

## **Caught in an Authoritarian Trap of Its Own Making? Brazil's 'Lava Jato' Anti-Corruption Investigation and the Politics of Prosecutorial Overreach**

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*The negative and corrosive impacts of corruption in the fields of economics, politics, and law are widely discussed. Less understood are the potentially negative impacts of anti-corruption struggles and strategies themselves. This article presents a case study of Brazil's 'Car Wash' ('Lava Jato') scandal from a legal and political perspective. Although the subsequent Operation Car Wash investigation was widely regarded as remarkably successful, supposedly buttressing the rule of law through high-profile prosecutions of leading politicians and businesspersons, the article argues that legal due process, wider constitutional law, and the political process were undermined. While the use of media leaks to strengthen the investigation proved tactically successful, when coupled with new legal instruments it undermined the presumption of innocence and contributed to a climate in which political and legal debates themselves became increasingly subordinated to simplistic polarizing anti-corruption discourses, thereby undermining an already fragile political and institutional environment.*

In recent years, Brazil had become an inspiration for many countries as a successful example of confronting systemic corruption and impunity.<sup>1</sup>

Lula's imprisonment is only viable in a context of total destruction of the political system, and that is what Lava Jato has achieved.<sup>2</sup>

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- 1 G. France, *Brazil: Setbacks in the Legal and Institutional Anti-Corruption Frameworks* (2019) 2, at <[https://www.transparency.org/whatwedo/publication/brazil\\_setbacks\\_in\\_the\\_legal\\_and\\_institutional\\_anti\\_corruption\\_frameworks](https://www.transparency.org/whatwedo/publication/brazil_setbacks_in_the_legal_and_institutional_anti_corruption_frameworks)>.
- 2 Gilmar Mendes, Brazilian Supreme Court judge, cited in C. Jiménez and R. Oliveira, 'Gilmar Mendes e a Lava Jato: "Deu-se poder para Gente Muito Chinfrim, Mequetrefe"' *El País*, 29 October 2019, at <[https://brasil.elpais.com/brasil/2019/10/24/politica/1571944278\\_725688.html](https://brasil.elpais.com/brasil/2019/10/24/politica/1571944278_725688.html)>.

## I. INTRODUCTION

Context plays a vital role in how corruption is constituted and how anti-corruption struggles are conducted and should be understood. In a special issue of *Daedalus* entitled ‘Anticorruption: How to Beat Back Political & Corporate Graft’, guest editor Robert I. Rotberg indirectly acknowledged the significance of context and the role of politics. He offered a case in point: ‘In China ... President Xi Jinping’s lengthy and aggressive anticorruption campaign may result in the diminution of many enduring corrupt endeavours, even if his foremost goals for the campaign are doubtless political.’<sup>3</sup> Expressed another way, a holistic analysis is essential. Minxin Pei’s piece for the same issue (‘How Not to Fight Corruption: Lessons from China’) suggested that the intensive drive to beat corruption was allied to a purge of political opponents; hence, this was not the way to fight corruption.<sup>4</sup>

Surprisingly, however, Rotberg’s assessment of Brazil’s recent anti-corruption struggles (known as the ‘Lava Jato’ (‘Car Wash’) investigation) dispensed with all such qualifications in a manner symptomatic of policy-oriented and media coverage in particular.<sup>5</sup> Instead, the issues were presented as relatively straightforward, and the outcomes as largely positive and conclusive:

rule-of-law reforms enabled Brazilian prosecutors and [Sérgio] Moro [the judge heading the Operation Car Wash investigation] and his fellow judges to pursue charges of corruption against individual politicians, political parties, and corporations, strengthening the rule of law in Brazil and helping to bring the impunity that politicians had long enjoyed to an unceremonious end.<sup>6</sup>

Like official narratives of the fight against corruption in China, Rotberg’s account of Lava Jato left out vital pieces of the equation, including the political context surrounding those arrests, their implications for the wider

3 R. I. Rotberg, ‘Accomplishing Anticorruption: Propositions & Methods’ (2018) 147 *Daedalus* 5, at <[https://www.mitpressjournals.org/doi/full/10.1162/daed\\_a\\_00513](https://www.mitpressjournals.org/doi/full/10.1162/daed_a_00513)> .

4 M. Pei, ‘How Not to Fight Corruption: Lessons from China’ (2018) 147 *Daedalus* 216, at <[https://www.mitpressjournals.org/doi/full/10.1162/daed\\_a\\_00512](https://www.mitpressjournals.org/doi/full/10.1162/daed_a_00512)> . See also A. Laurence, *Anti-Corruption Campaigns in Authoritarian Regimes: The Case of China* (2016) Master’s Thesis, Central European University, Budapest, at <[http://www.etd.ceu.hu/2016/laurence\\_anthony.pdf](http://www.etd.ceu.hu/2016/laurence_anthony.pdf)> . Laurence is clear that anti-corruption campaigns can be a means of consolidating authoritarian power.

5 Brazil’s deeply divided legal profession became increasingly critical, as did academic coverage. See, for example, J. Souza, *A Radiografia do Golpe* (2016); J. Souza, *A Elite do Atraso: da Escravidão à Lava Jato* (2017). Groups such as Transparency International, however, remained overwhelmingly supportive, presenting the Operation Car Wash Task Force with its 2016 Anti-Corruption Award. Likewise, the Organisation for Economic Co-operation and Development (OECD) allied itself to and deflected criticism of the investigation. See M. Sanches, ‘“Estamos Preocupados com Possíveis Retrocessos no Combate à Corrupção no Brasil”, Diz Dirigente da OCDE’ *BBC News Brasil*, 25 October 2019, at <<https://www.bbc.com/portuguese/brasil-50174618>> .

6 Rotberg, op. cit., n. 3.

rule of law, and narrower concerns related to the preservation of due process for the accused. His account starkly contrasts with another offered by someone with first-hand knowledge of the case, the former head of Brazil's Supreme Court Ricardo Lewandowski:

The truth is that the operations were extremely selective, they were not democratic in the sense of catching the oligarchs in a broad and comprehensive manner. ... This idea that the rich, the powerful, are now being arrested does not seem to me to correspond to reality. ... And the few who were arrested are already released, and with their assets intact. In practice, one or another more conspicuous politician remained in prison.<sup>7</sup>

This striking contrast can be better understood in light of Mark Tushnet's acknowledgement that conflicts of purpose and method may arise in high-profile anti-corruption probes designed to both protect constitutional democracy and punish corrupt leaders. Under determinate circumstances (which again underlines the importance of a contextual understanding), these goals may conflict. Citing the Lava Jato investigation, he suggests that

[n]o one appears to have openly taken into account the potential disruption of politics the investigation caused. Or perhaps more accurately: the judges and prosecutors appear to have believed that the benefits to democracy of an aggressive stance against high-level corruption outweighed the obvious disruption of ordinary politics ... that the investigation was causing.<sup>8</sup>

