LEGAL AND POLITICAL RESPONSES TO SYSTEMIC CORRUPTION

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Introduction

In August 2020, a symposium, jointly organized by the University of Toronto's Faculty of Law and the Getulio Vargas Foundation's Law School, brought together an interdisciplinary group of scholars to reflect on the promises and limits of legal and political responses to systemic corruption. The results of this symposium are now captured in two sets of publications: this special issue of the *Revista Direito GV* and a special feature of the University of Toronto Law Journal (DAVIS *et al.*, 2021).

The symposium was largely inspired by Operation Car Wash (*Operação Lava Jato*), perhaps the largest anti-corruption case in history. Operation Car Wash has sparked extensive debates in Brazil and elsewhere in Latin America around its legality as well as its political and economic ramifications (LAGUNES and SVEJNAR, 2020, PRADO and MACHADO, 2021; MARONA and KERCHE, 2020; TAYLOR, 2019; SA E SILVA, 2020; PIMENTA, 2020; OCANTO and HIDALGO, 2019). Operation Car Wash also raises broader questions about the role of law – particularly criminal law – in combating systemic corruption.

This introduction provides an overview of the papers published in this special issue and in the University of Toronto Law Journal. We begin with an overview of the problem and possible legal responses. We then move on to contributions that discuss the two most prominent features of many responses to systemic corruption: an emphasis on criminal law and a reliance upon multiple enforcement institutions. Then we turn to alternatives to direct legal responses, specifically, interventions by other branches of government or voters. Finally, we discuss the insights this collection of papers provides for efforts to evaluate and learn from responses to systemic corruption.

1. Overview of the Problem and Potential Responses

Davis (2021a) introduces this special issue with an assessment of the existing literature on the role that law plays in responding to systemic corruption. He begins by identifying the defining characteristics of systemic corruption. He suggests that corruption can vary in terms of its prevalence, causes, or perceptions and that it can be more or less systemic throughout each of those areas. Therefore, corruption may be systemic because it is *widespread* or *persistent*. Alternatively, corruption may be systemic because it is caused by identifiable features of a society's institutions as opposed to the idiosyncratic uncoordinated decisions of individual actors. Here Davis draws a further distinction between corruption that involves the compromise of systems designed to

control corruption (*subversive*) and corruption caused by features of other institutions (*structural*). Finally, the label "systemic" sometimes indicates that a particular group of people perceives corruption to be widespread, persistent, subversive, or structural; in other words, it has become *normalized*.

Davis's essay takes aim at recent contributions to the literature that question the effectiveness of direct legal responses to systemic corruption, *i.e.*, enforcement of explicit legal prohibitions by conventional legal institutions. He suggests that regardless of how systemic corruption is defined, direct legal responses are likely to play an important role in controlling it. How? Given the multitude of phenomena captured under the concept of systemic corruption, Davis argues that the role that legal responses may play will vary, depending on the nature of the problem. Enhanced enforcement efforts are a reasonable response to corruption that is widespread or persistent. Recruiting additional enforcement agencies is an appropriate response to subversive corruption. Finally, enforcement strategies deliberately designed to alter popular opinion may be an appropriate response to normalized corruption. He goes on to analyze conditions that are likely to determine the appeal of each of these strategies, acknowledging that the merits of each strategy will depend on the context. He also acknowledges that reforms to law enforcement cannot be the exclusive response to systemic corruption.

This analytical framework sets the stage for many of the other contributions to the symposium. For instance, several of the contributions examine one or more of the three main types of legal responses in the context of Operation Car Wash: Prado and Machado (2021) document the unorthodox use of legal instruments; Prado and Pimenta (2021), Jones and Pereira Neto (2021), Ferreira (2021) and Pimenta and Venturini (2021) map the mobilization of multiple enforcement institutions ("institutional multiplicity"); and Limongi (2021) shows how the limitations of conventional approaches to criminal law enforcement led judges and prosecutors into a deliberate effort to sway popular opinion in their favor and in support of a bill aimed at amplifying law enforcement agencies' margin of discretion.

