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# Anti-corruption Legalism and Moralizing Authoritarianism in Brazil

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Considering the experience of the first few months of the Bolsonaro administration in Brazil, it is hard to say that bolsonarismo constitutes a coherent and articulate ideology. Different political groups in Brazil have questioned his ability to govern; he has already reached the highest level of popular rejection for a first-term elected Brazilian president, and his own supporters have disputed his authority. These disputes start at home. They include his inner family circle and the influence of his three politician sons on the presidency – a critical influence due to the recent revelations of the family's ties with militia groups in Rio de Janeiro. These disputes around Bolsonaro's authority are also fuelled by the neoliberal views of the Economy Minister Paulo Guedes, the moralizing anti-corruption campaign of Minister of Justice Sérgio Moro, and the alleged intellectual guidance of right-wing polemicist Olavo de Carvalho. The strong presence of the military and the political positioning of Vice President Hamilton Mourão as a moderate voice within the government, as well as the support of catholic and evangelical conservatives are also important features of this context. In other words, the current Brazilian president has been unable to mediate such political tensions. This lack of ability and political leadership prevents both substantive reflection and political action to address Brazil's major problems, such as inequality and poverty.

I am interested in understanding the ways in which law has played an important role in creating the conditions that led to Bolsonaro's presidency. This was not a straightforward process, and it is necessary to delve deep into the inner workings of law as politics in Brazil. In particular, I want to explore how law has played a role in creating political space for so many different groups to join forces in

their fierce criticism of the Workers' Party (Partido dos Trabalhadores, PT), and their strong discourses against corruption, the left, human rights, climate change, and so-called 'globalism'. At first glance, the current discourses against 'globalism' in Brazil might seem dismissive of international law. Nevertheless, they put forward a particular perspective of international ordering, relying on the liberalization of the economy, and the so-called values of faith, family, and patriotism. Such values inform particular views on human rights, the environment, crime and violence, and corruption. In this contribution, I will set out the ways in which the Brazilian anti-corruption scheme was structured and expanded via law, as a means of fighting political corruption. This was an essential aspect of the process that led to the election of Bolsonaro. I will also attempt to think through a productive critical role for law and lawyers in the current Brazilian political context.

The rise of Jair Bolsonaro has been the subject of intense academic inquiry. To illustrate, a special issue in *Nexo* presented a set of academic analyses which explore the many political crises recently experienced in Brazil, including the 2016 impeachment of President Dilma Rousseff. The June 2013 protests are presented by Angela Alonso as an entry point to understand social and political polarization in Brazil. It was precisely this polarization that contributed to the far-right turn in the country. For Alvaro A. Comin, this unresolved Brazilian context of social and political polarization is connected to a global setting in which polarization scenarios are related to the progressive emptying of the developmental role of the nation-state. A third interpretation by Maria Hermínia Tavares de Almeida asserts the end of a durable political convergence between the reduction of inequality, the so-called social contract of the 1988 Brazilian constitution, and the promotion of economic growth through monetary stabilization and tax moderation. Even in light of different articulations between these two objectives by political forces both on the left and on the right, these two axes have been fundamental to Brazilian politics since the restoration of democracy in the country in the 1980s. Other productive analyses include the role of the middle classes and their shift to the far-right, the rise of Bolsonaro as part of a democratic decay in Brazil, and the particularities of the structure of Bolsonaro's campaign on social networks – especially the centrality of WhatsApp, one of the most used forms of communication among Brazilians.

## Anti-Corruption as Legal Structure

Notwithstanding the academic debates over *why* Bolsanaro was successful, my focus is more on the *how* question. I seek to interrogate the ways in which law played a role in creating the conditions that led to the election of Bolsonaro, with especial attention to legal issues related to fighting political corruption. Nevertheless,

describing what has been happening in Brazil as an example of a conservative group instrumentalizing the law only tells part of the story. Despite the recent leaked materials showing the manipulation of law in the context of "Operation Car Wash" in Brazil, the anti-corruption scheme has been structured and expanded through law in a way that cannot be fully reduced to a conservative master plan directed at destroying the political force of PT.

