The “the fight against corruption” in Brazil 2000’s: a political crusade through judicial activism

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In Brazil, after the military regime (1964-1985), the political leading role of the judicial institutions grew. The legal experts legitimize themselves as guardians of the fundamental rights of the 1988 Constitution which marks the redemocratization process of the country. The politization of the judicial area is ever-growing. It is noticeable in the proliferation of corporate associations of judges and in the hatching of the "criticism of the law" movement in the 1990s. Movements that put into question the neutrality and conservatism of law. (Engelmann, 2006). In the 1990s, associations of judges approached the left-wing in resistance to the neoliberal reforms proposed by the Cardoso government (1995-2002). During this period, privatizations of state-owned companies, proposals for the social security reform and the law system reform are increasingly challenged in the Judicial Branch. (Engelmann, 2015).

In the 2000s, though, the stage of the political leading role of the Judicial Branch presents different shapes. The increase in the penalization of corruption cases, the proliferation of police operations articulated amongst the Prosecution Office, the Federal Police Department and the Judicial Branch is an indicative of this phenomenon. (Da Ros, 2014; Arantes 2015 and Bento, 2017). In this scenario, a large number of prosecutors and judges give press interviews and travel throughout the country attending events that propagate an anti-corruption crusade. The political positions of judges and prosecutors are presented in events sponsored by corporate associations, think tanks and even, evangelical churches. They contribute to a discourse that mixes legal jargon with political and moral positions. This

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2 Brazil, in 2017, had 14,000 judges and 37 associations of judges distributed throughout the national territory.
discourse opposes "we" (the people) against "them" (corrupt politicians). In this sense, it refines with the traditionalists and conservative political positions of the military regime and with the business sectors uncommitted to the democratic regime.

The “Mensalão scandal” in 2005 may be taken as a representative point of the political inflection of the Judicial Branch towards the “fight against corruption”. This episode resulted in the criminal conviction of nationwide politicians linked to the Workers' Party. The highest point in this turnabout of the Judicial Branch and the Prosecution Office towards punitivism is the beginning of “Lava Jato” Operation (Operation Car Wash) in 2014. “Lava Jato” Operation became a national institution. In March, 2019 the prosecutors in the city of Curitiba, headquarters of the Operation, proposed the creator of “Lava Jato Foundation” but it was not approved by the Federal Prosecutor’s Office. The purpose was to manage 2.5 billion Brazilian reals (750 million dollars) originating from a fine paid by the petroleum company Petrobrás in the United States. The name of the Operation which started in 2014 comes from the use of a car wash station in Curitiba, southern region of Brazil, as a facade for money laundering. The connections between Petrobrás's directors appointed by political parties, construction companies, and politicians were built through hard criminal convictions, and subsequently with the execution of plea bargain deals aimed at obtaining accusations of political and party leaders. In this scenario, credit accumulated by judicial agents can be contrasted to the (dis)credit of political representatives labeled as “corrupt” in the "form of the law". (see Bourdieu, 1981, Bourdieu, 1986; Garrard, John & Newell 2006).

To understand this inflection of institutions which are born to defend the constitutional rights and become places of promotion for a punitive criminal law model, it is fundamental to analyze the connections between Brazilian legal elites and the international political space. The anti-corruption prescriptions that underlie the Brazilian legal experts are anchored at the same time in the international circulation of symbolic property and in the force of law and of the national State. In the first axis, we can include the conceptions with moral and scientific values propagated by NGOs, development agencies and think tanks. These conceptions give meaning to the notion of "good governance". On the other hand, international conventions developed in the UN, OECD and other organizations induce the production of laws increasing the political strength of national institutions. Amongst these, we

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3Political corruption scandal corruption through the purchase of votes of parliamentarians in the Brazilian National Congress, which occurred between 2005 and 2006
can highlight the institutions that claim their independence in relation to the political representation space, such as the Prosecution Office, the Judicial Branch, and in the last decade, the control and public transparency agencies. (Pieth, 1997, Chevalier, 2001 Coeurdrey, 2004, Vallé, 2008)

To understand this phenomenon, our approach mobilizes a research strategy that starts from two axes: 1) the Brazilian legal expert investments in new models of institutional autonomy and conceptions of law, as a corporate strategy; 2) the reconstruction of the trajectory of international anti-corruption prescriptions and their connections with the national legal field.