2. The Role of Criminal Law

Several contributions to the symposium deal with the most common response to systemic corruption: criminal law. This often involves reforms aimed at expanding prohibitions, removing procedural obstacles to investigation and prosecution, enhancing sanctions, or increasing resources dedicated to enforcement. Criminal law is the most powerful tool available to a state, with sanctions that involve deprivation of liberty, harsh interim measures (such as pretrial detention and seizure of assets), and far-reaching investigative powers. This repertoire of enforcement measures gives police and prosecutors considerable leverage over defendants,

both at trial and in bargaining over negotiated resolutions, and presumably creates powerful deterrent incentives. In addition, Chiao (2021) proposes that in systemic corruption scenarios criminal law can play an important role in stabilizing the norm of honest behavior.

However, there are several reasons to doubt the value of resorting to criminal law as a response to systemic corruption. To begin, there are concerns about its effectiveness: systemic corruption may co-opt, overwhelm, subvert or paralyze the legal system. Enforcement officials can be compromised. More generally, criminal justice systems are primarily designed to deal with individual cases, where there is a perpetrator, a victim, and an act that can be directly linked with a particular result. Systemic and collective problems do not fit neatly into this pattern and attempts to adapt criminal processes to address systemic problems have had mixed results. Moreover, expanded legal prohibitions or enhanced investigative powers and sanctions might be used by unaccountable enforcement officials to repress political opponents or marginalized groups, which is contrary to the principles of democracy, legitimacy, and procedural fairness. Increased attention to the criminal justice system can fuel penal populism (ROBERTS *et al*, 2002) among law enforcement agents, potentially harming due process and the rule of law. Harsh penal responses can also backfire: corrupt leaders may exploit enforcement proceedings using claims of persecution or unfairness to rally their supporters and revert accountability.

Operation Car Wash is a paradigmatic example of an attempt to adapt the criminal law to respond to systemic corruption. As Prado and Machado (2021) show, the criminal proceedings launched during Operation Car Wash were crucial for discovering information. They also resulted in unprecedentedly effective enforcement measures, including the criminal conviction of high-ranking politicians and businessmen, as well as the recovery of substantial amounts of misappropriated funds. Interestingly, the operation was facilitated by institutional reforms introduced only a few years earlier under a government led by the Workers' Party, many of whose officials were eventually targeted by Operation Car Wash. Those reforms strengthened and enhanced the independence of the Federal Police and the Federal Prosecution Service (*Ministério Público Federal)* and encouraged the use of multi-agency task forces.

Another novel feature of Operation Car Wash was the unprecedented way in which the prosecutors and judges courted the media and sought public attention. In order to promote transparency and gather support, they uploaded decisions and documents from the case to a public website, which facilitated public access. They also made proactive use of media outlets. Arrests, searches, and seizures, coercive conductions, and interrogations were broadcast by the media and followed by press conferences given by members of the Federal Police and the Operation Car Wash Task Force, with ambivalent results (PRADO and MACHADO, forthcoming).

In addition, as Prado and Machado (2021) argue, Operation Car Wash introduced many heterodox enforcement practices. These included coordinated raids by Federal Police officers launched at the crack of dawn which were designed to catch the targets of the investigation by surprise, extensive reliance on coercive questioning, as well as, in some instances, abuse of instruments such as plea bargains and pretrial detentions. These practices raised serious concerns about the rule of law and procedural fairness. As a result, Operation Car Wash also illustrates the reasons for ambivalence about relying on criminal law tools to deal with systemic corruption.

Limongi (2021) illuminates the reasons why the leaders of Operation Car Wash adopted the heterodox practices described by Prado and Machado (2021) and made such controversial use of the media. He documents how Sérgio Moro, the judge who presided over most of the Operation Car Wash proceedings, and the lead prosecutor, Deltan Dallagnol, were convinced that corruption in Brazil was systemic, in the sense that it was widespread among members of the political class. In their view, the only way to combat this kind of corruption was for judges and prosecutors to engage in a systematic attack – actually, a crusade – on corrupt politicians and to try to win public support for their cause. He argues that the combination of spectacular actions, transparency, and cooperation with the media were deliberate strategies to attract attention and win support from the general public.

