DEMOCRACY ON A TIGHTROPE

Politics and Bureaucracy in Brazil

Pedro Abramovay and Gabriela Lotta

Translated by Kim F. Olson and Diane Whitty

CEU PRESS

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For Chico, Quino, and Bebel, this book, which seeks paths that might make your world better than ours

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Translators' Note

The translator is the ultimate reader, a reader so thoroughgoing that they end up writing the book they are reading, word for word.
Author Antonio Muñoz Molina[1]

When we began translating this book in late 2023, we could not have imagined how appropriate its title would be today as we watch the current US administration overstep the Constitution and dismantle public institutions. Nor would we have understood the interplay between politics and bureaucracy as well as we do now, with politics choosing "the paths a country should take" while an expert bureaucracy furnishes "the materials that pave the roads laid out by these choices," as the book's introduction states. But since a translation is the most profound reading of any text, during our journey through this task—decoding Portuguese words into a supralinguistic message that we then converted into English—we gained a deeper appreciation for the interwoven nature of the roles of both technical experts and politicians, sometimes complementary, sometimes antagonistic, and often misconstrued.

Before you embark on your own journey through these pages, we would like to share some insight into what ours was like, from a translator's perspective. How did we make our voices harmonize, especially considering that we each translated our own chapters individually? (Diane did the introduction, chapters 1, 2, 5, 7, 9, 10, and the conclusion; Kim did chapters 3, 4, 6, 8, and 11.) What were the specific steps we followed?

At the simplest level, as we each worked through our own drafts, we compiled a joint glossary and style guide to maintain consistency, a fairly standard practice even when a translator is

1 Antonio Muñoz Molina, "Los traductores," *El País*, September 28, 2012, https://elpais.com/cultura/2012/09/26/actualidad/1348657096_697540.html.

flying solo. However, the adjective "simple" may leave the wrong impression. We are well aware that we haven't yet been replaced by machine translation in part because it is not just complex, nuanced sentences that demand the intervention of human intelligence—the same can be true of individual words themselves, since a single word can be steeped in history and culture.

Take *concursado*, just as an example. In Brazil, a coveted civil service job can only be secured by passing a rigorous application process that includes a highly competitive exam, and a *concursado* or *concursada* is a man or woman who has achieved this feat. So how did we decide to distill all that into a neat and tidy term in English? For the most part, we used "career civil (or public) servant," with a couple of variations, like "highly vetted careerist" and "vetted through an intensely competitive recruitment process." Another example—actually, the biggest single terminology challenge in the book—was the very pesky word *técnico*, which had us engaging in lengthy discussions via email and phone not just about this term but about all the book's key concepts. Over the course of the translation, our English equivalent for *técnico* morphed from "administrative expert" to "technical expert" to, ultimately, "expert bureaucrat."

Therein lies one of the immense advantages of what we call a four-handed translation: we each benefited from our partner's input, expertise, and talent. We served as mutual sounding boards, consulting each other not only on terminology but also whenever we encountered problems deconstructing the original Portuguese text or found ourselves wrestling with the English rendition—indeed flexing our creative muscles. So while we walked our own translation tightrope, between one language and the other, between literality and over-interpretation, we helped each other keep our balance.

Further on the technical aspects of our approach, one of our style rule decisions was to translate the names of all agencies and institutions. Rather than interrupting the flow of the text by then following these with their original Portuguese names in parentheses, we compiled a bilingual glossary, found at the end of

the book. We also opted to save the reader from an onslaught of incomprehensible Portuguese acronyms, reserving their use for those cases where the term featured quite frequently. In Chapter 7, for example, we felt comfortable using ENCLAA, which appears nearly twenty times—and even so, we occasionally inserted a descriptor as a reminder, such as "ENCCLA anti-corruption network" or "ENCCLA network."

Another decision was to respect cultural practices when it came to personal names. In English, it is customary in a journalistic or academic context to refer to people by their last name. Not so in Brazil, where former presidents Tancredo Neves, José Sarney, and Fernando Henrique Cardoso are most often called Tancredo, Sarney, and FHC. With the current president, Luiz Inácio Lula da Silva, now serving a third term, even the *New York Times* has learned to refer to him as Brazilians do: Lula, and not Mr. Silva. We adopted this practice regarding names throughout the book, making a conscious choice to "foreignize" rather than "domesticate"—in other words, to permit an element of the original language or culture to slip through rather than strip the text of a cultural signpost. In another instance, we domesticated the text instead, swapping a reference to Brazilian advertising great Nizan Guanaes for a reference to David Ogilvy. Which approach is best depends upon context, and it is very much up to the translator to decide.

When it came to references to people or events well known to Brazilian readers but not to foreign ones, we relied on the traditional tool of introducing a gloss, or brief description, always with the authors' subsequent approval. For instance, we added the information in bold: "After Lula won the **2002** elections"; "widow of **historian, writer, and public intellectual** Sérgio Buarque de Holanda and mother of **singer-songwriter** Chico Buarque"; and "led by **advertising strategist** Duda Mendonça."

This brings us to another example of differences between the Portuguese original and our English translation. At times, a mere gloss does not furnish enough context for readers whose memory banks do not include referenced events. While most

Anglophone readers will have some notion of what WikiLeaks was all about, few have probably ever heard of Leakwash. In Chapter 7, for example, the authors were asked to add two introductory paragraphs as a basic explanation of Operation Carwash. In the same chapter, we also suggested reordering a few paragraphs so that the chronology of events would be clearer to our English-language readers.

As the final step in our translation process, after we had finished our individual drafts, we read each other's chapters, checking them for style, flow, and inaccuracies in English as well as fidelity to the Portuguese original. This way we ensured a smooth voice—and sometimes saved each other from an infelicitous word choice or clunky phrasing.

We hope we have shed a little light on our balancing act between Portuguese and English, just as we hope this book will give you valuable insight on how policy and politics intersect with bureaucracy and public administration. As stated earlier, we began this assignment when 2023 was drawing to a close, and now we are witnessing the unfolding of an era when it behooves us all to examine the contributions to be made by both politicians and bureaucrats. As the authors tell us in Chapter 8: "Learning to deal with the tensions between politics and bureaucracy is inherent to strengthening democracy and governments." Weighty words at a time when we must seek to do just that.

Introduction: The Engine of Democracy

Abstract: This chapter introduces the central thesis: democracy in Brazil is precariously balanced between politics and bureaucracy. Drawing on the life and thought of sociologist Florestan Fernandes, the authors argue that politics—not technocracy—is the true engine of social transformation. They warn against the growing fetishization of managerialism and meritocracy, which threatens to depoliticize democratic institutions and concentrate power in unelected bureaucracies.

Keywords: Florestan Fernandes; democracy; politics vs. technocracy; Brazilian state; social transformation

Florestan Fernandes was born in a tenement in the city of São Paulo in 1920. His mother was a housemaid, and his father died soon after he was born. At the age of six, he took a job helping out at a barbershop and later worked as a shoeshine boy and a waiter. He dropped out of school in the third grade and only resumed his studies as an adult, earning a bachelor's degree in social science from the University of São Paulo (USP). By the age of forty, he had become Brazil's leading sociologist. Florestan was part of the generation of "white-coat professors," a term coined by Fernando Henrique Cardoso to describe scholars who applied tremendous scientific rigor to their research.

Florestan Fernandes's unusual story of social success, made possible by his academic drive and tenacious application of

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scientific method to the analysis of social problems, might well have produced an intellectual who defended meritocracy as a means of social ascent and viewed science and technology as central to solving the country's problems—but Florestan was just the opposite. He always made it clear that his attending college was not part of some collective project and that his career should not be construed as any kind of model:

> One could write: *the lumpenproletariat reaches the University of São Paulo*. However, it wasn't the *lumpenproletariat* who got there. It was me, the son of a former laundress, who wouldn't say *It's you and me now!* to the city of São Paulo, like a famous character from Balzac.[1]

Throughout his intellectual career, Florestan always emphasized politics as an element that transforms society. Underscoring the preponderance of political over economic factors, his precise, original interpretation of Brazil's independence countered the longstanding view that the country had experienced a safe, peaceful transition; instead, he presented the event as a true revolution. As he saw it, this wasn't because material and economic conditions had generated changes in the social structure but because Brazil's independence allowed rural masters to turn themselves into autonomous political actors and appropriate the state, where they then created a bureaucratic structure that accommodated their patrimonialist rule. In other words, for Florestan, it was politics that founded Brazil.

It was also because he understood that social transformations are a product of politics that Florestan, more than any other so-called classic interpreter of Brazil, recognized the importance of race in the country's social composition. He saw the racial question as pivotal precisely because of its political element: he

1 Florestan Fernandes, "Em busca de uma sociologia crítica e militante," in *A Sociologia no Brasil: contribuição para o estudo de sua formação e desenvolvimento* (Petrópolis: Editora Vozes, 1977), ch. 8, here 154.

believed Black people were central to the construction of Brazil, racial conflicts could illuminate their role in society, and the myth of racial democracy should be thrown in the trash.

In 1985, when Brazil ended a period of dictatorship and inaugurated its so-called New Republic, a huge contingent of technical staff were invited to join the Tancredo Neves administration. When Tancredo passed away in the early months of his presidency, Vice President José Sarney took over but kept the original team. The illusion was that a country emerging from twenty-one years of dictatorship could be transformed simply by assigning skilled professionals to the government. In 1991, Brazilian composer and singer Gilberto Gil released a song entitled "Um sonho" (A dream) that offered a critique of this period. Its lyrics tell of an economist who presents "statistics and graphs" while talking about "industrial hubs," "energy," and "economic strength based on the tonic of technology," while arguing that "culture," "poetry," and "leisure" could not move a country forward. The economist is interrupted by an elderly man humming a "sad tune," and the song ends with students and workers shouting, "Long live the Indigenous people of the Xingu River!" It's a lovely piece of music that expresses much of what we will discuss in these pages: the solutions to Brazil's problems will never be found solely in statistics or graphs produced by technical experts; rather, students, workers, Indigenous people, and many other social forces are the engines of democracy. Florestan had clearly realized this in the early days of the New Republic when he warned:

> There will be a New Republic if substantively democratic social forces throw themselves into the fray and do not leave the solution of our vital problems in the hands of government alone. They, not the government, will make the democratic revolution.[2]

2 Florestan Fernandes, *Que Tipo de República* (Porto Alegre: Editora Globo, 2007), 168.

It was also politics that expelled Florestan from the university when the dictatorship forced him to retire in 1969. And, not surprisingly, it was in politics that he ended his public career, serving from 1987 to 1994 as a federal deputy affiliated with the Workers' Party (PT).