An intense anti-corruption legal battle unfolded during the first mandate of President Lula, in 2005, with the scandal of 'Mensalão' – a legislative vote-buying scheme directed to ensure the support of congressional representatives for core political projects of PT.[1] To be sure, political corruption did not start in 2005 in Brazil. A quick review of post-authoritarian presidencies reveals that all administrations have faced accusations of political corruption,[2] broadly understood as 'the misuse of public office for private gain'[3]. Given historical impunity for high-ranking politicians facing charges of corruption, the 'Mensalão' trial of December 2012 became a landmark case as it convicted 25 of the original 40 defendants.

Brazilian criminal law establishes specific corruption crimes to protect public administration by bringing in technical legal criteria to assess political graft. These crimes are passive corruption (a public official who receives or asks for pecuniary or other undue advantages) and active corruption (when a private person offers or promises pecuniary or other undue advantages to a public official in exchange for certain official acts). The Brazilian Criminal Code dates back to 1940. Its bilateral scheme of passive and active corruption does not properly address complex arrangements of political graft. Accordingly, the 'Mensalão' scheme clearly challenged this legal view on corruption. As a legislative vote-buying scheme, it went far beyond the bilateral relation of one private person offering undue advantages to a public official, and instead became a sort of 'fidelity program' on corruption.

Despite their limitations, Brazilian criminal law standards were applied to the 'Mensalão' trial. More specifically, the trial involved technical legal discussions on the need to provide direct evidence of the specific measures adopted by public officials in exchange for undue advantages, and the issue of authorship of corruption crimes for high-level politicians considered mentors of the scheme. Operating under a constitutional provision that provides special standing for high-level officials, the Brazilian Supreme Court (Supremo Tribunal Federal, STF) tried the 'Mensalão'

[1] For the institutional and political variables of the 'Mensalão' scandal, see Carlos Pereira, Timothy J. Power & Eric D. Raile, 'Presidentialism, Coalitions, and Accountability' in Timothy J. Power & Matthew M. Taylor (eds.), *Corruption and Democracy in Brazil: The Struggle for Accountability* (University of Notre Dame Press, 2011) 31-55.

[2] For data on the first five administrations, see Timothy J. Power and Matthew M. Taylor, 'Introduction: Accountability Institutions and Political Corruption in Brazil' in Power & Taylor (2011) 1, at 1-3.

[3] Ibid, 6.

corruption charges. The charges covered not just high-level officials and politicians, but private sector intermediaries. In a contested procedural decision, the STF decided to try all defendants together. Alongside corruption charges, the 'Mensalão' defendants faced charges of money laundering, misappropriation of public funds, illicit financial flows, conspiracy, and fraudulent management in the context of financial institutions.

The STF had also handled corruption charges in the 1994 trial of former President Fernando Collor de Mello who became President in 1990 and was impeached in 1992. The STF found President Collor not guilty for lack of direct evidence of his participation in corruption schemes. The 2012 'Mensalão' decision clearly departed from this earlier precedent, putting forward a new legal interpretation on evidence in criminal prosecution in Brazil. Accordingly, direct evidence of the participation of a public official in corruption schemes is no longer legally required to criminal conviction. Circumstantial evidence is sufficient to convict. In this setting, the technicalities of the 'Mensalão' decision on the standard of proof in criminal prosecution opened space for an increasing criminalization of political graft in the country.

In Brazil, judicial deliberations by the plenum of the STF are broadcast live by 'TV Justiça', a public television channel administered by the STF. The 'Mensalão' trial received broad coverage, which included real-time legal analyses by scholars from prestigious law schools in the country. Despite the fact that since the return to democracy, the number of media exposés about political corruption has dramatically increased in Brazil,[4] the 'Mensalão' trial stands as one of the longest and the most complex trials in the history of STF. Televised and widely watched, it started on August 2012 and eventually ended on March 2014, after 69 sessions and over 20 months of duration – the final STF decision was over a category of appeals called *embargos infringentes,* which some of the convicted defendants filed against the decision of December 2012.

After the 'Mensalão' trial and as a response to the June 2013 protests, two important new laws were introduced in Brazil in August 2013 under the Dilma Rousseff administration. Law n. 12.846/13 regulated civil and administrative liability for corporations engaged in acts against the public administration in Brazil and overseas. It especially covered acts of corruption, establishing a series of governance procedures to be adopted by companies and associations. Law n. 12.850/13 defined organized crime, and introduced plea-bargaining in criminal proceedings related to criminal organizations, as well as procedures on intercepting communications and

[4] Mauro P. Porto, 'The Media and Political Accountability' in Power & Taylor (2011) 103, at 103-104.

accessing computer devices. In other words, these laws expanded the legal possibilities for leniency agreements, which already existed in Brazil under competition law, and plea-bargaining for natural persons involved in organized crime.