Limongi (2021) also questions the judges' and prosecutors' ability to manage the political effects of large anti-corruption trials. He argues that Operation Car Wash failed to live up to Moro and the prosecutors' hopes of promoting major changes in Brazil's political structure and highlighting the prevalence of high-level political corruption. His narrative illuminates the limits of criminal law as a tool to address a systemic problem, as illustrated by the unorthodox practices adopted in the case and an attempt to promote legal reforms (labeled "10 measures against corruption") that would have increased the discretionary powers of criminal judges and prosecutors and reduced important due process guarantees. Since the prosecutors' overt efforts to win popular support for their preferred criminal law reforms failed, they, with support from prominent judges, formed an impromptu coalition with the anti-government impeachment movement. As a result, Operation Car Wash judges and prosecutors became political players, but they were not necessarily central figures. Ultimately, therefore, Limongi questions whether criminal law enforcement agents and, in particular, judges and prosecutors, can and should play a central role in disrupting systemic corruption in the political system.

While Operation Car Wash provides a cautionary tale about the risks of the criminal process, a critical assessment of legal responses to corruption should not dismiss the criminal strategy. The limitations of individual criminal responsibility and punitive sanctions suggest that a promising path for future research may be to explore different combinations between the at times overlapping legal responses – preventive and reactive/punitive; structural reforms combined

with assigning responsibility; and sanctions that range from deprivation of rights, reparations, and fines to communicative or reputational measures. Analyzing the merits of these sorts of alternative combinations is a promising research agenda for anti-corruption scholars. In this special issue, one method of implementing these strategies is highlighted: the use of multiple enforcement agencies with overlapping authority. This is what we turn to next.

3. Institutional Multiplicity

Studying legal responses to systemic corruption necessarily involves paying close attention to law enforcement (DAVIS, JORGE and MACHADO, 2015), and one of the most notable features of enforcement actions aimed at systemic corruption – including Operation Car Wash – is institutional multiplicity. In the context of anti-corruption law, institutional multiplicity refers to a situation in which multiple institutions in the same legal system have the authority to respond to a case of corruption (DAVIS, JORGE and MACHADO, 2015; PRADO and CORNELIUS, 2020). For instance, in many legal systems, the same corrupt act may be subject to administrative, civil, or criminal sanctions, and several distinct institutions, both local and foreign, may enforce those sanctions. A burgeoning literature explores the positive and negative ways in which institutions can interact in situations that involve institutional multiplicity (DAVIS, JORGE and MACHADO, 2015; PRADO and CORNELIUS, 2020; PRADO and CARSON, 2016, PRADO, CARSON and CORREA, 2015; MACHADO and PASCHOAL, 2016; MACHADO, 2019).

Prado and Pimenta contribute to this line of inquiry by trying to identify conditions under which multiplicity may increase or decrease the probability of reported wrongdoings (PRADO and PIMENTA, 2021). They begin by proposing a granular view of systemic corruption in which functional accountability institutions can exist in an environment where other institutions are dysfunctional and vice-versa. Under the assumption that "pockets of honesty" may exist in corrupt environments, institutional multiplicity may offer an alternative path for an individual who is immersed in systemic corruption and has information about wrongdoings (*e.g.* a whistleblower or a potential defendant). Multiplicity can allow this individual to pursue accountability elsewhere, bypassing blockages in the accountability system. However, multiplicity can also be used to undermine the effectiveness of the accountability system, especially if accountability institutions are "pockets of corruption". In such a scenario, Prado and Pimenta discuss the risk of "façade enforcement" associated with some forms of multiplicity, which is an enforcement action that appears to bring accountability but is tainted by corruption. They offer examples of these scenarios using case studies from Brazil and explore some policy implications, such as when and how multiplicity, centralization, or coordination may be desirable, as well as the associated trade-offs. The hypothesis they present qualifies the claim

that multiplicity always threatens anti-corruption policies and opens room for a more balanced assessment of the positive and negative dimensions of institutional multiplicity in different contexts.