In one of Florestan's last articles, published six years after the enactment of the Brazilian Constitution of 1988, he drew attention to the constant threat that bureaucracy might hijack democratic processes:

> The association of bureaucrats and technocrats with politicians promotes the depoliticization of party institutions, from right to left. It drives personal career ambitions and private projects, divorced from the collectivity's priority needs. It thus strengthens conformism, potential fascism, and plutocracy.[3]

The accuracy of Florestan's early diagnosis is astonishing. He anticipated fascism's potential to bloom when technocracy usurps politics—something the sociologist, who died in 1995, did not have the chance to witness but which we would, many years later. The refrain "Brazil needs managers, experts, and not politicians" has been heard more often since the mid-2000s, and it formed a central electoral issue over the past ten years, when politics came to be seen as an expression not of democracy but of corruption. What took root was the notion that public policy solutions could be advanced by well-trained managers regardless of their ideology and that the difference between left and right is irrelevant, if it even exists at all. For every problem in society, according to this line of thinking, a correct public policy can be devised and implemented by an expert bureaucrat who has the option to forgo dialogue with society's various sectors.

Of course, there are no good policies without good management. Using a technical approach, public administrators must

3 Florestan Fernandes, "Burocracia e tecnocracia," *Folha de S.Paulo*, December 19, 1994, https://www1.folha.uol.com.br/fsp/1994/12/19/opiniao/7.html.

produce the most appropriate scenarios for politicians, who, legitimized by the vote, are the ones who make the decisions. But some of these managers often arrogate to themselves the authority ascribed to the post that they attained "by merit," taking it upon themselves to alter the state and politics, although they lack true legitimacy to do so. And in so doing, they undermine politics from within and gradually destroy democracy.

Through concrete examples—some simple, some more complex—this book explores the tension between expert bureaucrats and politicians in Brazil following the enactment of the country's newest constitution, in 1988. The examples are drawn from the experiences of one of the authors, Pedro Abramovay, during his eight years serving under the administration of Luiz Inácio Lula da Silva and another several months under Lula's successor, Dilma Rousseff. The stories themselves are told in the first-person singular by Abramovay, although Gabriela Lotta was deeply involved in the final writing. The other parts of the book have been written in the first-person plural. These stories take us on a journey through the tensions between politics and bureaucracy, between politicians and bureaucrats, and also between the tremendous structural forces that constitute the Brazilian state and society, as they capture, coexist, and clash with both the bureaucracy and politics.

Any project that is serious about building a solid, vibrant democracy concerned with reducing our inequalities must take a deep look at two things: the challenges born of the entanglement of the bureaucracy and politics in recent years and the time when this alliance produced virtuous outcomes.

The book is organized into four sections. The first three chapters outline the theoretical underpinnings of the discussion. The next section offers cases that illustrate how the primacy of expert bureaucrats over politicians distorts the political process. The third section surveys cases in which politics ignored technical considerations, preempting debate on certain topics and failing to listen to the different perspectives voiced by society and the bureaucracy. The fourth and final section presents textbook cases

that illustrate moments when a possible balance was reached in the tension between bureaucracy and politics, thus laying fertile ground for democracy.

Understanding the relationship between bureaucracy and politics is imperative to rethinking how Brazil might follow the virtuous path mapped out in the 1988 Constitution, guaranteeing the welfare of all and reducing inequality through broad social participation.

This book defends politics as the only viable, democratic means of social transformation, above all in a country where blatant inequality reigns. But it is also a book written at a time when politics is being used to run roughshod over science, bypassing fundamental administrative procedures and ignoring the bureaucracy that guarantees the republican functioning of democracy. Our intention in these pages is to arrive at an understanding of how it is possible to balance the valorization of politics with the valorization of democracy, the main vectors of the transformations to society that the state must make without trampling on technical decisions, science, and republican institutions. Democracy, through politics, chooses the paths a country should take, and republican institutions, in the form of an expert bureaucracy, furnish the materials that pave the roads laid out by these choices.

PART I

Politics and Bureaucracy

1. The Fetishization of Meritocracy

Abstract: This chapter critiques the rise of meritocracy as a political ideology. It explores how meritocratic discourse, once a satirical critique, has been co-opted to justify inequality and technocratic governance. Drawing on thinkers like Max Weber, Michael Young, and Michael Sandel, the authors argue that replacing politics with bureaucratic expertise undermines democratic deliberation and accountability.

Keywords: meritocracy; Max Weber; legal-rational authority; technocracy; democratic legitimacy; social democracy

César Hidalgo is a Chilean physicist and entrepreneur who always has provocative ideas. One of his most well-known proposals—a widely viewed TED talk—is quite controversial: politicians should be replaced by robots. Hidalgo starts from the premise that the public's enormous mistrust of politicians and disillusionment with them stems from the fact that effective communication is impossible. Politicians are unable to communicate with voters, Hidalgo says, because their demanding jobs keep them so busy making thousands of project decisions. This makes it hard for the public to gauge whether a politician is defending voter interests and practically impossible for them to influence their representatives' decisions.

To overcome this obstacle, Hidalgo suggests that robots be trained to ascertain how the public would vote on specific proposals. After all, if the whole structure of the internet is grounded on

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the notion that human behavior can be predicted, why shouldn't politics take advantage of this? If Instagram can figure out what we want to buy, why can't robots guess how we would vote on an issue?

Based on information about you—the authors you read, the music you listen to, the websites you visit, your favorite columnists, your friends, and much more—robots could keep an up-to-date record of your "likes," which other robots could then collate with other people's likes. The resultant data could be used to draft a bill that would more faithfully represent the will of the electorate.

Hidalgo's idea is not only provocative, it is actually quite frightening, because it ignores the fact that democracy is not a regime anchored either in laws that please the majority or in a hermetic political process that caters to predetermined preferences. Rather, democracy is based on a process of continual representation in which any idea can win a majority through peaceful voter persuasion. And those doing the persuading must constantly juggle a series of factors: initial voter preferences, voters' ability to mobilize, concerns with people's real needs, and technical considerations that might guarantee or improve the odds that an idea will in fact be implemented.

If a certain sector of society is pushing for a bill to set up an income transfer program, for example, this group must clearly announce the goals of the bill, demonstrate the mechanisms by which it will be implemented, and try to persuade other sectors about the positive or negative impacts of the proposal. It is also important to know whether the alleged beneficiaries of the bill are truly being heard, that is, whether the proposal represents a real constituent need or if it is simply being imposed on the group it is allegedly meant to benefit—just to mention a few of the factors and nuances that should be weighed in.

Politics subtly weaves together all these factors. In a democracy, elected politicians, bureaucrats, civil society organizations, and the free press interact to build public policy. The will of the people isn't, and shouldn't be, an aggregation of preferences.

Even if it were, these preferences are not given a priori. The will of the people is the product of multiple interactions that, far from ceasing when a law is passed, form part of an ongoing process. The law will continue facing criticism and pressure and may even undergo reform, since the principle of fallibility is precisely what makes democracy better than authoritarianism. The absolute king is infallible and cannot be corrected. Democracy, however, is imperfect and needs to be corrected all the time. It learns from its mistakes and is refined through discussion and debate.

It bears repeating: Democracy is not an expression of the majority's preferences. Nor is it an expression of the aggregation of preferences detected by robots, or even by the vote. Unchecked majorities can be extremely dangerous. In the mid-nineteenth century, Alexis de Tocqueville wrote that he was fascinated by US democracy precisely because it had the ability to control majorities. The French thinker's observation must be seen in context. As a young republic, the United States was the world's great successful experiment in expanding the vote (albeit not yet universally, since both Black people and women were excluded). Tocqueville noted that the country's success stemmed specifically from its capacity to prevent the tyranny of the majority through a sophisticated system of checks and balances. In this regard, the remarkable institutional novelty introduced by US democracy was the judiciary's power to review decisions made by the legislature. This system also required all branches to obey the Constitution, with the branches empowered to enforce compliance through mutual oversight.

In other words, in the nineteenth century it was already clear that a democracy depends not solely on the manifestation of the majority's preferences but on a system that guarantees that these preferences do not oppress minorities.

Over the course of the twentieth century, the idea gained traction that the relationship between the branches is not just about control but about a process of dialogue as well, where policies are debated publicly in a way that invites diverse viewpoints, with ensuing decisions moving in the directions identified during

debate. The relationship of harmony and tension between the branches is no longer seen as serving the sole purpose of preventing abuse but also of demanding public accountability for every act of power—which must be an act of persuasion as well. This system is supported by elections and the power of the vote, and the sectors that fail to persuade the public can be punished at the ballot box.

Relationships between the branches of government and between majorities and minorities are always marked by tension. And that is one of the beauties of the democratic game, which plays out through the careful balancing of three elements: (1) respect for the will of the people; (2) respect for minorities; and (3) the potential for these minorities to become majorities through peaceful persuasion. The first element is represented above all by the vote; the second, by the ability of institutions to enforce constitutionally guaranteed rights; and the third, by the fact that political decisions can derive from rationally justified, legitimate decisions. Max Weber conceptualized this best when he said modernity—and democracy—affords a form of legitimacy called "legal-rational," that is, a legitimacy grounded on the state's ability to justify its decisions rationally.