Connections with national spaces are built on institutional bases and on informal relationships that link agents and institutions. We find the formal links, beginning in the 90s, through the great volume of anti-corruption laws. These laws were particularly induced by the *Foreign Corrupt Practices* edited by the United States in 1977 and later by OECD in 1997. (Goudie e Stasavage, 1997; Ofosu-Amaah, 1999, Lascoumes, 2015). In the national space, the different profiles of inter-institutional cooperation point to other governmental bureaucracies that acquire increasing political autonomy and specialization in the "fight against corruption". These are agencies that contribute to the strengthening of the cooperation with the Judicial Branch, the Federal Police Department and the Prosecution Office over the 2000s. (Arantes, 2015 and Souza 2015). The Federal Prosecutor's Office expands its expertise in international cooperation, including creating departments and investing in the specialization of prosecutors in particular from the 2010s.

**International circulation of prosecutors in events related to anti-corruption**

[Graph]

Source: LEGALS ELITE AND FIGHT AGAINST CORRUPTION: international prescriptions, corporate investments and institutional rules in Brazil 2000s

2. THE STRENGTH OF IDEAS AND SCIENCE: THE CATECHISM OF THE FIGHT AGAINST CORRUPTION
Amongst the attempts to attribute scientific validity to the fight against corruption the investment in measuring instruments that allow countries to be ranked is found. Amongst them, the most widespread is the Corruption Perception Index created by the NGO Transparency International. Since 1995, the classifications built on these bases have been widespread in annual reports. Up until April, 2017, 22 reports have been edited, disclosed in the very first months of the year. In the report “People and Corruption: Latin American and the Caribbean”, published in October, 2017, we can observe the data collected through surveys. This data indicates that in the Latin American countries, the elected parliamentarians are considered the segment of the most corrupt government. Amongst the main prescriptions of the Report are the "increased autonomy of the judicial system" and "mobilization of the civil society". This catechism is repeated in other reports of the NGO and is replicated by think tanks and other national organizations in Brazil. (see Pope, 2000, International Transparency, 2007; World Bank, 2012 e 2014, Verteeg and Ginsburg, 2017)

The internationalization of the anti-corruption fight can be apprehended in the paths of agents involved in national operations, such as the Brazilian case of the Lava Jato Operation. In one way, in the technical participation of international agencies in transferring research models and conducting operations. In another way, in networks reinforced by regular trips abroad sponsored by agencies, universities and foreign institutes. These trips are aimed at "sharing experiences" by ongoing operations leaders.

The anti-corruption catechism also acquires greater importance amongst innovators and moral entrepreneurs (see Abelson, 2006, Medzet, 2012, Rocha, 2015, McGann, 2017). The think tanks space is exemplary in this sense. The diffusion of ideas occurs through the financing of specialists and publishers who carry law and political science books. These books influence disciplinary studies on corruption in Brazil. At Wilson Center, there is a constant presence in events and publications of Justices of the Federal Supreme Court, in addition to Judge Sergio Moro, leader of the main anti-corruption operation, Lava Jato Operation. This think tank created its Brazilian session in 2006. Since then, it has established relations with the Judicial Branch through the Brazil-United States Judicial Dialogue Program. In 2019, Judge Sergio Moro became a minister of the far-right government of Jair Bolsonaro. The Bolsonaro government conducts an international realignment of Brazilian foreign policy in an attempt to approach Trump's interests in South America on different cooperation fronts.

