



# *Contemporaneous Challenges in Fighting Corruption: When Large Part of the System is Overwhelmed by Corruption*



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# Appellate Court Judge *Fausto De Sanctis*

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## Professional Career

- Federal Appeals Judge Brazil (since 2011-present); Federal District Court Judge Brazil (1991 – 2011) – From 2004 served in a Specialized Money Laundering Court;
- São Paulo State Court Judge (1990 - 1991); Public State Attorney (1989 – 1990);
- Judicial Fellowship at the Federal Judicial Center-Washington, D.C. (2012); Joined the Advisory Board of the American University Program for Judicial and Legal Studies Brazil – United States (since 2013);

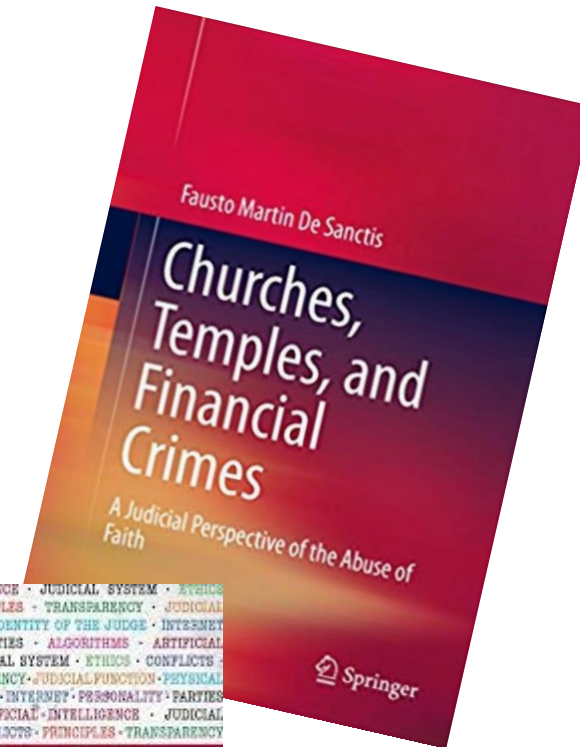
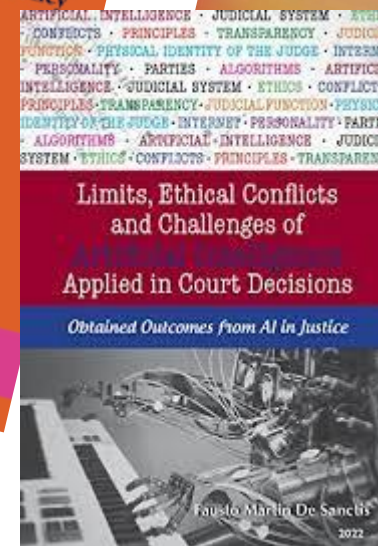
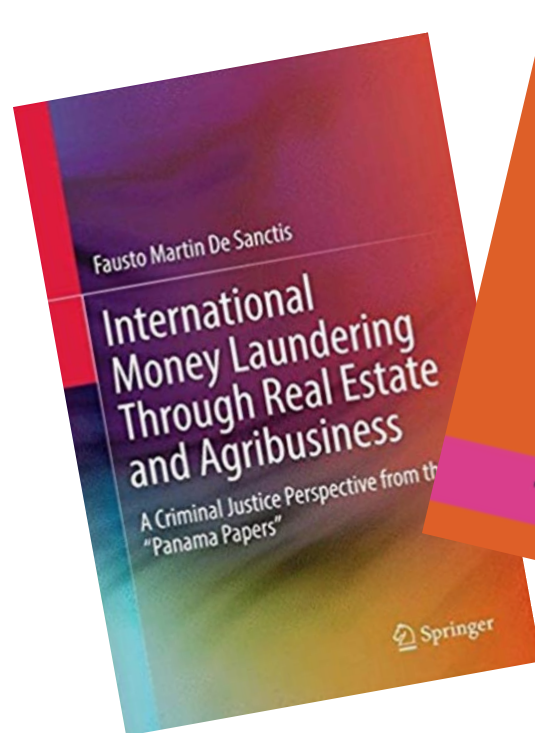


