Inclusive Experimentalism in Transnational Law Reform: Lessons from Operation Car Wash

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1. Introduction

The design of legal institutions to govern the exercise of power beyond the state is one of the great challenges of global governance. The challenge begins with the creation of legal norms and institutions that operate across borders, including those that allow for coordination among countries. The next step is to create institutions that ensure the constant and regular adaptation and improvement of those transnational legal norms and institutions. This second challenge – the design of institutions to govern the reform of transnational law – is the focus of this essay. We identify the key features of effective and legitimate transnational law reform institutions and underscore the importance of iterative, experimental and inclusive reform processes.

We develop our argument by considering the design of international legal institutions that govern the reform of transnational anticorruption law, one of the most important domains in which power is currently exercised across national borders. Anticorruption law is transnational in two senses. First, nominally domestic anticorruption laws are often modeled on foreign laws and, governed by an extensive set of international instruments and institutions, including the United Nations Convention Against Corruption ("UNCAC") and the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") and the bodies charged with implementing those conventions, such as the OECD Working Group on Bribery. Second, since the beginning of twenty-first century there has been a dramatic increase in enforcement of domestic laws aimed at transnational corruption, and more specifically, bribery and money laundering, such as the 1977 Foreign Corrupt Practices Acts in the United States and the 2013 Corporate Liability Law (also known as Anti-Corruption Law) in Brazil. For the purposes of this essay we use the term transnational anticorruption law to encompass laws that operate across borders in both these senses.

While the process of creation, implementation and reform of transnational anticorruption law involves both international and domestic institutions, the focus of our analysis is solely on the international ones. These international institutions that currently guide reform of transnational anticorruption law are ostensibly designed to facilitate iterative and experimental processes.

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However, we contend that those institutions and the processes they oversee are insufficiently inclusive in terms of the values, expertise or geographic locations of the people represented in the reform process.

To illustrate the potential benefits of inclusive experimentalism in reform processes and the limitations of existing transnational anti-corruption institutions we use a study of Brazil's Operation *Lava Jato,* or in English, Operation Car Wash ("Car Wash") and related investigations in other Latin American countries. Possibly the largest anticorruption case in history, Car Wash targeted an enormous Brazilian corruption scheme involving the state-run oil company (Petrobras), the largest construction companies in the country, and high-ranking politicians. Car Wash also led to follow-on proceedings against one of the construction companies, Odebrecht, in eleven other countries. Car Wash and the related investigations in Latin American countries led to numerous public protests and enforcement actions, harsh corporate sanctions, and the imprisonment and/or ouster of leading political figures, with far-reaching effects on economic growth, human rights, and democratic governance in the region.

If any two cases ought to prompt reform of transnational anticorruption law they are Car Wash and Odebrecht. The sheer number of countries in which similar patterns of corrupt activity were uncovered suggests that those activities ought to be frequent targets of transnational anticorruption law and suggests that there are substantial benefits to improving the applicable laws. Meanwhile, the magnitude of the social, economic and political impacts of the legal proceedings in these cases provides especially valuable lessons to the international legal institutions governing the reform of transnational anticorruption laws. Specifically, the cases suggest that while transnational anti-corruption law can be a potent force in the fight against corruption and impunity, it ought to exhibit more concern for due process and human rights, the dangers of recruiting the media into the fight against corruption, the political effects of anti-corruption law enforcement, the importance of coordination among domestic enforcement agencies, and the effects of international cooperation on third parties.

Attention to the substantive dimensions of these reforms will be at least partially motivated by the governance structure of international institutions. In fact, we find that Car Wash and Odebrecht provide important lessons on directions for reform of transnational anti-corruption law, but international anticorruption institutions are not likely to incorporate these lessons fully into their reform agendas. Because the international institutions that guide reform are insufficiently inclusive, we suspect that lessons about enhancing effectiveness and efficiency will be learned but the other lessons to be taken from these cases will be neglected.

The next section offers general definitions of transnational law and transnational law reform and then briefly summarizes the academic consensus that transnational law reform processes ought to be iterative, experimental and inclusive. Section 3 defines transnational anticorruption law and describes the institutions that currently guide its reform. Section 4 describes Car Wash. Section 5 identifies potential lessons to be learned from Car Wash. Section 6 then discusses the evidence that existing international institutions are unlikely to incorporate those lessons fully into the reform of transnational anticorruption law. Section 7 concludes.

2. Transnational law and its reform

Transnational law can be defined either broadly or narrowly. The broad definition includes all law whose content is influenced by norms or actors outside any single state, even if it governs conduct that takes place entirely within the borders of a single state.[1] The narrow definition encompasses the law that governs cross-border activities.[2] Reform of transnational law in the broader sense could refer to any process designed to improve any laws susceptible to cross-border influence. Reform of transnational law in the narrow sense means improving the laws that govern cross-border activities. Regardless of whether transnational law reform is defined broadly or narrowly it inevitably involves consideration of how similar problems might manifest themselves in multiple settings, and how similar legal norms will operate in those settings.

The kinds of international institutions and processes that support reform of transnational law will depend on whether the term is used broadly or narrowly. Improvement of transnational law in the broad sense will be fostered by international institutional mechanisms that help domestic legal actors to identify and assess the merits of institutional alternatives and to choose alternatives whose merits are clear. In other words, the international institutions and processes that support transnational law reform, broadly defined, ought to foster mutual learning by domestic actors while making room for translation of universal norms to local contexts.[3] Additional and distinct mechanisms are required to support reform of transnational law defined narrowly as the regulation of transnational activity. Individual states generally lack either the incentives or the capacity to coordinate and account for the interests of parties beyond their borders. Meanwhile, foreign states or international organizations are often relatively well placed to safeguard the neglected interests. Consequently, reform of the regulation of transnational activity will tend to involve international institutions and processes that empower external actors to encourage domestic actors to manifest due regard for the interests of foreign actors and help them coordinate cross-border enforcement actions.

The key questions in the design of international institutions and processes to guide transnational law reform concern *when* reform should take place, *what* subjects it ought to encompass, and *who* should be involved. There seems to be a broad consensus in the recent literature in favor of *iterative*, *experimental* and *inclusive* processes. Both at the domestic and transnational level, scholars have argued that law reform should allow for continuous feedback and revision of the regulatory framework, being especially attentive to implementation

[1] Halliday and Shaffer (eds.), *Transnational Legal Orders* (2015).
[2] Jessup, *Transnational Law* (1956).
[3] Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle', 108 American Anthropologist (2006) 38.

experiences.[4] These kinds of processes permit mutual learning and ensure the legitimacy of the values embedded in the overarching framework. Iterative and experimental reform also responds to the uncertainties caused either by the difficulty in determining how particular rules and norms will operate in different legal-political-cultural contexts, or by unintended consequences.[5] Such openness can take many forms, such as encouraging local actors to adapt general principles to local contexts, to find different solutions for a common problem, to design different ways of implementing shared general principles, to find multiple ways of achieving common goals. Finally, inclusiveness in law reform processes, which essentially entails maximizing participation by affected actors, both improves the quality of the information collected and helps to build legitimacy.[6] Different actors typically have different information about how law functions in various contexts. Also, different interests may be affected in different ways by rules and norms, and implementation processes.

There is no consensus around the institutional arrangements that promote inclusiveness. We conceive of inclusiveness as a measure of the distribution of power and influence across at least four dimensions: values, interests, expertise, and social position. A law reform process's levels of inclusiveness along each of these dimensions will depend on how and to what extent it incorporates the influences of people who have different professional backgrounds, national affiliations and demographic characteristics. Influence can be incorporated in a variety of ways, ranging from voting to making submissions prior to a decision to commenting after the decision has been made.[7] Rather than advocating for a particular institutional arrangement to guarantee inclusiveness, our argument is that transnational legal reform processes should be attentive to the overall breadth of participation.[8]

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[4] A prominent concept that embodies these features is experimentalist governance, which is "recursive process of provisional goal-setting and revision based on learning from the comparison of alternative approaches to advancing them in different contexts." Sabel & Zeitlin, 'Experimentalist Governance', in Levi-Faur (ed.) *Oxford Handbook on Governance* (2012) 1, 2–4; De Búrca, Keohane and Sabel, 'Global Experimentalist Governance', 44 *British Journal of Political Science* (Br. J. Polit. Sci.) (2014) 477. Such features are also embraced by the literature on New Governance, Responsive Regulation, Meta-Regulation, and Process-based regulation. See e.g., Scott, 'Reflexive governance, regulation, and meta-regulation: Control or learning?' in J. Lenoble and O. de Schutter (eds.), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (2010). There are also proponents of the use of more scientific methods to conduct legal experiments. See e.g. Abramowicz, Ayres and Listokin, 'Randomizing Law', 159 *University of Pennsylvania Law Review* (U. Pa. L. Rev.) (2011) 929.

[5] For a description of these uncertainties, see Davis, 'The Limits of Evidence-Based Anti-Bribery Law', 71, *University of Toronto Law Journal* (UTLJ) (2021) at 22-24 (for a general discussion) and 30-40 (for an anti-bribery law discussion).

