Corruption in Brazil: Beyond the Criminal Law

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ABOUT THE PROJECT

Lava Jato or Operation Car Wash refers to Latin America’s largest known corruption scheme in living memory. Related events began unfolding in Brazil in March of 2014. Construction companies were colluding with employees of Brazil’s state-owned oil company to win public works contracts. The oil company’s employees took bribes, while politicians obtained kickbacks as personal gifts or campaign donations.

The relevant scholarship had warned that corruption could result in public works being constructed at inflated costs. However, such warnings were ignored, and so the people involved in the scheme managed to steal billions in state funds. Prosecutors further revealed that bribes paid by the region’s largest construction group extended to eleven other countries besides Brazil.

In spite of the continued interest among policy practitioners and academics, there are key questions about Lava Jato that remain unanswered. For instance, how did the construction company that led the corruption scheme choose the countries in which to do business? According to the international press, the scheme played a role in the 2014 World Cup, but was corruption also at work in the planning and execution of the 2016 Rio Olympics? Also, what is motivating some of the key actors fighting corruption in Brazil, and what can be done to avoid similar corruption scandals in the future?

To answer these and related questions, the Center on Global Economic Governance (CGEG) at Columbia University’s School of International & Public Affairs has collected a series of policy briefs on Lava Jato-related themes. This project is proudly cosponsored by the Center for Development Economics and Policy (CDEP), Columbia Global Center in Rio, and the Latin America Initiative at Rice University’s Baker Institute for Public Policy with the goal of shedding light on a complex problem that has affected the lives of millions.

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Abstract
Corruption in Brazil is linked to aspects of its political system that permit the misuse of public office for personal and political gain. The electoral system encourages the formation of small, personalistic parties. Proportional elections and the rules for allocating seats produce many legislators who are unknown to voters. Public financing and illegal payoffs sustain multiple parties that form coalitions in the legislature. Businesses seeking government contracts, regulatory benefits, and tax concessions supply payoffs to executive branch officials in exchange for profitable deals. These payoffs are used to support legislative coalitions, fill party coffers, and enrich individuals in both the executive and the legislature. Reforming this self-reinforcing system will not be easy, but politicians need to recognize the current dysfunction and work for constructive reforms consistent with democratic principles.
With the election of Jair Messias Bolsonaro as President, Brazil faces a profound challenge to its democratic values, but one reached through the electoral process. As in the United States, the incoming president is popular with a large segment of the population, even as others find him deeply problematic. His army background, authoritarian leanings, lack of commitment to human rights, and reliance on those with military credentials raise fears, especially among those who opposed the military regime that gave up power only in 1988.\(^1\) Also troubling is the appointment of Sergio Moro as the new Minister of Justice. Moro attained almost rock star prominence as the lead judge for the Lava Jato corruption cases over the last few years. Many believe he managed those cases with restraint and respect for the rule of law, but critics argued that the anti-corruption prosecutions unfairly targeted Workers’ Party (PT) members.\(^2\) Moro and the prosecutors argued that the process was impartial and that the caseload reflected the PT’s control of the presidency during the period of the investigations. However, Moro’s acceptance of a prominent position in Bolsonaro's cabinet may pose a test. A hint of the difficult road ahead comes from the revelation that $300,000 passed through the bank account of Bolsonaro’s son’s driver and assistant, a sum far above his reported salary. As Moro has stated: “The facts need to be clarified.”\(^3\)

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\(^2\) Lava Jato’s successes coexist with the controversial use of technical instruments, such as preventive detention, although the prosecutors claimed that it was necessary to prevent the flight of wealthy defendants. The prosecutors also relied on public opinion and the media to build support for the cases. For more information see: Winter, Brian. "Brazil’s 'Car Wash' Probe: Tell Me How This Ends." Americas Quarterly September 28, 2016. <https://bit.ly/2OYXJ6I>.

The Brazilian prosecutors are an independent, highly selective body that may serve as a check on the incoming government and on members of the legislature as well as to their collaborators in the private sector. However, concentrating on the criminal law as the primary route to reform is insufficient. Individuals need to be brought to justice, but no collection of cases can resolve the structural weaknesses in Brazilian democracy. True, some will refuse to make or accept payoffs if the chances of being caught and the level of punishment are high enough, but if the problem is endemic, law enforcement bodies will not be able to deter all corruption. Even the reform bill initially proposed by the prosecutors, but never enacted, primarily concentrated on streamlining the justice system, not making fundamental institutional change.\(^4\)

