruption is needed to direct anti-corruption measures toward a focus on preserving human rights. Indeed, for the World Bank, corruption consists of the exercise of public power for private gain; for the International Monetary Fund, corruption is the abuse of public authority for private gain 33. For the United Nations Office on Drugs and Crime (UNODC), the concept encompasses "the practices of bribery and kickbacks, fraud, embezzlement, or any other misappropriation of resources by a public official. In addition, it may involve cases of nepotism, extortion, influence peddling, the use of privileged information for personal purposes, and the buying and selling of court judgments, among several other practices. 34. The traditional approach remains focused on the prosecution of individuals and organizations that disregards a human rights perspective

Corruption - including criminal forms in which it often appears, such as human trafficking, firearms trafficking, money laundering - fuels income inequality as well as

[33] Cf. ALTAMIRANO, Giorleny D. The impact of the Inter-american Convention Against Corruption. *University of Miami Inter-American Law Review*, Miami, n. 38, p. 487-548, 2006-2007l, p. 488).

[34] https://www.unodc.org/lpo-brazil/pt/corrupcao/index.html, accessed July 31, 2021

violence. It inhibits legitimate social and economic activity, poses a serious threat to public health and peace, and undermines gender equality.

Strengthening a human rights-sensitive anticorruption legal framework will promote and strengthen a criminal justice regime that is consistent with the rule of law (SDG 16) to address inequalities, eliminate discrimination, and strengthen respect for the rights of individuals, including greater attention to assisting victims of corruption.

Placing the fight against corruption in the context of human rights is thus necessary for sustainable and inclusive development, which will not be achieved until equal rights and opportunities are guaranteed. As long as corruption exists - in the form of tax distortions, mismanagement, or both - inequality will continue to undermine the building of solid and prosperous societies.

Democracy and justice will not thrive effectively unless there is a comprehensive approach to fighting corruption. Change requires the participation of all social actors and the strengthening of democratic institutions.

For this reason, the pursuit of the values enshrined in human rights protection texts must be a priority in the prosecution of corruption.

References

ABADE, Denise Neves. "Bens jurídicos e direitos: repensando a competência penal nas infrações contra a livre-concorrência" in *Revista Brasileira de Ciências Criminais* São Paulo, n. 172, ano 28, p. 59-96, out/2020

ABADE, Denise Neves. "Desafios para o enfrentamento da corrupção transnacional a partir do enfoque do Direito Internacional da Anticorrupção". *Publicações da Escola da AGU: Direito, Gestão e Democracia,* v. 12. Brasília: Advocacia-Geral da União, p. 255-276, 2020

ABADE, Denise Neves. *Direitos Fundamentais na Cooperação Jurídica Internacional.* São Paulo: Saraiva, 2013.

ALTAMIRANO, Giorleny D. The impact of the Inter-american Convention Against Corruption. *University of Miami Inter-American Law Review*, Miami, n. 38, p. 487-548, 2006-2007

ANDRADE, José Carlos. *Os direitos fundamentais na Constituição portuguesa de 1976*, 2ª ed. Coimbra: Almedina, 2001.

APPIO Eduardo Fernando. *Interpretação conforme a Constituição*, Curitiba: Juruá, 2002, p. 78 -79.

BARROSO, Luís Roberto. "Neoconstitucionalismo e Constitucionalização do Direito" in *Revista da Escola Nacional da Magistratura* - Ano I, nº 2, Brasília: Escola Nacional da Magistratura, 2006, pp.26-72, em especial p.50.

BILBAO UBILLOS, Juan Maria. *La eficácia de los derechos fundamentales frente a particulares. Análisis de la jurisprudência del Tribunal Constitucional.* Madrid: Centro de Estudios Políticos y Constitucionales, 1997

BONAVIDES, Paulo. "Prefácio" in SARLET, Ingo Wolfgang. *Dignidade da pessoa humana e direitos fundamentais na Constituição Federal de 1988*. 4ª ed. Porto Alegre: Livraria do Advogado, 2006.

CANOTILHO, J.J. Gomes. *Direito Constitucional.* Coimbra: Almedina, 1993

CAPITANT, David. *Les effets juridiques des droits fondamentaux en Allemagne.* Paris : L.G.D.J., 2001.

CARVALHO RAMOS, André de. "O Combate Internacional à Corrupção e a Lei de Improbidade" in *Improbidade Administrativa, 10 anos da Lei nº 8.429/92,* (Sampaio, José Adércio Leite;Costa Neto, Nicolau Dino de Castro e; Silva Filho, Nívio de

Freitas; e Anjos Filho,Robério Nunes dos, orgs.), Belo Horizonte: Editora Del Rey, 2002, p. 1-34

CARVALHO RAMOS, André de. *Teoria Geral dos Direitos Humanos na Ordem Internacional.* 7ª Ed., São Paulo: Saraiva: 2019.