[6] von Bernstorff, 'New Responses to the Legitimacy Crisis of International Institutions: The Role of 'Civil Society' and the Rise of the Principle of Participation of 'The Most Affected' in International Institutional Law', 32 *EJIL* (2021) 125. Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (2015).

[7] Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' 108(2) *American Journal of International Law* (Am. J. Int. Law) (2014) 211.

[8] von Bernstorff, *supra* note *.

3. Transnational anticorruption law and its reform

The general propositions from the preceding section all apply to transnational anticorruption law and the design of institutions to promote its reform.

Defined broadly, transnational anticorruption law includes all regulation of corrupt activity that is susceptible to influence by actors beyond the state.[9] Almost every country in the world is now a party to the United Nations Convention Against Corruption ("UNCAC"), a treaty which directs states how to regulate virtually every kind of corrupt activity. For this reason alone, transnational anticorruption law in the broad sense covers virtually every aspect of anticorruption law in every country in the world, even though most anticorruption laws in most countries long predate the adoption of UNCAC and their reform is often driven primarily by local forces.

The narrow definition of transnational anti-corruption law is limited to the body of law that governs corrupt activities that cross national borders. This definition encompasses both domestic laws, such as the US Foreign Corrupt Practices Act of 1977 and the Bank Secrecy Act, and international legal instruments such as the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"), as well as certain provisions of UNCAC. The institutions that administer and enforce transnational anti-corruption law include domestic bodies such as legislatures, courts, prosecutors and administrative agencies, as well as international bodies such as the OECD Working Group on Bribery, the Conference of States Parties to the UNCAC, the World Bank, and arbitral panels constituted to adjudicate investment disputes. These legal instruments and actors represent only a subset of the international mechanisms that govern transnational corruption. That larger set of governance mechanisms also includes corruption indicators, financial institutions that condition access to foreign aid and international finance on anticorruption efforts, and private firms' anticorruption standards.

At first glance, the international framework that shapes transnational anticorruption law appears to be reasonably conducive to iterative, experimental and inclusive reform.[10] The parties to both UNCAC and the OECD Convention have established bodies that meet two or three times per year to review the agreements' implementation by specific parties, share information and develop guidance on future implementation. It is not obvious that either treaty encourages individual countries to adapt international norms to local contexts.[11] However, both regimes are committed to learning from experience. Each convention has established a body to oversee periodic peer reviews designed to identify instances in which states have failed to live up to standards established by the relevant treaties, assist states in improving their implementation of the treaties, and provide a basis for identifying common challenges. The meetings of the relevant body under the OECD Convention, the OECD Working Group on Bribery, include a *tour de table* in which the parties review open enforcement actions.[12] The Conference of States Parties to

[9] Ivory, 'Beyond transnational criminal law: anti-corruption as global new governance,' 6 *London Review of International Law* (*Lond. Rev. Int. Law*) (2018) 413, at 420-421, 423-427.
[10] Harris, 'Experimenting with corruption — an analysis of the OECD Anti-Bribery Convention through the lens of experimentalism' 51(3) *Georgetown Journal of International Law* (2020) 565. See also Rose, *supra* note *.
[11] K. E. Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (2019).
[12] *Ibid.*, at 49.

UNCAC also has established separate bodies to review prevention of corruption, asset recovery, and international cooperation.[13]

While it is clear that these mechanisms provide for iterative review of the conventions' implementation, it is not clear how inclusive they are. On the one hand, the peer reviews often involve consultation of a broad range of parties within each country, including non-governmental actors (although in the UNCAC system inclusion of civil society is at the discretion of the state being reviewed and has been inconsistent).[14] Moreover, the OECD regularly engages in public consultations, including around revisions to guidance documents.[15] On the other hand, the mechanisms for reviewing the implementation of the major anticorruption conventions appear to be dominated by representatives of law enforcement agencies.[16] By virtue of their professional orientation those officials are more likely to pursue objectives such as effective deterrence than, say, protecting human rights or avoiding political and economic disruptions. In addition, when it comes to reform of transnational anti-bribery law the most influential institution has been the OECD Working Group on Bribery. The OECD Working Group comprises 44 relatively rich countries; in 2009, it decided to include a small number of non-States Parties in its meetings.[17] Since then, some countries have attended the meetings as *ad hoc* observers (China, India, Indonesia, Malaysia, and Thailand).[18] Yet, as Rose observes, "The Working Group's inclusion of non-Members as *ad hoc* observers has been relatively limited, as it has been geared towards those countries that are a part of the OECD's programme of 'enhanced engagement', which is designed to lead to non-members' eventual accession to the OECD."[19] Another limitation is that it does not have any formal mechanism for taking into account the interests of people in non-member states whose interests might be affected by member states' regulatory efforts.

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[13] 'Conference of the States Parties to the United Nations Convention against Corruption', https://www.unodc.org/unodc/en/corruption/COSP/conference-of-the-states-parties.html

[14] OECD, *OECD Anti-Bribery Convention: Phase 4 Monitoring Guide* (2020), at 14, available at https://www.oecd.org/daf/anti-bribery/Phase-4-Guide-ENG.pdf; UN Office on Drugs and Crime, *Mechanism for the Review of Implementation of the United Nations Convention against Corruption—Basic Documents* (2011), para. 28, available at https://www.unodc.org/documents/treaties/UNCAC/Publications/ReviewMechanism-BasicDocuments/Mechanism_for_the_Review_of_Implementation_-_Basic_Documents_-_E.pdf; UNCAC Coalition, *Keeping up with the Times: A way forward for ensuring an inclusive, transparent and effect and effective UNCAC Implementation Review Mechanism* (2021), at 16-19, available at https://uncaccoalition.org/new-report-on-strengthening-the-uncac-implementation-review-mechanism-irm/.

[15] See e.g., OECD Working Group on Bribery, *Public Comments: Review of the 2009 Anti-Bribery Recommendation* (2019), available at https://www.oecd.org/corruption/anti-bribery/Public-Comments-Review-OECD-Anti-Bribery-Recommendation.pdf. The OECD Working Group website also contains information about annual consultations with the private sector and civil society, available at https://www.oecd.org/corruption/anti-bribery/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm

[16] The OECD Convention encourages each lead examiner country to ensure that their two experts include "at least one law enforcement official with corruption-related experience". OECD, *OECD Anti-Bribery Convention: Phase 4 Monitoring Guide*, *supra* note 21, at 13. The governmental experts nominated to participate in the UNCAC peer review mechanism are predominantly law enforcement officials. It is also worth noting that the secretariat for UNCAC is the United Nations Office on Drugs and Crime, whose mandate is crime control. GA Res. 58/4, 31 October 2003.

[17] OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (2009), art XVII ('provide a forum for consultations with countries which have not yet adhered, in order to promote wider participation' in the Convention, the Recommendation, and the follow-up mechanisms).

[18] OECD Working Group on Bribery, *Annual Report 2014*, at 28–30, available at https://www.oecd.org/daf/anti-bribery/WGB-AB-AnnRep-2014-EN.pdf.

[19] Rose, *supra* note *, at 50.

4. Operation Car Wash and the Odebrecht Case

In order to demonstrate the potential virtues of inclusive experimentalism in transnational law reform we present two interrelated case studies of transnational anticorruption law in action: Car Wash and Odebrecht. Car Wash serves as an example of the implementation of transnational anticorruption law both because key aspects of the Brazilian anticorruption regime that informed the domestic investigation and sanctioning were influenced by foreign sources and because the operation was transnational in scope. The so-called "Odebrecht case", which refers to spin-off investigations and prosecutions in other jurisdictions that followed from Car Wash, and uncovered a trail of bribes paid by Odebrecht outside Brazil, is also transnational in both these senses. The purpose of these case studies is to show the potential benefits of ensuring that law reform processes capture as much information as possible about the implementation of anticorruption laws and consider the interests and views of the broadest possible set of actors. Examining multiple enforcement proceedings within one country and in other jurisdictions that arose from a related set of corrupt activities allows us to illustrate many different facets of our argument without having to recount the facts of a large number of wholly distinct cases.

A. Background conditions: Brazil's anticorruption regime

Car Wash was made possible by decades of investment in anti-corruption institutions, a critical set of legal reforms implemented shortly before the operation became public in 2014, the efforts of a small group of highly motivated judges and prosecutors and a population fed up with a long history of Brazilian elites enjoying impunity for corruption.

The institutional reforms commenced with Brazil's transition to democracy in 1988. Since then, successive Brazilian governments have strengthened institutions responsible for monitoring, investigating, and sanctioning corrupt acts, including the Public Prosecutor's Office (*Ministério Público*), the Judiciary, accounting courts, and internal control mechanisms.[20]

Brazil's institutional building was complemented by important legal reforms in the 2010s, many of which were influenced by international treaties and soft laws on corruption, terrorism, and money laundering. The most significant of these reforms were adopted in 2013 amidst enormous public demonstrations – mainly about corruption – and as Brazil was preparing to play host to the World Cup, the Rio Olympics and the Paralympics.[21] The OECD Working Group had previously criticized Brazil for failing to impose corporate liability for transnational bribery.[22]

[20] Praça and Taylor, 'Inching Toward Accountability: The Evolution of Brazil's Anticorruption Institutions, 1985–2010', 56 *Latin American Politics And Society* (*Lat. Am. Politics Soc.*) (2014) 27. Kerche and Marona, *A Política no Banco do Réus: a Operação Lava Jato e a Erosão da Democracia no Brasil* (Forthcoming), Chapters 1, 2 and 3.
21 De Assis Machado, Maciel and De Souza, 'Intertwining public security policy and protest control in Brazil: Sports mega-events and international diffusion of repression', 7 *Latin American Law Review* (2021) 81.
[22] OECD, *Brazil: Phase 2 / Report on the application of the Convention on combating bribery of foreign public officials in international business transactions and the 1997 recommendation on combating bribery in international business transactions* (2007) at 53, available at https://www.oecd.org/brazil/39801089.pdf.