The German sociologist was not only the great mind behind the notion of the legitimacy of the legal-rational state and an organized bureaucracy. He also developed perhaps one of the most notable arguments about the importance of politics, which we will explore in the next section.

Meritocracy: The Joke That Isn't Funny Anymore

In 1919, Germany was suffering the social and economic consequences of having lost the war. In January of that year, speaking before an audience of university students, Max Weber gave a lecture that would become a major work on how politics functions: *Politics as a Vocation*. In its pages, the sociologist laid out his conception of the democratic, republican state, whose

legitimacy would be anchored in the need to justify its actions rationally. Weber then formulated one of the most emblematic interpretations of how our societies work: the state holds a legitimate monopoly on the use of violence. That is to say, the state, and only the state, has the legitimate power to decide how and when violence—encompassing various forms of coercion, not just physical—should be used against citizens.

This state, which wields a legitimate monopoly on the use of violence, has to be built, Weber argues, and its construction depends on two types of central actors, the first being politicians, who must take the lead. Don't think politics is easy, the German sociologist said. A new state would have to be built, and it would need politicians with a vocation, with conviction, and with a sense of responsibility, whatever their particular role on the political chessboard. These individuals would have to be elected by the people, who would in turn hold their representatives accountable for their decisions. After all, democracy is the method by which we elect someone to make decisions for us, and if that person does not do so accordingly, we can replace them with someone else come the next election.

During the same lecture, Weber also said that it isn't up to politicians alone to maintain and run the state. It depends too on civil servants—so-called bureaucrats—who are faithful to rules and laws and ensure the smooth operation of the state machine. Although this idea has come to be seen in a highly negative light over the decades, its origins can be traced to a key component of the functioning of modern, democratic states. After all, bureaucrats guarantee the rational, legal, and steady functioning of public administration. And as British sociologist Paul Du Gay said in 2020 as he witnessed the rise of populism in a number of countries across the world: bureaucracy is a cornerstone of democracy and rights—drawing inspiration precisely from Weber.

On the same occasion, Weber also pointed out that politicians and bureaucrats have different responsibilities, ethics, and rationales. Politicians must be accountable, follow their passions,

and maintain ties to the public. They take part in politics and know how to run the political machine; they make decisions with both head and heart, reason and passion, responsibly assessing the consequences, acting with conviction, and believing in what is right. But bureaucrats cannot follow their passions; after all, that's not what they are chosen to do. They must instead be faithful to the law, respond to political decisions (so long as grounded in the law), and obey legal rationality. Their loyalty to jurisprudence enables them to guarantee democracy and rights, treating all citizens as equal before the law.

In his analysis of Germany after World War I, Weber argued it would be possible to rebuild a better country, a better state with better politicians, connected to society, and with a bureaucracy that would uphold the law while simultaneously being constrained by it. Weber did not live to see the transformation of Germany, falling victim to the Spanish flu in 1920, before the rise of Nazism. But his writings would be fundamental in the reconstruction of democratic countries in the post-World War II setting, and the question of the relationship between politicians and bureaucrats has permeated an important part of the political science debate ever since.

Years later, after George Orwell witnessed the rise and fall of Nazism, World War II, and the rise of the Soviet Union, he voiced concerns quite similar to Weber's. In 1948, when Orwell wrote his classic novel *1984*, one of his great inspirations was *The Managerial Revolution*, published by US author James Burnham seven years earlier. In his book, which elicited furious criticism from Orwell, Burnham argued that capitalism would be overcome not by a strictly socialist model but by a managerial revolution and that, in the twentieth century, control of the means of production would prove more valuable than ownership of it. The distinction between managers and business owners in the private sector, Burnham contended, would be reflected in the professionalization of bureaucracies in the public sector. Politicians, ideologies, and private interests would no longer define the course of the state; instead, the task would be accomplished through rigorous,

centralized planning, a job assigned to bureaucrats. In 1941, Burnham thought Germany was the greatest example of this model (although he was to revise his position a few years later). He posited that "managerial" Germany would be much more efficient than the capitalist democracies of France and Britain. As we can see, a blind belief in managerialism or technocracy tends to obscure power relations by construing political choices as the only possible solutions, even though these choices often boil down to an effort to keep certain groups in power.

In 1958, British sociologist Michael Young published *The Rise of the Meritocracy*, which is not a sociological or economic treatise but a futurist fantasy set in 2034 that blends social satire and political criticism. In its pages, the narrator describes the evolution of British society over the previous decades, after the country had adopted "meritocracy" as the solution for its political and social problems. Since then, a magic formula had governed society: IQ + effort = merit. Young children had to take intelligence tests so everyone's aptitude could be measured and, when the time came, individuals could be routed to the appropriate course of studies or career.

As a result, "the world beholds for the first time the spectacle of a brilliant class, the five per cent of the nation who know what five per cent means," says Young's narrator, who boasts of living in a society where inequality is no longer synonymous with injustice."[1] Before, less competent and less intelligent people had access to the best jobs simply because they were from the more privileged class. In the novel's dystopian future, inequality was a product of merit; the lower class wasn't made up of poor people who could not get ahead in life because they lacked opportunities but of intellectually inferior people. Society imagined it had achieved stability once it had identified a universally accepted motive that would both explain and preserve inequality. Yet a big problem remained: parliament. Politicians were still chosen

1 Michael Young, *The Rise of the Meritocracy* (New Brunswick/London: Transactions Publishers, 2008 [1958]), 93.

through free elections, not through the new merit-based system. Since people from intellectually inferior classes ended up serving as parliamentarians, the solution would be to choose politicians according to aptitude and merit.

Everything was going along fine until women began to rebel. Although they had access to the same education as men and to jobs suited to them, women were forced to stay home and look after their newborn children. It would be unacceptable for a child to be deprived of maternal love, let alone put into the care of people from inferior classes, that is, less intelligent people, as the novel saw it. So women began demanding equality in the division of household labor. The book ends with a footnote informing that the "author" was killed in an uprising by a certain populist movement, which paragraphs earlier had been labeled a group coming from a minority devoid of intelligence.

As we can see, the book published in 1958 viewed meritocracy from a very different angle than often viewed today. The term has gradually lost the critical, satirical sense intended by Michael Young, who had ties to Britain's Labor Party and was a main figure in European social democracy. Labor supporters themselves have distorted the concept, for example, when former Prime Minister Tony Blair went so far as to say in 2001 that meritocracy had the power to redeem the British state. In response to Blair, Young, then eighty-five (he was to die the following year), published an article in the *Guardian* entitled "Down with Meritocracy," in which he explained that his book was "a satire meant to be a warning" and that "it would help if Mr. Blair would drop the word from his public vocabulary, or at least admit to the downside."[2]

But the warning was in vain. In addition to defining a system of social reward, the term "meritocracy" has come to designate a new political system in which people are supposedly governed by "the best." But how does one determine who the best are? And the best for whom? This is what poses the greatest risk to

2 Michael Young, "Down with Meritocracy," *The Guardian*, June 29, 2001, www.theguardian.com/politics/2001/jun/29/comment.

democracy: turning meritocracy into a political element when it is merely bureaucratic. Even when the goal is managerial rigor and efficiency, one cannot replace politics with bureaucracy, as if the latter were politically neutral.

In *The Primacy of Politics: Social Democracy and the Making of Europe's Twentieth Century*, political scientist Sheri Berman underscores an important question: "For the first half of the twentieth century, Europe was the most turbulent region on earth, convulsed by war, economic crisis, and social and political conflict. For the second half of the century, it was among the most placid, a study in harmony and prosperity. What changed?"[3]

According to Berman, the answer has to do with the triumph of social democracy in part of Europe, the result of a lengthy political process and not a set of decisions by bureaucratic managers. The author shows that the social-democratic movement was forged not by experts holed up in their offices but by politicians engaged in debates spanning decades. Reaching the same conclusion, US political scientist Peter Gourevitch argued that all economic policies are the product of interactions often rife with conflict between various social actors who bargain and form alliances.[4]. Social democracy offers an essential example when it comes to understanding the primacy of politics. It was thanks to politics, and not to the technocratic logic of meritocracy, that it was possible to build the most successful sociopolitical experiment from the standpoint of democratic conciliation.

Yet believing in the primacy of politics does not imply derogating either the bureaucratic framework that underpins the construction of the state or the valuable role that technical rationality can play in supporting decision-making. But the bureaucracy alone does not guarantee the best decisions. An

3 Sheri Berman, *The Primacy of Politics: Social Democracy and the Making of Europe's Twentieth Century* (Cambridge: Cambridge University Press, 2006), 25.

4 Peter Gourevitch, "Keynesian Politics: The Political Sources of Economic Policy Choices," in *The Political Power of Economic Ideas: Keynesianism across Nations*, ed. Peter A. Hall (Princeton: Princeton University Press, 1989), 87–106.

example of this is the way immigration has been dealt with in the European Union, where decisions are almost always made by bureaucratic staff esteemed by the defenders of the meritocracy but disliked by those who perceive a lack of democracy in the bloc's decisions. There is no shortage of technical arguments for defending immigration; various studies have shown how it would benefit Europe today. But it obviously hasn't been easy to craft and sustain a technical solution to the issue. This is because the problem can only be addressed through broad political negotiations and, more than that, through inclusive political action, sealing pacts between Europe's working classes and its immigrants.

The discourse of meritocracy, adopted to legitimize inequality in various corners of the globe, has also penetrated the world of politics and the individual's relationship to the state. In *The Tyranny of Merit: What's Become of the Common Good*, published in 2020, US philosopher Michael Sandel maintains that when meritocracy assigns individuals responsibility for their own success in life—as if it were merely a matter of individual effort—it exempts politics and public policy from their responsibility. But when this logic lights the fire of revolt in those who cannot ascend the social ladder, it weakens the social fabric, people's sense of belonging, and their belief in the state, leaving the door open to populist projects, like the one we have recently witnessed in the form of Donald Trump in the United States, one of the cradles of meritocratic discourse.

