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Law, Neoliberal Authoritarianism, and the Brazilian Crisis

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Dilma for Jango. Lula for Getúlio. The robes of 2016 for the tanks of 1964.
~ André Singer

The world-historical facts and persons which occur as it were twice, no longer occur the second time as farce. Or rather, the farce is more fearful than the tragedy it follows.

~ Herbert Marcuse

After almost three decades as a relatively unknown and marginal congressman, Jair Bolsonaro was elected President of Brazil in late 2018 on a platform mixing economic neoliberalism with conservative, militaristic, misogynistic, homophobic and racist dispositions. The resulting political unrest has been accompanied by an equal amount of confusion. In this reflection, I will address the historical and political context that led to the rise of Bolsonaro.¹ I will then emphasise the role of law, and of international law in particular, in creating the conditions in which authoritarian populism could flourish. I make two main points. First, I argue that international law played a critical role in disciplining the Brazilian state, linking the political transition from military dictatorship to democracy to the economic transition to neoliberalism. This entanglement resulted in a contradictory neoliberal democracy that has been pushed to its limits by the combination of economic crisis and the rise of the far right. My second point refers to the judicialisation of politics and the correlated discourse of corruption as crucial elements that led to the rise of

¹ This reflection is based on considerations debated on the roundtable 'Legal Reflections on Authoritarianism in Brazil and Beyond' held by the Laureate Program in International Law at Melbourne Law School on November 2018. I would like to thank Anne Orford, Fabia Veçoso and Rose Parfitt for those discussions.

Bolsonaro. I place these developments in the context of the transformation of the Brazilian state towards liberal authoritarian legalism.

Understanding the rise of authoritarian populism in the Brazilian context

Bolsonaro's rapid rise in the polls followed turbulent years in Brazilian politics. President Dilma Rousseff was ousted by a congressional coup and President Lula, Brazil's most popular President in history, was imprisoned and barred from pursuing a new mandate. Yet from the perspective of Brazil's socio-political history, *Bolsonarism* is less a break than a continuation of structural trends in Brazilian society. His platform of law and order and religious conservatism imbued with neoliberalism on steroids is but the latest form of reaction against weak attempts at social inclusion. In order to begin making sense of the rise of Bolsonaro, Brazil must be placed in the context of the global historical development of capitalist modernity in its peripheral place as a commodity frontier.² Brazilian society was born out of a genocidal commercial enterprise premised on the extermination of Indigenous Peoples and on the concentration of slave labour to serve foreign markets. Racism and genocide are thus foundational in Brazil's 'frontier capitalism'. The political forms that have developed in this context have produced one of the most unequal societies in the world. The ruling classes have historically relied on an authoritarian central power, which acts as a sort of birth control for any viable alternative social system, brutally repressing any insurgency or sign of revolt, often through 'preventive revolutions'.³

Nowadays frontier capitalism manifests itself in expanding agricultural frontiers and extensive mining, which have resulted in prolonged environmental degradation, deindustrialisation, and in the reproduction of a reserve workforce of cheap labour. The peculiar path of expansion of the Brazilian economy has reinforced these dynamics since the 1960s. Social exclusion, rather than an anomaly of an incomplete modernisation, has been a vital element of its dynamism.⁴ Against this background, the rise of Bolsonaro is a sign of both how far the dominant classes are willing to go to halt even weak reformist attempts at social inclusion and of the inherent contradictions of the Worker's Party (PT) strategy while in government.

² Jason W Moore, 'Sugar and the Expansion of the Early Modern World-Economy: Commodity Frontiers, Ecological Transformation, and Industrialization' (2000) 23:3 *Review (Fernand Braudel Center)* 409.

³ Darcy Ribeiro, *O povo brasileiro: a formação e o sentido do Brasil* (Global, 2016) 20; Luis Fernando Verissimo, 'Controle de Natalidade' in Ivana Jinkings (ed.), *A Verdade Vencerá: O Povo Sabe Por Que Me Condenam* (Boitempo, 2018).