Facing domestic and international pressure to combat corruption and control the protests, the government fast-tracked the adoption of an Anti-Corruption Law which imposed strict administrative and civil liability on corporations for corrupt acts (both domestic and transnational).The law also included a provision permitting non-trial resolutions of proceedings through leniency agreements, which was added at the last minute before approval. The Anti-Corruption Law introduced the possibility that multiple enforcement authorities would have jurisdiction over a particular corrupt transaction but did not clearly indicate which authority in such a case would have competence to negotiate and sign leniency agreements or whether the conclusion of a leniency agreement would preclude action by other authorities.

The government also adopted a separate Organized Crime Law that created new offences related to participation in organized crime and granted the police and the Public Prosecutor's Office enhanced investigative powers as well as the power to negotiate plea bargains with individual defendants in criminal proceedings. Plea bargaining was new to Brazilian criminal procedure, a transplant from Anglo-Saxon systems. In the course of Car Wash, the STF ruled that a plea bargain could be signed by both the police and the Public Prosecutor's Office, maintaining the overlap between enforcement authorities.[23]

The third element of Brazil's anti-corruption regime that made Car Wash possible was a cadre of highly motivated judges and prosecutors willing to launch a crusade or a "blitzkrieg" against corruption. The leading judge in the case, Judge Sergio Moro, and the leading prosecutor, Deltan Dallagnol, were part of a generation of Brazilian enforcement agents with international experience, who were familiar with international efforts to combat corruption. The Manu Pulite case in Italy, perhaps the largest anti-corruption case prior to Car Wash, was a major source of inspiration for them.[24]

Finally, before Car Wash, Brazil had a record of unsuccessful corruption cases (with the important exception of the Mensalão case, which resulted in the conviction of high ranking members of the ruling party in 2005).[25] To a certain extent, the impunity reflected defects in Brazilian procedural law. For instance, in Brazil, the clock for the statute of limitations continues to run while the case is in court.[26] As a result, in the decades preceding Car Wash, many corruption cases failed to lead to convictions because the accused strategically resorted to interlocutory and final appeals that artificially extended the duration of the case.

[23] Prado and Pimenta, 'Systemic Corruption And Institutional Multiplicity: Brazilian Examples Of A Complex Relationship', 71 *University of Toronto Law Journal* (*UTLJ*), (2021) 74, at 93.
[24] Limongi, 'From birth to agony: The political life of Operation Car Wash (Operação Lava Jato)', 71 *UTLJ* (2021) 151.
[25] Praça and Taylor, *supra* note 25.
[26] OECD, *Phase 3 Report On Implementing The OECD Anti-Bribery Convention In Brazil* (2014), available at https://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf, at 45 and 68.

B. Operation Car Wash

Car Wash targeted a massive scheme of bribery and embezzlement aimed at obtaining and distributing the benefits of overpriced contracts with Petrobras, a giant oil company controlled by the Brazilian state and which was Latin America's most valuable company at the time the investigation started.[27] The scheme involved cartels among Brazil's largest construction companies, including Odebrecht, the largest construction company in the country.[28] The corruption extended far outside Brazil. Odebrecht channeled bribes to and through trusts and accounts abroad, especially in Switzerland, but also in other countries with traditions of protecting bank secrecy or with less strict anti-money laundering regulations.[29] In addition, some of the construction companies involved in Car Wash, and in particular Odebrecht, had paid bribes to public officials in over 12 countries, most of them in Latin America.[30] In Peru, for instance, where Odebrecht had large and complex infrastructure projects, the company participated in a local cartel, bribed high-ranking politicians across the political spectrum, and financed campaign contributions through legal and illegal donations.[31]

Car Wash led to proceedings that involved virtually every component of Brazil's anti-corruption regime. There were criminal proceedings against politicians, officials of state-owned companies, business executives and middlemen; antitrust proceedings against individuals and corporations accused of collusion and bid-rigging; administrative actions in the accounting courts based on the misuse of federal funds by corporations, individuals and political parties; civil actions under the Brazilian Improbity Law that imposed monetary sanctions on government officials and provide damages to the State; prosecutions in specialized electoral courts against individual politicians and political parties for violation of campaign finance laws; and proceedings seeking political sanctions (such as impeachment or "quebra de decoro") in Congress. Some of the companies involved were also subject to administrative proceedings involving the securities' authority (CVM) and/or other regulatory agencies.[32] These proceedings also sparked many disputes among affected parties that ended in arbitration, as well as bankruptcies and tax collection

[27] Uol Economia, *Petrobras Volta A Ser Maior Empresa Da América Latina Em Valor De Mercado* (2014), available at https://economia.uol.com.br/noticias/redacao/2014/08/06/petrobras-volta-a-ser-maior-empresa-da-america-latina-em-valor-de-mercado.htm.
[28] Jones and Pereira Neto, 'Combatting Corruption and Collusion in Public Procurement: Lessons From Operation Car Wash', 71 *University of Toronto Law Journal* (UTLJ), (2020) 103.
[29] Department of Justice, Odebrecht Plea Agreement, United States of America v. Odebrecht S.A., 2016, Cr. No. 16-643 (RJD) Brasil, Ministério Público Federal; Odebrecht S.A. Termo de Acordo de Leniência (2016). Switzerland, Office of the Attorney General. *Petrobras– Odebrecht Affair: The Office of the Attorney General of Switzerland Convicts Brazilian Companies and Demands Payment of over CHF200 Million* (2016). Available at: https://www.bundesanwaltschaft.ch/mpc/en/home/medien/archiv-medienmitteilungen/news-seite.msg-id-65077.html.
[30] Department of Justice, *Ibid*.
[31] Pimenta and Greene, 'Comparing Peru and Mexico in the Lava Jato corruption scandal', in P. Lagunes and J. Svejnar (eds), *Corruption and the Lava Jato Scandal in Latin America* (2020), at 143.
[32] Jones and Pereira Neto, *supra* note 35.

cases. By 2021,[33] Car Wash had led to 294[34] criminal lawsuits with 1,710[35] individuals prosecuted, and 722[36] criminal plea bargains signed. Corporations involved in the scheme agreed to pay 12.9 billion reais in fines (around USD2.6 billion)[37] in over 30 corporate non-trial agreements with different agencies in the Brazilian government. They also settled over 31 cases before the Brazilian antitrust authorities. The Federal Accounting Court issued over 100 decisions, and civil actions demanding reparations of over 51 billion reais (approximately 10 billion USD) are still ongoing.[38] In addition, Brazilian authorities made 447 requests for legal assistance to 61 countries and received 606 requests from 40 countries, ranging from requests for information, access to testimony, obtaining documents, freezing assets, etc. More than 2.1 billion reais (around 500 million USD) were frozen abroad, mostly in bank accounts in Switzerland but also in Monaco, Singapore, Luxembourg, and the United States, among other countries.[39]

The police, prosecutors and judges who spearheaded Car Wash employed exceptionally aggressive tactics. The investigation was divided in phases, with each new phase involving several judicial orders, such as searches, seizures, coercive questionings and arrests in different cities. All law enforcement measures of each phase happened simultaneously in a single day, often commencing with dawn raids designed to take defendants and other targets by surprise. These were accompanied by extensive use of pre-trial detention of defendants—almost 300 detention orders were issued by the courts in Paraná and Rio de Janeiro.[40] Prior to Car Wash, pre-trial detention had rarely been used against white collar defendants.[41] The legal basis of many of these detentions was questionable because it was not obvious that the prosecution demonstrated the

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[33] The most up to date numbers available vary according to the city or the court. The data from Curitiba, Rio de Janeiro, the Superior Court of Justice, and the STF are from 2021. The data from São Paulo are from 2020. The numbers referring to the Federal Court of the 2nd Region are from 2019. Cf. http://www.mpf.mp.br/grandes-casos/lava-jato/resultados.

[34] Data taken from the Operation Car Wash website. There were 179 lawsuits in Curitiba; 104 in Rio de Janeiro; 9 in São Paulo; and 2 at the Superior Court of Justice. The Data from Curitiba, Rio de Janeiro and the Superior Court of Justice are from 2021. The numbers referring to São Paulo are from 2020. Cf. http://www.mpf.mp.br/grandes-casos/lava-jato/resultados.

[35] There were 553 people prosecuted in Curitiba; 887 in Rio de Janeiro; 89 in São Paulo; 48 at the Federal Court of the 2nd Region; 7 at the Superior Court of Justice; 126 before the STF. Cf. http://www.mpf.mp.br/grandes-casos/lava-jato/resultados.