Whether practically, let alone in principle, such issues can be meaningfully 'taken into account', or indeed should be, is debatable.<sup>9</sup> Instead, the present article simply asserts that the Lava Jato investigation struck the balance in the wrong place both in terms of narrower methods (due process) and wider objectives and outcomes, which were mixed to say the least. Sadly, the investigation echoed aspects of the Dreyfus Affair, a late-nineteenth-century French case that also deeply divided public opinion, fed into deeply held prejudices, was whipped up in certain media outlets, was exploited by political fellow travellers, entailed the weakening of citizen guarantees in court, and underwent numerous twists and turns. To be sure, the Dreyfus Affair entailed anti-Semitism, a series of forged documents, and one accused person, whereas Lava Jato's multiple cases (still ongoing) were based on potentially tainted confession evidence. Nevertheless, one is struck by the intimate links that

7 C. Jimenez and R. Oliveira, 'Lewandowski: "O Combate à Corrupção no Brasil Sempre Foi um Mote para Permitir Retrocessos"' *El País*, 7 January 2020, at <<https://brasil.elpais.com/politica/2020-01-07/lewandowski-o-combate-a-corruptcao-no-brasil-sempre-foi-um-mote-para-permitir-retrocessos.html>>.

8 M. Tushnet, 'Institutions Supporting Constitutional Democracy: Some Thoughts about Anti-Corruption (and Other) Agencies' (2019) *Singapore J. of Legal Studies* 440, at 453.

9 Israeli Prime Minister Benjamin Netanyahu's indictment (November 2019) and court appearance (May 2020) on charges of corruption illustrate the difficulty. What might prosecutors have done to 'take into account' the disruption to the political process that their actions would undoubtedly cause?

these cases have to the politics of their respective times, their far-reaching symbolic importance (for supporters and detractors alike), and their longer-term political ramifications, which in Brazil's case will likely reverberate for decades to come.<sup>10</sup>

The Lava Jato investigation is also reminiscent of Italy's 'Mani Pulite' ('Clean Hands') investigation of the early 1990s. Its lead judge, Antonio di Pietro, recently reasserted the necessity of the investigation into allegations of corruption that led to a systemic political collapse, but acknowledged that, far from intellectual and political renewal, what followed in its wake was a 'great void' that benefitted right-wing personalities such as Silvio Berlusconi, Umberto Bossi, and later still Roberto Salvini.<sup>11</sup>

Lava Jato's ramifications are yet to be played out and lie beyond the scope of this article. Instead, I will contend that the aggressive stance of prosecutors and judges pushed legal boundaries to their limits and beyond. I will suggest that on many occasions due process for the accused was subordinated to the imperative to prosecute. Finally, I will argue that the claimed benefits of ending impunity and strengthening the rule of law fell far short of the reality. Indeed, although by no means the only factor, anti-corruption discourse's dominance of wider political discourse contributed to the empowerment of right-wing authoritarian parliamentary and extra-parliamentary forces. Whether this was by accident or design is not our main concern here. What is, however, is the mischaracterization of the Lava Jato investigation as an overwhelming success.

In Part II, I briefly outline the mechanics and political economy of the Lava Jato scandal itself. Part III examines the investigation from several angles, including the claims made by its supporters, the legislative reforms that made it possible, and the politics of prosecution that encompassed the tactical and strategic concerns of prosecutors and judges, as well as the remarkable determination to prosecute their cause. Finally, Part IV offers a critical evaluation of the investigation's successes and failures and considers whether, in certain contexts, anti-corruption struggles and strategies may have negative impacts that policy-oriented literature in particular is reluctant to acknowledge but needs to take on board.

10 George Whyte suggests that the Dreyfus Affair proved a 'turning point in French and European history and triggered many major developments: the strengthening of the Republic; the separation of Church and State; the power of the media and its manipulation of public opinion; Herzl's vision of a Jewish State and his manifesto *Judenstadt*. ...Above all, the Affair was a warning signal highlighting the fragility of human rights in our most "developed" societies.' G. Whyte, *The Dreyfus Affair: A Chronological History* (2008) xxvi.

11 G. Casadio, 'Di Pietro: "Sì, Mani Pulite Ha Distrutto i Grandi Partiti e Favorito Quelli Personali"' *La Repubblica*, 10 September 2017, at <[https://www.repubblica.it/politica/2017/09/10/news/di\\_pietro\\_si\\_mani\\_pulite\\_ha\\_distrutto\\_i\\_grandi\\_partiti\\_e\\_favorito\\_quelli\\_personali\\_-175086519/](https://www.repubblica.it/politica/2017/09/10/news/di_pietro_si_mani_pulite_ha_distrutto_i_grandi_partiti_e_favorito_quelli_personali_-175086519/)>.

## II. LAVA JATO: A BRIEF SUMMARY

The Lava Jato or Car Wash scandal began in March 2014 as an investigation into black-market money laundering at a petrol station (hence the nickname), but quickly morphed into Brazil's largest ever anti-corruption investigation. The speed was partly due to what Transparency International rightly characterized as 'a system of corruption embedded so deeply within Brazilian politics and business that exposing one piece started a chain reaction'.<sup>12</sup> Although official statistics demand caution (since operational sustainability partly rested upon claims of success<sup>13</sup>), no other Brazilian investigation could boast the number of arrests and imprisonments, the amount of money recovered, or the high-profile nature of the companies and individuals targeted, among whom would be a former President of Brazil, imprisoned for 19 months. In December 2019, prosecutors claimed that over five years R\$4 billion had been recovered through the operation's activities and that '112 criminal charges were also filed against 484 people. In 50 cases, there have already been sentences, totalling 244 convictions against 159 people. So far, the sum of penalties has reached 2,249 years, 4 months and 24 days.'<sup>14</sup> More significant than the numbers were the revelations concerning the corrupt nexus of power at the heart of Brazil's political and economic system. The investigation expanded to include the country's largest company, the oil producer Petrobras, many of its largest civil construction firms (some, such as Odebrecht, with a multinational presence), and leaders from the governing Workers' Party (PT) and others, most notably the Party of the Brazilian Democratic Movement (PMDB) and the Brazilian Social Democratic Party (PSDB).

### 2.1. *The mechanics and political economy of Lava Jato*

Although bewilderingly complex in outward detail, the underlying drivers of the scandal were actually quite simple. One major factor was the long-standing practice of firms – in this instance primarily in the construction sector – to carve up highly lucrative contracts using price-fixing arrangements. Lava Jato saw limited numbers of bidders offering

12 Transparency International, '25 Corruption Scandals that Shook the World' 5 July 2019, at <[https://www.transparency.org/news/feature/25\\_corruption\\_scandals#Lava%20Jato](https://www.transparency.org/news/feature/25_corruption_scandals#Lava%20Jato)>.

13 Claims of financial success excluded the near bankruptcy of the oil giant Petrobras and the filing for bankruptcy protection of the transnational construction conglomerate Odebrecht in June 2019. For a critical analysis of the economic costs of Lava Jato, see W. Warde, *O Espetáculo da Corrupção: Como um Sistema Corrupto e o Modo de Combatê-Lo Estão Destruindo o País* (2018).