CARVALHO RAMOS, André. *Curso de Direitos Humanos, 8ª ed.* São Paulo: Saraiva, 2021, p. 1068

COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS, Resolução 1/18, aprovada em Bogotá, Colombia, em março de 2018, disponível em https://www.oas.org/es/cidh/decisiones/pdf/Resolucion-1-18-es.pdf, acesso em 15/07/2021.

COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS. *Corrupción y derechos humanos: Estándares interamericanos.* Washington, OAS-Documentos oficiales, 2019. Disponível em http://www.oas.org/es/cidh/informes/pdfs/CorrupcionDDHHES.pdf, acesso em 15/07/2021.

COMITÊ CEDAW. *, Recomendação Geral No 33, sobre o acesso das mulheres à justiça*, item I

GARCÍA DE ENTERRÍA, Eduardo. *La Constitución como norma y el Tribunal Constitucional*. Madrid: Editorial Civitas, 1994

GARCÍA DE ENTERRÍA, Eduardo. "La constitución española de 1978 como pacto social y como norma jurídica" in *Revista de Direito do Estado*. Rio de Janeiro: Renovar, v. 1, n. 1, 2006, p. 3-23.

GUASTINI, Riccardo. "A 'constitucionalização' do ordenamento jurídico e a experiência italiana" in SOUZA NETO, Cláudio Pereira e SARMENTO, Daniel. *A constitucionalização do Direito – fundamentos teóricos e aplicações específicas.* Rio de Janeiro: Lúmen Júris, 2007, pp. 271-293.

HÄBERLE, Peter. *La libertà fondamentali nello Stato costituzionale*. Trad. Alessandro Fusillo e Romolo W. Rossi, Roma, La Nuova Italia Scientifica, 1996

HESSE, Konrad. *A força normativa da Constituição*. Tradução de Gilmar Ferreira Mendes. Porto Alegre: Sergio Antonio Fabris Editor, 1991.

JELLINEK, George. *Sistema dei diritti pubblici subbiettivi.* Milano: Sociteà Editrice Libraria, 1919.

JOHNSTON, Michael. "Cross-border Corruption: Points of Vulnerability and Challenges for Reform". *Corruption and Integrity Improvement Initiatives in Developing Countries,* 1998, vol 13.

LOW, Lucinda. "Towards Universal International Anticorruption Standards: The United Nations Convention Against Corruption and Other International Anticorruption Treaties: Too Much of a Good Thing?", *in* Second Annual Conference of the International Bar Association- IBA, International Chamber of Commerce - ICC, Organization for Economic Cooperation and Development- OCDE, "The Awakening Giant of Anticorruption Enforcement", 22-23 de abril, Paris, 2004.

MENDES Gilmar Ferreira. *Direitos fundamentais e controle de constitucionalidade*, 1998

MENDES, Gilmar Ferreira; COELHO, Inocêncio Mártires e BRANCO, Paulo Gustavo Gonet. *Curso de Direito Constitucional.* São Paulo: Saraiva, 2007, em especial p.1185-1187.

PREISS, Richard T. "Privacy of Financial Information and Civil Rights Issues: The Implications for Investing and Prosecuting International Economic Crime" in

RIDER, Barry and ASHE, Michael. (Eds), *Money Laundering Control.* Dublin*:* Round Hall Sweet & Maxwell. 1996, p. 343-360.

QUEIROZ, Cristina M.M. *Direitos Fundamentais: teoria geral.* Coimbra: Coimbra Editora, 2002, p. 39.

QUEIROZ, Cristina M.M. *Dreitos Fundamentais: teoria geral.* Coimbra: Coimbra Editora, 2002

ROSENN, Keith S. "Brazil´s legal culture: the jeito revisited". Florida International Law Journal, 1984, vol I, p. 1-43

SARMENTO, Daniel. *Direitos fundamentais e relações privadas*, Rio de Janeiro : Lúmen Júris 2004.

SCHIER, Paulo Ricardo. *Filtragem Constitucional. Construindo uma nova dogmática jurídica.* Porto Alegre: Sérgio Antonio Fabris Editor, 1999.

SILVA, Virgílio Afonso da (org.). *Interpretação constitucional*. São Paulo: Malheiros, 2005

SILVA, Virgílio Afonso da. *A Constitucionalização do Direito.* São Paulo: Ed. Malheiros, 2005

SOLOZÁBAL ECHAVARRÍA, Juan José. "Algunas cuestiones básicas de la teoría de los derechos fundamentales", *Revista de estudios políticos*, nº 71, 1991, pp. 87-110, também disponible em http://www.cepc.es/rap/Publicaciones/Revistas/3/REPNE_071_094.pdf,.

VALE, André Rufino do. *Eficácia dos direitos fundamentais nas relações privadas.* Porto Alegre: Sérgio Fabris Ed., 2004, p. 100.

VIEIRA DE ANDRADE, José Carlos. *Os direitos fundamentais na Constituição portuguesa de 1976*, 2ª ed. Coimbra: Almedina, 2001.