[36] There were 349 in Curitiba; 180 in Rio de Janeiro; 10 in São Paulo; 183 before the STF. Cf. http://www.mpf.mp.br/grandes-casos/lava-jato/resultados.

[37] The fines were imposed by the branches of the Operation Car Wash in Curitiba and Rio de Janeiro. Cf. http://www.mpf.mp.br/grandes-casos/lava-jato/resultados.

[38] There were 17 agreements in Curitiba; 9 in Rio de Janeiro; and 2 in São Paulo. Cf. http://www.mpf.mp.br/grandes-casos/lava-jato/resultados. These illustrative numbers do not consider agreements signed with other authorities. For examples of these overlaps, see M. R. Sanchez-Badin and A. Sanchez-Badin, 'Anticorruption in Brazil: From Transnational Legal Order to Disorder', 113 *American Journal of International Law* (AJIL Unbound) 326 and Jones and Pereira Neto, *supra* note 35.

[39] Ministério Público Federal, *Efeitos No Exterior — Caso Lava Jato* (2022), available at http://www.mpf.mp.br/grandes-casos/lava-jato/efeitos-no-exterior.

[40] Ministério Público Federal, *Lava Jato em Números*. Available at http://www.mpf.mp.br/para-o-cidadao/caso-lava-jato/atuacao-na-1a-instancia/atuacao-na-1a-instancia/parana/resultado.

[41] Mirza, in a critical way, has stated that the Operation Car Wash implied a "new paradigm" to the use of pre-trial detention in judicial cases of corruption. Cf. Mirza, 'Novos Paradigmas da Prisão Preventiva: Um Claro Retrocesso', 122 *Revista Brasileira de Ciências Criminais* (RBCCrim) (2016) 115.

requisite threats to either "public order" or the criminal proceeding.[42] There was also concern that detention was being used improperly to coerce the accused into entering plea bargain agreements.[43]

Car Wash was widely publicized by the media in Brazil, marking the success of a carefully crafted publicity strategy. Each phase of the investigation had a memorable nickname such as doomsday (*juízo final*) and slaughter (*abate*).[44] Media outlets were informed in advance of raids so that they could be fully televised.[45] The public prosecutor's office published voluminous statistics about the operation on its website accompanied by colorful graphics. There were also regular press conferences, in which prosecutors often used Powerpoint slides to explain the proceedings, and all judicial hearings were livestreamed.

The emblematic case was the prosecution and sentencing of former President Luis Inácio Lula da Silva which raised concerns related to due process and impartiality, including the accusation that a criminal process was being used for political purposes. In fact, these allegations formed the basis of a petition submitted by Lula to the UN Human Rights Committee.[46] Lula was sentenced in July 2017 and arrested in April 2018, thus being barred from running in the Presidential elections of October 2018. Concerns that the prosecution of Lula and other officials were politically motivated were amplified later in 2018 when the presiding judge of the case, Sergio Moro, decided to leave the bench to become Minister of Justice in the administration of Jair Bolsonaro, the winning candidate in the Presidential election. These concerns were further reinforced in June 2019, when a leak of private messages (*Vaza Jato*) exchanged between Moro and a group of prosecutors during the course of the case suggested improper collaboration between investigative and adjudicative authorities.[47]

In November 2019, Lula was released by the Brazilian Supreme Court (STF).[48] In 2021, the Court first overturned Lula's conviction on the grounds that Judge Moro did not have jurisdiction

[42] See, e.g., Mirza, *Ibid*.
[43] See Morais and Bonaccorsi, 'A Colaboração por Meio do Acordo de Leniência e Seus Impactos Junto Ao Processo Penal Brasileiro: Um Estudo a Partir da "Operação Lava Jato"', 122 *Revista Brasileira de Ciências Criminais* (RBCCrim) (2016) 122; Matos, 'Colaboração premiada: análise de sua utilização na Operação Lava Jato à luz da verossimilhança e da presunção de inocência', 143 *Revista Brasileira de Ciências Criminais* (RBCCrim) (2018) 156; Aires and Fernandes, 'A colaboração premiada como instrumento de política criminal: a tensão em relação às garantias fundamentais do réu colaborador', 3 *Revista Brasileira de Direito Processual Penal* (RBDPP) (2017) 253.
[44] Cf. https://en.wikipedia.org/wiki/Phases_of_Operation_Car_Wash
[45] Ricardo Balthazar, Folha De S. Paulo, *Mensagens Vazadas Da Lava Jato Indicam Favorecimento A Jornalistas Aliados* (2019), available at https://www1.folha.uol.com.br/ilustrissima/2019/12/mensagens-vazadas-da-lava-jato-indicam-favorecimento-a-jornalistas-aliados.shtml.
[46] 'Brazil's Lula tells U.N. his rights violated in corruption probe', *Reuters*, 28 July 2016, available at https://www.reuters.com/article/us-brazil-corruption-un-idUSKCN1082OC. .
[47] Glenn Greenwald, Betsy Reed and Leandro Demori, The Intercept Brasil, *Como E Por Que O Intercept Está Publicando Chats Privados Sobre A Lava Jato E Sergio Moro* (2019), available at https://theintercept.com/2019/06/09/editorial-chats-telegram-lava-jato-moro/.
[48] Lula was released due to a decision by the Federal Justice in his process of Execução Penal Provisória n. 5014411-33.2018.4.04.7000. This decision considered the results from the simultaneous trial of ADCs 43, 44 and 54 by the STF, responsible for the prohibition of imprisonment soon after conviction in a second instance.

over the case[49] and then annulled all decisions against Lula on account of Moro's bias.[50]One of the Justices concluded: "Fighting corruption is fundamental, but it must be done within the legal framework, observing due legal process. One cannot fight crime by committing crime."[51] The sentences of many of the Car Wash accused have met the same fate.[52]

C. The Odebrecht case

Car Wash also triggered a flurry of legal proceedings outside of Brazil, the most prominent of which involved Odebrecht. In 2016, Odebrecht and its subsidiary Braskem entered into simultaneous settlement agreements ("the joint resolutions") with Brazil's Federal Public Prosecutors' Office, the U.S. Department of Justice, the U.S. Securities and Exchange Commission, and the Office of the Attorney General in Switzerland, based on misconduct both inside and outside of Brazil.[53] The U.S. agencies immediately posted their settlement agreements and related documents on their websites. In those documents, Odebrecht admitted to paying bribes to government officials not only in Brazil but also in Angola, Argentina, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and Venezuela.[54] These disclosures triggered follow-on investigations in all of the countries named, against both Odebrecht and individual politicians.[55] In many countries, contracts with Odebrecht were suspended or cancelled.

Both the joint resolutions and the follow-on investigations involved significant amounts of cross-border cooperation between law enforcement agencies, both formal and informal.[56] Brazil's authorities formalized their arrangements with prosecutors and state attorneys from Argentina, Chile, Colombia, Ecuador, Mexico, Panama, Peru, Portugal, the Dominican Republic and Venezuela by entering into the Brasilia Declaration on International Legal Cooperation Against

[49] AG. REG. no AG. REG. no HABEAS CORPUS 193.726 PARANÁ and AG. REG. no HABEAS CORPUS 193.726 PARANÁ

[50] HC 164.493/PR. There were actually three separate criminal proceedings against Lula: one involving a beach apartment in Guarujá, a country house in Atibaia and the Lula Institute.

[51] STF. 2021. Habeas Corpus 164.493. Ministro Gilmar Mendes. Brasília, DF, March 09, 2021. Available at https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=756048250

[52] José Marques and Felipe Bächtold, Folha De S. Paulo, *Afastamento De Juizes Na Esteira Do Caso Lula-Moro Beneficia Políticos* (2022), available at https://www1.folha.uol.com.br/poder/2022/03/afastamento-de-juizes-na-esteira-do-caso-lula-moro-beneficia-politicos.shtml.

[53] United States of America v. Odebrecht S.A., Cr. No. 16-643 (RJD), Plea Agreement, paras. 43-70.

[54] *Ibid*.

[55] Camilo Carranza, Seth Robbins and Chris Dalby, InSight Crime, *Major Odebrecht Corruption Cases and Investigations in 2019* (2019), available at https://insightcrime.org/news/analysis/major-latam-odebrecht-corruption-cases-investigations-2019/; DW.com, *Ex-ministro moçambicano Paulo Zucula detido por corrupção* (2019), available at https://p.dw.com/p/3JrBd; DW.com, *Tribunal Constitucional de Espanha anula extradição de ex-colaborador de PR angolano* (2021), available at https://p.dw.com/p/3yRxC. Carranza et al. also refer to investigations in El Salvador and Bolivia.

[56] Pimenta and Venturini, 'International Cooperation and Negotiated Settlements for Transnational Bribery: A Study of the Odebrecht Case', 39 *Revista Direito GV* (2021)

Corruption.[57] The terms of this agreement overlapped with but went beyond the provisions on mutual legal assistance found in the OECD Convention, and included Ecuador, Panama, the Dominican Republic and Venezuela, countries that are not parties to the OECD Convention.