Following the same rationale explored so far, the 2013 laws should not be seen as a complete innovation in the Brazilian legal system. The development of a legal and institutional framework to fight corruption in the country has been 'broad, dynamic, and continuous' since the restoration of democracy,[5] which has included the ratification of international treaties and agreements on corruption and the participation in schemes of international cooperation (for a good overview and analysis see here and here respectively). Importantly, what seems to be significant in the current Brazilian context is that in light of a historical trial on political corruption and strong popular reactions against the misuse of public office, criminal law is posited as the ideal tool to correct Brazil's political malaise. According to this narrative, corruption is to be understood as the cause for the recent political and economic crises experienced in the country, especially under the Rousseff administration. More specifically, the social transformations brought by PT and its progressive agenda were achieved at the high cost of misusing public office for private gain. I am not asserting here that corruption did not occur under the PT administrations. It did. My point is rather to shed light on the reductionist view of fighting corruption through criminal law as a way to solve Brazil's political and economic problems. In other words, how capable is criminal law of addressing a country's structural challenges? How far can the process of criminalization go to redress inequality and poverty? Is it productive to turn all sorts of behaviors and individuals into crime and criminals?

## The Expansion of Authoritarian Anti-corruption Measures and the Role of International Law

The "Operation Car Wash" activities and its explosive consequences fully illustrate the issues at stake when using criminal law as a way to address structural challenges in a given country. As the biggest investigation to date into corruption and money laundering in Brazil, Operation Car Wash started in March 2014, and the reformed legal apparatus to fight corruption was put into play straight away. Operation Car Wash started as an investigation of criminal organizations led by *doleiros* (black-market money dealers), which then led to a much bigger corruption scheme involving Brazil's national oil company Petrobrás. Led by the Federal Prosecution Office (Ministério Público Federal, MPF), the main narrative of Operation Car Wash

[5] Power & Taylor (2011) 4.

asserts that contractors (companies for office construction, drilling rigs, refineries and exploration vessels) formed a cartel to defraud Petrobrás' bids, and that this cartel would have benefited from the corruption of Petrobrás' directors (equated to public officials for legal matters). Many repressive legal initiatives have been put into play by Brazilian state organs, including criminal investigations of cartels and corruption by public officials, the filing of class-action lawsuits, as well as administrative investigations of anti-trust violations.

It is worth noting that Brazil is a member of the Financial Action Task Force (FATF) and of the Financial Action Task Force of Latin America (GAFILAT, formerly known as Financial Action Task Force of South America) since 2000. This soft law scheme sets international standards and promotes international cooperation on combating money laundering, terrorist financing, and other threats to the international financial system. Accordingly, Law n. 9.613/98 (recently modified by Law n. 12.683/12) defined the crime of money laundering, and created the Council of Control of Financial Activities (Conselho de Controle de Atividades Financeiras, COAF) as the financial intelligence unit in Brazil. In the last ten years –that is, between the 'Mensalão' scandal and the Operation Car Wash – COAF has produced around thirty thousand intelligence reports on financial transations which have fuelled the country's criminal investigations on corruption and money laundering with massive amounts of information. International law has had a fundamental role in the Brazilian context of fighting corruption.

In a complex institutional context in which Brazilian bureaucracies have been struggling for prominence in fighting corruption, the expanded legal tools of leniency agreements and plea-bargaining have been extensively used by the MPF. This, in turn, has given rise to a series of problems. One aspect is the lack of coordination between the different organs of the Brazilian state and the many ways in which these organs can use law to fight corruption. This includes the leniency agreements reached in the course of criminal investigation into cartels, and the class-action lawsuits filed afterwards by the Federal Attorney General's Office (Advocacia Geral da União, AGU), which are based on the same facts and evidence collected in the context of those leniency agreements. In this setting, the desired cooperation of private actors, as pursued with the enactment of the 2013 laws, might have unintended consequences, with a decreasing level of cooperation with Brazilian bureaucracies. The limited material capacity of the STF to try the Operation Car Wash charges, as it did in the 'Mensalão' scandal, and the risks posed by this intense criminalization process to the survival of the infrastructure sector in Brazil are also issues of debate.