Along the same lines, Jones and Pereira Neto (2021) provide an in-depth analysis of Operation Car Wash, by showing how it involved an instance of systemic corruption and examining ways of mitigating the negative effects of institutional multiplicity. They argue that several interlinked factors explain the systemic nature of the corruption unveiled by the investigations. First, procurement processes and state-owned enterprises were at the center of the scandal. A second factor was the involvement of politicians who appointed officials at the procuring entities in return for personal profit and political donations. Third, there was the perception of a low risk of detection and punishment for corruption. Then, they map multiple criminal, civil, and administrative proceedings aimed at the individuals and companies targeted by Operation Car Wash. While these multiple proceedings led to unprecedented sanctions and penalties, they also potentially created double jeopardy. The authors propose reforms to promote closer alignment of public procurement, anti-corruption, and competition policies and tighter coordination between procurement officials and law enforcement agencies. The authors also account for the political coalitions necessary to sustain the reforms that they favor. They acknowledge that while more structural reforms depend on political will, there are some low-hanging fruits – *e.g.*, changes in the public procurement system – that are less likely to face fierce resistance and could have positive implications in both the short and long term.

Ferreira (2021) offers another perspective on the effects of institutional multiplicity. Rather than discussing how different agencies perform accountability functions, she discusses how courts and lawyers have interpreted a statute that tried to create multiplicity in Brazil, the Administrative Improbity Act (Law n. 8.429 of 1992). The Act introduced civil liability for corrupt acts in an attempt to create an alternative to criminal proceedings, which were perceived to be procedurally complex and with guarantees that reduced the probability of convictions. She argues, however, that the effects of the Improbity Act have been mixed: while there have been convictions, cases take a long time to be decided and asset recovery has been limited. In explaining the reasons for these disappointing results, Ferreira demonstrates that the absence of clear procedural provisions in the Act opened an avenue for legal interpretations that simply followed criminal procedures or largely mimicked criminal guarantees. She also analyzes the battle over special jurisdiction for prosecuting authorities and politicians. After many years of competing judicial interpretations, leading to numerous appeals, courts have settled on the conclusions that procedural safeguards are civil in nature and there is no special jurisdiction for either elected or politically appointed officials. The paper concludes by indicating that there are still other procedural fairness questions to be resolved, such as potential *bis in idem* generated by institutional multiplicity cases, a question that is constantly being debated by the courts.

Institutional multiplicity leads to further complications when regulation of corruption takes on a transnational dimension. Domestic enforcement institutions may, as discussed before, have limited ability to effectively confront systemic corruption. Foreign institutions may act as a complement, as they can bring in new resources and are not immersed in the same political economy (DAVIS, JORGE and MACHADO, 2015). However, there are important questions about the effectiveness and legitimacy of foreign enforcement agencies. Two contributions in the project highlight some of these issues.

Transnational enforcement has been driven by the expansive application of the U.S. Foreign Corrupt Practices Act (FCPA), a law aimed at bribery of foreign public officials which has significant extraterritorial reach. Acorn (2021) shows that there are many open questions about the use of the FCPA against foreign corporations: Why is the US willing to incur the costs of policing the conduct of non-American businesses abroad? What factors influence its exercise of jurisdiction? The article carefully reviews the existing interdisciplinary body of research on the topic, mapping studies that consider the influence of historical contexts, the legal and political opportunities, and motivations behind the enforcement of the FCPA. Building on this map, Acorn highlights methodological challenges and gaps in the existing literature and points to potential future avenues for research. She concludes by suggesting that further studies should include qualitative research and continue to explore the relationship between law enforcement and US foreign policy and international politics.

The transnational dimension of institutional multiplicity is also analyzed by Pimenta and Venturini (2021), who focus on transnational cooperation for bribery cases through an in-depth analysis of negotiated settlements involving Odebrecht. Negotiated settlements have been a central tool in anti-corruption initiatives, in both national and transnational cases. By analyzing Odebrecht settlements in Brazil, Switzerland, the U.S., the Dominican Republic, and Peru, the paper articulates a distinction between investigative and sanction-based cooperation. After describing the features of each tool, the authors explore the effects – both positive and negative – of employing them in a dynamic setting that involves multiple countries pursuing settlements with the same defendants either simultaneously or sequentially. Investigative cooperation between different countries' authorities can buttress the negotiation of joint resolutions by these same authorities. In contrast, if a joint resolution is only signed by a few of the affected countries, then it can negatively impact subsequent investigative cooperation with authorities that were not part of the negotiations. These insights can serve as a basis for a possible research agenda on regulatory design in settings that involve transnational cooperation and institutional multiplicity. As more countries adopt settlements as part of their anti-corruption toolkit, further research is needed on how different types of settlements interact, and how different institutions and rules may unexpectedly constrain or empower various actors.