On at least two occasions international cooperation led to the development of mechanisms to protect the interests of the private actors targeted by the investigation. For instance, before requiring Brazilian individuals who had previously entered into agreements in Brazil to give evidence to Peruvian authorities, the Brazilian Federal Prosecution Service required the Peruvians to sign a memorandum confirming that they would not use the information against any of individuals or companies to whom the Brazilians had agreed to grant leniency.[58] The STF also granted former Peruvian President Ollanta Humala's petition for full access in response to Odebrecht's agreement with Brazil so that he could determine whether the information shared with Peruvian authorities omitted information that could be beneficial to his case.

Odebrecht signed non-trial agreements with other 5 countries after it had entered into the joint resolutions. Some countries, such as the Dominican Republic, relied on the information released by the United States together with the results of their own investigations. Others relied more heavily on assistance provided after the joint resolutions. However, in 2019, a team of investigative journalists subsequently uncovered millions of dollars in bribes paid to officials in the Dominican Republic, Ecuador, Panama and Peru that were not referred to in the agreements released by the US authorities.[59]

D. Aftermath

The Car Wash task force was officially disbanded in 2021 leaving a complicated legacy. While the operation had strong public support in its first years, the concerns over abuses grew louder as the enforcement activities advanced.

The legal legacy of Car Wash includes a series of measures designed to curtail perceived abuses of due process that occurred during the operation, but also includes measures that are likely to hamper the operation of the anticorruption system. In 2017 the STF issued decisions condemning the abusive use of pre-trial detention[60] and in 2018 the Court curtailed the use of coercive questioning against suspects and the accused.[61] In 2019 Congress enacted the Law of

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[57] Brasilia Declaration on International Legal Cooperation Against Corruption (2017), available at: http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/declaracaobrasilia.pdf.
[58] Pimenta and Venturini, *supra* note 63.
[59] Sasha Chavkin, International Consortium of Investigative Journalist, *Leak Exposes Millions of Dollars in New Payments In Odebrecht Cash-for-Contracts Scandal* (2019), available at https://www.icij.org/investigations/bribery-division/leak-exposes-millions-of-dollars-in-new-payments-in-odebrecht-cash-for-contracts-scandal/
[60] Prado and Machado, 'Using Criminal Law to Fight Corruption: The Potential, Risks and Limitations of Operation Car Wash (Lava Jato)', *American Journal of Comparative Law* (Am. J. Comp. Law), forthcoming.
[61] STF. 2017. Arguição de Descumprimento de Preceito Fundamental 444. Ministro Gilmar Mendes. Brasília, DF, December 19, 2017 (Justice Mendes issued an injunction forbidding any authority from using coercive questioning under the argument that it violated not only freedom of movement but also the presumption of innocence). S.T.F., Arguição de Descumprimento de Preceito Fundamental ADPF No. 395 / DF, Relator: Gilmar Mendes, 14.06.2018, D.J.e. Nr. 119, 15.06.2018. (the court issued a final decision determining that coercive questioning of suspects and

Abuse of Authority (Law n. 13.869/2019). Among other things this legislation created a new position in the criminal law system – the *juiz de garantia* – which ensures that the same magistrate will not be responsible for both the investigative and adjudicative phases of a criminal proceeding. This proposal was directly linked to the accusations of partiality against Judge Moro in Car Wash. In 2021, a New Administrative Improbity Law came into force (Law n. 14.230/21), changing many of the provisions that governed civil suits associated with Car Wash. For instance, despite not imposing criminal sanctions, the law now requires intentionality (*mens rea*) for liability. As the new law applies to cases that have not been decided, it may allow many political parties and public officials accused by Car Wash to escape liability.

Car Wash had profound economic and political consequences for Brazil. The reputational taint and threat of liability hanging over many of Brazil's largest companies led to paralysis of the country's infrastructure sector and a credit shortage, with knock-on effects for many other sectors. Losses to the Brazilian economy, which was already faltering for other reasons, have been estimated at 2% of the country's GDP in 2014 and 5% in 2015.[62] In the political sphere, Car Wash helped to undermine a stable (albeit problematic) political dynamic that had prevailed since the country's democratic transition, contributing to the impeachment of President Rousseff (who was not among the accused in the Operation) and the rise to power of Jair Bolsonaro, a backbencher with autocratic inclinations who had been a relatively insignificant figure in the Brazilian political landscape until then.[63] President Bolsonaro and his government have taken several actions designed to dismantle or weaken accountability institutions as well as to decrease transparency, including dismantling the Car Wash task force.[64]

The Odebrecht case also had massive economic and political effects outside of Brazil. The suspension and cancellation of Odebrecht's contracts paralyzed infrastructure construction throughout Latin America with concomitant ramifications for employment and economic growth. In Peru, for example, some 60,000 workers were dismissed as of February 2017 as a result of Odebrecht's failure to pay its suppliers. The governor of the Central Bank estimated that Car Wash–related delays in two major infrastructure projects would reduce GDP growth by between 0.5 and 0.6 of a percentage point.[65] The political effects were equally significant. In most countries officials at the very highest levels of government were implicated, including the last five presidents of Peru as well as former presidents in Bolivia, Ecuador, El Salvador, and Panama.[66]

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accused persons violates the Constitution). The Law on abuse of power approved in the Congress in the same year criminalized the illegal ordering of coercive questioning (Law n. 13,869).

[62] https://ineep.org.br/os-impactos-economicos-da-operacao-lava-jato-e-o-desmonte-da-petrobras/

[63] Vieira, 'Clash of powers: Did Operation Car Wash trigger a constitutional crisis in Brazil?', 71 *University of Toronto Law Journal* (*UTLJ*), (2021) 174.

[64] Lagunes et al, 'Promessas e ações do presidente Bolsonaro sobre corrupção', 39 *Revista Direito GV* (2021).

[65] De Michele, Prats Cabrera and Isaías, *Effects of Corruption on Public–Private Partnership Contracts: Consequences of a Zero-tolerance Approach* (2018), at 2, available at http://dx.doi.org/10.18235/0001355; Davis, *supra* note 16, at 187.

[66] Carranza et al, *supra* note 62.

5. Lessons from Car Wash and the Odebrecht case

Car Wash and the Odebrecht case revealed both strengths and weaknesses in transnational anti-corruption law. On the one hand, adoption of international approaches to regulation of corruption in general and transnational corruption in particular appeared to enhance the efficiency and effectiveness of Brazilian anticorruption institutions. On the other hand, transnational law did not afford sufficient weight to guarantees of due process, the dangers of recruiting the media into the fight against corruption, the effects of anticorruption initiatives on a country's political landscape, the importance of coordination among domestic enforcement agencies, and the effects of international cooperation on third parties.

A. Fairness and due process matter for efficient anti-corruption law enforcement

Design of anti-corruption law involves a balance between multiple objectives, including due process, efficiency, effectiveness and legitimacy.[67] Car Wash illustrates the complex relationship between these objectives and that apparent tensions may be overstated.

UNCAC acknowledges that anti-corruption law must comply with "the fundamental principles of due process of law" (at least in the context of criminal proceedings or adjudication of property rights).[68] In a similar vein, the 2021 version of the OECD Convention Recommendation, the main guide to implementation of the OECD Convention, acknowledges the importance of due process in the context of non-trial resolutions.[69] However, neither instrument offers specific guidance on the meaning of due process. At the same time, one of us has argued that the dominant approach to transnational anti-bribery law emphasizes efficient deterrence, which entails reducing the cost and duration of proceedings and maximizing the likelihood of sanctions being imposed.[70]

It is commonplace to view practices designed to ensure due process as obstacles to efficient law enforcement. Several commentators claim that human rights and procedural rights "can be used by corrupt government officials to circumvent and avoid punishment and accountability".[71] Along these lines, the leaders of Car Wash have argued that due process guarantees in the Brazilian legal system are obstacles to efficient law enforcement.[72] To deal with these obstacles, Car Wash in general, and Judge Moro in particular, adopted a series of strategies to promote innovative judicial interpretations of existing statutory provisions and legal doctrines, aiming to alleviate the burden of proving illicit conduct, and pushed the limits on discretionary powers governing law

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[67] Davis, *supra* note *

[68] UNCAC, Preamble.

[69] UNCAC, Preamble; OECD Convention, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, XVIII.

[70] Davis, *supra* note 16.

[71] Gathii, 'Defining the Relationship between Human Rights and Corruption', 31 *University of Pennsylvania Law Review* (U. Pa. L. Rev.) (2009), 125, at 126.; Davis, ibid.

[72] Deltan Dallagnol, *Luta Contra a Corrupção, A: a Lava Jato e o Futuro de Um Pais Marcado Pela Impunidade* (2017); Sergio Fernando Moro, *Preventing Systemic Corruption in Brazil*, 47 DAEDALUS 157 (2018).

enforcement measures such as coercive questioning and pre-trial detention. Some of these strategies tested the formal limits of the law, while others explicitly violated it.[73]

In the first few years of Car Wash, the discourse hostile to procedural guarantees attracted a great deal of public support. For example, coercive measures, such as coercive questioning and pre-trial detentions were not always in compliance with statutory requirements,[74] but they provided a public spectacle (as the media showed powerful people being handcuffed and escorted in police cars to the courthouse)[75] that was applauded by a population frustrated with decades of impunity. Operation Car Wash seemed to be systematically breaking the cycle of impunity by jailing powerful politicians and business people. These results, in turn, seemed to provide credence to the argument that the existing procedural guarantees in the Brazilian system were the source of the problem.