# Appellate Court Judge *Fausto De Sanctis*

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*Pioneer 1. In the early sale of goods (before the final decision); 2. Requiring payment of rewards as a way of demonstrating regret in award-winning Plea Agreement, serving as a basis for regulation of the law; 3. In the allocation of resources to charities (as a form of indemnification to society and show of repentance); 4. Donation of artworks for cultural entities and destination to public squares; 5. In the procedure of telephone/data monitoring, adopted by the subsequent legislation; 6. Effective International Cooperation Repatriation, Frozen Assets, etc.*

Books and articles, among them: “Fighting Wars Through Anti-Money Laundering Police (2023); “Limits, Ethical Conflicts and Challenges of Artificial Intelligence Applied in Court Decisions” (2022); “Technology Enhanced Methods of Money Laundering (2019); “International Money Laundering Through Real Estate and Agribusiness. A Criminal Justice Perspective from the ‘Panama Papers’” (Springer/2017); “Churches, Temples, and Financial Crimes. A Judicial Perspective of the Abuse of Faith” (Springer, 2015); “Football, Gambling, and Money Laundering: A Global Criminal Justice Perspective” (Springer, 2014); “Money Laundering through Art. A Criminal Justice Perspective” (Springer, 2013).



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# Challenging Question

**How to deal with those that are responsible for criminal enforcement, including the courts, when large part of the system is overwhelmed by corruption?**



# Brazil Before 1988

Dictatorship Periods: 1937 - 1946 / 1964-1985

Strong Link Between Politicians and Economic Power

No Rights Era - Only Duties

O Brasil  
antes de  
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# 1988 – Citizen's Constitution

## Rights and Duties Established:

### People's voice:

- Habeas Data
- Popular Action
- Habeas Corpus
- Injunction Writ
- Writ of Mandamus

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## **Last Four Decades**

**Several Scandals**

**Media Role**

**Judiciary Tolerance**



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# Judicial Branch

## Chronic and Institutional Problems:

- **Slowness**
- **Lack of Efficiency**
- **Lack of a Rational Appeal System**
- **“Apartheid Law”**
- **Scarce Activity of the Judiciary**

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# Effectiveness & Transparency

- Brazil had **84 million cases, pending at the end of 2023**, 71,3 million at the end of 2022; 75.4 million cases at the end of 2021; 77.1 million cases at the end of 2019;
- **National Council of Justice/CNJ**
- **Self-cleaning**
- **TV/Internet Coverage**

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# Specialized Courts on Money Laundering

**ENCCLA: National Strategy to Combat Corruption and Money Laundering**

**Creation of Specialized Courts in Financial Crimes and ML**

**Clean Record Law**

**Administrative Misconduct**

**Anti-Corruption Law**

**Free Public Information Access Law**

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# Outcomes of ENCCLA

## **Criminal Procedure Code**

**New Money-Laundering Act** (Law n° 9,613, March 3, 1998, and Law n° 12,683, July 9, 2012)

**Organized Crime Act** (Law n° 12,850, Aug 18, 2013)

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# Corruption Cases and Judicial Activism

- 1. Satiagraha/2008**
- 2. Castelo de Areia/2009**
- 3. Porto Seguro/2012**
- 4. Mensalão/2012-2013**
- 5. Lavajato/Car Wash/2014**
- 6. Rachadinha/2016-2017**

# Car Wash Case



1º INSTANCE (Sao Paulo, Curitiba and Rio de Janeiro):

**399** Plea Bargaining;

**361** Convictions (several political parties):

2 previous presidents Lula, Temer.

3 previous Governors of Rio –Cabral, Garotinho e Pezão)

1 previous from Paraná – Beto Richa

1 previous from Minas – Azeredo; one in a final decision/Aécio

1 former president of the House of Representatives – Cunha.



**BRAZILIAN SUPREME COURT:**

**71** investigations; 1 convicted politician.



# CARTEL: ILLEGAL AGREEMENT AMONG BIDDERS BEFORE BIDDING

Administrative Center of Federal District:



Port of Suape:



# TARGETING: ADDRESSING BIDDINGS

**Minas Gerais**  
**Administrative City:**

**Sertão Alagoano Chanel:**



**Bridge over Negro River:**





# INTERFERENCE IN THE BIDDING NOTICE AND ADDITIONAL CONTRACTS

**Southern Branch of the Rodoanel in SP:**



**Fonte Nova**

**Arena:**



**Jirau Hydroelectric Plant:**



# CIRCUMVENTING THE BIDDING LAW

A bidding process offers three different moments in which corruption may occur:

- the formation of a cartel among competing companies;
- during the bidding process, and;
- the execution of the work or service.