⁴ According to Oliveira, the particularity of the Brazilian revolution in production without a parallel bourgeois revolution is the 'productive character of backwardness'. See: Francisco de Oliveira, *Crítica à Razão Dualista, O Ornitórrinco* (Boitempo, 2003) 118.

Born in the midst of industrial struggle and as the political expression of social movements, the PT was a victim of the paradoxes of its own electoral success. *Lulism*, a term coined by André Singer, did not confront the dominant classes, but undertook to reduce poverty while appeasing the neoliberal regime of capital.⁵ Whilst in power, the PT shifted its priorities from class-driven goals of economic and political democracy to a vague developmentalism operated through the co-option of the political and business class. Vague developmentalism was the path available for a progressive government after a series of interventions by International Financial Institutions (IFIs) throughout the 1980s and 1990s. International law's role in transforming the Brazilian state effectively left little alternative in the following decades.⁶

Internally, corruption was the price paid for this strategy of weak reformism.⁷ It unquestionably benefited millions of the poorest in the country, but concurrently deteriorated the prospects of deeper structural change. The high price paid for popular demobilisation and the abandonment of social movements became evident when the shockwaves of the financial crisis of 2007-2008 hit Brazil. The volcano of discontents and contradictions of *Lulism* erupted in the June protests of 2013, the largest mass uprising in a generation. What began with leftist and anarchist demonstrations against the government was soon taken over by an organised middle-class riding on the back of a protracted media campaign against the PT.⁸ In the midst of what Perry Anderson has termed a one-sided class war, the PT was abandoned by the elites it had co-opted only to find its popular base demobilised. It ignored the warning that 'one can only rely on what resists'.⁹

⁵ André Singer, *O Lulismo Em Crise: Um Quebra-Cabeça Do Período Dilma (2011-2016)* (Companhia das Letras, 2018) Introdução.

⁶ Francisco Panizza identifies three camps which followed the implementation and critique of the Washington Consensus in Latin America: the 'post-Washington Consensus', the 'new developmentalism' and 'twenty-first-century socialism'. Here I equate vague developmentalism to the centrist position commonly referred to as 'new developmentalism'. See: Francisco Panizza, *Contemporary Latin America: Development and Democracy beyond the Washington Consensus* (Zed, 2009); David M Trubek, 'Law, State, and the New Developmentalism: An Introduction' in David M Trubek et al (eds.), *Law and the New Developmental State: The Brazilian Experience in Latin American Context* (Cambridge University Press, 2013) 3.

⁷ Perry Anderson, 'Bolsonaro's Brazil' (2019) 41:3 *London Review of Books* 11.

⁸ The 'swing to the right' and the rise of authoritarian populism in Brazil has many similarities, albeit in the more violent and accentuated form common to a peripheral country, to the process described some forty years ago by Stuart Hall in: Stuart Hall, 'The Great Moving Right Show' (1979) *Marxism Today*.

⁹ The quote is from François Andrieux's famous advice to Napoleon: 'on ne s'appuie que sur ce qui résiste'. See: Luis Felipe Miguel, 'A Democracia à Beira Do Abismo' in Ivana Jinkings (ed.), *A Verdade Vencerá: O Povo Sabe Por Que Me Condenam* (Boitempo, 2018).

The role of law and of international law in particular: embedding neoliberalism

Unlike the military coup of 1964, when tanks took to the streets and the Constitution was suspended by a series of executive acts, the 'postmodern coup' of 2016 and the subsequent developments that led to Bolsonaro's election took place under the guise of legal formalities. Numerous inconsistencies in Dilma's impeachment proceedings as well as in Lula's imprisonment were demonstrated.¹⁰ Instead of focusing on those arguments, I draw attention to how law has enabled Brazilian authoritarian neoliberalism to flourish in more profound ways. I argue that international law played a fundamental role in disciplining the Brazilian state as it transitioned from military dictatorship to democracy. It did so by constraining popular control over the economy and consequently producing a contradictory neoliberal democracy: politically legitimate, as it presumably responds to popular pressure, but requiring a strong state hostile to the majority.¹¹ In this context, the trend since the 1990s towards increasingly legalised forms of decision-making, linked to neoliberal thinking and practice, is central to producing the crisis that led to the rise of Bolsonaro.¹²