Eventually, however, both popular opinion and legal doctrine shifted and the abusive nature of many of the tactics employed in Car Wash became widely acknowledged. In 2021, a poll showed that the approval to the work of the former judge Sergio Moro had fallen from 65% to 45%, in a five-year period.[76] Meanwhile, the STF took a more active stance toward controlling abuses in the Operation. It reversed several lower court decisions and nullified convictions for breach of due process. Now the concern is that the pendulum may have swung too far and that Brazilian law currently imposes too many constraints on anti-corruption enforcement.

The lesson from this episode is that disregarding due process concerns may promote enforcement in the short term, but in the longer run, it may lead to backlash that leads to reversal of legal reforms and the hobbling of anticorruption institutions. In that sense, respect for due process is necessary for maintain the efficiency, effectiveness and legitimacy of law enforcement.

B. Political fallout and backlash

Anti-corruption investigations frequently reach high ranking public officials and powerful private actors and for that reason the transnational anticorruption regime generally stresses measures designed to insulate anticorruption enforcement institutions from political pressures.[77] The OECD Convention explicitly provides that investigation and prosecution of foreign bribery

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[73] For a detailed description, see Prado and Machado, *supra* note 67.
[74] Prado and Machado, *Ibid*.
[75] Jacqueline Saraiva, Eduardo Militão, Correio Braziliense, *Presidentes da Odebrecht e Andrade Gutierrez são presos na Lava-Jato* (2015), available at https://www.correiobraziliense.com.br/app/noticia/politica/2015/06/19/interna_politica,487150/presidentes-da-odebrecht-e-andrade-gutierrez-sao-presos-na-lava-jato.shtml.
[76] Cf. G1, *DATAFOLHA: aprovação ao trabalho de Moro na Lava Jato cai de 65% para 45% em cinco anos*. G1, (2021), available at https://g1.globo.com/politica/noticia/2021/03/22/datafolha-aprovacao-trabalho-moro.ghtml.
[77] UNCAC, Article 36 (requiring state parties to have specialized bodies charged with enforcement of anti-corruption laws which "shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence"); Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Adopted by the Negotiating Conference on 21 November 1997, para. 27 ("…in order to protect the independence of prosecution, [prosecutorial] discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature.")

"shall not be influenced by considerations of national economic interest."[78] That kind of insulation of anti-corruption enforcement agencies runs the risk of granting unaccountable enforcement officials tremendous power to shape the political landscape and economy of a country, potentially contravening principles of democratic governance and the rule of law. Car Wash illustrates several possible manifestations of these dangers.

First, unaccountable officials may use discretionary powers in law enforcement processes for partisan purposes. In Brazil, there is a dearth of regulation and codes of conduct related to how/when and what kind of information law enforcement officials decide to make public in the course of criminal investigations and trials.[79] One episode in Car Wash illustrates the problem. Six days before the voting day in the 2018 Presidential election, Judge Moro made public the plea bargain agreement of Antonio Palocci, a former minister in Lula's cabinet and chief of staff of President Rousseff. Palloci's agreements had serious accusations involving Lula and was intensively covered by the media, being immediately weaponized by other parties against the Workers' Party candidate, who was endorsed by Lula. While the disclosure was not illegal, the timing was suspicious, and there were concerns regarding the credibility of Palocci's statements,[80] raising questions about whether Moro's decision to make the agreement available was driven by partisan reasons.

Second, non-elected officials may decide to use law enforcement to "fix" political problems. Fernando Limongi argues that Car Wash was not partisan, but it was a political project, as its main operators believed themselves to be in a crusade against the entire political establishment to fight "systemic corruption".[81] This meant that some enforcement decisions were not guided by "technical" prosecutorial protocols, but were instead driven by a concern with the overarching political objective of the operation. This explains why Car Wash appeared to be biased against the Workers' Party. Citizens opposed to the Workers' Party government became one of the most important sources of popular support for Car Wash, providing incentives to target the party's leadership. And this was reinforced by the media: when Marcelo Odebrecht was arrested, one of the main national weekly magazines announced that "Lava Jato is reaching the highest echelons of power of Lula's-era".[82] Aware of the political significance of reaching Lula personally and his family, the Car Wash task force indeed initiated a crusade to get him, but according to Limongi this was a strategic move to achieve the ultimate political goal of the crusade.

Third, insulation of law enforcement officials from concerns about the economic ramifications of their decisions encourages decision-making that is not only economically inefficient but also politically unpopular. It is an open question whether the costs of Car Wash outweighed the

[78] OECD Convention, *supra* note 87, at Article 5.
[79] Prado & Machado, 'Turning Corruption Trials into Political Tools, in the Name of Transparency: The Lava Jato Case', in E. Ocanto, S. Botero & D. Brinks (eds.) *The Limits of Judicialization: From Progress to Backlash in Latin American Politics* (forthcoming).
[80] For a detailed discussion, see Prado and Pimenta, *supra* note 28.
[81] Limongi, *supra* note 30.
82 Afonso Benites, El País, *Operação Lava Jato Chega À 'Joia Da Coroa' E Se Aproxima De Lula* (2015), available at https://brasil.elpais.com/brasil/2015/06/20/politica/1434759084_789881.html.

benefits. Moreover, part of the popular backlash against Car Wash and Brazil's anti-corruption institutions was caused by the perception that had it damaged the Brazilian economy.

Fourth, law enforcement agents may not be driven by partisan or political motives, but their discretionary decisions may have unintended political consequences. Car Wash significantly influenced the Brazilian political landscape. Ten of the 46 state governors elected between 2010 and 2014 were arrested and could not finish their terms.[83] Car Wash also played a key role in the political turmoil that led to President Rousseff's impeachment in 2016. The President was not one of the accused, and her impeachment was due to illegal accounting practices, not corruption. Although her vulnerability to impeachment stemmed in part from an ongoing economic crisis,[84] her removal from office was strongly driven by Car Wash. Rousseff lost both popular support due to the corruption scandal involving her party and political support in Congress, as she was not doing enough to curtail Car Wash (despite being under political pressure to do so, including by members of her own party). At the time, Car Wash was aggressively expanding its reach to include many Congressional representatives, including the vice-President, who took the seat after her impeachment. A leaked conversation between two high-ranking politicians revealed that they assumed a "change" in government would result in a pact to "stop the bleeding" provoked by Car Wash.[85] Ultimately that change took place and so, intentionally or not, Car Wash ended up empowering actors who are now actively dismantling Brazilian anti-corruption institutions to protect their own interests.

C. The dangers of recruiting the media in the fight against corruption

The bodies charged with implementing both the OECD and the UNCAC have recently begun to characterize the media as a potential combatant in the fight against corruption.[86] Car Wash demonstrates both the potential benefits and pitfalls of deliberate efforts to recruit the media into anticorruption initiatives.

[83] Cf. Felipe Bächtold, Folha De S. Paulo, *10 dos 46 governadores eleitos em período alvo da Lava Jato já foram presos* (2020), available at https://www1.folha.uol.com.br/poder/2020/02/10-dos-46-governadores-eleitos-em-periodo-alvo-da-lava-jato-ja-foram-presos.shtml.

[84] Vieira, *supra* note 65.

[85] Cf. Estadão, *'Conseguiu estancar a sangria?', pergunta mulher a Jucá durante voo* (2017), available at https://noticias.uol.com.br/ultimas-noticias/agencia-estado/2017/11/30/conseguiu-estancar-a-sangria-pergunta-mulher-a-juca-durante-voo.htm.

[86] OECD, *The role of media and investigative journalism in combating corruption* (2018), available at https://www.oecd.org/daf/anti-bribery/The-role-of-media-and-investigative-journalism-in-combating-corruption.pdf. "WELCOMING the efforts of companies, business organisations and trade unions, non-governmental organisations, and the media to contribute to the fight against bribery of foreign public officials", OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (2021) at preamble, available at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378; "Recognizing also the important role of the media in raising public awareness about corruption", UN Office on Drugs and Crime, *Conference of the States Parties to the United Nations Convention against Corruption, Ninth Session, Resolution 9/8 — Promoting anti-corruption education, awareness-raising and training* (2021), available at https://www.unodc.org/unodc/en/corruption/COSP/session9-resolutions.html#Res.9-8.

Members of the Car Wash task force often praised the media coverage of the operation, arguing that the media increased the transparency of the Operation, helped make public officials accountable, and also served as a protection against potential backlash by entrenched interests and powerful actors engaged in rent-seeking.[87] However, concerns have also been raised about the media coverage of the operation. While making information available to media increased transparency of law enforcement measures, it also meant that there was very little independent fact-finding or investigative journalism. Instead, media reporting was largely reliant on the information provided by public officials (police, prosecutors and judges), resulting in "a failure of the press to act as a watchdog of the investigation".[88] The fact that narratives about the Car Wash were dominated by uncritical reporting vastly increased the reputational cost of criticizing the operation publicly.