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4 Gilmar Mendes, Paulo Toffoli, Teori Zawascky, and Sergio Moro will participate in the project with conference funding, for further details, see Wilson Center (2018) and Wilson Center (2018b).
5 For further details, see Wilson Center (2018).
Think tanks that supported publications about corruption in Brazil in the 2000s

<table>
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<tr>
<th>Institution</th>
<th>Found in</th>
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TRIKUNAS, Haruoold e DAVIS, Caitlyn. Dilma impeached: Picking up the pieces um Brazil. 2016.
INGRAM, Matthew e DA COSTA, Marcelo MA. Targeting Violence Reduction in Brazil: Policy Implications from a Spatial Analysis of Homicide. 2014.
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| Wilson Center     | 1968     | TOFFOLL, José A. Dias. The Evolving Role of Brazil’s Supreme Court. 2016.
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ROBERTS, James. Brazil’s corruption holds back economic freedom. 2012.
ROBERTS, James. OLSON, Ryan. Time for Brazil to reject capital controls and end failins statis policies. 2013.
ROBERTS, James. Brazil: Corruption scandals will cas a shadow over Obama – Roussef meeting. 2015.
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Amongst other programs for promotion of the rule of law that have a significant presence of Brazilian legal experts, we can highlight the British Bingan Center of the Rule of Law. This center has cooperation bonds with the Getúlio Vargas Foundation-FGV - a Brazilian academic think tank - and has the support of the American foundation of the global law firm, Jones Day. Along the same lines, another program that counts with Brazilian legal experts is the training network of the World Justice Program that disseminates a "Rule of law" index and awards national initiatives related to the subject.

Anchoring in national institutions is a key condition for these import-export movements around the anti-corruption catechism. This doctrine joins the notions of "good governance" and Rule of Law.

The professional and academic paths of the prosecutor and the federal judge with greater public projection in the scope of the “Lava Jet Operation” provide interesting indications in this sense.

The Federal Prosecutor Deltan Martinazzo Dallagnol holds a master's degree from Harvard where he is oriented by the criminal expert Scott Brewer. The master's degree dissertation, which was published in Portuguese in 2015, titled As lógicas das provas no processo – Prova direta, indícios e presunções (The Logic of Evidence in the Process - Direct evidence, evidence and presumptions) shows the investment in the spreading of criminal law models. The model mobilized directly by the prosecutor as the basis for the judicial actions in “Lava Jato” pleads the convictions for circumstantial evidence. This criminal law model is disputed by the defense attorneys for anti-corruption operations. The main argument is that this model goes against the concept of ample defense provided for in the 1988 Constitution. The defense of the punitive model is carried out through the mobilization of the public opinion. Prosecutors from the Prosecution Office give dozens of interviews to the mainstream press during the Lava Jato Operation contributing to the production of a major political scandal certified by the operation of law. In a way, they follow the strategies defended by the NGO Transparency International. This NGO granted to the prosecutors the Annual Anti-Corruption Award for the “Lava Jato Operation” in 2016.
In the same way, there is Judge Moro, who became an international celebrity due to being responsible in the first instance for the “Lava Jato Operation”. He was mentioned several times in the dissertation by the Prosecutor DallAgnol. Moro held his Doctor’s Degree specializing in “white-collar crime”. This notion also comes from the American criminal law, based on the work by the criminologist Sutherland published in 1949. In an article widely published in social networks, "Considerations on the operation mani pulite", Moro is impressed by the power of the judges in Italy in the early 1990s (see Vauchez, 2004). The Brazilian judge emphasizes the importance of prisons and confessions widely propagated by the media as central to the good progress of the "anti-corruption fight".