2. Old and New Patterns of Relations Between the State and Society in Brazil

Abstract: The authors analyze Brazil's historical state-society relations through five coexisting patterns: clientelism, corporatism, bureaucratic insulation, procedural universalism, and a new participatory pattern introduced by the 1988 Constitution. They argue that despite democratic reforms, older exclusionary patterns persist, often masked by technocratic language and meritocratic ideals.

Keywords: clientelism; corporatism; bureaucratic insulation; procedural universalism; participatory democracy; Brazilian Constitution 1988

In Brazil, the notion of meritocracy is inseparable from the structure of the state and democracy. Much as in the United States and Europe, meritocracy has served as an excuse for excluding certain social groups from the realm of state concern. But in Brazil, this idea has had an even more profound effect on how the violence of our inequality is justified. Perfectly embedded in the country's highly unequal social structure, where inequalities manifest themselves inside the state itself, the notion of meritocracy helps legitimize a new form of exclusion, irrespective of the social contract represented by Brazil's 1988

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Constitution, which calls for universal equality and inclusion. But this appropriation of foreign ideas that serve to make allowances for preserving an unequal social structure is nothing new. In "Misplaced Ideas," the essay that opens *To the Victor, the Potatoes*, critic Roberto Schwarz develops arguments that shed light on tensions in nineteenth-century Brazilian society and that are useful to understanding the juggling acts employed by Brazilian elites to justify the unjustifiable and win over part of the public.[1]

Two points are quite pertinent today. First, these elites tend to look for ethical pretexts to excuse the terrible things to which the poorest sectors of the population have been subjected, and they often source these pretexts from abroad, in Europe and the United States. Second, these elites have formed a perverse alliance with society's middle strata, the better to exclude the poor.

For Schwarz, Brazil is a country that knows how to blend old and new, lending a fresh visage to the old as it mixes the more obsolete in with the more advanced. In *Cartas a favor da escravidão* (Letters in favor of slavery), for example—dating to the timeframe analyzed by Schwarz—José de Alencar displays his clear appreciation of the idea of the modern state and the values of freedom imported from Europe. He does not deny these values in his defense of slavery; to the contrary, he uses them to justify the system:

> Gratuitous rancor towards institutions that have ceased to exist or are dying out is therefore an unjust and ungenerous sentiment. Every law is just, useful, and moral when it achieves the betterment of society and presents a new, albeit imperfect, situation for humanity. Thus is the case with slavery. It is a form of law, albeit crude; a stage of progress; an instrument of civilization, as was the conquest, mancipium, and the glebe. As

1 Roberto Schwarz, *To the Victor, the Potatoes: Literary Form and Social Process in the Beginnings of the Brazilian Novel*, trans. Ronald W. Sousa (Leiden/Boston: Brill, 2020).

> an institution, to me it seems as respectable as colonization; however, it is far superior as regards the service it has rendered to social development.[2]

Alencar's critique of abolitionist ideas almost seems to mirror the reservations expressed in current meritocratic reasoning about the expansion of rights. Alencar writes:

> In Brazil, to my knowledge, no statistics have yet been compiled on this subject. The intention is to legislate on the unknown, an absurdity akin to building in the air, without any foundation or support. However, some very salient facts, which reveal themselves independent of investigation, can provide data for a parallel, albeit an imperfect one.[3]

The writer avails himself of modernizing, technical arguments ("to my knowledge, no statistics have yet been compiled") to preserve what is thoroughly archaic; he manages to come across as innovative merely by suggesting superficial changes to the social structure. Or, as the Prince of Falconeri said in Lampedusa's novel *The Leopard*: "If we want things to stay as they are, things will have to change." The quest was to find new guises for old practices so different standards could coexist. Returning to Florestan Fernandes, the modern bourgeois was born from the ashes of the old master in Brazil.

The notion of meritocracy has played this same role in twenty-first-century Brazil. Imported from the United States and Europe, it has put a modern veneer on inequality and violence while instilling in the middle strata the hope that they can ascend the ladder and also escape the state's brutal violence, reserved for those who have no place in the plans outlined by meritocratic management.

2 José de Alencar, *Cartas de Erasmo*, ed. José Murilo de Carvalho (Rio de Janeiro: Academia Brasileira de Letras, 2009), 284.

3 Alencar, *Cartas de Erasmo*, 301.

Grounded in this logic, justifications are found for condoning policies that reinforce violence against Blacks, the poor, and Indigenous people and that deepen inequality—because none of this is done in the name of racism, sexism, or greed but in the name of meritocracy and of ideas that both temper and substantiate the brutality of political choices.

In short, an elite that deems itself Western (attached to Europe and the United States) could find no universalizing ethical justification for Brazil's profound class, gender, and racial inequalities. But borrowing categories used in these contexts makes it possible to devise excuses for this exclusionary, unequal society.

The second point presented by Roberto Schwarz is that the elites are able to form a perverse alliance with the middle class, with the purpose of excluding the poor from state benefits. Schwarz argues that the relationship between the wealthy and the middle class was formerly mediated not by a republican logic of rights but by the granting of favors. This system resulted in a pact that guaranteed to both parties, "but particularly to the weaker, that neither in the arrangement was a slave."[4]

Once again, the logic of meritocracy fits perfectly with the desire to maintain this alliance. Symbolically, it is individual effort, or merit, that differentiates the middle class from the poorer classes, who are victims of the most brutal violence and are denied access to the most basic rights. With meritocracy lending symbolic weight to this distinction, the elites garner the support of the middle classes—even though a social welfare state, built through broader political bargaining, could bring greater material benefits to these middle classes.

This meritocratic, exclusionary social project demands an equivalent political project that does two things: first, it must rely on rational justifications with apparently universalizing and ethical airs to perpetuate inequality and power structures that are servile to private interests and, second, sustain the arrangements and alliances made between and among various

4 Schwarz, *To the Victor, the Potatoes*, 7.

social sectors that are meant to distinguish them from the poorer sectors. Technocracy, which is the expression of meritocracy in politics, fits this purpose like a glove.

This discourse helps uphold the status quo in many ways. For one thing, it ensures that the government machine is used for private purposes while preserving the state's ingrained clientelism—after all, these expert bureaucrats will probably be upper-class white men who have a rational, public justification for conserving inequality. These dynamics also find support in the construction of the Brazilian state, grounded in a syncretism of forces that at first glance appear incompatible.

The argument made by Edson Nunes in *A gramática política do Brasil: clientelismo e insulamento burocrático* can help us understand this phenomenon. In his analysis of how Brazil functioned from 1930 to 1960, Nunes says that four political "grammars" structured the relationship between the state and society: clientelism, corporatism, bureaucratic insulation, and procedural universalism. Nunes is employing the linguistic term "grammar" to refer to the distinct patterns that structure relations between society and political institutions. In these pages, we will use the term "pattern of relations" instead of "grammar." In other words, we are talking about different patterns of relations between the state and society.

The first pattern Nunes talks about is clientelism. As a legacy of patrimonialism and a longstanding part of Brazilian tradition, clientelism denotes a kind of interaction based on personal exchanges and favors between oligarchs and individuals over whom the oligarchy seeks to preserve political control. It is a way of guaranteeing governability, since the exchange of favors ensures power is maintained. At the same time, clientelism jeopardizes the enforcement of rights since it is impossible to guarantee universal rights when trading individual favors.

Nunes says that the other three patterns of relations emerged during the 1930s under the government of Getúlio Vargas, even while clientelism remained robust. The second pattern, corporatism, characterizes a power-maintaining relationship between

politics and corporate groups; as such, it is a weapon of political control that allows conflicts to be absorbed before they surface. At the time of Vargas, for example, corporate groups that represented workers collectively were a major threat to political stability. To mitigate potential conflicts and disputes, the government negotiated directly with these corporate groups, granting them access to rights and benefits not extended to the rest of the population. This is how, for example, Brazilian workers won a series of labor rights over the years, although the latter are enjoyed only by a specific slice of the population. Like clientelism, corporatism makes it possible to defuse conflict, in this case through the logic of exchange—not with individuals but with professional groups and collectives.

The third pattern of relations is bureaucratic insulation, a strategy the elites employ to circumvent the arena controlled by political parties, separating off certain government areas that interest these elites. Based on the alleged primacy of technical expertise (and the fact that it is protected from influence coming from the political arena), the elites guarantee a space inside the state where they can satisfy their interests. This phenomenon of bureaucratic insulation is crucial to explaining Brazil's process of industrialization, first under the administration of Juscelino Kubitschek and later during the 1964–1985 military regime. If insulation seems central to the advance of capitalism, it is a major problem for democracy, since these detached organizations are not subject to social control and may end up serving the interests of specific economic groups or even of the very public servants who work in these organizations.

The last pattern is procedural universalism, which has to do with two things: on the one hand, equal rights, impartiality, and isonomy in terms of the state's relationship with society and, on the other, a system of checks and balances and of accountability. This pattern first appeared during the Vargas era when the Public Service Administrative Department, or DASP in its Portuguese acronym, was created to rationalize and foster greater efficiency in public administration. So the proposal was not to guarantee

universal social rights, a concern that came on stage only in 1988. And although this pattern was born under Vargas, it would later have a direct bearing on the Brazilian Constitution of 1988, the return to democracy, and the establishment of the democratic rule of law in Brazil.

Nunes shows how these four patterns emerged, transformed, and solidified like archeological layers that do not overlie each other but coexist, conjoin, and interact synergistically. He argues that the development of the Brazilian state in the twentieth century entailed the reconstruction of patterns of relations and that no government administration was able to eliminate previous patterns in order to build new ones, despite a series of reforms. In reality, every administration used a different combination of patterns to ensure governability, meaning that each of the four played a greater or lesser role at certain points in history. The Brazilian state has therefore been characterized by the coexistence of clientelism, corporatism, insulation, and procedural universalism in varying configurations.