Through a vicious cycle of dependence on private finance, inflationary, financial and exchange-rate crises and the subsequent implementation of structural adjustment programs backed by IFIs, the political transition to democracy in Brazil was entangled *through law* with the economic transition to neoliberalism. During the 'long 1990s', state led initiatives to promote industrialisation and import substitution were dismantled and shifted toward market-oriented approaches, embracing the neoliberal prescriptions of the Washington Consensus. State-owned enterprises were privatised, areas of the economy deregulated, tariffs drastically reduced, competition fostered and enforced, and austerity implemented. From adherence to the revamped international trade law regime to successive constitutional reforms imposing rigid fiscal rules and lifting restrictions on foreign investment, law was used to insulate a number of key policy areas from political struggle.

Through the first ten years of the PT's government, while the economy expanded during the global commodity boom, the country managed to avoid

¹⁰ Raimundo Rodrigues Pereira, *O Impeachment de Dilma: A História Do Golpe Parlamentar Que Tirou a Presidente Do Comando Do Poder Executivo Do País* (Manifesto, 2017); Maria Ramos, *The Trial* (Nofoco Filmes, 2018); Carol Proner et al (eds.), *Comentários a Uma Sentença Anunciada: O Processo Lula* (Canal 6 Editora, 2017); Carol Proner et al (eds.), *Comentários a Um Acórdão Anunciado: O Processo Lula No TRF4* (Outras Expressões, 2018).

¹¹ Alfredo Saad-Filho & Lecio Morais, *Brazil: Neoliberalism versus Democracy* (Pluto Press, 2018) 163–164; Evelina Dagnino, 'Construção democrática, neoliberalismo e participação: os dilemas da confluência perversa' (2004) 5 *Política & Sociedade* 139.

¹² Ntina Tzouvala, 'Neoliberalism as Legalism: International Economic Law and the Rise of the Judiciary' in Ben Golder & Daniel McLoughlin (eds.), *The Politics of Legality in a Neoliberal Age* (Routledge, 2017) 116. See also: Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018).

austerity without escaping its structural framework. Brazil embraced 'new state activism', combining new forms of industrial incentives with the expansion of social policy.¹³ Yet what seemed like a shift away from neoliberalism was perhaps more notable for its continuities. Macroeconomic policy, consisting of a floating exchange rate, inflation targeting, and fiscal austerity remained untouched. The price paid was a restriction on government spending and relatively high interest rates.¹⁴ Instead of pursuing deeper structural changes, 'new developmentalism' emphasised the need to adhere to trade liberalisation and for state action to encourage competitiveness. Law, both international and domestic, had by then entrenched a neoliberal version of the state, which compelled it to the protection of property rights and the safeguarding of markets. It left little room for more radical alternative projects.¹⁵ What seemed like the emergence of a new developmental state was rather an ephemeral hybridity that entrenched the neoliberal package while adding touches of social and industrial policy.¹⁶

From the point of view of the legal project that has been pursued since, there is a straight line running from the 2016 coup to Bolsonaro's government. Its main signposts are the freezing of public investment in social programmes, including education, healthcare and infrastructure (2016);¹⁷ the obliteration of labour rights (2017);¹⁸ the denationalisation and privatisation of the economy (2018);¹⁹ and restricting access to pensions and social security (ongoing). Whilst this agenda had been repeatedly rejected when submitted to the popular vote, I argue that the cumulative juridification of economic policy and of political struggle in Brazil is central to understanding the country's current predicament.

