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BRAZILIAN ANTI-CORRUPTION LAW

Mani Pulite, Lava Jato and the Road Ahead for Anti-Corruption Efforts in Brazil

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When Sergio Moro, Brazil's current Minister of Justice and Public Safety, studied the anti-corruption push in Italy stemming from Operation Mani Pulite (Clean Hands) in 2004, he could not have imagined he would later lead a corruption investigation in his home country with even more far-reaching effects – Operation Lava Jato (Car Wash).

In a 2004 academic article analyzing Operation Mani Pulite, Moro concluded that:

Perhaps the most important lesson from this entire episode is that judicial action against corruption only will be effective with the support of democracy. It is she who defines the limitations and the possibilities of judicial action. As long as [judicial action] counts with the support of popular opinion, it has conditions to advance and will present good results. If this does not occur, it likely will not find success.^[1]

Like the Italian anti-corruption investigation Moro studied, Lava Jato exposed the fact that his country's "political and administrative life . . . was drowning in corruption. . . ." And, as with Operation Mani Pulite in Italy, faith in Lava Jato's success in ferreting out corruption has waned as the political tides continue to ebb and flow and Moro himself has left the judiciary and taken a role in government.

In my opinion, reports of Lava Jato's demise are exaggerated, but significant additional popular pressure will be needed for the gains made in fighting corruption in Brazil are to be maintained long-term. In this article, I will briefly discuss the aftermath of Italy's Mani Pulite investigation and the demonstrated lack of popular support that it enjoyed during its final years, the circumstances that have led Lava Jato to similarly see a reduction in popular support, and finally discuss steps that must be taken so that Lava Jato's failures and successes alike ultimately can continue to assist Brazil in its long struggle against corruption and its corrosive effects.

See "[Anti-Corruption Is Front and Center for Recently Elected Presidents in Latin America](#)" (Nov. 28, 2018).

The Judicial Attack on "Tangetopoli" and the Resulting Backlash

The Operation Mani Pulite investigation started in early 1992 when a Milanese entrepreneur did what at the time was unthinkable – he refused to pay a bribe to a politician and instead reported him to the police. Exposing Milan as Tangetopoli, or "Bribesville" in English, Mani Pulite led to the

indictment of more than 3,000 individuals, captivated popular attention and ultimately led to the demise of Italy's two most powerful political parties – the Christian Democrats and the Socialists. According to Alessandro Merli, an economist and journalist who is currently an associate fellow at the Bologna Institute for Policy Research, one of the results of this power vacuum was the rise of the controversial media mogul Silvio Berlusconi and the pitting of the political elite against the judiciary.

Berlusconi, attempting to fend off several corruption investigations directed at him and his cohorts, rose to the position of Italian prime minister and wasted no time deploying his extensive media holdings in an attempt to portray the Mani Pulite judges as overzealous. According to Merli:

As Berlusconi himself became the target of several investigations, including the corruption of judges, he initiated a powerful pushback against the magistrates, who had enjoyed a considerable degree of public support in the first phase of Mani Pulite. He not only used the means at his disposal on the media front, subjecting the judiciary to relentless attack, but also mobilized his majority in Parliament to approve legislation that would severely restrict the magistrates' actions. The most important measure was undoubtedly the law the imposed stricter statute of limitations. The impossibility of concluding the majority of the trials within the new deadlines was one of the factors in the public's loss of trust in the magistrates' actions.^[2]

Other anti-investigation measures were implemented, including the Biondi decree, which “excluded corruption from the list of

crimes for which prosecutors could request pre-trial custody, which had proven an effective tool in the Mani Pulite operation.”^[3]

Merli also argues that another factor negatively influenced popular opinion with regard to Mani Pulite: several magistrates entered politics themselves – founding parties and getting elected to Parliament – giving “credence to the image of a politicized judiciary.”

The above factors eventually resulted in the loss of public support for, and public interest in, Mani Pulite. As noted by the University of Pisa's Alberto Vanucci, “[s]urprisingly, the question that acted as the detonator of the crisis – revelations of widespread corruption – quickly faded as a major issue on the agenda of Italian politics. The persistence of extensive corruption and the lack of effective anti-corruption policies do not currently figure in public debate as relevant political and economic questions. . . .”^[4]

Finally, one also can point to another significant factor for Mani Pulite's disappearance from the popular opinion radar: “[d]espite the overarching anti-corruption rhetoric, Italian politics is still corrupt ‘on every level’ . . . from top politicians taking bribes to the general public cheating on their taxes. The paradox is that Italians are constantly ‘complaining about politicians who repeat, at the top, the same behaviors that many ordinary citizens demonstrate, on a smaller scale, on a daily basis.’”^[5]

See [“Regional Risk Spotlight: Baker & McKenzie Lawyers Discuss Italy's Corruption Risks and Unique Compliance Model”](#) (Apr. 20, 2016).