In analyzing how Nunes's book might contribute to understanding the post-1988 state, Luiz Carlos Bresser-Pereira argues that Brazil's 1988 Constitution made more room for procedural universalism while limiting other patterns:[5] insulation would be held in check under the aegis of democracy; corporatism would become a "mere defense strategy employed by certain social groups";[6] and clientelism would be steadily weakened as democracy and universal rights grew stronger. Thus, right from the foreword to Nunes's book, Bresser-Pereira questions whether it makes sense to consider these patterns in the light of the post-1988 Constitution democratic state.

We believe these patterns still make sense. While Brazil's Constitution of 1988, like prior changes, may have provided the state with a new set of dynamics, it failed to erase all signs of

5 Edson Nunes, *A gramática política do Brasil: clientelismo e insulamento burocrático* (Rio de Janeiro: Zahar, 1997), foreword by Luiz Carlos Bresser-Pereira.

6 Nunes, *A gramática política*, foreword by Bresser-Pereira, 12.

its original formation. Thus, the patterns detected by Nunes are still at play, albeit as part of new dynamics and dressed in new clothing. Although procedural universalism has indeed become more prevalent, it should actually have become predominant had it succeeded in eliminating former patterns. Corporatism, clientelism, and bureaucratic insulation have reshaped themselves and continue to coexist with the state's new dynamics.

But did nothing new arise as a result of the 1988 Constitution, considering its establishment of the democratic rule of law? On the one hand, the new constitution empowered procedural universalism by blending such principles as isonomy, legality, and morality with the idea of universal social rights. At the same time, it created something we call a "participatory pattern," grounded in the construction of participatory republican institutions that alter decision-making processes in various areas of government and that grow stronger over the years through the bureaucracy's defense of republican principles. The post-1988 Constitution Brazilian state has thus been the stage for the four existing patterns, along with a new one, all coexisting in tension with each other: clientelism, corporatism, bureaucratic insulation, a fortified procedural universalism, plus the new, participatory pattern. Of course, interrelationships between the various patterns have consequently shifted as well.

Participation: The People Join in Brazil's Political Game

Under Brazil's new constitution, procedural universalism became the official pattern of the state. In view of constitutional principles like legality, impartiality, and isonomy (traits of universalism), the patterns of corporatism and clientelism had to be reshaped. Similarly, under the regime of democracy and the various institutions created to implement it, bureaucratic insulation had to reinvent itself. What would its new dynamics be like? How would these patterns of relations readjust themselves to the new model?

A number of factors explain how these adjustments transpired. The first, which is essential to strengthening procedural universalism, was the institutionalization of republican mechanisms through a number of clauses in the constitutional text, starting with elements laid out in Article 37: "Bodies belonging directly or indirectly to the public administration in any branch of the Federal government, the states, the Federal District, or the municipalities shall obey the principles of legality, impartiality, morality, publicity, and efficiency." In addition to establishing constitutional principles aimed at advancing the construction of a republican state and the pattern of procedural universalism, Article 37 further proposes such measures as conducting civil service entrance exams pursuant to constitutional principles. The independence and autonomy of the Public Prosecutor's Office likewise has a hand in strengthening the republican state, as does the construction of a system of control over public administration, consisting of courts of auditors and comptroller generals entrusted with overseeing state decision-making and holding the state accountable for these decisions.

A second factor was the recognition that the process of redemocratization should entail not only representative democracy and the vote but direct citizen participation as well.

There is an interesting story about how the 1988 Constitution shifted the country's vision of democracy. In early 1988, the Constituent Assembly found itself behind schedule and was about to start voting on the final text. Right from the outset, during discussions of the preamble, it seemed members had reached an insurmountable impasse: the left refused to include a reference to God in the text, and the right refused to proceed unless the introductory sentences explicitly stated that the state operated under divine blessings. Ulysses Guimarães, president of the assembly, was growing impatient. They had less than a year to finalize the text yet could not even agree on the preamble. Ulysses asked Mário Covas, floor leader for the Brazilian Democratic Movement (PMDB), to craft an agreement, and a few hours later, the senator returned: the left had agreed that the preamble could state that the

Constitution was being enacted under the protection of God, while the right had given in on another point—and this was precisely the change that emphasized a new vision of democracy in the state.

Since 1934, the text of every Brazilian constitution had included the following wording: "All power emanates from the people and is exercised in their name." It is a lovely concept that for years remained practically unaltered, even during Brazil's periods of dictatorship (evidently, dictators can also wield power "in the name of the people"). The agreement to include God in the preamble altered this phrasing, so the Constitution now reads: "All power emanates from the people, who exercise it through elected representatives or directly." There are two vital novelties here: 1) it is the people who exercise power; it is not exercised in their name; and 2) power should be exercised directly, not only through representatives.

This wording ensured that participation was included as a new pattern of relations between state and society, shifting the balance between clientelism, corporatism, bureaucratic insulation, and procedural universalism. Of course, the shift was not the consequence of this phrasing alone but of the Constitution itself, which proposes such mechanisms as conferences, councils, participatory budgets and planning, public hearings, and ombudsman offices. At the time, it was believed that direct citizen involvement in decision-making would strengthen democracy by creating spaces where citizens could wield direct influence over both broader decision-making processes related to policymaking and more routine decision-making related to the management of public services. And in the 1990s and 2000s, the country witnessed the exponential growth of participatory institutions. In 2012, Roberto Pires and Alexandre Vaz showed that Brazil had more than 30,000 participatory councils addressing an array of policies, spread across all states. This same period saw hundreds of public conferences and hearings, while thousands of ombudsman offices were opened at public agencies.

The growth of participatory institutions has not been immune to criticism. On the one hand, part of society argues that

institutions have become less effective over time, often held captive by the interests of social or corporate groups. Others contend that direct participation weakens our model of representative democracy—a criticism well refuted by Thamy Pogrebinschi and Fabiano Santos, who showed that conferences have in fact helped strengthen and guide the legislative branch by allowing it input for decision-making processes. So the creation of these participatory institutions, in combination with classic mechanisms of representation, has effectively restored the multidimensionality of democracy.

If the creation of these institutions in and of itself established spaces for social dialogue and thus altered the state's modus operandi, what happened inside the bureaucracy was even more striking: careers that valorize participatory institutions were strengthened, and so participation began to be incorporated as a modus operandi in bureaucratic decision-making. This is the third factor that helps explain how these patterns of relations readjusted. Taking the career of technical analyst of social policies as an example, Roberto Pires and Rebecca Abers examined how the majority of newly hired civil servants believed in social participation and valued it as a determining element in the enhancement of decision-making processes. Abers and several others have also shown how part of the bureaucracy deploys the logic of institutional activism, proposing contentious agendas, building direct connections to movements and organizations, and thus incorporating elements of participatory logic into their work within the bureaucracy. In addition to building republican institutions and advancing participatory institutions, this process has strengthened a bureaucracy that defends practices like these, giving rise to the new pattern mentioned earlier: the participatory pattern.

The participatory pattern lends politics its most profoundly democratic character. It is apparent that corporatism, clientelism, bureaucratic insulation, and procedural universalism are political in nature. They represent the ways in which the state and society relate to each other and are therefore essentially

political patterns. But the tension between them is between the public and the private, between the republic and the private appropriation of the state. None of these patterns prioritize the role of the people as the agent of transformation. This is the great innovation of the Constitution of 1988: the inclusion of the people's participation as a truly new pattern of relationship between the state and society, giving democracy as much weight as the republic in Brazil's political balance. If the existing tension identified by Edson Nunes was between more republican patterns (procedural universalism and bureaucratic insulation) and more privatist patterns (corporatism and clientelism), the participatory pattern introduced by the new constitution complexified these interactions by bringing democracy to the center of the debate on politics.

3. Administrative Reform Under Fernando Henrique Cardoso and Luiz Inácio da Silva

Abstract: This chapter compares two waves of administrative reform. The FHC era emphasized managerial efficiency and privatization, while the Lula era focused on expanding and professionalizing the civil service. Both reforms, however, failed to dismantle entrenched clientelist and corporatist structures, inadvertently empowering a technocratic elite that often resists democratic oversight.

Keywords: administrative reform; FHC; Lula; technocracy; bureaucracy; state modernization

The shift in the patterns of relations between society and political institutions that followed the enactment of Brazil's Constitution of 1988 was deeply shaped by two major reforms that have altered the country's public administration over the past twenty-five years. Given their breadth, these reforms warrant particular consideration. The first period of administrative change, which dates back to the Fernando Henrique Cardoso era (1995–2002), has been widely discussed by scholars of public administration in Brazil. The second, under Luiz Inácio Lula da Silva (Lula), has been much less extensively discussed and, in general, not recognized as a reform.

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The first administrative reform, begun in the 1990s during the first term of Fernando Henrique Cardoso (hereafter FHC), was drawn up by the Ministry of Public Administration and State Reform, then under the leadership of economist Luiz Carlos Bresser-Pereira. It is interesting to note that at the same time that Bresser-Pereira was pushing for administrative reform, he was writing the foreword to Edson Nunes's book and considering whether the "grammars" (or, in our terminology, patterns of relations)—still made sense. Bresser-Pereira's straightforward and bold proposal for administrative reform divided state activities into four main types—strategic core, exclusive activities, nonexclusive services, and the production of goods and services for the market—and called for specific changes to each.

Activities considered part of the strategic core, comprising the top levels of the legislative, judicial, and executive branches, were not expected to undergo major changes, although they might be subject to management enhancements. The state would continue to have sole responsibility for exclusive activities, which include such aspects as law enforcement, the publication of rules, compliance monitoring, diplomacy, and oversight, all implemented by a competent and skilled bureaucracy, but these activities would undergo significant administrative improvements that would entail, for example, the adoption of mechanisms for accountability, planning, and monitoring.

Nonexclusive services, which include social policies regarding health, education, and welfare, had become universal rights under the Constitution. In line with the proposed reform, these activities would be "publicized," in other words, made the responsibility of nongovernmental public organizations that would have greater flexibility in implementing them through state contracts and oversight. This would universalize and guarantee the social rights enshrined in the Constitution, but not under the state's direct authority. The process of so-called publicization would include the proposed creation of what are known as social organizations (SOs), which are public but not state-owned; that is, SOs must serve the public interest and cannot make a profit but are not

subject to the rules of administrative law that govern state-run organizations. Thus, these bodies are concerned about the public and social interest but are not constrained by the management hurdles of public administration.