On the one hand, attempts at incremental breaks with neoliberalism are met with legal obstacles at every step of the way. An illustrative case of these limitations

¹³ David M Trubek, Diogo R Coutinho & Mario G Schapiro, 'New State Activism in Brazil and the Challenge for Law' in David M Trubek et al (eds.), *Law and the New Developmental State: The Brazilian Experience in Latin American Context* (Cambridge University Press, 2013) 28.

¹⁴ Ibid, 36.

¹⁵ On the intersections of international law, trade, economic policy and the role of the state see: Anne Orford, 'Food Security, Free Trade, and the Battle for the State' (2015) 11:2 *Journal of International Law and International Relations* 1, at 65.

¹⁶ Cf. the perspective in 2013 of Trubek, Coutinho and Schapiro (2013) at 12-13. See also: Lecio Morais & Alfredo Saad-Filho, 'Neo-Developmentalism and the Challenges of Economic Policy-Making under Dilma Rousseff' (2012) 38:6 *Critical Sociology* 789.

¹⁷ The Constitutional Amendment n. 95 of 15 December 2016, dubbed the 'New Fiscal Regime' – one of the most absurd austerity measures in the world – froze government spending for the following 20 years, effectively reducing an already anaemic government spending per capita given population growth.

¹⁸ See Law n. 13467 of 13 July 2017.

¹⁹ Most evidently the change in the regime of concessions for the exploration of oil in the pre-salt region of the continental shelf, increasing the participation of foreign capital, implemented by the Provisional Measure 811 of 21 December 2017 and subsequently transformed into Law n. 13679 of 14 June 2018.

concerns the loss competitiveness in manufacturing.²⁰ The government's attempts to promote the national automotive sector and information and communication technologies have generated continued controversy at World Trade Organisation (WTO).²¹ Industrial policy has been forced to adapt in order to diminish the likelihood of WTO complaints, leading Brazil to adopt policy instruments that follow a liberal regulatory model and filter legitimate developmental strategies and legal frameworks.²² On the other hand, the Brazilian state has been transformed into an 'austere subject' of the law, having internalised austerity and forced an ostensibly developmentalist and progressive administration into a corner when faced with the onslaught of the financial crisis.²³ It is quite significant that the legal technicality invoked as the reason for Dilma's impeachment consisted in the signing of a number of decrees assigning expenditure to social programs and in the use of funds from state-owned banks for similar purposes, allegedly violating the Fiscal Responsibility Law.²⁴ Ultimately, claims that the country was bankrupt and that the deficit had to be controlled could find a legal basis where the more evident pact between political, business, military and judicial leaders to oust an elected President who had become a liability to their interests could not.²⁵

This signals a wider transformation of the Brazilian state towards what Andreas Kalyvas has dubbed 'liberal authoritarian legalism'. Drawing from Poulantzas's notion of authoritarian statism, this new form of the capitalist state is characterised by the gradual transfer of power from the executive and the legislative to the judiciary.²⁶ It is also accompanied by the revival of formal legality and the reinvigoration of the rule of law. At the heart of 'liberal authoritarian legalism' lies

²⁰ Saad-Filho & Morais (2018) 124.

²¹ For the more recent cases, see: Brazil – Certain Measures Concerning Taxation and Charges, Reports of the Panel, WT/DS472/R and WT/DS497/R, 30 August 2017; and Reports of the Appellate Body, WT/DS472/AB/R and WT/DS497/AB/R, 13 December 2018.

²² Ada Bogliolo Piancastelli Siqueira & Julia Cadaval Martins, 'Policy Space and Policy Autonomy under the WTO: A Comparison of Post-Crisis Industrial Policies in Brazil and the US' (2015) 8:2 *Law and Development Review* 427–429. See also: Nicolas Lamp, 'The "Development" Discourse in Multilateral Trade Lawmaking' (2017) 16:3 *World Trade Review* 475.

²³ Robert Knox, 'Against Law-Sterity' (2018) 6 *Salvage* 16–17.

