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## White Collar Crime - Brazil

### Supreme Court cracks down hard on corruption and money laundering

December 10 2012

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## Introduction

'*Mensalao*' - which roughly translates to 'big monthly payment' - is the popular name given by the media to a recent corruption and money-laundering case before the Supreme Court (Penal Action 470), the most complex it has ever heard.

One of the most important ministers in Lula's (1) administration was sentenced to more than 10 years in prison, charged with masterminding a scandal that involved stealing money from a fund that the Bank of Brazil (a public bank) owned, via fraudulent contracts set up with a marketing firm in the state of Minas Gerais and a Brazilian bank. This financial institution then made several million-real loans to the Workers Party and to the marketing firm without valid guarantees. Through the scheme, during 2003 and 2004 the former president's campaign costs (amounting to more than US\$5 million) were secretly paid into an account in the Bahamas. Furthermore, through this private bank, several members of Congress received cash taken from the Bank of Brazil fund, which was then used to approve bills presented by the presidency. According to one of the convicted defendants, the scheme involved up to US\$175 million. Before the scandal emerged, none of this money had been declared to the tax authorities.

Out of a total 37 defendants, the former minister and a further 24 people were convicted and sentenced to up to 40 years' imprisonment each, for:

- bribery;
- appropriation of public money;
- money laundering;
- conspiracy to commit crimes; and
- removal of money from the country without notifying the Central Bank.

Among these were nine congressmen, a bank president and vice president, as well as marketing professionals and a lawyer. The remaining 12 were acquitted.

Lula's marketing professional was one of the few acquitted, once he had paid millions in tax fines, as the Supreme Court accepted that there was no clear evidence that he had been aware of the illegal origin of the money. This conclusion was reached despite the fact that he had been asked to open an account in the Bahamas specifically to receive payment (and had been told that if he did not do so, the payment could not be made).

The 11 Supreme Court justices, in a trial broadcast live on television and involving more than four months of intensive debate, declared the majority of the accused guilty as charged. The public largely applauded the conviction. However, the convicted parties still deny that any crime occurred, claiming that it was an 'invention' of the attorney general and that the judges had been influenced by public opinion and political trends.

The judgment raised a number of important legal issues that will change Brazilian jurisprudence in future, as detailed below.

### Live broadcast of the trial

The Brazilian Supreme Court is the only court in the world to have its sessions transmitted live on network television (*TV Justiça*), directed by the court itself.

Live broadcast has both pros and cons. On the one hand, it ensures absolute transparency in those judgments that must be made public in line with the Constitution. Furthermore, it is educational - the public can watch topical debates (eg, on stem cell research, euthanasia, abortion due to anencephaly, corruption and the limits of Indian territories in the Amazonian rainforest). A significant percentage of the Brazilian population of almost 200 million is beginning to comprehend legal issues, boosting public understanding of the judiciary.

However, the downside of live broadcasts is that arguments between the 11 justices have increased in number, particularly when the case attracts media attention. On occasion, judges have appeared particularly keen to voice their disagreements in public. In *Mensalao*, some of the judges argued vociferously, even raising their voices and walking out of the courtroom, which may give the public the impression that the Supreme Court is not as serene and calm as might be hoped.

### Corruption in absence of specific action

Article 333 of the Penal Code 1941 defines the crime of 'corruption' as the conduct of "offering or promising undue advantage to a public servant, to [allow] him to practice, to omit or delay any official act". Punishment will vary from two to 12 years' imprisonment, plus a fine. The penalty is increased by one-third if, due to the promised advantage, the public servant delays or fails to perform any official act, or disrespects his or her duties.

In addition, under Article 316, a public servant will be punished with the same penalty if he or she requests or receives undue advantage or accepts a promise of such an advantage as a result of the act (whether personally or on behalf of others, directly or indirectly, or outside the function or before assuming it). The penalty is increased by one-third if, in consequence of the promise or advantage, the official delays or fails to perform any official act or practice in violation of his or her duty.