14 Paraná Federal Prosecution Service, 'Valor Devolvido pela Lava Jato já Ultrapassa os R\$ 4 Bilhões' 2 December 2019, at <<http://www.mpf.mp.br/pr/sala-de-imprensa/noticias-pr/valor-devolvido-pela-lava-jato-ja-ultrapassa-os-r-4-bilhoes>>.

fictitious (theoretically competitive) bids for huge contracts from the state-owned Petrobras. Through gentlemen's agreements, apparent competition was maintained, with some firms excluding themselves from the bidding process and awaiting their turn in future rounds. It was a giant cartel. Up for grabs were contracts for the construction of everything from regional headquarters to refineries, oil platforms, and exploration vessels. It should be noted that Petrobras was by far Brazil's largest company. Having developed vast subsalt oil deposits off the coast of Rio de Janeiro state in the midst of a global oil boom, it was now responsible for a significant portion of the nation's gross fixed capital formation: 11.1 per cent of the total in 2009.<sup>15</sup> Over time, the Lava Jato investigation would spill over into other non-oil-related infrastructure projects, such as the Angra-3 nuclear facility, the stadia of various football clubs including Corinthians, Goiânia Airport, the Rio Metro system, and the Belo Monte hydroelectric project in Pará state. Largely because of the activities of the Brazilian construction giant and transnational Odebrecht, the scandal seeped into ten other Latin American countries as well as Mozambique and Angola.

Alongside Brazil's sophisticated cartels came inflated contract prices, part of which (usually between 1 and 5 per cent of *total* contract value) would be passed as kickbacks to three main beneficiaries. First were the companies and executives directly involved in the schemes, such as Paulo Roberto Costa, Director of Supply at Petrobras. It was the gift of a car to him by Alberto Youssef (see below) that initially raised the suspicions of the investigators. Costa later turned state's evidence and revealed the scheme in August 2014. He had received his share of the kickbacks (including the car) in exchange for ensuring that particular firms won bidding rounds. Crucially, he had been put forward for the post by the Progressive Party (PP), a reactionary group with links going back to the military dictatorship.

The political nature of the appointment is the second part of the jigsaw. That Costa's nomination came at the formal behest of then President Lula was merely part of the enduring system of negotiation to which all political appointees were subject. Although possessing tremendous powers of patronage, presidential power is circumscribed by the need to maintain complex alliances in Brazil's highly fractured Congressional base. That applied especially to the PT, a minority party facing huge Congressional opposition. That partly explains the earlier emergence of the Mensalão ('Big Monthly') scandal of 2005, where substantial sums of money were siphoned off to opposition deputies and senators on a monthly basis (an additional salary of US\$12,000) in exchange for their support in the legislature.<sup>16</sup> Lava

15 Instituto Brasileiro de Petróleo, 'Investimentos Petrobras e Formação Bruta de Capital Fixo Nacional', June 2018, at <<https://www.ibp.org.br/observatorio-do-setor/investimentos-petrobras-e-formacao-bruta-de-capital-fixo-nacional/>>.

16 G. Michener and C. Pereira, 'A Great Leap Forward for Democracy and the Rule of Law? Brazil's Mensalão Trial' (2016) 48 *J. of Latin Am. Studies* 477.

Jato partly owes its origins to the imperatives and challenges of coalition building. A tiny detail in this system of alliances, Costa's job was to collect funds for the PP, part of the ruling coalition. This practice of funding was carried out by virtually all political parties (with a few small exceptions, such as the more radical left Socialism and Liberty Party (PSOL)). It was an open secret, overlooked because almost all had an interest in maintaining a lucrative status quo that financed vast war chests for expensive election campaigns.

The final part of the Lava Jato puzzle was the middlemen: party treasurers, their counterparts in state and private enterprises, and financial consultants or traders in black-market dollars such as Alberto Youssef, who aided and abetted the secretive transfer of funds, and to whom I now briefly return.

As one of Brazil's largest wholesale dealers in black-market dollars, Youssef had already been caught up in another scandal in 2003 which involved the illegal remission and laundering of hundreds of millions of dollars overseas through the Banestado bank in the late 1990s and early 2000s. His contacts and expertise were required for Lava Jato, this time funnelling money back to Costa and to PP and PMDB politicians. Other directors of Petrobras, such as Renato Duque and Nestor Cerveró, were appointed by the PT and the PMDB respectively and had their own money launderers and political groups to pay. All of them – directors, parties, politicians, and middlemen – worked in a coordinated fashion.

However colourful the cast of characters, far reaching the networks, or unique its features, the Lava Jato scandal should be seen as a variation upon long-established themes. Pedro Campos demonstrates the prevalence of a political economy of corruption in the construction sector throughout the military dictatorship (1964–1985).<sup>17</sup> Although the modality was different (contracts awarded in secrecy, away from public scrutiny and effective legal/financial accountability), the enormous financial incentives were there throughout, especially in a period of rapid economic growth averaging 7 per cent during the 1960s and 1970s. However, what distinguishes Lava Jato from other military and civilian scandals is how its internal logic was relentlessly torn apart and exposed. The following section turns to the small group of judges and prosecutors who undertook that task.

### III. LAVA JATO AND THE POLITICS OF PROSECUTION

If the structural problems and high stakes involved rendered the Lava Jato investigation controversial, its advocacy of exceptional methods and legality compounded this. Its lead judge, Sérgio Moro, drew comparisons with Italy's Mani Pulite investigation in his preface to the Brazilian edition of Gianni Barbacetto's book on the Italian scandal:

17 P. Campos, *Estranhas Catedrais: As Empreiteiras Brasileiras e a Ditadura Civil Militar, 1964–1988* (2014).

In a context of systemic corruption, of its deep and widespread penetration of institutions and civil society, the adoption of exceptional remedies cannot be considered an arbitrary choice, but a necessary measure, in the form of the law, to break the vicious cycle.<sup>18</sup>

Ironically, it is unlikely that the investigation would have been possible without a series of legal reforms (Laws 12.846/13<sup>19</sup> and 12.850/13) enacted by PT governments, partly to contain anti-corruption protests underway in 2013. Also known as the Anti-Corruption Law, Law 12.846/13 closed lacunae in Brazilian legislation, particularly regarding corruptors, and included civil and administrative liabilities for companies, including fines of up to 20 per cent of gross turnover. Law 12.850/13, also known as the Law on Organized Crime, defined the legal concept of a criminal organization, established penalties for participation, and introduced certain leniency arrangements for individual suspects. Also nicknamed the ‘Lei da Delação Premiada’ – ‘rewarded denunciation’ or ‘rewarded accusation’ (in fact, the correct term is ‘colaboracao premiada’, or ‘rewarded collaboration’) – it would become crucial in time because, in Moro’s view, it ‘breaks the alliance between the corruptor and the corrupted’.<sup>20</sup> In exchange for a reduction of sentence – or even a complete exemption – or favourable change in the prison regime, suspects had to confess their offences and commit to cooperating with the investigators by bringing new information to light, detailing the structure of the criminal organization, producing and collecting evidence, and, if necessary, paying fines. According to Moro, these special methods, alongside the use of preventive imprisonment, would help to ‘break the criminal cycle of repetition and also ... prevent undue interference in collecting evidence and the normal course of the legal process’.<sup>21</sup>