²⁴ The practice of 'fiscal pedalling' is a peculiarly Brazilian way of side-stepping the strictest aspects of the legal web of austerity. It had been commonly used by leaders of the Executive power in all federal levels. The so-called 'fiscal pedalling' manoeuvres were effectively legalised by Congress only two days after Dilma was impeached (See Law 13.332 of 1 September 2016).

²⁵ No document reveals this as clearly as the already historic leaked audio recording of a conversation between then Senator Romero Jucá and businessman Sérgio Machado, where they reveal a plot involving the Supreme Court, Congress, the military and the Vice-President to oust Dilma in an attempt to halt corruption investigations. See: 'On Tape: The Coup Plot Which Brought down Dilma', *Brasil Wire* (24 May 2016) <http://www.brasilwire.com/on-tape-the-coup-plot-which-brought-down-dilma/>.

²⁶ Andreas Kalyvas, 'The Stateless Theory: Poulantzas's Challenge to Postmodernism' in Stanley Aronowitz & Peter Bratsis (eds.), *Paradigm Lost: State Theory Reconsidered* (University of Minnesota Press, 2002) 105, at 125.

the 'depoliticisation and neutralisation of democratic legitimacy and the divestment of the popular sovereign of its political responsibilities'.²⁷ The judiciary becomes the main agent for consolidating market discipline, a trend reinforced by the expansion of international law, which further transfers decision-making to judges, commissions, international institutions and bodies not answerable to the public of the Brazilian state.²⁸

Corruption and the judicialisation of politics

A second point I want to make is that Bolsonaro is not the cause, but more of a symptom of the exhaustion of a system in which political parties have converged to a legally bounded 'centre', forcing citizens to choose between different shades of essentially the same neoliberalism. But in order for the electorate to opt for an extreme version of neoliberal conservatism, it was crucial that its main elements became concealed in an altered electoral process in which corruption, disorder and violence became the main elements of political struggle. It is here that the judicialisation of politics and the prominent corruption investigation known as *Lava Jato* (Car Wash) played a critical role in channelling the discontent of the middle class onto the state and the political system.²⁹ If law was not the only cause or field in which the Brazilian crisis played out, it was nonetheless the strategic ground in which corruption and state inefficiency could be portrayed as the most relevant problems in Brazil. Predictably, the 'fight against corruption' has been the traditional way the authoritarian right has historically gained traction in Brazil (in 1954, 1960, 1964, 1989 and 2013). But unlike the military coup of 1964, this time it was the judiciary that acted as a lever for overturning the popular will.

First, a series of legal innovations extended the reach of prosecutors and judges. In criminal law, new forms of plea-bargaining were imported and adapted to the Brazilian tradition. Standards of evidence were lowered, allowing convictions in the absence of direct evidence of participation in a crime on grounds that the accused must have been involved due to their position in an organisation or party. Preventive detention was used expansively to coerce defendants into plea bargains. In the field of political rights, a new law gave judges unprecedented control over who could run in elections. The 'Clean Slate Law' of 2010³⁰ barred anyone condemned by a collegiate judiciary body from running in elections, even if the conviction was not

²⁷ Ibid, 126.

²⁸ Tzouvala (2017) 132.

²⁹ For a great book on the topic, see: Jessé Sousa, *A Elite Do Atrazo: Da Escravidão à Lava Jato* (Leya, 2017).

³⁰ Supplementary Law 135 of 4 June 2010.

definitive. Although often regarded as a useful tool to 'clean up politics', it is ultimately premised on the idea that courts are immune to political manipulation. It also assumes that the people have little discernment over public matters and need to be 'protected' from bad candidates.³¹ Lula, who had sanctioned this law in 2010, was barred from running in 2018 under its provisions.

Second, corruption was framed as an evil derived from the behaviour of specific individuals or of certain parties, ignoring its institutional and structural aspects. Third, the judiciary was portrayed as the ultimate guardian of morality and law as the remedy to corruption and the restorer of order, as if legal technique would by itself guarantee impartiality. Last, a strategy of immobilism and distancing towards legal institutions during the previous government, which took pride in reinforcing the independence of prosecutors and judges, accelerated its downfall.