3. THE RULE OF LAW: INTERNATIONAL COOPERATION AND NATIONAL OPERATIONS

In the Brazilian legal space, the strength of ideas in the promotion of Rule of law are linked to the scenario that followed the enactment of the 1988 Constitution. The strength of this institutional structure supported several laws that increased the power of publicly controlled bodies. At the same time, the control bodies benefited from the significant amount of resources provided by the Lula and Dilma Rousseff governments during the 2000s. In addition to the Federal Police Department, we can highlight, within this framework, the Office of the Federal Controller General (CGU) and the Federal Attorney General's Office (AGU). These bodies were central to the legislative proposals construction approved in Congress during the 2000s, in particular. (see Arantes, 2015)

The elaboration of these legal marks was refined with mobilizations of public opinion that involved the associations of judges and federal prosecutors. The "Clean Record Act" which prevents candidacy after conviction by a collegiate judicial body was proposed after movements that had the support of the Association of Brazilian Judges (AMB) and the National Association of Federal Prosecutors (ANPR). In the same way, in the last two years, the Federal Prosecutor's Office has carried out a wide media campaign about the approval in the Congress of the "ten measures against corruption". In this campaign, the prosecutors of the “Lava Jato Operation" were on the front line. The measures aim to strengthen the instruments of investigation and monitoring of civil servants considered suspected of corruption.
Agreements with foreign institutions take different forms. Amongst more specific organisms of the federal government, like the CGU and foreign government departments or with international organizations like UN and OAS. The agreements highlight the autonomy of the Brazilian anti-corruption agencies. An example can be found in the Financial Action Task Force of Latin America (GAFILAT). This task force points several financial control agencies having as the main focus, propose recommendations to be adopted in the fight against money laundering. This is an example of an agency that unites different countries and aims to standardize operations through regulations shared between different countries.

In the governmental realm, a set of initiatives, programs for the formation of civil servants and anti-corruption work groups are also developed. To a large extent, the actions have been coordinated since 2007 through the Fight Against Corruption and Money Laundering Plenary Meeting (ENCCLA), created during the Lula government in 2003 and directed towards the recovery of financial assets. In the same sense, a second articulation was developed, the GROTUIS-Brazil program, which copies the model implemented in the European Union with a focus on international legal cooperation. Right now, in addition to training courses for public agents focused on techniques and operations, the focus is on...
fostering academic research on corruption subject. The only political position opposed to the increase in punitivism was made public by the Association of Judges for Democracy (AJD). The Association has shown opposition to the "ten measures against corruption" proposal articulated by the Prosecution Office in March, 2016 (see AJD, 2017). The Association defended the "Guarantor" law model and denounced the alliances of judges and prosecutors with conservative sectors of the Brazilian society.

**The historical evolution of Brazilian laws related to the criminalization of corruption**

![Graph showing historical evolution of Brazilian laws related to criminalization of corruption](image)

Source: Legals elite and fight against corruption: international prescriptions, corporate investments and institutional rules in Brazil 2000s

### 3.2 Advocacy and pantouflage: the anti-corruption market

In the early 2000s, large Brazilian law firms absorbed the demand related to American rules and the directives issued by international organizations, such as the OECD. However, they were also driven by the movements of national legal bureaucracies. This was based on leniency agreements and the expansion of compliance programs induced in "anti-corruption" police operations.

This phenomenon occurs according with the expansion of the leniency agreements and demarcation in the scope of the Federal Prosecutor's Office (MPF) and the Federal Court System. These agreements were executed by the large business executives involved in the “Lava Jato Operation”. The Central Bank, for example, issued a normative instruction requiring that by December, 2017, financial institutions headquartered in Brazil should implement compliance programs. The large open market for the anti-corruption fight has favored the entrance of a younger generation of criminal law lawyers focused on corporate law. They are lawyers graduated during the 2010s and are more connected with the
American model of *compliance* programs. (CONJUR, 2014 and 2014b). Also, legal experts who held senior positions during the government and were at the center of the articulation of anti-corruption milestones, benefited from the process. This phenomenon makes us stress the importance of studying in a greater depth the space of reconversion of the Brazilian legal elite. At the same time, it draws attention to the possibility of an emergence of a new version of the Brazilian public-private relations regulation that emerge from this process (see Dezalay, 1992, France and Vauchez, 2017).