In a 1994 corruption case, ex-president Fernando Collor was accused of receiving money from private entrepreneurs who had contracts with the government through his former campaign treasurer, Paulo Cesar Farias (who was later killed). Collor was acquitted by the Supreme Court mainly because the attorney general failed to demonstrate the 'official act' that he had been alleged to practise, omit or delay.

However, in the case at hand, the Supreme Court took an alternative approach, convicting the defendants of paying dirty money to congressmen, and the congressmen of receiving such amounts, even though no specific 'official act' was found to have been practised, omitted or delayed. In so doing, the court broadened the understanding of the legal text, which could be problematic in terms of the country's Roman-Germanic law system, under which every crime must be precisely defined by a previous law and interpreted restrictively, and when upholding the right to freedom. This aspect of the judgment raises legal insecurities.

### Money laundering

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In line with Brazilian jurisprudence, most criminal law professors and authors (based on criminal theory and the right to freedom) agree that conduct can be defined as a crime - thus authorising the state to enforce its right to punish - only once an important, socially relevant variable (eg, life, bodily integrity, freedom, honour, money, property or environment) has been violated or significantly placed at risk.<sup>(2)</sup>

When a crime against property, for example, is committed and the stolen money is then used to buy goods, the court will consider this second act irrelevant when determining the sentence, as none of the other above-mentioned socially relevant variables have been infringed (ie, the second crime is also a crime against property). If the perpetrator simply uses the illicit money obtained (eg, to pay his or her lawyer), under the rule of double jeopardy he or she cannot be punished again; neither can the legal professional, provided that such professional was unaware of the illicit origin of the money. However, if the perpetrator then commits fraud (eg, by using a false identity to buy a house and conceal the money), he or she will have perpetrated another crime. This issue is often raised in regard to compliance and private legal assistance.

However, the Supreme Court in *Mensalao* came to a different conclusion. According to the court, the perpetrator of money laundering can be said to have committed further money laundering if he or she uses the illicit money obtained for his or her own benefit and attempts in any way to disguise it, even though no further fraud has been committed. For example, the court convicted a number of congressmen of receiving money (ie, corruption), and at the same time found them guilty of money laundering, because the payment cheques were addressed to the bank itself and the name of the beneficiaries appeared only in a separated fax order attached to it. One was convicted because his wife cashed the cheque and another because he sent an assistant to cash the cheque.

Money laundering is typically committed by third parties who intentionally conceal or try to conceal the money's illicit origin, such as bank executives, real estate and insurance brokers and fine art auction professionals, and not by the same person who committed the previous crime.

Arguably, the Supreme Court understanding violates the rule of double jeopardy - the perpetrator of a previous crime cannot be punished twice (ie, both for the original crime and for the resultant money laundering) where he or she used the illicit profit and attempted to hide the fact that he or she had done so, but no fraud occurred in using the illicit money. In this case, even if fraud had been committed in order to disguise the origin of the money (eg, use of a false identity or false documents), he or she should be convicted for the crime of fraud (but not money laundering), since he or she would have infringed another relevant societal value.

However, this liberal interpretation was denied by the Supreme Court, as it ruled that the same person who committed the previous crime could also be convicted of money laundering in relation to the illicit profit.

### Convictions supported on indirect evidence

In order to convict, the judicial authority must be sure that the defendant:

- committed the crime solely by his or her own hands (ie, as a direct author);
- committed the crime with the assistance of another party (ie, as a co-author);
- ordered another person to commit a crime (ie, as a mediate author); or
- helped another person to commit a crime by planning or giving that person the means to do so (ie, as a moral or intellectual participant).

Except for jury trials (which in Brazil apply only to intentional crimes against life), the Constitution states that all judgments must demonstrate a clear motive. It is therefore fundamental that the court fully explain in its sentence how the conclusion of culpability has been reached, based on evidence obtained under judicial cross-examination between the prosecution and defence and before a judge.