More is needed to confront weaknesses in the structure of Brazilian democracy. The constitution establishes a representative federal democracy, but its institutions create built-in incentives for corruption as a coping mechanism. The Executive needs to resort to coalition-building to pass legislation, coopting parties and individuals through the distribution of federal resources, often to lower-level governments. Labeled “coalition Presidentialism,” some political scientists see it as the root of Brazil’s institutional dilemma.\(^5\) The most obvious weakness is the number of political parties in the legislature, 30 in the Chamber of Deputies and 21 in the Senate after the last election.\(^6\)

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\(^4\) A reform bill named “10 Measures against Corruption” was presented to Congress but was never approved. It did, however, include a few broadly worded provisions requiring the government to introduce a marketing program against corruption, to train public employees to counter corruption, and to ensure whistleblower confidentiality. For the measures (in Portuguese) refer to: <https://bit.ly/2bC3B3X>.


seldom have a working majority of their own party in Congress. Bolsonaro’s party, PSL (Partido Social Liberal), has 52 of the 513 seats in the Chamber of Deputies; the PT is in first place with 56. Of the Senate’s 81 seats, no party has more than 12 seats; PSL has 4.7

This proliferation arises from society’s disenchantment with traditional parties, as well as an institutional design that encourages fragmentation. Brazil’s proportional election results depend upon political parties’ access to public resources and on electoral institutions that favor smaller parties with little political capital.

Proportional elections are held for the House of Representatives, as well as for state and municipal legislatures using a variant of open-list proportional representation.8 Voters can choose between casting a vote for an individual candidate or for a party. At the federal level, the total number of votes in the current election is divided by the number of seats available in a given state to calculate what is called “the electoral factor” (larger states have more seats and smaller states, fewer).9 The factor determines the number of votes necessary to win a seat and differs across the states. To know how many seats a party will earn in each state, the sum of votes cast for the party and for its individual candidates is divided by the electoral factor. Finally, subject to the 2015 reform briefly described below, the occupants of the seats are determined from a list organized by the number of votes received.

7 Ibid.
8 Brazil’s President, governors, mayors as well as senators are elected directly through a majority system with a runoff for the top two candidates if no one obtains 50% in the first round.
9 This creates differences between the number of votes needed in populous and smaller states. According to Jairo Nicolau, if the number of seats in each state was truly proportional to the population, the State of Sao Paulo (the most populous in the country) would have 58% more seats than it currently has and the state of Roraima (a much smaller one) would have only 17% of its current seats. Jairo Nicolau (2017) Os (des)caminhos do seu voto da urna à Câmara dos Deputados, Ed. Zahar, 1 ed, p. 172.
Parties can form coalitions that count as a single party according to the division explained above. Between 1994 and 2010, 74% of the candidates for seats in the Brazilian Congress were elected in party coalitions.\textsuperscript{10} Many of these are not based on policy or ideology; instead, they were established purely for electoral benefits. Coalitions in proportional elections allow smaller parties to piggyback off the votes cast for larger parties. Hence, popular candidates—who may sometimes obtain two or three times the number of votes necessary for a single seat—help to elect lesser-known names on the coalition list.\textsuperscript{11} This could mean representation in Congress for candidates who are essentially unknown to voters, while allowing their parties to obtain public resources in the next elections. A reform in 2015 tried to address this problem, but as the 2018 vote shows it appears to have had little effect.\textsuperscript{12}

Political parties in Brazil have access to two important resources. First, public subsidies of advertising time on radio and TV have been a key communication tool between candidates and voters.\textsuperscript{13} Second, the state provides public resources for campaign

\textsuperscript{11} Ibid. \\
\textsuperscript{12} Since 2015, even if a party has sufficient votes to receive more than one seat, it will only obtain the extra seats if the listed candidates each receive at least 10\% of the electoral factor. This rule aims to prevent extremely popular individual candidates from bringing into the legislative other candidates who would not otherwise be elected. Yet, this percentage is low and does not solve the problem of party proliferation. For instance, in the last election, the electoral factor in São Paulo was 301,000 votes (out of over 30 million registered voters). If a given candidate receives 602,000 votes, he or she could potentially obtain two seats for his coalition list. According to the new rule, the candidate filling the extra seat must obtain at least 31,000 votes on his or her own to be elected. Therefore, it is still likely that Congress will include members who are unknown to the majority of voters. See: (Law 4,737 of July 15, 1965 as amended by Law 13,165 of 2015). See: André Shalders, “Eleições 2018: Como Regra Criada por Eduardo Cunha impediu PSL de Bolsonaro de ter a Maior Bancada da Câmara”, \textit{BBC Brasil}, October 8, 2018. \texttt{<https://www.bbc.com/portuguese/brasil-45793142>}. \\
\textsuperscript{13} In the 2018 elections, the time slots for Presidential campaigns were divided as follows: 90\% was distributed proportionally to the number of representatives a given party has in the House of
financing. For 2018, the subsidies surpassed 2.5 billion BRL (approx. 600 million USD).  
Both advertising time and campaign finance subsidies are distributed mainly according to each party’s representation in the Lower House. Therefore, substantial resources in the next election are conditional on the level of success in the current elections. However, it is worth questioning the extent to which any of this affected Bolsonaro’s vote totals because his campaign reached voters using social media and messaging apps that are outside the subsidized system. These methods of outreach are likely to grow in importance over time.