Moro and Lava Jato's Initial Salvo Against the Political Class

In 2013, Brazil greeted spectators of the Confederations Cup, the warm-up soccer tournament before the 2014 World Cup, with millions of Brazilians protesting in the streets what initially had been a decision by various states and municipalities to increase bus fares. Weeks of transformative street protests, without any central leadership or coordination, lashed out against the Brazilian government for its perceived poor handling of the economy, education and infrastructure, as well as corruption. A few months later, undoubtedly pressured by the public to take action, President Dilma Rousseff signed Law No. 12.846, known as Brazil's Clean Company Law.

As has been extensively discussed in this and other publications, starting in 2014, Brazilian prosecutors used the Clean Company Law, along with already established criminal statutes, to unravel the massive corruption schemes that had been perpetrated by, among others, Brazil's largest construction companies as uncovered by the Lava Jato investigation. Sergio Moro was the magistrate presiding over the investigation and resulting prosecutions.

Perception of Political Motivation

As the Lava Jato prosecutors trained their targets on Brazil's political elite for receiving improper payments or illicitly funding their parties' campaigns, the same arguments that were trotted out by the Mani Pulite critics were used to attack Moro. One argument that obtained particular traction with a tranche of the Brazilian populace was that the investigation was a witch hunt aimed at the members of the political class, principally

those affiliated with the Workers' Party (*Partido dos Trabalhadores* or PT), even though Lava Jato prosecutions indisputably targeted members of several of Brazil's major political parties). Additionally, Moro was criticized for a decision to release evidence damaging to President Rousseff.

The public protests did not let up in 2015, and arguably peaked in March 2016 when former Brazilian president Luis Inácio Lula da Silva, who already was the target of Lava Jato-related investigations, was being considered by then-President Rousseff for a Cabinet post. Had Lula been appointed to a Cabinet post with the Rousseff administration, he would have been immune from prosecution in regular courts and instead only could have been tried by Brazil's Supreme Federal Tribunal.

In March 2016, Moro unsealed audio recordings of wiretaps involving Lula and President Rousseff. In the recordings, President Rousseff, who already was facing impeachment proceedings and popular anger at her administration, indicated that she already had executed a document appointing Lula to her Cabinet were it to become "necessary," which was a statement that was widely interpreted to mean that the appointment was directly linked to the risk of Lula being arrested in connection with the Lava Jato probes. The Supreme Federal Tribunal suspended President Rousseff's attempt to nominate Lula and Lula eventually was tried and convicted by Moro on one Lava Jato indictment. Lula was later convicted in another matter, by another federal magistrate.

Support From the Judiciary

Some saw Moro's decision to release these tapes as politically motivated and controversial, though he maintained popular

support. Moro also enjoyed support from Brazil's judiciary in the form of jurisprudence that advanced Lava Jato's goals. Specifically, one of the principal weapons of Lava Jato against putative defendants was the ability of the trial court judge to order convicted individuals to begin serving their sentences after confirmation of the sentences by the first appellate court. At the height of Lava Jato in 2016, the Supreme Federal Tribunal confirmed this jurisprudence even though detractors argued that the Brazilian constitution endowed a convicted criminal the right to remain free from prison until all appellate avenues had been exhausted. This jurisprudence caused, *inter alia*, Lula to begin serving his criminal sentence once his first Lava Jato-related conviction was affirmed by the relevant appellate court.

See the Anti-Corruption Report's three-part series on takeaways from the Petrobras settlement: "[Deal With SEC and DOJ to Resolve Allegations of Systemic Bribery](#)" (Oct. 17, 2018); "[State-Owned Entity, Victim and Perpetrator](#)" (Oct. 31, 2018); "[Lessons on Preventing Top-Down Corruption](#)" (Nov. 14, 2018).