Most of the irregularities pointed out in the Car Wash case should be framed in the articles of the Criminal Code on active corruption, passive corruption and money laundering.

## PLEA AGREEMENT:

### HOW BUSINESSMEN AND POLITICIANS 'DRIBBLED' THE BIDDING LAW

Bidding cases won by **Odebrecht in several states help explain how irregularities were practiced before signing the contracts or during the execution of the works.**

Created in 1993 to prevent irregularities in contracts among private companies and governments, the Bidding Law (former Law n. 8,666, June 21, 1993; new Law 14,133, April 1, 2021) was challenged by the plea agreements of former Odebrecht high-ranking executives (CEOs) in Carwash Case (“Lavajato”).

The plea agreements in the **270 hours of testimony** showed that both public and private agents found ways to "dribble" the law and gained advantages in contracts with the government, causing harm to the population.

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# Complexity of the Brazilian Appeal System

The complexity of the Brazilian Appeal System can be shown from different possibilities of appeals, writ of *habeas corpus*, and criminal review action. Change of jurisprudential understanding with retroactive effect to reach past decisions.

Are the annulments of the Car Wash case the result of technical or political decisions?



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## Questions we ask ourselves today after Car Wash

The discussion has gained relevance in the media due to the request for the opening of an investigation by then Chief Justice Dias Toffoli, for the purpose of investigating crimes against honor and threats to some Justices of the Court.

The request to open an investigation is based on art. 43 of the Internal Regulations of the Brazilian Supreme Court (RISTF), provides:

***Art. 43. In the event of an infringement of criminal law at the seat or dependency of the Court, the President will initiate an investigation, if it involves an authority or person subject to its jurisdiction or will delegate this attribution to another Justice.***

Doubts have arisen as to the interpretation to be given in relation to what can be considered “seat or dependence of the Court”, which according to the Chief Justice, is interpreted extensively, in order to allow any crime committed in the face of the Supreme Court and its members throughout the national territory, can be investigated based on an inquiry initiated ex officio by the court, since the Justice is a Justice anywhere.

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# Integrity: Concept

*Behavior of individuals and an organization to follow the rule of law with effectiveness and transparency.*

It requires:

- **Trust** – working together;
- **Cooperation** – for common objectives unless it is not possible to get what you need;
- **Sound individuals and corporations: 1.** By raising integrity and anti-corruption compliance standards **in the private sector** (ESG Policy); **in government and elections** (through transparency and accountability, promoting campaign finance reports, financial disclosures reports, gift disclosures; **2.** By **closing loopholes** in anti-money laundering framework that allow corrupt people to enjoy the proceeds of crime like corruption.

**Corrupt people make rational decisions and they evaluate how far they can go.**

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# Integrity: Normative Prediction

International Conventions adopt a comprehensive approach to corruption, calling for **a wide range of measures to prevent it, measures to punish it, measures to check corruption** (related to money laundering), and **to assist countries**.

- 1. The United Nations Convention against Corruption – UNCAC is the most comprehensive convention.**
- 2. The Organisation for Economic Co-operation and Development – OECD Anti-bribery Convention.**

**Does the fact of cooperating with international conventions mean a desire to fight corruption? Adopting is one thing. Building effective capacities is another.**

Both start **mistaken premises** that often **do not correspond to what really exists institutionally in countries dominated by dictators or (systemic) corruption**: for instance, when there is a **moral crisis at all levels of power, when judicial decisions have led to mistrust in view of the rigor and disproportions of decisions for the alleged fake news of electoral campaigns, in relation to those who fought corruption (release of corrupt and frequent annulment of corruption operations – Brazil.**

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# Jakarta Principles and Colombo Protocol

The **Jakarta Principles** (2012) as supplemented by the **Colombo Protocol** Commentary (2020) **identify principles** that should be followed by countries when designing the legal and institutional frameworks to ensure independence and effectiveness ranging from **an adequate legal mandate, safeguards regarding appointment and dismissal leadership, adequate control over financial and human resources and effective accountability mechanisms.**

They focus on Anti-Corruption Agencies – ACAs but not on the judicial courts.