As a result of Lava Jato, Brazilian politicians have been motivated slowly to change its electoral system. Under a 2017 constitutional reform, amendments banned coalitions in proportional elections starting in 2020. The statute discourages smaller parties and gives them an incentive to merge in order to run on single slates. In order to access public resources, coalitions must earn at least 1.5% of the national votes or elect nine (out of 513)

Representatives and 10% is divided equally among all candidates (in accord with Law 9,096 of September 19, 1995). See also: Flavia Furlan, “PT, MDB e PSDB terão 34% do tempo de TV e rádio na Campanha Eleitoral”, Revista Exame, June 12, 2018, sec. Brasil, <https://abr.ai/2Tg8inj>.

The Supreme Court banned corporate donations in 2015, leaving Brazil with two sources of public funding: one to fund parties and another to fund campaigns. The first source of public funding is mostly (95%) distributed proportionally based on the Party’s number of representatives in the Lower House in the last election. A small portion (5%) is distributed equally to all parties. The second source of public funding (i.e., the one for campaigns) has a more complex distribution scheme allocated partially based on the party’s number of representatives in the Lower House (48%) and in the Senate (15%) in the previous elections. However, it also provides resources for all registered parties (2%) and to those with at least one representative in the Lower House (35%). These percentages ensure that parties with little representation have considerable access to resources (Law 9,504 of September 30, 1997 as amended by Law 13, 487 and Law 13,488 both of 2017). See: Igor Moraes, “Entenda o que são e quais as diferenças entre o fundo eleitoral e o fundo partidário”, O Estado de São Paulo, June 22, 2018, <https://bit.ly/2EWg1Uu>.

Folha de Sao Paulo newspaper revealed that businessmen linked to Bolsonaro allegedly financed the spread of messages—including so-called fake news—on WhatsApp to benefit his candidacy. These are potentially illegal donations both because they were not declared and because they could count as corporate donations, which are forbidden under Brazilian election law. For more information see: Patrícia Campos Mello, “Empresários bancam campanha contra o PT pelo WhatsApp”, Folha de São Paulo, October 18, 2018. <https://bit.ly/2NKhtpj>. 
representatives in at least nine states (out of 27). The threshold increases in each election, reaching 3% of the national vote in 2030.\textsuperscript{16}

This is a good start, but does not go far enough. Even if the reform achieves substantial results—say, by decreasing the number of political parties in half—Brazil would still have 15 parties.\textsuperscript{17} The existence of multiple parties would continue to present a governance challenge for any President who would need to form coalitions to govern. Many parties are individual fiefdoms with few ideological or policy anchors; hence, their leaders’ support can be a bargaining chip as presidents seek winning coalitions.

Furthermore, Brazil’s federal structure of government motivates national legislators to secure funding for states and localities in their districts because the system concentrates resources at the top while competences lie heavily at the state and municipal levels.\textsuperscript{18} The President has considerable discretion over the budget, he or she can influence Congress by giving out and holding back money for specific constituencies and projects.\textsuperscript{19}