4. Political Responses

Law enforcement agencies are not the only actors capable of responding to corruption. In fact, there are certain contexts in which these kinds of direct legal responses are likely to be futile. For instance, efforts to increase enforcement will be unavailing if the relevant enforcement agencies have been subverted. There also will be settings in which direct legal responses are likely to be inferior to the alternatives. For example, structural reforms seem like the logical response to structural forms of corruption. Moreover, to the extent that there are concerns about the legitimacy of unelected enforcement officials targeting duly appointed political actors, it may be preferable to have elected officials, or voters, take the lead in responding to corruption. Two contributions to our symposium analyze these types of political, as opposed to legal, responses, exploring the potential roles of the separation of powers (DA ROS and TAYLOR, 2021) and elections (LAGUNES *et al.*, 2021) in holding high-level political actors accountable.

Da Ros and Taylor (2021) challenge the frequently made assumption that checks and balances and the separation of powers are always effective instruments to curb the abuse of power and, therefore, corruption. They do so by making a distinction between these two entangled concepts. They argue that separation of powers is a broader concept that can entail different types of checks and balances, including abusive or improper forms, and the use of rule of law can be used as a political weapon. To explore the implications of the conceptual distinction, they discuss separation of powers dynamics during crises that have led to the removal of presidents and more routine uses of checks and balances. Not all of these dynamics are conducive to corruption control. They point to the fact that the regime's ecology (*i.e.*, the distribution of economic and political power, civic engagement, and state capacity) determines "how the game is played". Finally, they place checks and balances as a mediating variable between the regime's ecology and the control of corruption, a conclusion that serves as an alert to an excessively optimistic view on checks and balances as a prescription to fight corruption.

Lagunes *et al*. (2021) turn to another political mechanism that may be deployed to curb corruption: elections. One of the most acute political effects of Operation Car Wash was to upset the equilibrium that had prevailed in the Brazilian political system ever since the constitutional reforms of 1988. This opened the political arena to new actors, many of whom deployed anti-politics populist discourse that included vehement allegations of political corruption. The anti-corruption sentiment paved the path of President Jair Bolsonaro to power. Lagunes *et al*. (2021) show how, once in power, Bolsonaro and his administration failed to sustain his anti-corruption platform. Brazilian politics, they argue, is permeated by the co-existence of anti-corruption promises and the persistence of corruption scandals. However, they consider that living up to campaign promises remains an indicator of whether elected officials remain responsive to the electorate. They carefully track each promise Bolsonaro set for himself, ranging from

transparency, legal reforms (including his endorsement of the 10 measures against corruption), as well the support and preservation of enforcement institutions, among others. They show reversion, dismantling, and/or indifference in every dimension. Their findings show that a political campaign based on an anti-corruption agenda may not translate into policy reforms, raising questions about why the electorate does not continue to serve as a disciplining force once politicians are in power.

5. Monitoring, Evaluation, and Learning

In addition to mapping responses to systemic corruption, this symposium has also explored how to evaluate these responses. While it seems natural to look at their effectiveness in reducing corruption, Davis (2021b) argues that as a practical matter it is very difficult to determine the effectiveness of legal responses to a problem like corruption. Focusing on the problem of transnational bribery, he identifies three distinct challenges. First, there is the challenge of obtaining good data on either the characteristics of legal interventions or the outcomes of interest. Second, it can be challenging to determine whether there is any sort of causal connection between those interventions and outcomes, keeping in mind the variety and complexity of the factors that influence a phenomenon like corruption. Third, there is the challenge of finding or developing the institutional capacity required to evaluate evidence of effectiveness. All of these challenges are exacerbated in situations that involve systemic corruption, especially when they entail institutional multiplicity and transnational law enforcement.