Two trajectories of legal experts who participated in key positions of the Lula and Dilma governments are exemplary in this regard. In April, 2017, the former Chief Minister of the Office of the Office of the Federal Controller General (CGU), from 2006 to 2014, Jorge Hage left the government to found the Law Firm, *Hage, Navarro Fonseca, Suzart & Prudêncio*, focused on *Compliance* (see Hage et al. 2017 and Hage, 2010). Jorge Hage, who had fundamental importance in the drafting of various anti-corruption proposals, approved in the last decade. In May, 2017, his successor in the position, Luiz Navarro, also became a member of the Firm. In September, 2017, the law firm became a consultant to the National Confederation for Financial Institutions to implement a *compliance* program in order to comply with the standards issued by the Central Bank. The trajectory of the former Attorney General's Office (2006 to 2016), Luiz Inácio Adams, is also an indicative of the open passages that have formed around anti-corruption movements. Adams left the government and the position obtained through a Public Tender in the career of public advocacy, to be the chief of the *compliance* area and member of the *Tauil & Chequer* Firm associated with the International Banking *Mayer Brown*6 and located in the center of power, in Brasilia. (see Conjur, 2016).

Still on this passage way from the public to the private sector, we can include representative case of the former Federal Prosecutor, Marcelo Miller. He worked directly with Attorney-General Rodrigo Janot in conducting the Lava Jato Operation in the working group located in Brasilia. Prior to joining the Office of the Attorney-General, he held a position as a diplomat, and throughout his career in the Prosecution Office, he was the institution's representative in the anti-corruption working groups in the OECD. In early 2017, he resigned from the Prosecution Office to join one of the largest law firms in Brazil, *Trech, Rossi & Watanabe*. Amongst the clients of this firm was, at that time, the company JBS. This company

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6 The Brazilian Bar Association (OAB) prohibits the association of Brazilian and foreign law firms. This regulation is contested by the large Brazilian companies, mainly since the 2010s. In December, 2013, OAB started a lawsuit against the company *Tauil & Checker Advogados*. Due to a « firm mistake » OAB received accounting reports demonstrated the loans received from the American firm *Mayer Brown*. see CONJUR (2014). About the firm *Mayer Brown* (2017).
was at the center of the plea bargain deals negotiated by the Prosecution Office with even Miller himself participating.

**Final considerations**

In the Brazilian case, anti-corruption prescriptions are consistent with the rise of different categories of legal professionals. Since the redemocratization, these categories have obtained increasing corporate and political gains. At the same time, the prescriptions reinforce the political and economic groups’ discourse which seek to reestablish the neoliberal agenda of the 1990s. In Brazil, this agenda has as its central axis the (de)legitimation of the social rights foreseen in the 1988 Constitution, as well as of social policies implemented in the last decades.

The autonomy of these "anti-corruption legal elites" and their international connections are evident. They transcend the political-party oppositions anchored in the traditional political system. They include, from the members of the large law firms, prosecutors from the prosecution office, to agents who have acted as "trustworthy lawyers" of the Lula and Dilma government. Amongst these, after leaving the government, many of them began to profit from consultancy in compliance programs aimed at large companies. It can also be mentioned the political reconversions of the "Lava Jato Operation party" whose greater representation is the former judge Sergio Moro that became part of the Bolsonaro government.

"Lava Jato Operation" deserves a deeper research focusing on the rise of a generation of law professionals less concerned with the fundamental rights model of the 1988 Constitution. Jair Bolsonaro was elected president in 2018 underpinned on an "anti-politics" platform. A discourse that mobilizes the "we" against "them" with a clear message focused on increasing punitivism. In this sense, we can attest that the anti-corruption catechism favored a new version of an authoritarian pattern that presents itself in different versions throughout the Brazilian political history.
References