Most importantly, lawyers in Brazil have pointed out legal issues related to the ways in which the Operation Car Wash investigations have been conducted. Based on legal innovations imported from the US legal academia,[6] investigations have included the coercive use of preventive detention by the MPF in plea-bargaining, a voluntary form of criminal cooperation, the leaking of confidential information with sensitive political impact in the course of the investigations, the widespread media coverage of the action of the federal prosecutors, and obstacles faced by defence attorneys. Moreover, a recent set of leaked materials show that Judge Sérgio Moro systematically directed the activities of the Operation Car Wash prosecutors in a scheme of collusion which included passing on advice, investigative leads, and inside information. The imprisonment of President Lula was central to this agenda, involving politicized abuse of prosecutorial powers.

**Far-Right Moralizing and the Role of Progressive Lawyers**

As I have shown, when we go into the details of the recent operation of law in Brazil, we can see the stakes of having anti-corruption as a battle to be fought in the legal field. Criminal law is being used to protect the public administration as a moralizing project of politics, which has contributed to the current context of social and political polarization in the country. Despite the many legal problems related to the use of criminal law in such a context, fighting corruption in Brazil was somehow equated to a strong anti-PT campaign, which contributed to the process of having so many different groups joining forces against the PT administrations. Bolsonaro was elected invoking a strong anti-corruption discourse.

In an attempt to think through a productive critical role for law and lawyers in the current political context in Brazil, I suggest that the articulation of a lively and substantive legal argumentative practice might be able to bring current political struggles to the surface. With no intention to argue for leaving aside grass-roots and civil society movements, lawyers can be helpful in the task of redescribing the far-right narratives in Brazil[7] – that is, of debunking the far-right explanations for Brazil's socio-economic problems and the related set of proposed solutions. Law is deeply embedded in projects of social ordering, giving shape to these solutions. Therefore, lawyers are equipped to explore the far-right's shallow articulation of what is at stake in the Brazilian context precisely because of our skills in articulating

[6] The United States is recognized as a source of rules and practices for fighting corruption globally. Ellen Gutterman, 'Extraterritoriality as an analytic lens: Examining the global governance of transnational bribery and corruption' in Daniel S. Margolies, Umur Özsu, Maïa Pal, and Ntina Tzouvala (eds.), *The Extraterritoriality of Law. History, Theory, Politcs* (Routledge, 2019) 183, at 187-188.

[7] On redescription as strategy, see Anne Orford, 'In Praise of Description' (2012) 25 *Leiden Journal of International Law* 609.

relevant facts under broader systems of value in the process of constructing our legal interpretations. Lawyers can do this productively not just by opposing one truth claim to another, but as a way to bring political struggles to the surface.[8] The issues of fighting corruption through criminal law have been explored above. Another example has to do with the ways in which the Bolsonaro administration poorly describes violence and criminality in Brazil. Focusing on the figures of murder as the main aspect of criminality in the country, the proposed set of solutions focuses on more criminal law and convictions, more incarceration, and liberalization of firearm licenses in Brazil. This view does not take into account the fact that Brazil has the world's third largest prison population, and that drug trafficking is the crime responsible for most incarcerations. In other words, Brazil definitely does not need more criminal law and more incarceration, but rather a coherent way to incorporate into public policy the comprehensive debates on the root causes of criminality that already take place in the country (see here, here and here). In the same vein, a strategic engagement with rights discourse may also play a substantive role in this task of redescription, making us remember our history of resistance against dictatorship, and affirming the rights-emphasis of our constitution. Human rights activists in the field of law are already reflecting upon these issues in light of the Bolsonaro administration's contempt for human rights and minorities. In conclusion, there is room for an argumentative practice that may open space for action within democratic political institutions, making political struggles visible and alive.

[8] Anne Orford, 'Scientific Reason and the discipline of International Law' (2014) 25 *The European Journal of International Law* 369; Anne Orford, 'Life after Truth: Facts and the Foundations of International Law' (December 2018), keynote address, Melbourne Doctoral Forum. https://law.unimelb.edu.au/research/mdflt#program (accessed 24 April 2019).