In themselves, these legal changes and the determination to exploit them were insufficient. The third essential component identified by Moro and prosecutors lay outside the legal sphere: public support, informed by a campaign waged through newspapers, television outlets, and social media. The team were acutely aware of the Italian Mani Pulite precedent, when prosecutors and judges had faced seemingly overwhelming odds. Changing those odds required careful information management – not just to forestall any attacks, but also in order to go onto the offensive. Referring to the Italian case, Moro approvingly cited Mark Gilbert’s observation that ‘[t]he constant

18 S. Moro, ‘Introdução: Mãos Limpas: A Verdadeira História’ in *Operação Mãos Limpas: A Verdade sobre a Operação que Inspirou a Lava Jato*, G. Barbacetto et al. (2016) 4.

19 For detailed discussion of this law, see P. Toledo de Campos, ‘Comentários à Lei nº 12.846/2013: Lei Anticorrupção’ (2014) 2 *Revista Digital De Direito Administrativo* 160, at <file:///Users/lasao/Downloads/80943-Texto%20do%20artigo-127259-2-10-20150318.pdf>.

20 Moro, op. cit., n. 18, p. 4.

21 Id.

flow of revelations kept the interest of the public high and the party leaders on the defensive'.<sup>22</sup> Similar tactics were subsequently deployed in Brazil.

This tactical and strategic understanding of power relations is what I understand by the politics of prosecution. Operation Lava Jato went beyond legal and institutional frameworks alone. It had to resonate with the public at decisive stages and therefore be conducted under the glare of publicity in a carefully controlled and selective fashion. The series of criminal charges outlined against former President Lula by lead Federal Prosecutor Deltan Dallagnol on 14 September 2016 is a prime example. His press conference, carried live by the main broadcaster Globo,<sup>23</sup> subsequently dominated headlines in print and television media. Dallagnol began by rebutting various legal and political concerns about the investigation; then emphasized its apolitical nature, which was about specific crimes (money laundering and corruption) and not Lula's or the PT's ideology; and then added that a broader contextualization was nevertheless necessary, illustrated by an extended narrative and a PowerPoint presentation. One slide, later dubbed 'the Lula PowerPoint' and seen by many as the presentation's defining moment, put Lula quite literally at the centre of everything.<sup>24</sup> Standing alongside it, Dallagnol declared that '[w]e will present the body of evidence and the context that leads us to conclude, beyond any reasonable doubt, that Lula was the commander of the criminal scheme discovered by Operation Lava Jato'.<sup>25</sup>

For now, our concern is with neither the accusations nor the quality of evidence presented (about which Dallagnol harboured his own private doubts<sup>26</sup>), but rather the fact that the press conference constituted one of many highly audacious – and largely successful – gambles by prosecutors that 'kept the interest of the public high and the party leaders on the defensive'. The official release of custody interview material from Antonio Palocci, former Chief of Staff to Dilma Rousseff (2011) and Minister of Finance to President Lula (2003–2006), on the cusp of voting in the second round of presidential elections in 2018 was another gamble. Whether it constituted an overt form of the politics of prosecution, possessing party-political dimensions, is addressed in Part IV. For now, what is important is that it made headlines and kept leaders on the back foot.

Throughout the investigation, the prosecutors were aware that they risked alienating powerful forces. In 2017, Dallagnol suggested that 'as the investigation has expanded and reached the universe of the powerful, they have united. Although they are opponents in the political sphere, they have

22 S. Moro, 'Considerações sobre a Operação Mani Pulite' (2004) 26 *Revista CEJ* 56, at 59, at <<https://www.conjur.com.br/dl/artigo-moro-mani-pulite.pdf>>.

23 Key parts of the conference are available at <[https://www.youtube.com/watch?v=tCUQ\\_rZ3HQ](https://www.youtube.com/watch?v=tCUQ_rZ3HQ)>.

24 *Id.*, at 13:32.

25 *Id.*, at 14:00.

26 These came to light in secret conversations with Moro, released to *The Intercept*. For a brief discussion of the *Intercept's* revelations, see the main text below Notes 53 to 55.

a common adversary, which is Lava Jato'.<sup>27</sup> Through legislative change, it could be 'a matter of time before they can tie up the investigators, destroy the investigative tools, and empty the punishments'.<sup>28</sup> Thus, '[t]he future depends on how much society will defend this operation. The great shield that the operation has today is society.'<sup>29</sup>

One subtext of the investigation (which can only be touched upon here) is how it fed into and was reinforced by mass mobilizations. The mass protests that engulfed Brazil from June 2013 onwards initially encompassed a broad range of opponents to the status quo, including left-wing opponents of the government. The immediate cause was a rise in bus fares in Sao Paulo and the brutal fashion in which demonstrations against those increases were put down. However, the protests evolved rapidly to cover poor-quality public services generally (education, health, and transport). The billions being spent on the impending World Cup (2014) and Summer Olympics (2016) reinforced the impression that the government was out of touch. Re-elected in 2014 with a wafer-thin majority (51.6 per cent to 48.4 per cent) whose authenticity her opponent, Aécio Neves, questioned in court, Dilma Rousseff looked increasingly fragile. That her re-election owed much to the support of her predecessor and mentor Lula (later embroiled in his own difficulties) also cast a shadow, as did the sense that bad economic news had been postponed. Finally, compounding the new government's difficulties, a global fall in commodity prices and a severe recession led to one of the steepest and fastest rises in unemployment in recent decades (from 6.5 per cent in 2014 to almost 13 per cent by 2017). The optimism and political capital of the Lula years, which had helped to contain the Mensalão scandal (see above), had evaporated.

Against this background, the fight against corruption gained political traction and could be prosecuted more aggressively.<sup>30</sup> Through extensive coverage from an overwhelmingly hostile media, the issue increasingly defined public perceptions of government. Although Lula was not convicted in the Mensalão scandal, Dallagnol succeeded in reconnecting him to it in the public imagination. Long-standing opponents mobilizing on the streets and within the government's own electoral alliances now saw corruption as its Achilles heel. Anti-corruption became weaponized as politicians smelt blood. Whether those leading the investigation did so too is not our current concern,

27 A. Schipani, 'Brazil Graft Probe at Risk of Sabotage' *Financial Times*, 26 November 2017, at <<https://www.ft.com/content/da7fcc7a-cef6-11e7-b781-794ce08b24dc>>.