However, Article 155 of the Penal Procedure Code makes a very concerning exception, allowing judges to convict based on evidence obtained by police and (as in this case) by a congressional investigatory commission, once such evidence has been reinforced by other evidence obtained during the criminal procedure itself, with the participation of both the prosecution and the defence. The code states that:

*"the judge will form his conviction by free assessment of evidence produced under judicial adversarial system, not been allowed to base its decision solely on the elements of information gathered in the investigation, except for precautionary proofs, unrepeatable and anticipated"*.

In general cases, because of this rule, police interrogation without the presence of a lawyer or confessions allegedly obtained under torture are still admitted (such torture is difficult to prove on the word of the defendant alone, even where strong and coherent, as judges still tend to ignore it). Arguably, this rule indirectly encourages the police to obtain confessions through illegal methods, despite the fact that any citizen arrested is formally entitled to the constitutional right to silence and torture is severely punished by Brazilian law (at least in theory).

Returning to the *Mensalao* case, when convicting the former minister of bribing congressmen, the Supreme Court used this rule to include not only evidence obtained during the criminal procedure under the adversarial system, but also statements obtained by a previous congressional investigatory commission, in which the defendant's lawyers did not participate.

Furthermore, the Supreme Court ruled that in the case of certain types of crime, such as corruption with the participation of several parties, it is sufficient to demonstrate the existence of indirect evidence, some of which has been obtained by the police or the commission, as stated above. The court therefore ruled that it is unnecessary to have direct evidence of the accused handing over the money or signing the money order to the public servant; a taped conversation in which he or she talks indirectly to other defendants will suffice.

Two different situations therefore arise, respectively involving intellectual participants and those who carry out a crime themselves. For both convictions, solid evidence regarding cooperation in the crime is always needed. The Supreme Court found that it was sufficient to prove that circumstantial evidence existed - such as meetings with other defendants shortly before the day on which the contracts were signed - alongside depositions of the other defendants before a congressional investigatory commission, in order for the judge to conclude, logically and rationally, that the accused had participated in the crime.

The judges then referred to the 'domain of the fact' theory of German author Claus Roxin, stating that his theory justifies conviction without direct evidence provided that, based on indirect proof, the judges were convinced of his or her guilt. This conclusion is questionable. Evidence is always needed; even in the case of intellectual participants, it must be proven that their acts directly related to the planning of the crime (although it is not necessary to prove that they executed the crime personally). The theory does not change this fact.

The willingness of the Supreme Court to convict a person for corruption and other crimes based solely on indirect proof may result in a breach in the Brazilian legal system, making it much easier to convict defendants accused of intellectual participation in crimes.

### Comment

Sociologically, the Supreme Court's strict ruling in this case is understandable. The corruption and impunity of the political elite, which have led to widespread corrosion of moral standards, are no longer tolerated. Jails are full, with more than 500,000 inmates and a further 500,000 who have not yet been arrested. Furthermore, 99% of those who are in jail have been convicted or charged with drug dealing, stealing, robbery (with violence) or homicide, and most are very poor. Only an insignificant percentage have been convicted of tax evasion, corruption or bribery, or other financial crimes perpetrated by the elite.

The recent case was the biggest corruption scandal ever seen in Brazil, involving the bribery of several congressmen and fully covered by the media through the live television transmissions.

On the one hand, this decision has changed people's perception of the judiciary, giving them hope that criminals who belong to the elite and commit so-called 'white collar crimes' can no longer rule with impunity. However, through its new judges, the Supreme Court has changed its own jurisprudence and authorised a much more flexible interpretation of the law in corruption cases.

Although many have applauded the decision, there are very relevant concerns and only time will tell whether the Supreme Court went too far in its mission to convict those involved in the scandal. One thing is sure: the debates between the 11 judges were intense and there can be no doubt that their views were made loud and clear.

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### Endnotes

(1) 'Lula' is the popular name given to Luiz Inácio Lula da Silva, the former president of Brazil.

(2) This is in line with the Roman phrase "nullus in culpa est innoxius" (no crime without injury) or the basic principle stated by John Stuart Mill in his

(2) This is in line with the Roman phrase "*nulum crimen sine iniuria*" (ie, no crime without injury) or the harm principle stated by John Stuart Mill in his 1859 *On Liberty*.

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