\textsuperscript{17} The estimate was made by listing the number of Representatives the party currently has and asking if they meet the cut-off criteria. See: João Fellet, “Cláusula de barreira: entenda os prós e contras de mudança eleitoral que complica vida de nanicos”, BBC Brasil, September 7, 2017, <https://bbc.in/2FcceCV>.
\textsuperscript{18} In the 1980s, during the transition back to democracy, Sérgio Abranches (supra note 5) argued that reducing the number of parties would have little or even no impact on Brazil’s governability because of the fragmentation of federalism.
\textsuperscript{19} For example, in 2013, the federal government was responsible for 69% of the taxes collected in the country and had 57% of the available revenue. That means that transfers to other government levels were not particularly high. However, major responsibilities for education and health are located at the state level (24% of the available revenue) and in municipalities (18%). Social pressures originate from the bottom, but resources are concentrated at the top, making localities and states largely dependent on federal government transfers and investments. See: Constantino C. Mendes, Federalism in Brazil: governance and fiscal reforms. IPEA, Brazil, 2016. <https://bit.ly/2ABdQSx>. See also: Roberto Maltchik, “O Próximo Governo não Terá Coalizão Programática’ diz Sérgio Abranches”, O Globo, September 16, 2018. <https://glo.bo/2Altfq2>. 
This dynamic can take many forms, but one feature of the Brazilian budget process serves as an illustration. Legislators can annually approve a “budgetary window” that provides small grants for local projects and funds. It serves as a shortcut for lawmakers to fund policies in their electoral districts. However, the Executive controls the dates when the amounts are released. The interaction between party fragmentation and federalism leads to bargaining between the branches of government. For instance, in 2015, President Rousseff vowed to release over 400 million BRL ($100 million USD) in amendments if Congress voted on a project that the Executive favored. More recently, while President Temer was being investigated for corruption, he released over 10 billion BRL ($2.5 billion USD) to secure support in Congress that helped him avoid trial on obstruction of justice and corruption charges.

Coalitions are often quite stable, but their persistence may be the result of patronage and corrupt links that endure over time to the mutual advantage of presidents and legislative powerbrokers. Presidents have been able to submit and pass their legislative agendas, from the more conservative Fernando Henrique Cardoso to Lula of the Workers’ Party. According to Fernando Limongi, discipline and predictability have been largely the norm on the floor of the Congress. However, recent corruption scandals indicate that the

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21 Ibid.
23 FHC’s rate of bill approval was of 85% and Lula, in his first term, was 90%. See: Fernando Limongi (2007) Democracy in Brazil: Presidentialism, Party Coalitions and the decision-making process, Novos Estudos CEBRAP, vol. 3.
24 Limongi (2007) measures discipline as the proportion of lawmakers who are members of parties with ministerial positions who vote in line with the explicit position of the leader of the government in Congress.
observed stability is costly for citizens in the form of padded contracts and poorly conceived projects. Some state and local governments may benefit from the political connections of national politicians as others lose out. Even if no bribes change hands, the quid pro quos that permit stable political deals may not serve most voters’ interests. The President’s electoral alliances, where one might expect some ideological convergence are, instead, mainly linked to the access to resources and the media. The party coalition that supported the President’s campaign is not necessarily the one he or she will rely on once in power. Electoral coalitions may succeed at the polls, but the governing coalition needs to be even larger to have a majority in Congress.

The stability of a coalition may be maintained by outright vote-buying. The Mensalão scandal that broke in 2005 during Lula’s government illustrates that strategy. It is commonly described as a wide-spread and organized strategy of votes-for-cash for congressional allies in return for the support of the executive’s legislative agenda. The claim was that the governing party was paying a monthly stipend to allies through fake advertising contracts with state-owned companies. ²⁵ Prominent figures of the Workers’

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Party were sentenced for corruption and money laundering, but Lula himself managed to bounce back, win re-election and finish his government with one of the highest approval ratings in Brazilian democracy.

If illegal payoffs from the executive branch to the parties and their elected representatives inside the coalition maintain its stability, then the executive, in turn, may suborn government contractors and those seeking favorable regulatory or licensing outcomes. Those making the payments will pad the prices charged to the government for infrastructure. Public officials and contractors may design over-engineered and overly specialized projects where payoffs are easy to hide because there are no private sector benchmarks. The costs of such corruption ultimately fall on the Brazilian citizens in the form of higher taxes and inefficient public spending. Of course, payoffs in contracting and in regulatory programs can occur without the extra link to members of Congress who seek private and political resources, but that final link in the chain makes reform especially difficult. It deters the chief executive from a through-going effort to reform government contracting and service delivery because it would make his or her relations with the legislature more difficult.

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27 Ibid.

28 The Federal Supreme Audit Court estimates that Petrobras contracts investigated in Lava Jato were approximately 17% more expensive than they would be in a competitive setting. The bribes paid to Petrobras officials guaranteed that the construction companies in the cartel maintained stable access to such contracts. Although the exact percentage can be disputed, the fact that the oil company is state-owned exemplifies how society bears the costs of corruption. See: Eduardo Juntolli Vilhena et al “Técnicas Econométricas e seu Papel Inovador no Cálculo do Sobrepreço: o Caso da Lava Jato”, *Revista do TCU*, January 2017. [https://bit.ly/2QfWQD](https://bit.ly/2QfWQD).
Another way to gain support would not involve direct payoffs to parties or politicians. Because the President controls a large share of the nation’s budget, he or she can allocate resources strategically, as well as make appointments to ministries, special agencies, state-owned companies, etc. Of course, such prerogatives are not necessarily problematic, as they allow the President to fulfill campaign promises, and many men and women who take such positions sincerely aspire to serve their country. It would be a mistake to assume that they are automatically prone to corruption. However, if the President’s coalition is not based on ideological affinities or an overlap on policy preferences, then society in general will find it difficult to keep the coalition and the bureaucracy in check.