28 *Id.*

29 *Id.*

30 David Nelken discusses why judges in Italy suddenly acquired traction after years of failure, also citing endogenous factors; D. Nelken, 'The Judges and Political Corruption in Italy' (1996) 23 *J. of Law and Society* 95. For an explanation of the PT's loss of traction, see W. Hunter and T. Power, 'Bolsonaro and Brazil's Illiberal Backlash' (2019) 30 *J. of Democracy* 68, at <<https://muse.jhu.edu/article/713723>>.

but rather their perception that '[t]he great shield that the operation has today is society'.<sup>31</sup>

A more direct connection with 'society' was underlined when, on 11 January 2019, Dallagnol appealed directly to voters, via a social media video, to reject moves (accepted by the Supreme Court's head, Dias Toffoli) permitting the election of the heads of the Federal Senate and Chamber of Deputies by secret ballot.<sup>32</sup> Dallagnol feared that politicians under investigation could be elected, thereby prejudicing the enquiries and prospect of wider anti-corruption legislative reform. He argued that this was contrary to his own constitutional interpretation and invited electors to sign a petition against the secret vote (and Toffoli's decision).

This episode underscores just how central the politics of prosecution was to the investigation. It was shaped by a distinctive reading of corruption in Brazil, its systemic components, and the challenges that they posed. Furthermore, this politics of prosecution was not limited to positioning or tactics, including the sequence in which events were revealed for operational reasons (forestalling the destruction of evidence) and public consumption.<sup>33</sup> Public mobilization was critical to propelling the investigation forwards and forestalling reversals. If that entailed appealing directly to the public above the head of the Supreme Court, so be it.

Part IV critically evaluates the investigation's successes and failures. Within the Brazilian context, it considers some of the wider – including negative – implications of anti-corruption struggles and whether the politics of prosecution represented a form of overreach.

#### IV. A CRITICAL EVALUATION OF LAVA JATO, THE POLITICS OF PROSECUTION, AND THE DEMOCRATIC RISKS OF ANTI-CORRUPTION STRUGGLES

In many senses, Lava Jato was a success. Operationally speaking, the investigators' strategy and tactics were vindicated. The operation endured, retained widespread public support, carved out political and operational space, claimed significant prosecutions, and exposed the innermost workings of a corrupt nexus of politicians and big business. This was a remarkable achievement. However, widespread claims like Rotberg's that it 'helped to bring the impunity that politicians had long enjoyed to an unceremonious end'

31 Schipani, op. cit., n. 27.

32 Available at <<https://www.facebook.com/deltandallagnol/videos/a-elei%C3%A7%C3%A3o-dos-presidentes-da-c%C3%A2mara-e-do-senado-%C3%A9-muito-importante-para-o-futuro/278269049524536/>>.

33 On public and political impact, see M. Damgaard, 'Cascading Corruption News: Explaining the Bias of Media Attention to Brazil's Political Scandals' (2018) 24 *Opinião Pública* 114, at 114–115, at <<https://www.scielo.br/pdf/op/v24n1/1807-0191-op-24-1-0114.pdf>>.

are overstated for at least two reasons. First, legal precedents already existed, most notably the impeachment of President Fernando Collor on the grounds of corruption in 1992, but also the Mensalão scandal in which a number of high-ranking politicians were jailed on corruption charges. Second, other structural factors, earlier referred to as the political economy of corruption, were largely left intact, an issue to which I return later.

Alongside its notable achievements, however, Lava Jato generated major negative impacts in both the legal field and the wider democratic process. These are briefly outlined below.

#### *4.1. The dialectics of spectacle*

Lava Jato's chronic dependency upon publicity and mass mobilization created its own difficulties. Publicity and mobilization were not the problem as such, but rather how these were combined during the course of the investigation. President Rousseff's 2016 impeachment is among several illustrative instances (including media leaks, former President Lula's imprisonment, and his exclusion from the 2018 election).

Legally speaking, Rousseff's impeachment was not about corruption but rather a form of creative accounting known as 'pedalagem fiscal' ('deceptive budgetary measures'). This entailed delaying payments from the central Treasury to organizations such as the Central Bank and Brazilian Development Bank for programmes that they funded on the government's/Treasury's behalf, thereby artificially inflating government accounts in contravention of the Fiscal Responsibility Law 2000. Many authors have noted the weakness of the charges as a basis for impeachment and the negative precedent thereby created.<sup>34</sup>

Mads Damgaard demonstrates how nevertheless 'the media event of the impeachment came to be intertwined with the Lava Jato investigations and the discourse of corruption'.<sup>35</sup> He explains this in terms of the operation's selective and sequenced information releases to the media; the latter's own cycles of operation, selection, and de-prioritization of other stories; and a shifting political landscape that included the presidential ambitions of Vice-President Michel Temer and his allies determined to exploit the investigation to maximum effect within the chamber and through street protests outside. Rather than a single vector, Damgaard paints a picture of convergences with widespread political and constitutional ramifications:

With the [Lava Jato] leaks of conversations between Lula and Rousseff, government coalition parties found a convenient excuse to jump ship, and news on impeachment immediately flooded the landscape of media. In the

34 See A. Ansell, 'Impeaching Dilma Rousseff: The Double Life of Corruption Allegations on Brazil's Political Right' (2018) 59 *Culture, Theory and Critique* 312.

35 M. Damgaard, *Media Leaks and Corruption in Brazil: The Infostorm of Impeachment and the Lava-Jato Scandal* (2018) 181.

two months from the great street protests in March [2016<sup>36</sup>] to the preliminary removal of Rousseff on May 12 [2016], the media outlets were engrossed in the proceedings and the spectacle of the impeachment. Ignoring the investigations implicating the parties coming into power, the intense media focus paved the way for the ousting of Rousseff, and legitimized her impeachment.<sup>37</sup>

An article by the weekly magazine *Istoé* on 'The Criminal Structure of the Dilma Government' was typical in declaring that 'Lava Jato and other investigations by the Federal Police and the Public Prosecutor's Office show how the suspended president institutionalized corruption in the federal government'.<sup>38</sup>

Although the investigators cannot be held responsible for the way in which either the media or pro-impeachment groups on the streets framed the issues, they did little to correct or distance themselves from that framing. On the contrary, given that it served their interests of increased power and autonomy, they were happy to grace the front covers of magazines and be portrayed as heroes and crusaders against corruption. Whether by accident or design, a convergence between largely conservative media interests and those of the investigation occurred. The heightened profile of Moro and the prosecutors led one Supreme Court judge, Gilmar Mendes, to wryly observe that the investigators were 'better publicists than jurists'.<sup>39</sup>

Lula's removal from the 2018 presidential elections despite his frontrunner status<sup>40</sup> again illustrates the dialectics of spectacle's problematic political and constitutional implications. On the orders of Moro on 4 March 2016, he was publicly escorted by police for questioning under a compulsory procedure that, if accepted as constitutional, should only have been used in cases of refusal to attend, yet he had already offered to attend and had not been notified beforehand of the desire to question him. Leaked to the media and carried out under the glare of television cameras and waiting journalists, this was high political theatre. Two years later, on 14 June 2018, the Supreme Court found, by six votes to five, that those actions had been illegal and unconstitutional. Detailed reading of the judgment leaves the clear impression

36 The weekly magazine *Época* put the figure at 3.3 million people in at least 250 cities across Brazil; 'As Manifestações de 13 de Março em Todo o Brasil' *Época*, 13 March 2016, at <<https://epoca.globo.com/tempo/noticia/2016/03/manifestacoes-de-13-de-marco-em-todo-o-brasil-acompanhe.html>>.