Finally, the activities involved in the production of goods and services for the market, then in the hands of state-owned enterprises operating in energy, telecommunications, mineral extraction, and so on, would be fully privatized, in other words, taken over by private companies whose focus and management would be in line with market principles. But since some of the services would continue to be in the public interest (like access to energy, for example), their activities would have to be regulated by the state. To this end, regulatory agencies were set up not only to oversee the market but also to ensure standards of service and prices that would not tie all national and societal interests to the logic of the private market.

In retrospect, it is safe to say that the administrative reforms of the 1990s were only partially implemented. Several companies were privatized, including mining giant Vale do Rio Doce and some in the power and telecommunications sectors, while others, such as Petrobras and Brazil's postal service, were not. Numerous regulatory agencies were established in the wake of privatization, including the Brazilian Health Regulatory Agency (ANVISA), the National Electrical Power Agency (ANEEL), the National Telecommunications Agency (ANATEL), and the National Agency for Supplemental Health (ANS). The state continued to provide most social services. SOs were primarily implemented at the state and municipal government levels and not adopted at the federal level for universities and research institutions, as originally proposed.

While implementation had been partial, there is no doubt that notions of reform were widespread and managed to make an impact. One such impact was the ability to encourage and disseminate within the federal bureaucracy administrative principles focused on planning, management by results, and policy analysis. This period saw a reinforcement of key management careers as well as of the National School of Public Administration

(ENAP), which was tasked with promoting these new managerial approaches inside the bureaucracy and with offering a series of programs to train and enhance the skill sets of management staff. One can therefore conclude that the administrative reform of the 1990s sought to advance the measures proposed by the 1988 Constitution, especially with regard to increased transparency and social oversight, efficiency, and the universalization of public services. However, its partial implementation did not allow it to achieve widespread procedural universalism, nor successfully address patterns of clientelism, corporatism, and procedural universalism.

The Lula administration also saw extensive changes to the federal bureaucracy, but these were generally not associated with the notion of reform, particularly because, unlike FHC, Lula did not devise an explicit plan for reform or create a specific ministry for this purpose. Most of his efforts were focused on the Planning Ministry, but without any explicit, coordinated project. Nor were there ever any systematic efforts to deliberate on this process inside the government or to document it as such. But considering that there was a fairly major effort to bring about change during the period, we would categorize these efforts as a second post-1988 Constitution administrative reform.

Aside from more specific measures, such as changing organizational structures and building major policy coordination models—establishing the Unified Social Assistance System (SUAS) and the Growth Acceleration Program (PAC)—the biggest "reformist" measure of the Lula administration was to invest in strengthening the federal bureaucracy by holding competitive civil service entrance exams and developing new career paths. If 51,600 civil servants were hired during FHC's two consecutive administrations, during Lula's two terms in office (2003–10) that number nearly tripled, reaching 151,200 civil servants, in areas such as Brazil's Federal Tax Authority, Ministry of Foreign Affairs (Itamaraty), and Federal Police, plus the country's cadre of public managers and planning, environmental, and social policy analysts. The increase in the number of civil servants was

directly tied to the Constitution's proposed universalization, which required a public bureaucracy to expand access to public services. Although some sectors of society think Brazil has too many civil servants, the efforts by FHC and Lula were still not enough to reach the numbers needed for a country of its size and complexity. In 2020, for example, the proportion of civil servants in Brazil's population was 5.6 percent, while the average for OECD countries was 9.6 percent.

Aside from raising the number of competitively recruited civil servants, the Lula administration also invested in restructuring civil service careers and boosting salaries; average outlays on personnel costs in this sector rose 70 percent in real terms. Continuing the process set in motion under FHC, the Lula administration also committed to additional training for civil servants, and ENAP began offering an expanded number of courses to civil servants from all ministries. The administration also introduced such programs as leadership training, along with master and doctoral tracks for civil servants at both ENAP and other federal government schools.

This entire process had the effect of creating a series of islands of excellence across ministries, made up of young, well-educated civil servants with good salaries and plenty of initiative for proposing changes, all within an administration that encouraged creativity and innovation. Numerous consequences of these efforts are still visible today, such as the strengthening of entities like the Federal Police and the Office of the Comptroller General (CGU) and the establishment of high-impact policies like the *Bolsa Família* financial assistance program and the Water for All projects.

The first reform, in 1995, emphasized the use of management elements and tools within public administration, forcing the bureaucracy to adjust to new forms of decision-making. The second reform, under Lula, brought a young, highly educated, and valued workforce into the state bureaucracy, responsible for obvious changes. In late 2002, it was virtually impossible to find anyone at Brazil's top law schools who aspired to joining

the Federal Police, whose ranks were full of the aging and unmotivated, if not the downright corrupt. After the Workers' Party (PT) administrations, however, employment with the Federal Police became a popular option for students at all of Brazil's best law schools. The same was true of the careers of public attorney, prosecutor, defender, and manager.

Since 2003, the career profile of the average civil servant has undergone radical change. The 2004 Federal Police strike, which featured the symbolic burial of Justice Minister Márcio Thomaz Bastos, illustrated how corporatist movements were one of the driving forces behind salary increases and career expansion, leading to a corresponding growth in the number of civil servants. However, there is reason to believe that investing in a highly educated bureaucracy was not just a gesture to please staff, nor did it aim to reverse the changes made by the previous administration. It was clear that the development model on which the PT regime was betting required a stronger state, highly trained civil servants, and well-structured career paths. What was never very clear was how those administrations viewed the roles that such careers would play in the twenty-first century. Nor was there any in-depth discussion about the consequences of reinforcing the bureaucracy, from the standpoint of both public administration and political life.

So, although this process had obvious consequences in terms of bolstering institutions and establishing public policies, it also had consequences that affected how the state worked in general. In the cases we will examine here, the tensions between strengthening the patterns of procedural universalism and bureaucratic insulation, on the one hand, and the new reality of the participatory pattern, on the other, will begin to come into focus.

If these reforms succeeded in improving public administration, they failed to address clientelist and corporatist traditions and did little to increase oversight and participation in insulated areas of the Brazilian state. To some extent, the effect was just the opposite: by recruiting large numbers of young, highly trained, and well-paid civil servants into the state, traces of corporatism were

reinforced. This faith in the competence of professionals who were granted autonomy boosted bureaucratic insulation. The carte blanche given to the oversight system, which would strengthen the bureaucracy and ensure functional autonomy without checks on those tasked with oversight, allowed conservative features to gain ground. So, by seeking to fortify public administration without any real plan to modernize the republican state and democracy itself, these reforms created a technocracy that ended up holding politics back.

The reform agenda implemented by the FHC and Lula administrations overlooked the ability of some elites, including the bureaucratic, to appropriate the public machine to serve their own interests. This ultimately empowered a state that displayed clientelist and corporatist features, now under the guise of the democratic rule of law. After all, government bureaucracy does not live apart from society. And a slice of society had clearly been appropriated by, or was aligned with, business sectors with well-defined interests. The extreme valorization of administrative expertise ended up erecting barriers to real political dispute, reducing the possibility that those disadvantaged by inequality could gain access to power. This strictly administrative logic contributed to naturalizing the idea that, since some people are better than others, their place in society is justified by "merit," legitimizing the enormous inequalities that have historically shaped us and that continue to grow.

Bureaucrats or Politicians?

As we have seen, recent reforms have not reversed the entrenched patterns of relations between the state and society. In fact, reinforcing the government bureaucracy without a plan to rebuild the republic and democracy itself allowed patterns that weakened both republican and democratic perspectives to adapt to the new situation. This was not the intended purpose of the reforms; quite the contrary, the reforms were intended to align the Brazilian

state with the 1988 Constitution. Yet by failing to implement measures to fight clientelism, corporatism, and insulation, the reforms let these backward patterns readjust and coexist with procedural universalism and the new participatory patterns.

The case of appointed positions exemplifies the contradictions and tensions inherent to this process. Political appointments are an essential element of democracy because legitimately elected politicians need to make sure their decisions are effective, and to do so, they must have people in positions of trust within the machine who can coordinate these political decisions. However, if the general idea of appointed positions is central to democracy, in Brazil, the distribution of these positions can only be understood within the constraints of the five patterns we have been discussing.

Brazil has a large number of appointed positions—more than 20,000 in the federal government in 2021, apart from the thousands at the state and municipal government levels. Conventional wisdom tells us that these positions are allocated to serve political party interests, yet several analyses focused on the PSDB and PT administrations show that many of the people who hold these positions have a high level of administrative expertise.[1]

In recent decades, Brazilian presidents have sought to curb the purely political use of these posts. In 2006, Lula signed a decree stipulating that a minimum percentage of positions must be filled by civil servants recruited through the competitive hiring process. In 2016, the Temer administration amended this decree, passing Law 13.346, which likewise set a required minimum percentage of positions to be filled by career civil servants, therefore reducing the space occupied by purely political appointees, measures more in line with procedural universalism. In 2021, however, despite

1 For more references on appointed positions in Brazil, see Felix Lopez, "Evolução e perfil dos nomeados para cargos DAS na administração pública federal (1999–2014)," *Nota Técnica*, no. 16 (Brasília: IPEA, 2015), 201; Pedro Cavalcante and Gabriela Lotta, eds., *Burocracia de médio escalão: perfil, trajetória e atuação* (Brasília: ENAP, 2015).

these new regulations, more than 6,000 appointed positions were held by members of the military, a body that has wielded tremendous power during the Bolsonaro administration.