How to move forward? In June 2018, Fundação Getulio Vargas, a Brazilian University and think-tank, and the Brazilian Chapter of Transparency International released an extensive document with 70 proposed measures to address corruption. The initiative draws upon the first reform presented by prosecutors and builds on it by consulting hundreds of experts from different public and private institutions and by moving beyond the criminal law. For political parties, it suggests increasing the transparency of their internal operations and financial condition, clarifying parties’ liabilities for the use of

illegal funds by its members, and creating mandatory ethics committees and hotlines.\textsuperscript{30} It also suggests the abolishment of one of the special public funds for campaign financing because its allocation between candidates is not sufficiently transparent. The proponents of this legal change argue that, instead of a public fund, voters’ contributions to candidates would be easier for the electorate to monitor.\textsuperscript{31} However, if one of the goals is to strengthen the party system, then reducing the power of party organizations would be counterproductive. Greater transparency and grassroots involvement seem desirable as a route to greater political accountability, but parties do need to be able to have an institutional base to help consolidate democracy. Although such measures could be valuable, there is no guarantee that they are sufficient to transform the intricate balance of Brazilian electoral institutions—a fact recognized by the organizers of the initiative.\textsuperscript{32}

Another source of ideas is the report of an Expert Advisory Group to the President of the Inter-American Development Bank that provides an overview of anti-corruption strategies.\textsuperscript{33} It argues for increasing the authority, independence, and resource base of electoral monitoring institutions, prosecutors, and courts. Some of the reforms it recommends are already in place in Brazil, such as restricting electoral contributions of legal entities and reinforcing the independence of investigators, but Brazil could take up the report’s recommendations for more effective monitoring, reductions in the costs of

\textsuperscript{30} Ibid., p. 177-185.
\textsuperscript{31} Ibid, p. 186-187.
\textsuperscript{32} Ibid.
elections, better whistleblower protections, and enhanced on-line access to data on contributions.

The most dramatic reform would be the creation of a parliamentary system that would require a governing coalition to form after an election. This has long been debated in Brazil. In a 1993 referendum, Brazilians rejected parliamentarism by a large margin.\(^{34}\) During Dilma Rousseff’s impeachment process, in 2016, discussions about parliamentarism and semi-presidentialism were on the public agenda but were soon discarded in the midst of the political turbulence of the time.\(^{35}\) The Brexit crisis in the UK illustrates the limits of coalition governments, but in normal times coalitions that work together over time provide more stability and fewer corrupt incentives.

Still, in Brazil, parliamentarism would not be enough to change corruption incentives. A large consensus on how to strengthen the Brazilian democracy is required: taking a hard-look at the federal structure, decreasing the ever-expanding election costs, and, progressively, increasing the public’s confidence in the political system.

Whether talking about dramatic or progressive changes, there are also practical difficulties at this particular political moment. Moro accepted his new position with the


\(^{35}\) They largely were presented as alternatives to impeachment, in view of the decreasing power of the Presidency at the time. When the impeachment was confirmed, such proposals lost strength (Ibid.).
reform package proposed by GFV and TI under his arm, but he will need to gather massive support from Congress to pass it into law. This is the most fragmented Congress since the reestablishment of democracy under the 1988 constitution, with bigger parties losing seats, especially in the House of Representatives. To build a stable coalition will be an arduous task for the government, especially given the president-elect’s divisive rhetoric. So far, Bolsonaro is creating thematic-centered alliances (mainly with evangelical and law-enforcers groups), as opposed to political-party-centered coalitions. Ad hoc coalitions created to pass particular statutes could prove to be very unstable and could fuel corrupt incentives.

Finally, it is unclear what types of changes to the political system are on the incoming President’s agenda. In a recent statement, Bolsonaro said that “The People needs no intermediaries.” While praising the power of social tools that paved his way to power, he also expresses an unmistakable mistrust of political parties that ought to be prominent intermediaries in any democracy. And here rests the puzzle that Brazilian society has to face: to couple long-sought reforms with a greater commitment to democracy and prosperity, without giving in to divisive solutions that pit people against each other. This can only happen through politics—that is, through politicians and political parties that work for constructive systemic reform.

37 Maltchik, supra note 13.