37 Damgaard, op. cit., n. 35, p. 181.

38 A. Filgueira, 'A Estrutura Criminosa do Governo Dilma' *Istoé*, 29 July 2016, at <<https://istoe.com.br/estrutura-criminosa-do-governo-dilma/>>.

39 "'Lava Jato tem Melhores Publicitários do que Juristas'", Diz Gilmar Mendes' *O Estado de São Paulo*, 7 October 2019, at <<https://politica.estadao.com.br/noticias/geral,lava-jato-tem-melhores-publicitarios-do-que-juristas-diz-gilmar-mendes,70003041459>>.

40 Even four months after his imprisonment, opinion polls suggested that Lula still led the field with 37.3 per cent of the vote against the second runner and eventual victor Jair Bolsonaro's 18.8 per cent; G. Vengalia, 'Lula Lidera Isolado com 37%, Mostra Nova Pesquisa CNT/MDA' *Veja*, 20 August 2018, at <<https://veja.abril.com.br/politica/lula-lidera-isolado-com-37-mostra-nova-pesquisa-cnt-md/>>.

that even those who favoured the law's use felt that it should be deployed with extreme caution. Although the Supreme Court did not mention Moro by name, it implied that he had played fast and loose with legal procedure. The majority of judges acknowledged that such actions circumscribed the liberties of individuals, putting respondents in an extremely vulnerable position in relation to the state. The highly creative interpretations and abuses of this law were unacceptable and illegal.<sup>41</sup>

Another area of deep concern was the illegal release to the media of an illegally obtained telephone recording of a conversation between President Rousseff and Lula. Recorded on 16 March 2016, Moro authorized its release the same day. Rousseff had offered Lula a post in her government, a prospect that would have forestalled any imprisonment by Moro, since government ministers could only be tried in the Supreme Court under special jurisdiction or so-called 'privileged forum' ('foro privilegiado'). The release of this recording poured petrol onto an already inflamed situation, helping to precipitate the formal collapse of the governing coalition, segments of which openly began to demand impeachment. Regardless of the advisability of Rousseff's offer and Lula's acceptance, the fact remained that the mandate for the tap had already run out and its application had been so broadly interpreted as to include his lawyers – again illegal. However, there is another arguably deeper issue here – namely, what relationship the revelations bore to the subject under criminal investigation, since Rousseff's and Lula's move was not a crime.

This constituted the politics of prosecution at its grandest. By releasing the recording, Moro had taken a huge gamble that changed the political dynamics and course of events. It did not create a precedent, since the Supreme Court eventually rebuffed his action, but was a *de facto* success, leading to a crisis of the coalition and calls for Rousseff's impeachment that eventually found favour. This was more than mere collateral damage, going well beyond Tushnet's earlier observations concerning the balance to be struck between 'an aggressive stance against high-level corruption' and 'the obvious disruption of ordinary politics'.<sup>42</sup> It represented a recasting of the political order through legal *and* illegal means. Moro's and Dallagnol's actions also begged an important question: where did the limits of judicial or prosecutorial authority lie?

#### *4.2. The price of investigative overreach*

Since much of the evidence relating to the Lava Jato investigation necessitates detailed contextualization within an interpretive framework,

41 For an official summary, see 'Plenário Declara a Impossibilidade da Condução Coercitiva de Réu ou Investigado para Interrogatório' *Notícias STF*, 14 June 2018, at <<http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=381510>>.

42 Tushnet, *op. cit.*, n. 8.

differing narratives have, understandably, emerged. The diverse responses to Moro's swift parlaying of his celebrity status into political office are illustrative. In November 2018, the President in waiting, Jair Bolsonaro, offered him the post of Minister of Justice, which he immediately accepted. Given that Bolsonaro benefitted most from Lula's elimination from the election race,<sup>43</sup> many saw Moro's ministerial appointment (upon Bolsonaro's inauguration in January 2019) as a form of payback for services rendered and circumstantial 'proof' of the former judge's lack of impartiality and vaulting political ambitions. Others, including former Brazilian Attorney General Rodrigo Janot (2013–2017), saw Moro's acceptance as profoundly misguided and damaging to the investigation's credibility. Moro and his supporters, however, presented it merely as a logical next step and an opportunity to consolidate the fight against corruption within the government itself. As such, the move eventually proved to be a serious failure.<sup>44</sup>

Although conflicting interpretations are possible, on the basis of the evidence this article sees the investigation in a profoundly negative light. Despite its innovative approach and highlighting of past failures, it suffered from grave weaknesses and entailed a much greater political and legal cost than the narrow focus upon anti-corruption alone would suggest. When questioned about the value and significance of Lava Jato, Marcelo Nobre, a lawyer appointed by both houses of Congress to the National Justice Council (2010–2012), an organ at the heart of the Brazilian judiciary, said:

I am in favour of Lava Jato, as long as it is carried out within the law. Lava Jato could have done many of the things it did within the constitution. Only the truth is that it has passed like a tractor over the constitution, over the right to a defence.<sup>45</sup>

No fan of Rousseff, he nevertheless cited the release of the Rousseff/Lula telephone recording as an example of breaking the law and violating the constitution. He also suggested that media support had helped to obscure the fact that 'within a democracy, everyone has to be subject to the law. Not just politicians. Judges and prosecutors too.'<sup>46</sup>

Lava Jato's attrition or degradation of legal norms was, for Nobre, evident in the preventive imprisonment on 21 March 2019 of former President Michel Temer, described as 'an act of will, rather than an act of law'.<sup>47</sup> Allegations of corruption had long surrounded Temer. He was preventively imprisoned at the behest of Judge Marcelo Bretas, of Rio's 7th Federal District, ostensibly due to the potential destruction of evidence, the seriousness of the alleged

43 See n. 40.

44 See conclusion to this article.

45 R. Gentile, 'Lava Jato Tem Passado como um Trator sobre a Constituição, Diz Advogado' *Folha de São Paulo*, 4 April 2019, at <<https://www1.folha.uol.com.br/poder/2019/04/lava-jato-tem-passado-como-um-trator-sobre-a-constituicao-diz-advogado.shtml>>.

46 Id.

47 Id.

criminal acts, and his status as the head of a criminal organization. Bretas emphasized that this was not an electoral crime, over which the superior electoral courts clearly had jurisdiction. He was asserting his right to judge the matter. However, the imminence of any destruction of evidence was neither established nor adequately addressed and Bretas' argument that the monies were Temer's personal expenditure rather than related to electoral matters flew in the face of the facts.