Since the 2000s, several ministries have tried to introduce internal regulations for how these positions are filled, and some career tracks have managed to ensure admission only to those who have passed the competitive exam process, as in the case of Brazil's Federal Tax Authority, Central Bank, Itamaraty, National Treasury, and the Brazilian Institute of Geography and Statistics (IBGE). If, on the one hand, civil servants recruited through a competitive hiring process can strengthen the bureaucracy and impose limits on politics, on the other hand, hiring only these civil servants can camouflage a corporatist battle by career groups who want to ensure their autonomy in relation to politics. Whether or not you agree with these rules, they highlight the tensions between the republican measures adopted by the Constitution and the corporatist and clientelist features of the Brazilian state.

To better understand how these patterns readjusted themselves, it is also worth looking at the effect of isonomic selection processes, whose number increased during the FHC and Lula administrations. Under the new rules of the Constitution, recruitment through competitive exams must be based on legal and impartial processes, equal before the law, and justified on the grounds of merit—only the best are selected. If this process appears to contribute to building procedural universalism, it can also hide traces of meritocracy and exclusion, which are legitimized precisely by the idea of impartiality and equality before the law. This is because competitive exams legitimize and safeguard the notion that those who have been selected deserve to be there. Over time, as these exams grow more competitive, only "the best" are accepted into the highest-paid, most powerful career tracks—such as positions in the judiciary and the Public Prosecutor's Office.

In this way, behind the isonomic, impartial, and legal competitive exams, there is a reification of certain career profiles

within the state bureaucracy. Several prestigious competitive exams have ended up recruiting a fairly predictable group in terms of background: white men from Brazil's economically and politically more powerful South and Southeast regions, whose family members have also been recruited for elite careers, as in the case of magistrates.

In addition, by ascending to career tracks legitimized by competitive exams and merit, civil servants are able to claim autonomy, job security, and additional privileges, such as salary increases and perks. All of this is protected by virtue of merit and success in the competitive recruitment process and by the power attained when working for the state. After all, who can question the decisions of an attorney in the Public Prosecutor's Office if she is a civil servant and has functional autonomy? Who can question the decision of a controller from the CGU or the Federal Audit Court (TCU) if she has the power and legitimacy to oversee others?

Competitive exams, for their part, are no longer seen as part of a mere selection process for bureaucrats charged with implementing the decisions of those elected by the people. Instead, the exams have become a source of legitimacy for purportedly autonomous groups within the state, who can then use their autonomy and position for personal gain or to implement political agendas or the interests of certain segments of society.

The reform agenda did not take into account how strengthening the public administration would help build a technocracy that would claim greater power in making public decisions. For some time now, scholars of public administration in Brazil, such as Maria Rita Loureiro and Fernando Abrucio, have called attention to the links between patrimonialism and bureaucratic insulation, which want to impose their administrative views without considering the diverse viewpoints of society. As this perspective would have it, the political world is always associated with some form of corruption, which is not the case with the bureaucracy, since it is assumed to be untainted and the best route to finding the right solutions. But the view that elected officials (the products

of democracy) are always somehow associated with corruption is obviously authoritarian—just as it is naïve to think that civil servants recruited through a competitive hiring process cannot be corrupted. Two of the main perpetrators of the corruption schemes at Petrobras, Renato Duque and Paulo Roberto Costa, were career civil servants with extensive industry experience. Even so, the impression that only politicians were responsible for the company's corruption became widespread.

This preconceived notion that corruption comes from politics and is far removed from expert bureaucrats distances the state from civil society, stripping people of the hope that their lives will be transformed for the better when they cast their vote. If every solution depended on the administrative expertise mastered exclusively by those legitimized by competitive exams, what would be the point of voting, elections, and democracy?

As Maria Rita Loureiro and Fernando Abrucio put it:

> The great challenge facing contemporary democracies is to combine the efficient action of the state in managing public policies with the democratic principles of greater inclusion of political actors in decision-making, thus guaranteeing continued accountability of those who make the decisions. This amplified political accountability implies the institutionalization of ongoing oversight of elected officials—not only at the time they are elected but also throughout their term in office—and policymaking bureaucrats, both those in charge of public administration and those responsible for internal and external oversight of the executive branch.[2]

We are not criticizing or questioning the work of civil servants, nor the need for adequate pay or competitive civil service entrance

2 Fernando Luiz Abrucio and Maria Rita Loureiro, "Burocracia e ordem democrática: desafios contemporâneos e experiência brasileira," in *Burocracia e políticas públicas no Brasil: interseções analíticas*, ed. Roberto Pires, Gabriela Lotta, and Vanessa Elias de Oliveira (Brasília: IPEA/ENAP, 2018), 6.

exams. On the contrary, we are recognizing that an important part of Brazil's bureaucracy has achieved results that have greatly advanced the construction of the democratic rule of law. The argument that career civil servants who possess administrative expertise are morally superior can undermine politics and destroy democracy. We know that entrusting bureaucracy with the mission of replacing politics is neither a new nor a politically neutral stance. What we must understand is that strengthening Brazilian democracy depends on its ability to balance bureaucracy and politics.

Democracy on a Tightrope

We are writing this book during a pandemic. It is 2021, and we are following discussions being held by a congressional investigation commission (CPI) in Brazil's Senate, which uncovered a series of omissions and abuses by the federal government and helped explain why Brazil was ranked worst in the world for its pandemic response.[3] Amid the battle of narratives surrounding the CPI, there was a constant clash between the discourse of expert bureaucrats working within the state machine and the political decisions of government leaders. The conflict was apparent from the outset, starting with a civil servant's allegations of a possible corruption scheme through to a statement by the coordinator of the National Immunization Program, who claimed her recommendations and opinions had never been considered. Conflicts like this, with civil servants claiming the Bolsonaro administration did not listen to them, have spread through Brazil's ministries and are particularly evident in the areas of health, education, and the environment.

3 According to a poll conducted by the Lowy Institute, Brazil ranked last among surveyed countries in its handling of the COVID-19 pandemic in 2021. https://poll.lowyinstitute.org/charts/global-responses-to-covid-19/ (accessed August 14, 2025).

It was impossible to witness this debate and not perceive the importance of a well-educated bureaucracy that informs political agents and grounds their decisions. Politicians who govern with the sole intention of reinforcing their political base also undermine democracy precisely because they circumvent the need to publicly and rationally justify their actions.

Brazil's post-1988 Constitution democracy was virtuous in promoting the expansion of procedural universalism and the broadening of popular participation, patterns of relations between the state and society that fundamentally benefited the population. However, we have still not succeeded in eliminating the harmful elements that shaped the Brazilian state and that interlace clientelism, authoritarianism, and corporatism under the guise of liberal democracy. Our democracy is a balancing act, where the tightrope walker leans sometimes toward republicanism and participatory progress and at other times toward conservative patterns of relations.

The Unified Health System, the universalization of primary education, the Unified Social Assistance System, reductions in poverty and inequality, expanded university access for Black men and women, an independent Public Prosecutor's Office, an efficient Federal Police, and reduced deforestation, among many other achievements, were the outcome of a constitution that has been able to accommodate the expansion of democratic space to institutions capable of providing technically sophisticated solutions to major problems. But the democratic crisis that has reached a peak under the Bolsonaro administration makes it clear that this balancing act between bureaucracy and politics, between popular participation and strong institutions, is the key to consolidating the ambitious 1988 dream in a country that for centuries has made much more of a point of being called democratic than of actually becoming a democracy for all.

Part II

Democracy Struggling to Balance:
Bureaucracy Overrides Politics

4. The Access to Information Law

Abstract: This case study illustrates how bureaucratic resistance can obstruct democratic transparency. The Ministry of Foreign Affairs and the Defense Ministry opposed time limits on document secrecy, invoking their role as guardians of the state. The eventual passage of the law, driven by political actors and civil society, highlights the need for politics to assert itself over bureaucratic mystique.

Keywords: transparency; Itamaraty; Defense Ministry; public interest; bureaucratic resistance; Max Weber

One workday in late 2008, my telephone rang at around seven a.m. It was the minister. Although he was an early riser, Tarso Genro rarely called so early. Something must have happened. "Pedro, I don't know what you did, but Samuel showed up at my house last night, saying he needed to talk to me before I went abroad. From what I understood, it was something very serious you said about the Baron of Rio Branco." I had indeed said something. And everything indicated I was being called on the carpet for bad behavior. Genro said I needed to explain myself by going to the office of the acting Minister of Foreign Affairs, Samuel Pinheiro Guimarães.

What exactly made this acting minister go all the way to the justice minister's house to summon the young secretary to his office to explain himself? It wasn't just concern about an apparent insult to the baron, the patron of Brazilian diplomacy. The debate was really about the Access to Information Law (LAI).

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At the time this discussion was taking place, Brazil was among the few countries within the Latin American wave of new constitutions in the late 1980s and early 1990s that had yet to pass a comprehensive freedom of information act. In prior years, the Brazilian debate had focused more on opening the archives of the military dictatorship than on the importance of a law establishing clear procedures to allow any citizen access to state information or on the rules for declaring a document secret, along with the time limit governing such secrecy. Right then, the government was focusing precisely on the timeline for secrecy.

Chief of Staff Dilma Rousseff, Justice Minister Tarso Genro, and Minister of State and Head of the Office of the Comptroller General (CGU) Jorge Hage were the individuals most clearly in favor of not only establishing a law on access to information, but establishing one that was as open as possible. On the other hand, Itamaraty, as we call the Ministry of Foreign Affairs, and the Defense Ministry were both cautious about introducing a general law on the subject and were strongly opposed to establishing a time limit for confidentiality. These two ministries would have preferred that the secrecy of some documents could be renewed indefinitely, a position the press called "eternal secrecy."

The day before the telephone call from Tarso Genro, there had been a meeting to discuss the issue of so-called eternal secrecy. I attended it as a representative of the Justice Ministry, together with colleagues from the Office of the President, the CGU, Itamaraty, and the Defense Ministry. We knew where each ministry stood ahead of that meeting and were fully aware of how difficult it would be to change people's minds. But what was most surprising was the position of the Defense Ministry and Itamaraty, both of whom considered themselves representatives of the state. They were concerned about maintaining the backbone of the Brazilian state, which in their view could only survive thanks to a body of public servants loyal to that structure. We, on the other hand, were viewed as reflecting the views of the administration and as temporary in our posts, representing something considered less noble in the debate: political interests.