The Political Class Strikes Back

After the impeachment of President Rousseff and the confirmation of Lula's prison sentence, which had rendered him ineligible to participate in the 2018 presidential elections, there was a marked decrease in the public protests against corruption, a fact that was used by some to argue that the protests principally were motivated by anti-PT anger rather than support for Lava Jato or against corruption generally. Indeed, Rousseff's successor, Michel Temer, who assumed Brazil's

presidency, was implicated in numerous scandals but Brazil did not experience the popular convulsions that had taken place in 2016 and 2017. Other explanations for this lull were frustration at the political process, the lack of coordination between the various protesting factions, and even exhaustion at the entire exercise.^[6]

By the time the 2018 presidential campaign began in earnest, the major Brazilian political parties had been severely tarnished by Lava Jato, like the major Italian political parties had been during Mani Pulite. Whereas the favorites during the recent presidential elections were candidates of the center-left (PT) or center-right (the Brazilian Social Democracy Party or Partido da Social Democracia Brasileira (PSDB)) parties, the frontrunner for the 2018 presidency was a populist, longtime Brazilian congressman named Jair Bolsonaro. Virtually unknown prior to his bid for the presidency, Bolsonaro campaigned on a law and order agenda that, at least initially, promised to consolidate the successes of Lava Jato.

A New Position for Moro

Bolsonaro won the election after two rounds, beating out the PT's candidate, Fernando Haddad, who had been endorsed by Lula from his jail cell. In an attempt to shore up his anti-corruption bona fides, in early November 2018, Bolsonaro offered Moro the post of Minister of Justice and Public Safety, with the promise to give Moro *carte blanche* in the fight against corruption and to consolidate various law enforcement and investigative units under Moro's control.

In 2006, when asked whether he ever would enter the world of politics, "[n]o, never. Never. I'm a man of justice, and without any offense,

I'm not a man of politics.”^[7] Nevertheless, Moro accepted Bolsonaro's offer, diving headfirst into politics.

Moro's acceptance of the Cabinet post sent shockwaves within the Brazilian political establishment. Those who believed that Lava Jato was politically motivated from the outset had fresh ammunition for their arguments, while others argued that Moro simply was taking the anti-corruption fight from his office in Curitiba to the congressional and executive halls of Brasília. As succinctly noted by Brian Winter, the editor-in-chief of Americas Quarterly:

Some people are going to use this to just destroy him – including some people who were previous fans of his. It's unavoidable. The narrative of a judge who jailed Lula and then took a job in his opponent's government will be too compelling for some to resist. And I suspect [Moro] knows that and I suspect he believes the benefits are greater than the risks.^[8]

Brasília is not Curitiba, however, and almost from the start of his tenure as Minister of Justice and Public Safety, Moro faced serious setbacks from the Brazilian executive, legislative and judicial branches. He also suffered serious damage from self-inflicted errors. These events indisputably caused popular support to wane for Lava Jato and Moro, and have led to fears that anti-corruption efforts that took place since 2014 would be wasted.

Bolsonaro Backtracks

In the executive branch, Bolsonaro first backtracked on his promise to bring Brazil's financial investigative unit into Moro's ministry and succumbed to legislative pressure to keep

it under in the Central Bank's portfolio. Moro's ambitious anti-crime legislation also has not been pushed by the Bolsonaro administration, with Bolsonaro and his ministers preferring to focus on entitlement and economic reforms. Although Bolsonaro generally has supported Moro's efforts, he has not expended his political capital in making anti-corruption a priority for his government, in part due to scandals that have erupted regarding his sons and allegations of improper payments and potential involvement with Brazil's vigilante militias.

Legislation Targeting Judges

In 2016, when Lava Jato was reaching its peak, more than half of Brazil's federal senators and members of congress had been convicted, accused or investigated for crimes, including corruption. Although the composition of the congress changed once Moro became Minister of Justice, many legislators welcomed the opportunity to do battle with Moro on their own turf. Congress's principal rebuke of Moro and Lava Jato came in the form of “abuse of authority” legislation, Law No. 13.869, that now provides for criminal sanctions for judges and prosecutors who, for example, engaged in some of the tactics that had been used by Lava Jato prosecutors. Moro was able to convince President Bolsonaro to veto some of the more controversial aspects of the abuse of authority law, which went into effect on January 1, 2020, but its enactment largely was seen as an attempt to put Moro and Lava Jato in their place.