Besides the legal innovations advanced by lawyers and judges, it took the concerted effort of opposition groups and a protracted media campaign, through carefully staged leaks, obstinate coverage of police operations and media-led worship of judges and prosecutors, to empower the judiciary and the police to play a more prominent role in the country's political life. It is also no secret that in a country as unequal as Brazil, judges, prosecutors, Federal Police officers and other top judicial bureaucrats are part of a small caste of privileged civil servants whose structural role is to maintain public order and who tend to oppose popular organisation.³² The judiciary and judicial power have upheld and arguably amplified hierarchies of gender, race and class. Unsurprisingly, and despite the complexity of corruption investigations that are at once 'factious *and* republican', it is the inevitably selective and sectarian aspects which prevailed as calls for the end of corruption became a code for the destruction of the PT.³³ It was only in this context of an emboldened judiciary, acting in synchrony with a reactionary media and bent on actively interfering in the electoral process that Bolsonaro was able to win an election with an elusive message of law and order.

Law and Resistance

Authoritarianism has a long history in Brazil. In its various forms, it has been central to sustaining patterns of capital accumulation of a peripheral, frontier economy. A particularity of its most recent neoliberal version is its overgrown legal and judicial

³¹ Miguel (2018).

³² Saad-Filho & Morais (2018) 149–152. The starting salary of judges in Brazil are roughly 40 times the minimum wage, besides generous other benefits and allowances. That they are willing to defend their privilege with tooth and nail was evident in the recent scandal/struggle over a housing allowance on top of their salaries which in and of itself was more than four times the minimum salary.

³³ Singer (2018).

apparatus. The paradox of Bolsonaro's government is that the central measures it has promised to take are bound to fail and to generate public resentment.³⁴ The ongoing push to reform the pensions system, slashing funding and restricting access, is symbolic in its repugnance to a majority of the population. In this context, such measures can only be imposed by placing them beyond revision or contestation through collective participation in politics. This has happened both through the internationalisation and the judicialisation of decision-making. In liberal authoritarian legalism, organised state oppression need not hide itself behind a veil of secrecy. It manifests itself through and in the law, in a completely visible and public way.³⁵ In the last months we have seen courts in Brazil raid universities to pull down anti-fascist banners, interfere with the electoral process, censor the press, and selectively leak classified information, while providing no answers to the killing of Marielle Franco, who has since become a symbol of the resistance to Bolsonaro.

In this ongoing process of intensification of state violence and a rising judiciary, what role is left for progressive lawyers and for law? I argue that on the one hand there is no immediately conceivable retreat from law and legal institutions: every demand emerging from common interests struggles to acquire universal validity in the form of legislation.³⁶ Exposing contradictions, contesting conservative interpretations and revealing biases in legal doctrines and proceedings are indispensable. On the other hand, the Brazilian experience reveals how 'transforming the law' can only be an insufficient goal, for it ignores the fact that 'law is fundamentally inimical to popular mobilisation'.³⁷ The PT's and especially Lula's legal scuffles suggest that in the struggle against Bolsonaro and parallel global trends, the judicial terrain cannot be our primary front. As Third World and progressive lawyers, we must take into account the limitations imposed on legal struggles and not lose sight of their ultimate subordination to the broader struggle for democratic control of the economy and of the political system. This will involve breaking with the current mystification of the juridical and the widespread cult of legal norms. It will equally entail refusing to endorse the increasing juridification of the economy, as well as mitigating the limits placed by law on political contestation and collective participation in politics.³⁸

³⁴ Bolsonaro's popularity had plummeted merely first three months after taking office.

³⁵ Kalyvas (2002) 128.

³⁶ Friedrich Engels & Karl Kautsky, 'Juridical Socialism' (1977) 7:2 *Politics & Society* 203, at 219.

³⁷ Knox (2018) 19.

³⁸ *Ibid.*, 19–20.