Several contributions to this symposium suggest that responses to systemic corruption must be evaluated according to criteria outside effectiveness alone. For instance, Prado and Machado (2021) evaluate the heterodox practices introduced in connection with Operation Car Wash in terms of their compatibility with due process and the rule of law. Meanwhile, Davis (2021a, 2019) advocates the evaluation of anti-corruption law in terms of not only effectiveness, but also efficiency, due process, fairness, and legitimacy.

Vieira (2021) evaluates Operation Car Wash against yet another criterion: its effects on the health of Brazil's constitutional democracy. He makes an important intervention in a prominent debate over whether Operation Car Wash caused a constitutional crisis in Brazil. Ultimately, he concludes that Brazil experienced a constitutional malaise, but not a constitutional crisis and that this malaise was not solely caused by Operation Car Wash. In his rich description of the political and constitutional context in which Operation Car Wash occurred, Vieira (2021) highlights several interconnected events that led to a political crisis and constitutional malaise. The political and constitutional system was put under stress not only by Operation Car Wash and its spillover effects on the political class but also by a Supreme Court

decision that further fragmented a multi-party system of Congressional representation, the biggest wave of social unrest since the country's re-democratization, which culminated in the nationwide protests of 2013, the Presidential impeachment, and the tensions it generated between the Brazilian Supreme Court and other branches of government, all on top of a deep economic crisis with serious fiscal consequences. The picture shows how the increasing tension generated by these events led to an escalation in the reaction of important political players, who decided to engage in what Vieira considers to be "constitutional hardball", a game in which players do not violate the rules of the constitutional game, but do push it to its limits (TUSHNET, 2004). The Operation Car Wash case, with its heterodox practices and attempt to co-opt popular support (as described in other contributions to this symposium), was part of that game. The analysis suggests that the excesses of Operation Car Wash should be read in the context of this broader institutional conflict. The analysis also has implications beyond Operation Car Wash: Vieira's analysis points to the importance of better mapping and assessing the political impact of legal responses to corruption.

Conclusion

This project has revealed that there is considerable room to refine our thinking about alternative responses to systemic corruption. The first step is to define with some precision what we mean by systemic corruption, as the term is often used loosely to describe a wide variety of problems. It is also important to acknowledge the wide range of potential responses to systemic corruption – criminal and non-criminal, legal and non-legal, domestic and foreign – as well as how they might be used, either in combination or as alternatives, and how they might interact. Proceeding in this spirit, the studies in this symposium suggest that the effects of different responses depend not only on the precise nature of the problem but also on complex interactions between diverse social and institutional factors. Several of the studies, and especially those focused on Operation Car Wash, demonstrate that the effects of trying to remedy systemic corruption can be far-reaching, extending even to the most fundamental political structures of a society. All of these topics merit further study.

Given the apparent complexity and context-specificity of the relationships between policy interventions and systemic corruption, it is difficult to extract reliable policy lessons from past experience, especially when the experience derives from unique cases such as Operation Car Wash. As many of the contributions to this symposium suggest, one way to pursue such inquiries is to seek conceptual categories that allow for relatively high levels of abstraction and thus generalization. The concept of institutional multiplicity, for instance, offers a much broader analytical frame than traditional legal analysis, thus allowing for comparisons that would otherwise not be possible.

As far as legal analysis is concerned, future studies in this area are unlikely to be useful if they rely solely on traditional doctrinal analysis, *i.e.*, simply accounting for legal provisions. At the very least it is important to consider interactions between different bodies of law and the processes, the organizations, and the personalities involved in their application (DAVIS, JORGE and MACHADO, 2015). It is also important to pay attention to interactions between law and legal institutions on the one hand, and, on the other hand, sociological and political factors such as popular beliefs and the distribution of power among different groups within a community. Therefore, these analyses can only benefit from the interdisciplinarity that informed our symposium, drawing on insights from and generating a dialogue between law and the social sciences.

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