Court Decision Frees Prisoners Awaiting Appeal

On the judicial front, Lava Jato has been weakened by the Supreme Federal Tribunal. In one of its most controversial decisions,

the tribunal reversed itself again and, in a November 2019 six-to-five ruling, now has held that Brazil's constitution requires that a convicted defendant not be incarcerated until all of his appellate options are exhausted. This decision led to the possibility of release of over five thousand convicted criminals, many of which had been convicted of corruption offenses. One of the released prisoners was former president Lula, who was released from his Curitiba cell in early November 2019. The impact of Lula's release on Lava Jato cannot be overstated, and it represented a significant defeat for Moro and the Lava Jato prosecutors. Certain members of the tribunal also recently vacated a sentence handed down by Moro on the basis that he failed to guarantee certain procedural rights to the defendants, and if the plenary tribunal adopts this position, many of Lava Jato's convictions could be vacated in the future.

Leaked Text Messages

Finally, in June 2019, an online publication called The Intercept began publishing electronic messages that had been exchanged by then-Magistrate Moro and the Lava Jato prosecutors. Although it appears that The Intercept obtained these messages from an individual or individuals who hacked into Moro's and the prosecutors' mobile telephones, the messages evidenced close cooperation and exchange of information between Moro and the prosecutors. Reaction to the "Vaza Jato" scandal ("vazar" means "to leak" in Portuguese) in Brazil and abroad was swift and damning, with the majority of commentators stating that, although perhaps not illegal, Moro's and the prosecutors' conduct was unethical, particularly because Brazil's criminal system is adversarial and judges typically should not be engaging in substantive, ex parte

communications with prosecutors (although other commentators noted that this practice is quite common in Brazil). Moro and the Lava Jato prosecutors did not, at least initially, contest the authenticity of the hacked messages, which were exchanged through an application called Telegram, and the damage done to Moro's and Lava Jato's reputations has been grave.

See "[Bolsonaro Nepotism Allegations Upend Brazilian Corruption Investigations](#)" (Aug. 7, 2019).

The Public Must Be Re-engaged in the Fight against Corruption

As a student of Mani Pulite, Moro knew of the risks of entering the world of politics and how that decision would affect Lava Jato and its legacy. He nevertheless took it, and, due to the issues outlined above, popular opinion has waned and the political class, in all of its iterations, has used this opportunity to stifle the fight against corruption. The challenge, now, is to convince the public that it must re-engage and take to the streets to defend Lava Jato's principal goal – to eradicate corruption from the public sphere. The next few months will be critical and Moro, the Bolsonaro administration and non-governmental organizations fighting corruption will have to attempt to rebuild and reinvigorate the populace so that it does not allow all of the recent anti-corruption efforts to go to waste. This will be no easy task.

See "[Seven Tips for Conducting Integrity Due Diligence on Third Parties in Brazil](#)" (Mar. 06. 2019).

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[7] Fausto Macedo and Ricardo Brandt, “Jamais Entraria Para Politica, diz Sergio Moro,” Estado de São Paulo (5 November 2016) (translation by author).

[8] Tom Phillips, “Bolsonaro Appoints Judge Who Helped Jail Lula to Lead Justice Ministry,” The Guardian (quoting B. Winter) (1 November 2018).

[1] Sergio Moro, Considerations on Operation Mani Pulite, R. CEJ, Brasília, No. 26, pp. 56-62 (July-September 2004) (translation of text by author).

[2] Alessandro Merli, Lessons from Italy’s Anti-Corruption Efforts, Brazil: Boom, Bust, and the Road to Recovery, International Monetary Fund, p. 344

[3] Raffaele Asquer, The Persistence of Corruption in Italy: Politicians and the Judiciary since Mani Pulite,” WPSA 2013 Annual Meeting (Preliminary Draft) 28 March 2013.

[4] Alberto Vanucci, “The Controversial Legacy of ‘Mani Pulite’: A Critical Analysis of Italian Corruption and Anti-Corruption Policies,” Bulletin of Italian Politics, Vol. 1, No. 2, 2009, 233-64, at p. 2.

[5] Momigliano (quoting former Mani Pulite magistrate Gherardo Colombo).

[6] Felipe Betim, “Com Tantas Notícias Sobre Corrupção, Por Que os Grandes Protestos Sumiram das Ruas?,” El Pais Brasil (27 June 2017).