When corruption is systemic there are vested interests to maintain the *status quo* at multiple levels. State was captured. Most specialized agencies charged with investigation and prosecution of corruption fail.

**Art. 36, UNCAC** – persons specialized **with the necessary independence.**

# Georgetown University Americas Institute

It has a

*2023-2024 Study on  
Enhancing Corruption  
Enforcement: Putting in Place  
and Effective Appointment  
Process.*

By,

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# Mistrust of the Effectiveness of the Entire Anti-Corruption System

- 1. Any proposal must begin with recognition of its complexity in terms of nature and extension.**
- 2. When it comes the norm (systematic), the underlying causes are of a structural nature and cannot be explained simply in terms of the failings of individuals, but the enabling environmental (organized crime, cultural/courtesy, natural resources, post-conflict situations).**
- 3. It can be addressed through Award Forms (emotional reward, orders, prizes, and titles), but also through criminal enforcement (to deter wrongdoers).**
- 4. The rule of law is weak and impunity is high relying on awards alone. They may not outweigh the social and financial gains of violating anti-corruption standards.**
- 5. The effectiveness depends on the risks of being caught. If the risks are low, corruption is a profitable and rational decision. Enforcement Institutions need to address in international best practices that have been enforced by the international community, but it of limited relevance if there is no political will.**



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# Mistrust of the Effectiveness of the Entire Anti-Corruption System

6. Enforcement Institutions need to address in international best practices that have been enforced by the international community, but it of limited relevance if there is no political will.
7. The difficulty in systematically corrupt countries – some of the most corrupt institutions are those that are responsible for criminal enforcement, namely, the police, the prosecution and the courts. The system is what we see and what we don't see. Transparency to see the truth. How to react with it? Destroying the Proceeding that led to it?
8. Make a legal reform. Domestic conditions of it must be in place – a landslide election of a government based on an anti-corruption platform, series of serious scandals lead to na emerging consensus that corruption has had a devastating and corrosive impact on economic prosperity, democratic integrity and the rule of law.
9. Putting in place na Effective Appointment Process – failure to appoint leaders who have both the substantive qualifications and a track record of integrity and Independence. Jakarta: “appointed through a process that ensures their apolitical stance, impartiality, neutrality, integrity, and competence”.
10. Selection Committee – responsible for identifying the candidates that may presented to Parliament from both public and private sectors (academics and non-governmental organizations – NGOs), and transparency requirements, with possibility to remove from the position.

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## Creation of an International Anti-Corruption Court?

The IACC already has the support of more than 275 world leaders - including former Heads of State and of Current and former government, government and intergovernmental officials and representatives of civil society, business and religious communities - from more than 40 countries.

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# Conclusions

- 1. The Car Wash case has been one of the pivotal cases in shaping the Brazilian anti-corruption landscape.**
- 2. Also again, it deeply challenged the Judicial System, which is marked by decisions by simple alteration of legal understanding.**
- 3. Independent trial judges in Brazil have exercised a direct impact on the electoral process.**
- 4. STF's change of opinion regarding incarceration after a criminal conviction (admission in 1999 and 2016 – prohibition in 2009 and 2019).**
- 5. Conflicting or poorly settled decisions have impacted legal security and give the impression that they are taken for the benefit of the criminal elite, and or politicians, which is perpetuated with the certainty that at some point decisions of higher courts will benefit them.**

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## Conclusions

- 6. Superior Courts have become considered by people a kind of an "operation cemetery", sealing the outcome of investigations that have upset politicians and their families, executives, bankers, and private companies.**
- 7. The Brazilian experience, when it does not distinguish social extracts, has been successful (despite the procedural obstacles and extreme right to appeals and broad defense), representing a hope in a law, in criminal law, as well as in the Federal Justice, as instruments of solution and appeasement of social conflicts.**
- 8. The same cannot be said of political-economic crimes. That is why a careful review of the appeal system must be done in order to ensure greater effectiveness of anti-corruption actions, besides of the way in which Justices are selected.**
- 9. The UNCAC, Jakarta principles and its Colombo Commentary need to focus beyond Anti-Corruption Agencies – ACAs but on the Judiciary system as a whole.**
- 10. Countries either opt for a perennial weak justice system, that remains with interminable scandals, or improves it definitively. The creation of an International Anti-Corruption Court seems to be a solution.**



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