There have been also concerns about bias in media coverage of the operation, amplified by the fact that the media in Brazil is highly concentrated and thus easily captured. Numerous studies have argued that media reporting focused on proceedings against members of the governing party, to the detriment of members of other parties who were also being charged, further contributing to polarization and the political crisis that culminated in the impeachment of President Rousseff.[89]

Deliberate use of the media by anti-corruption officials exacerbates the risks of abuse of power by those officials. For example, in March 2016, Moro made public a wire-tapping involving former-President Lula and then President Rousseff, regarding Lula's appointment as Rousseff's Chief of Staff.[90] Rousseff claimed that the appointment would help to address the political schism between the President and Congress at the time. Critics were concerned that appointment to a cabinet position would make Lula immune from prosecution before the ordinary courts, meaning that he could only be judged by the STF and not by Moro. The outcry that resulted from the leak prevented Lula from assuming the post and paved the way for his eventual prosecution and conviction. Some believe that it also thwarted a move that could have allowed Rousseff to avoid impeachment. In other words, making the wiretap available to the public was a questionable act from the legal point of view and had important political consequences.[91] The media played a critical role in enabling this abuse of judicial power.

Media coverage may also have influenced institutions responsible for holding the Car Wash task force accountable. Defence lawyers involved in the case speculate whether the intense and uncritical media coverage of Car Wash (along with strong public support) made appellate

[87] Dallagnol, *supra* note 78.
[88] Bulla and Newell, 'Sunlight is the best disinfectant: investigative journalism in the age of Lava Jato', in P. Lagunes and J. Svejnar (eds), *Corruption and the Lava Jato Scandal in Latin America* (2020), at 87.
[89] Daniela Campello et al., 'Captured media? Examining Brazilian coverage of Lava Jato', in P. Lagunes and J. Svejnar (eds), *Corruption and the Lava Jato Scandal in Latin America* (2020), at 68 (providing a literature review of studies
[90] Cf. Bruce Douglas, The Guardian, *Release of Tapped Phone Calls between Lula and Rousseff sparks mass protest in Brazil* available at https://www.theguardian.com/world/2016/mar/17/release-tapped-phone-calls-lula-rousseff-deepens-brazil-chaos.
[91] Prado and Machado, *supra* note 62.

courts reluctant to reverse Moro's decisions.[92] Media reporting may also have contributed to the lack of disciplinary actions in response to blatant illegalities. For instance, the STF declared that Moro's disclosure of private conversation between Lula and Rousseff was illegal, but Moro was never sanctioned. Some speculate that the strong popular support for Lava Jato helped insulate Moro from disciplinary actions.[93] In a private conversation among the task force's prosecutors leaked by The Intercept Brasil, one prosecutor indicated his concern with the illegality of Moro's decision while another responded that the illegality was a minor detail; what mattered was the political damage, which was significant.[94] In sum, media coverage seems to have insulated Car Wash not only from backlash, but also from any form of accountability.

D. Lack of coordination among domestic enforcement agencies

The current anti-corruption regime is expressly designed to encourage international cooperation. Cooperation allows enforcement authorities to pool resources such as information, investigators, and enforcement capacity, in order to achieve desired enforcement outcomes, in much the same way that commercial agreements allow private actors to achieve mutually beneficial economic outcomes. It should come as no surprise therefore, that international cooperation is the focus of roughly one third of UNCAC's 71 articles as well as a lengthy new addition to the OECD Convention Recommendation.[95]

While both the OECD Convention and the UNCAC contain explicit references to international cooperation among law enforcement agencies, less attention is paid to the interactions between domestic law enforcement agencies.[96] This is a significant lacuna because institutional multiplicity, i.e. the existence of multiple legal avenues to pursue accountability for corrupt practices within a single legal system, is a feature of many countries' anti-corruption regimes.[97] Sometimes the alternative forms of accountability involve different modes of procedure (e.g. administrative, civil, criminal). In other cases they involve institutions with authority over different subjects (e.g. competition, securities or sectoral regulations).

Coordination among enforcement agencies, whether domestic or international, has both advantages and disadvantages. Coordination can prevent unnecessary duplication of effort. It also protects private actors—including innocent ones—from the burden of being subject to multiple

[92] Bela Megale, O Globo (2021) *Lava Jato Causou Anestesia na Sociedade e nos Tribunais diz Advogado de Lula* available at https://blogs.oglobo.globo.com/bela-megale/post/lava-jato-causou-anestesia-na-sociedade-e-nos-tribunais-diz-advogado-de-lula.html

[93] Tânia Maria Saraiva de Oliveira, 'Lava Jato: a força-tarefa em seu labirinto', *Brasil de Fato*, October 20 2021, available at https://www.brasildefato.com.br/2021/10/20/lava-jato-a-forca-tarefa-em-seu-labirinto.

[94] Cláudio Wagner analysis of conversation between Deltan Dallagnol and Sergio Moro, available at https://download.uol.com.br/files/2021/02/1318731355_peticao.pdf.

[95] UNCAC Articles 38 and 41-64; OECD Convention, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, XIX.

[96] UNCAC Article 5.1 requires states to maintain "effective, coordinated anti-corruption policies." Article 14.1(b) encourages cooperation in relation to money laundering.

[97] Prado and Cornelius, 'Institutional Multiplicity and the Fight Against Corruption: A Research Agenda for the Brazilian Accountability Network', 16 *Revista Direito GV* (2020).

investigations and enforcement actions. In addition, coordination ensures that the cumulative sanctions imposed on any given actor are appropriate to achieve their intended objectives, including the objective of inducing cooperation through promises of leniency. At the same time, uncoordinated institutional multiplicity can lead to healthy institutional competition and redundancy, with concomitant enhancements in the effectiveness of law enforcement. These benefits are particularly important in situations of systemic corruption where there is high risk that any single enforcement agency will be overwhelmed or captured.[98]

Car Wash may have demonstrated the benefits of lack of coordination among domestic enforcement agencies, but it also demonstrated the costs. Many of the defendants in Car Wash, and especially the corporate defendants, were subject to multiple proceedings initiated by multiple Brazilian agencies.[99] Several agencies entered into formal coordination agreements but there were still many cases in which agencies with overlapping jurisdiction failed to coordinate. In addition to resulting in excessive burdens for private actors the lack of coordination negated the appeal of the newly introduced leniency agreements because entering an agreement with one agency not only failed to insulate the accused from investigations and punishments by other agencies, but also enhanced their exposure by generating information that could be used by other agencies. Competition among law enforcement agencies also undermined the corresponding protection granted to whistleblowers in a similar way.[100]

The OECD Working Group identified lack of coordination as a potential obstacle to conclusion of leniency agreements in the 2014 peer review for Brazil. However, the primary concern in the report was the administrative process conducted by CGU and its interaction with judicial processes conducted by the Public Prosecutor's office.[101] The report failed to account for the multiplicity of administrative processes that could be pursued simultaneously.

E. Effects of international cooperation on third parties

Car Wash has drawn attention to the ways in which the information and penalties generated by an agreement among enforcement agencies might affect third parties, that is to say, actors who have little or no control over the agreement's terms. Those third parties can include individuals, firms, and even other countries. Car Wash illustrates the value of responding to these kinds of international externalities by including as many authorities as possible in any agreement and devising legal mechanisms to protect the interests of parties who are not included.

Although the initial investigation of Odebrecht was motivated by and focused on wrongdoing in Brazil, it also yielded information about potential wrongdoing in other countries, including potentially corrupt dealings between Odebrecht and numerous high-ranking public officials outside Brazil. Other countries' enforcement agencies had an interest in obtaining as much

[98] Kevin E. Davis, 'Anti-corruption Law and Systemic Corruption: The Role of Direct Responses', 17 *Revista Direito GV* (2021); Prado and Pimenta, *supra* note 28.
[99] Jones and Pereira Neto, *supra* note 35.
[100] M. R. Sanchez-Badin and A. Sanchez-Badin, *supra* note 40.
[101] OECD *supra* note 31 at 40-41.

incriminating information as possible from the parties to the joint resolution; Odebrecht had a corresponding interest in limiting the transmission and use of such information. Meanwhile, public officials tainted by association with Odebrecht had an interest in accessing any exculpatory information that had been gathered in the course of the initial investigation.

The Odebrecht proceedings highlighted the need for legal mechanisms designed to enhance the positive externalities associated with transnational anti-corruption enforcement and to minimize the negative externalities. The Brasilia Declaration is an example of the former, a mechanism designed to enhance the positive externalities associated with the joint resolutions. The measures that Brazilian prosecutors and courts took to protect Brazilians who gave evidence in Peru and former President Humala are examples of mechanisms designed to minimize negative externalities.[102] However, the fact that the joint resolutions failed to uncover the full extent of Odebrecht's misdeeds in countries such as the Dominican Republic suggests that more can be done to encourage countries to maximize the benefits of their investigations for third parties. It is also worth considering ways to ensure that lack of coordination among domestic enforcement agencies does not undermine transnational protections for third parties.[103]

6. Implications for institutional design

As we shall see, Car Wash and Odebrecht have important implications for the design of the international institutions and processes that govern transnational anticorruption law reform, but we note in passing that they also have implications for domestic reform processes. Specifically, the cases revealed the potential dangers of hasty and ill-considered adoption of foreign norms. Non-trial resolutions should not have been adopted in Brazil without greater attention to mechanisms to enable coordination among domestic enforcement agencies. And plea bargains should not have been adopted without greater attention to the role of the judiciary in approving them. Brazil's experience should serve as a cautionary tale for domestic lawmakers about the downside of quickly incorporating transnational influences without properly considering their impact and functioning in the national system.