Limitations of space preclude me from entering into detail, but crucially, this was not a technical discussion about appropriate jurisdiction. Rather, it highlighted the tensions between lower-level judges pursuing their version of Lava Jato and their fears about loss of control to other sectors. Temer's case played out against this political background and not on its own merits. It was, as Nobre says, an act of will rather than of law. Indeed, it echoes another criticism of Lava Jato judges and prosecutors, made by Supreme Court judge Gilmar Mendes, that the autonomy that they had established amounted to a sort of declaration of independence, or 'Republic of Curitiba', increasingly beyond legal or constitutional control.<sup>48</sup>

If Brazil's legal system and profession is characterized by deeply ingrained cultures of excessive formalism,<sup>49</sup> then Lava Jato was characterized by its opposite: an astounding degree of adventurism. Recent laws targeting corruption and other offences were pushed to their limits and beyond. The rewarded denunciation/accusation law (Lei da Delação Premiada) that Moro saw as pivotal to breaking alliances 'between the corruptor and the corrupted' is a case in point. In April 2016, Judge Marco Aurélio Garcia of the Supreme Court expressed grave concerns over its liberal application and implications:

I have never seen so many rewarded denunciations. For one thing, these should be spontaneous. I don't understand that someone can be sent to jail, on a provisional basis, and kept there until there is an award. Something is going wrong.<sup>50</sup>

48 J. Tavares, 'República de Curitiba não Tem Abrigo na Constituição, Diz Gilmar sobre a Lava Jato' *Folha de São Paulo*, 9 August 2019, at <<https://www1.folha.uol.com.br/poder/2019/08/república-de-curitiba-nao-tem-abrigo-na-constituicao-afirma-gilmar-mendes.shtml>>.

49 The mismatch between legal formalism and massive social inequality partly led to the emergence of the Alternative Law Movement and other efforts at using law to favour oppressed social groups. For an introductory overview, see A. Barreto and U. Lyra, 'O Direito Alternativo e a Instituição de uma Dogmática Emancipatória' (2016) 2 *Revista Brasileira de Teoria Constitucional* 1230, at <[https://www.researchgate.net/publication/322594850\\_O\\_Direito\\_Alternativo\\_e\\_a\\_Instituicao\\_de\\_uma\\_Dogmatica\\_Emancipatoria](https://www.researchgate.net/publication/322594850_O_Direito_Alternativo_e_a_Instituicao_de_uma_Dogmatica_Emancipatoria)>. See also P. Gouvêa et.al., 'Beyond Legal Formalism in Brazil: The Law & Poverty Group Experience' (2017) International Meeting of the Law and Society Association, Mexico City, at <<https://ssrn.com/abstract=2988275>>.

50 His wide-ranging interview with *TV Cultura* (4 April 2016) is available at <<https://youtu.be/A02OiSe8gUA>>, at 1:11:09.

He was alluding to the law's use as a mechanism for extracting confession (a problem that the Supreme Court later sought to correct). In the same interview, he noted that 'the release [of a recording] was in flat contradiction to the law'.<sup>51</sup> Indeed, law breaking even included obstruction of justice when Moro took it upon himself, without authority, to instruct the Federal Police to ignore the habeas corpus granted to Lula (8 July 2018) by a more senior judge, Rogério Favretto of the 4th Federal Regional Tribunal.

One of the most difficult yet significant contextual aspects for readers to grasp was the propagation of a climate of distrust and antipathy towards both legal and political institutions, an increasingly toxic zeitgeist. Criticism of the Lava Jato investigation came to be viewed with increasing suspicion – even opprobrium – and fidelity to it as a litmus test of rectitude, one that future President Bolsonaro would pass (initially, at least) with flying colours. For sure, part of the strength and resonance of the Lava Jato investigation was its ability to draw attention in forensic detail to the failings and rotten aspects of law and politics, but it did so in an increasingly arbitrary, tendentious, and factious fashion, with elements of a personality cult. Crucially, the new anti-corruption zeitgeist was not created by allies in the media alone. It also came from within. In August 2018, for instance, Dallagnol suggested that three Supreme Court judges (Dias Toffoli, Gilmar Mendes, and Ricardo Lewandowski) were sending a 'very strong message of leniency in favour of corruption' because they chose to restrict certain powers of Moro.<sup>52</sup> His attack formed part of a wider, increasingly polarized legal and political discourse – which he referred to as a 'war', no less – that imputed dishonourable motives to those questioning the course of the investigation, in this instance judges. It also underlined how powerful prosecutors such as Dallagnol had become, albeit in ways not easily captured within formal institutional notions of office. The shift was evident a year later, in November 2019, when Dallagnol was issued with little more than a formal reprimand by the Prosecutors' Administrative Council, a number of whose members simultaneously emphasized what a great job he and other prosecutors were doing.

Only with the leaking and publication by *The Intercept* of a vast haul of private, encrypted, but hacked messages between Lava Jato prosecutors and Moro, in what colloquially became known as the 'Vaza Jato' scandal ('Jet Leak', a wordplay on 'Car Wash'), did the extent of the operation's overreach become apparent.<sup>53</sup> It included collusion and unwarranted levels of cooperation between prosecutors and the presiding judge. According to the

51 Id., at 6:47.

52 'Conselho do Ministério Público pune Deltan com Advertência por Críticas a Ministros do STF' *Folha São Paulo*, 26 November 2019, at <<https://www1.folha.uol.com.br/poder/2019/11/conselho-do-mp-pune-deltan-com-advertencia-por-criticas-a-ministros-do-stf.shtml>>.

53 An English version of the leaks is available at <<https://theintercept.com/2019/06/09/brazil-lula-operation-car-wash-sergio-moro/>>.

Code of Penal Procedure (Código de Processo Penal), judges and prosecutors are forbidden from collaborating in order to produce a desired result. In violation of those laws, however, Dallagnol and Moro exchanged private messages (through an encrypted app rather than work emails) that included Moro's advice that Dallagnol listen and act on a tip from a 'serious source' who had information on property transfers from one of Lula's sons.<sup>54</sup> This went well beyond the technical exchanges that are an inevitable part of case progression; it constituted substantive covert cooperation to bring to light evidence potentially detrimental to the accused.

Crucially, too, the idea of an apolitical prosecution service did not stand up to scrutiny. Prosecutors considered how they might block or undermine a newspaper interview with Lula in jail, granted by the Supreme Court on the grounds of freedom of speech. Referring to the second round of presidential voting and prospects of the PT's remaining presidential candidate Fernando Haddad, one member of the Lava Jato team, Laura Tessler, expressed fears that 'Who knows ... but an interview before the second round of voting could help elect Haddad'.<sup>55</sup> Carlos Fernando dos Santos Lima, a former Lava Jato prosecutor, later acknowledged that many prosecutors saw Bolsonaro as the lesser of two evils, thereby trumping all other considerations: 'it was obvious ... Fernando Haddad represented everything we were trying to avoid, which was the end of the operation'.<sup>56</sup>

The wider systemic price of investigative overreach, particularly in a country like Brazil which only experienced a return to democracy little more than 35 years ago, is discernible in André Singer's observation that Lula's imprisonment produced 'a kind of artificial imbalance of political forces, not an imbalance produced by the voters' own will, but judicialised'.<sup>57</sup> To be sure, judiciaries, prosecutors, and legal systems produce political imbalances all of the time; it is an inevitable and proper part of judicial review, for example. However, when, as in Brazil's case, investigators and judges produce imbalances on such a scale and in such a delicate historical and contemporary context, one would expect at the very least a higher standard of caution or care to be exercised – one, for instance, that is more than rhetorically attentive to separations of power, procedural fairness, propriety, and impartiality. Demonstrably, that is not what occurred in the course of the

54 See A. Fishman et al., 'Breach of Ethics' *The Intercept*, 9 June 2019, at <<https://theintercept.com/2019/06/09/brazil-lula-operation-car-wash-sergio-moro/>>.

55 G. Greenwald and V. Pougy, 'Hidden Plot' *The Intercept*, 9 June 2019, at <<https://theintercept.com/2019/06/09/brazil-car-wash-prosecutors-workers-party-lula/>>.

56 Comments made during the course of a podcast hosted by Renata Lo Prete, 'O Governo Bolsonaro e os Órgãos de Investigação do Brasil' *CBN*, 24 August 2019, at <<https://cbn.globoradio.globo.com/media/audio/272227/o-governo-bolsonaro-e-os-orgaos-de-investigacao-do.htm>>.

57 E. Julio, 'Singer: Cheio de Contradições, Governo de Bolsonaro Tem Instabilidade Crônica' *Agência PT*, 21 February 2019, at <<https://pt.org.br/singer-cheio-de-contradicoes-governo-de-bolsonaro-tem-instabilidade-cronica/>>.

Lava Jato investigation. As Susan Rose-Ackerman, a leading specialist on political and economic corruption, observed:

in Lula's case, not only was justice instrumentalised for political ends, but the rule of law was clearly disrespected in order to eliminate the former President from the political contest. There is no rule of law without respect for due legal process. And there is no respect for due legal process when a judge is not impartial but acts as head of the prosecution.<sup>58</sup>

## V. CONCLUSION

The Lava Jato investigation has been held up by policy analysts, non-governmental organizations, multilateral organizations, and even some academics as a model of progress and a great step forwards in 'the fight against corruption', often with insufficient – or no – reference to the wider legal, constitutional, and political price to be paid. The OECD persists in referring to 'Brazil's exemplary fight against corruption'<sup>59</sup> and cautions against legal reforms that would undermine the supposed 'independence of prosecutors and judges in fighting corruption'.<sup>60</sup> On various grounds, this article has questioned the extent of that independence and whether, indeed, the results should be taken as a positive exemplar.

On 25 April 2020, amid a global pandemic, Sérgio Moro resigned from the job that he should never have undertaken, ostensibly because of President Bolsonaro's interference in the independence of the Federal Police, who were moving closer in their investigations of his sons' allegedly corrupt activities. Such room for manoeuvre as ever existed under Bolsonaro had evaporated completely. More than just Moro's personal failure, this represented a monumental political failure and misreading of the situation by sections of the anti-corruption movement that had hitched their fortunes to his and thereby Bolsonaro's bandwagon.

58 Open letter signed by Rose-Ackerman and 16 prominent jurists, lawyers, former Ministers of Justice, and high court judges, cited in M. Bergamo, 'Juristas Estrangeiros se Dizem Chocados e Defendem Liberdade de Lula' *Folha de São Paulo*, 11 August 2019, at <<https://www1.folha.uol.com.br/poder/2019/08/juristas-estrangeiros-se-dizem-chocados-e-defendem-liberdade-de-lula.shtml>>.

59 OECD Working Group on Bribery, 'Brazil Must Immediately End Threats to Independence and Capacity of Law Enforcement to Fight Corruption' *OECD*, 13 November 2019, at <<https://www.oecd.org/corruption/brazil-must-immediately-end-threats-to-independence-and-capacity-of-law-enforcement-to-fight-corruption.htm>>.

60 OECD Working Group on Bribery, 'Abuse of Authority Provisions Adopted by the Senate Raise Concerns over Brazil's Capacity to Ensure Independence of Prosecutors and Judges in Fighting Corruption' *OECD*, 1 July 2019, at <<https://www.oecd.org/corruption/abuse-of-authority-provisions-adopted-by-the-senate-raise-concerns-over-brazil-s-capacity-to-ensure-independence-of-prosecutors-and-judges-in-fighting-corruption.htm>>.

Moro's efforts at reform during his tenure were diluted by Congress,<sup>61</sup> in exchange for silence on too many issues (including the passage of more liberal gun laws) and what Transparency International belatedly concluded was 'a government marked by the corrosion of the democratic system'.<sup>62</sup> However, those corrosive features were on prominent display well before Bolsonaro came to power.<sup>63</sup> Despite this, Moro's former Secretary of Justice, Vladimir Passos de Freitas, suggested a partnership with Bolsonaro was possible because Moro 'had no idea what this life would actually be like working together', believing that Bolsonaro 'would be a person [active] in the fight against corruption and crime. Because the candidate's proposal was the strongest of all.'<sup>64</sup> If true, this represents another disastrous miscalculation and the subordination of all other considerations to 'the struggle against corruption'.

Ironically, the outcome may yet result in the anti-corruption movement's greatest success and most pyrrhic of victories: the presidency itself. Moro is a credible candidate for the 2022 presidential elections. Whatever happens, the questions that should be asked are what success really means and where this will leave Brazil's democracy and legal institutions. When the full history of the Lava Jato investigation comes to be written, will it be found to have strengthened these and brought political impunity to an end? On all of these counts, I am highly sceptical. It may even have exacerbated the situation to such an extent that historians will conclude that it fell into an authoritarian trap of its own making.

61 His Anti-Crime Law (10.372/18), approved in December 2019, was stripped of three key proposals: a system of plea bargaining, imprisonment after first appeal, and the relaxation of sentences involving excessive use of force by police.

62 Transparency International Brazil, 'Brazilian Institutions and Society Must Act to Save Democracy and the Fight against Corruption' *Transparency International*, 25 April 2020, at <<https://www.transparency.org/en/press/brazilian-institutions-and-society-must-act-to-save-democracy-and-the-fight-against-corruption#>>.

63 For Bolsonaro's declarations in favour of torture, political execution, military dictatorship, the closure of Congress, and police violence, see 'Bolsonaro em 25 Frases Polêmicas' *Carta Capital*, 23 May 2020, at <<https://www.cartacapital.com.br/politica/bolsonaro-em-25-frases-polemicas/>>.

64 F. Bächtold, 'Moro Não Tinha Ideia de como Seria Trabalhar com Bolsonaro, Diz Ex-Secretário da Justiça' *Folha de São Paulo*, 13 May 2020, at <<https://www1.folha.uol.com.br/poder/2020/05/moro-nao-tinha-ideia-de-como-seria-trabalhar-com-bolsonaro-diz-ex-secretario-da-justica.shtml>>.