Turning to international institutions, the OECD Working Group has demonstrated that it is capable of incorporating at least some of the lessons from Car Wash and Odebrecht into its reform agenda, specifically, lessons about how to make anti-corruption law more efficient or effective and how to facilitate international co-operation. For example, while Car Wash was in progress the OECD Convention's monitoring mechanism collected and produced a large amount of knowledge about the structural features of the Brazilian criminal law system that hampered enforcement of anti-corruption laws. The 2014 *Report on Implementing the OECD Anti-Bribery Convention* presented statutes of limitation as a serious concern, together with lengthy judicial processes, the range of appeal options and the tendency of judges to award low sentences.[104] It also anticipated at least some of the ways in which the absence of coordination mechanisms among agencies with

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[102] Pimenta and Venturini, *supra* note 63.
[103] M. R. Sanchez-Badin and A. Sanchez-Badin, *supra* note 40
[104] OECD, *supra* note 30.

overlapping jurisdiction might discourage firms from entering into leniency agreements (although the 2017 follow-up report avoided further inquiry into those concerns). More generally, the 2021 revision of the OECD's Recommendation contains extensive new material on non-trial resolutions and the ways in which national enforcement agencies can cooperate to ensure that their efforts yield benefits for other countries that almost certainly drew upon member states' experiences with Car Wash and Odebrecht.[105]

At the same time, the OECD Working Group's engagement with Brazil has ignored concerns about due process. As insightful as it was about some of the shortcomings of Brazilian criminal procedure, the 2014 report on Brazil completely ignored longstanding problems of abuse of pre-trial detention and curtailment of defendants' human rights by law enforcement authorities. Similarly, the 2017 follow-up report celebrated the use of judicial pardons, a form of plea bargain introduced by the Organized Crime Law. The report cites the Car Wash case as an example of the appropriate use of judicial pardons, noting that "only those offenders who are indeed helping with the investigations and promoting reimbursement are being considered eligible for judicial pardons".[106] There is no mention of concerns about the voluntariness of judicial pardons negotiated in the shadow of pre-trial detention.

By contrast, international human rights organizations and NGOs have long identified the arbitrary and excessive application of pretrial detention as a chronic problem in Brazil and many other Latin American countries.[107] Similarly, the threats to due process posed by enforcement of anticorruption laws have been explicitly acknowledged by human rights organizations. In its report *Corruption and human rights: Inter-American Standards*, the IACHR acknowledges that it can be challenging for states to comply with their duty to effectively respond to a "complex phenomenon for which the traditional investigative techniques appear to be insufficient", while simultaneously reaffirming that people accused of corruption "lose none on their human rights."[108] The Commission also emphasizes that pre-trial detention should be used for the limited purpose of protecting judicial proceedings and "cannot be based on general preventive or special preventive purposes, which could be attributed to the punishment".[109]

The OECD Working Group also appears to have paid little heed to Car Wash and Odebrecht's lessons about the importance of accounting for broader ramifications of anti-corruption law. The

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[105] OECD, *supra* note *, Recommendations XVII-XIX.

[106]OECD, *Brazil: Follow-Up To The Phase 3 Report & Recommendations* (2017), available at https://www.oecd.org/corruption/anti-bribery/Brazil-Phase-3-Written-Follow-Up-Report-ENG.pdf. at 56-60.

[107] IACHR, *Report on the use of pretrial detention in the Americas* (2013), available at http://www.oas.org/en/iachr/pdl/reports/pdfs/report-pd-2013-en.pdf. IACtHR, Report No. 2/97 (Case 11.205, Jorge Luis Bronstein et al, Argentina, 1997) ("pretrial detention constituted "a serious problem in several OAS member countries"); IACHR Report on the Situation of Human Rights in the Dominican Republic, OEA/Ser.L/V/II.104. Doc. 49 rev. 1, October 7, 1999; United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD), Crime, Criminal Justice and Prisons in Latin America and the Caribbean: How to Implement the United Nations' Rights and Duties Model, 2010. Human Rights Watch, *Behind Bars in Brazil* (1998), available at https://www.hrw.org/sites/default/files/related_material/BRAZL98D.pdf.

[108] IACHR, *Corruption and human rights: Inter-American Standards* (2019) at 134, available at http://www.oas.org/en/iachr/reports/pdfs/CorruptionHR.pdf.

[109] *Ibid.* at 133.

OECD remains committed to the idea that enforcement agencies should operate with as much independence as possible from other branches of government and should ignore economic considerations or the interests of foreign states.[110] We have not come across any indications of concern about the legitimacy of granting unelected anti-corruption officials unchecked authority to pursue cases that are likely to have significant economic and political effects. Similarly, both the OECD and UNCAC appear to have neglected lessons about the pitfalls of collaborating with the media. It was just in 2021that both the OECD Working Group and UNCAC Conference of States Parties endorsed the idea of recruiting the media in the fight against corruption, well after the lessons of Car Wash ought to have been learned.[111]

We attribute the OECD Working Group's selective attention to the lessons to be learned from Car Wash and Odebrecht to its lack of inclusiveness. It should not be surprising that an international institution dominated by law enforcement officials would focus on learning how to promote efficient deterrence and neglect ways to address concerns about due process, human rights, legitimacy or negative externalities associated with law enforcement. Moreover, an exclusive organization like the OECD is not well-suited to considering the impact of transnational enforcement on relatively poor non-member countries.

The UNCAC Conference of the States Parties is also dominated by law enforcement officials. However, UNCAC has a virtually global membership and so ought to be more sensitive to concerns about negative extraterritorial externalities. It is unclear whether its failure to address those issues as of the time of writing reflects lack of concern or simply a delayed reaction.[112]

The conclusion that the leading international anti-corruption institutions are not sufficiently inclusive does not automatically generate specific implications for reform. Since the process of reforming transnational anti-corruption law typically involves multiple institutions and stages, there are many alternative points at which to enhance inclusiveness. For instance, the OECD Working Group and UNCAC Conference of States Parties could ensure that human rights receive greater consideration either by giving human rights organizations greater input into consultation processes initiated at the international level or by giving national governments greater latitude to deviate from international templates in response to human rights concerns raised at the domestic level. Similarly, the parties to the OECD Convention could accommodate non-OECD states' concerns about externalities by expanding the membership of the OECD Convention. Or they could resolve to defer to the views of the somewhat more representative UNCAC Conference of States Parties. Alternatively, the OECD countries could enhance inclusiveness of the overall process of developing transnational anti-corruption law by reforming enforcement processes (which effectively give content to the norms). For instance, they could allow representatives of

[110] See note *, *supra*.
[111] See note *, *supra.*
[112] As of the time of writing, the only publicly available review of Brazil by the UNCAC Review Mechanism was based on a site visit from 2011, before the launch of Car Wash. See, UNODC, Country Profiles – Brazil, https://www.unodc.org/unodc/en/corruption/country-profile/countryprofile.html#?CountryProfileDetails=%2Funodc%2Fcorruption%2Fcountry-profile%2Fprofiles%2Fbra.html

affected states to participate in deliberations about individual enforcement actions, either as part of the Working Group's *tour de table* or through bilateral interactions with national enforcement officials. Further increasing the flexibility for non-member states to attend the meetings of the Working Group could also be helpful. Yet another possibility is that the international institutions could adopt blanket rules requiring states undertaking transnational enforcement activity to give affected parties—including both states and individuals—recourse to national courts. The question of whether inclusiveness ought to be fostered at the domestic or international level, or in legislative, adjudicative or enforcement settings is highly contestable, and each option involves significant tradeoffs.[113] Accordingly, for present purposes we take no position on the best way to enhance inclusiveness.

7. Conclusion

The processes that govern reform of transnational anti-corruption law are generally both iterative and experimentalist, but they are not sufficiently inclusive. Although reform processes involve continuous efforts to learn from countries' experiences with implementation of anti-corruption laws, they also exclude important voices. Car Wash and the Odebrecht case suggest that some of the most important excluded voices are people outside the law enforcement community, such as the human rights organizations who studied Brazil's criminal justice system for decades and were aware of the risk of abuse of pre-trial detention. It also is important to include information and perspectives of members of the general public and people in foreign countries. Inclusiveness can help to reduce the risk that reforms will go awry and lead to the massive, political, economic and social turmoil that Brazil and other countries experienced in the aftermath of Car Wash and the Odebrecht cases. Transnational anti-corruption law risks both its effectiveness and its legitimacy if it continues to exclude important voices from its law reform processes.

[113] von Bernstorff, *supra* note *, at 154-157. See Rose, *supra* note *.