Expressed at times subtly, at times bluntly, this mindset was puzzling. On the one hand, one could view this tension as potentially positive. Between clinging to the traditions of the state and embracing the new winds blown in by politics and democracy, perhaps there was a reasonable position to be reached. But there was something so profoundly anti-democratic about their attitude that it was impossible to accept it calmly. Wasn't this loyalty to the fabric of the Brazilian state also loyalty to a state that had been the driving force behind the entrenchment of all of our injustices? What's more, the Defense Ministry and Itamaraty refused to reveal their real fears about ending eternal secrecy. What kind of document, if shared with the public, might negatively affect the country's stability? They wouldn't say, because we, on the other side of the table, the political side, were not the state. Even as high-ranking public servants, we weren't qualified in their view to access the information we needed to make decisions. We were supposed to trust the loyal spirit they claimed to represent.

It was tough to swallow their position, so I insisted they give an example of a document from something like fifty or one hundred years ago that, if released, would affect the stability of the Brazilian state. After much insistence, the senior Itamaraty official at the meeting spoke up: "Borders. There is information that could affect our borders." We all knew what he was referring to. The reputation of the Baron of Rio Branco—the diplomatic genius who by skill alone secured 900,000 km² of Brazil's borders—has sometimes been tarnished by troublemakers who have dared suggest it took more than his diplomatic skills to achieve this feat. And some of his methods were, perhaps, not entirely aboveboard.

What was most troubling was the other side's attitude, which implied that as representatives of the state, they didn't need to enlighten us with information to which we were not privy or present us with new arguments that might have got us thinking differently. By possessing information that couldn't be shared with other civil servants or the public, they held the power to make decisions. That's why I decided to speak up and make the comment that earned me the tongue-lashing:

> I appreciate your having raised this point because it helps us better understand what we're discussing here. The issue is not borders. As a member of the Justice Ministry, I can say there is absolutely no legal danger that Bolivia will attempt to reclaim the state of Acre or that there is any chance we will lose a piece of Amapá or Roraima. Zero. The only one who might lose anything is not Brazil, but the Baron of Rio Branco. If he really did bribe someone or did anything undignified in the process of acquiring land, he doesn't deserve to keep his place in history. But don't the Brazilian people have the right to obtain full access to information so they can decide who their heroes are?

My comment completely dampened the atmosphere, and the meeting ended without any consensus being reached. Hence the ambassador's surprise visit to the justice minister.

A few months later, Lula and his ministers met to decide on the final text of the bill. The bureaucracy, which claimed to be the faithful guardian of inviolable memory, won. The ministers convinced the president there were issues that should remain forever secret—even though the vast majority of countries have no such provision and even though Brazilian society had been clamoring for transparency and greater democracy. Yet bureaucracy can be very convincing when it hides not behind administrative arguments but behind its symbolic power, that of representing the continuity of the state.

The bill was sent to Congress and then came the politicking. There was intense mobilization by various civil society groups that were fighting for transparency, such as Conectas, an advocacy group that promotes human rights and democracy, and Artigo 19, an organization that advocates the right to free expression. This reopened discussions. Information from other countries was then presented, and there was talk about the benefits of placing a time limit on secrecy. The press also covered the issue—Fernando Rodrigues, at the time a journalist with *Folha de S.Paulo*, wrote about it repeatedly.

Itamaraty and the Defense Ministry continued to make their case to lawmakers. They actually succeeded in convincing Senator Fernando Collor de Mello. But this opposition between a strategy based on corporate arguments, using the mystique of the bureaucracy, and the public debate waged by civil society and the press eventually did away with the secrecy argument. Thanks to pivotal support from José Genoino (PT) and Mendes Ribeiro (PMDB),[1] the final text of the bill was amended in the Chamber of Deputies. Ultimately, the law that passed allowed public documents to remain secret for a maximum of twenty-five years, renewable for no more than an additional twenty-five years.

The law is nearly a decade old now, and Brazil's borders remain intact. But today, Brazilians are able to learn a lot more about their history. This case is an excellent example of how public servants can use their technical legitimacy and meritocracy to try to keep politics from influencing decision-making. The attempt to place bureaucracy above politics—and the public interest itself—was clear. Determining the time limit for secrecy was undoubtedly a political decision, and one that was a matter of public interest. Such a decision should be based as well on technical criteria that make clear what is being decided. But the debate over whether to create a more transparent state is not merely a technical one—it is above all political.

By being part of a public body and having been recruited through a competitive process, the Itamaraty officials involved in the discussions had behaved as if they had more legitimacy to participate in decision-making than did public servants appointed by political ministers. It is as if politics depended on the authorization of bureaucrats, at least on certain issues.

1 Rodrigo Bittar, "Comissão limita sigilo de documentos públicos a 50 anos," Câmara dos Deputados, February 24, 2010, www2.camara.leg.br/camaranoticias/noticias/administracao-publica/145362-comissao-limita-sigilo-de-documentos-publicos-a-50-anos.html; Fernando Rodrigues, "Aprovação de projeto é primeiro passo contra cultura de opacidade," *Folha de S.Paulo*, October 26, 2011, https://www1.folha.uol.com.br/fsp/poder/po2610201112.htm.

This case is a perfect illustration of the dilemma presented by the coexistence of expert bureaucrats and politicians, as suggested by Max Weber in the early twentieth century. When analyzing the formation of modern republican states, Weber proposed that the proper functioning of a democratic regime depended on a tenuous but necessary balance between democratically elected politicians and bureaucrats who embodied the state. The tension and instability of this balance would arise precisely because of the differences in intentions and motivations that drive the two.

In the Weberian ideal type, politicians are agents driven by passion, a sense of responsibility, and a sense of proportion who devote themselves to certain causes and set out to represent them in politics. Politicians—represented in the case of the LAI by the Justice Ministry, CGU, and Office of the Chief of Staff—have a political vocation and live for it. But the bureaucrats, represented by civil servants from Itamaraty and the Defense Ministry, hired on the basis of meritocratic and isonomic criteria, are part of a stable body that operates within a permanent professional structure.

It is up to bureaucrats to respond to the public by obeying the rules, upholding the laws, and carrying out the orders of politicians (so long as grounded in legislation). As Weber noted, "the true civil servant [...] should not engage in politics precisely because of his vocation: he should administer [...]. He should carry out the duties of his office without anger and prejudice."[2] It would not be up to bureaucrats, for example, to claim to be "representatives of the state" by maintaining the secrecy of information that should be public. Since bureaucrats are not elected, they should exercise no political power, at the risk of undermining the democratic order or lacking legitimacy in their decisions. They should therefore leave their passions to politics

2 Max Weber, "The Profession and Vocation of Politics," in *Weber: Political Writings*, ed. Peter Lassman and Ronald Speirs (Cambridge: Cambridge University Press, 1994), 330.

and democracy. In this particular case, they should comply with what has been politically and legally determined to be in the public interest.

Decades after Max Weber's writings, French sociologist Pierre Bourdieu analyzed the transition from what he called the "dynastic state" (one based on the power of a royal dynasty) to the bureaucratic state. Bourdieu asserted that this transition took place gradually, during the formation of nation states, with the establishment of a bureaucratic regime that continued to operate in the context of the king's absolute power. This brought with it a contradiction between the private domain of the king and the public domain under which the bureaucratic structure began to operate. While the dynastic system is based on blood ties, the bureaucratic system, according to Bourdieu, is based on merit and competence. And this approach inspires the establishment of a series of rituals and procedures designed to reinforce the legitimacy of this rational bureaucratic power.

But Bourdieu made it clear that the emergence of this bureaucratic system is related to a dispute over state resources. In other words, what he referred to as the "state nobility" is a new group that gains access to decisions regarding the use of state resources and, in order to be able to do this, requires that the criteria for using these resources obey a formula that ensures its exercise of power. This group, which does not necessarily come from the old nobility but whose legitimacy is based on education at major universities and performance on competitive exams, now enjoys power. What seems universal has a specific purpose. As Bourdieu stated, "one can even say that they had a private interest in the public interest."[3]

Thus, these universalizing practices and procedures, designed to ensure legal-rational legitimacy, acquire an air of mystery. The actions of officials from Itamaraty and the military involved in

3 Pierre Bourdieu, "From the King's House to the Reason of State," in *Pierre Bourdieu and Democratic Politics*, ed. Loïc Wacquant (Cambridge: Polity, 2005), 48.

this process reflected this very perspective. Blessed by a rational administrative legitimacy, they attempted to crush the possibility of public debate on the issue. By allowing the public to obtain access to documents that were previously deemed secret, the LAI somehow broke through this aura of mystique, democratizing information and practices and, in doing so, diminished the power of the state nobility.

The passage of this law showcases this kind of tension and its limits. Officials appointed by the Lula administration represented a political agenda that was expanding channels of transparency in many areas. The 2004 launch of Brazil's Transparency Portal, the 2005 opening of the military dictatorship's archives, and the 2011 enactment of the Access to Information Law were huge achievements. The bureaucracy could have presented its arguments about the risks of ending secrecy; it could have argued that such a measure would have caused problems with Brazil's neighbors, exposed figures recognized as national heroes, or reopened historical wounds. Once the risks had been assessed, it would have been up to the politicians to make the final decision, because after all, they are the ones who are accountable to the public for their decisions.

The bureaucracy must always uphold the law. But when, in a legal and legitimate process, the bureaucracy refuses to yield to legally justified policy, usurping the right to define what it deems to be in society's interest and invoking an administrative discourse that ends up protecting only its own interests, democracy is tarnished.

In this case, the bureaucracy's strategy was to first omit information and then create a certain mystique about the administrative information in its possession, thereby excluding any other actors from taking part in the debate. It was therefore a strategy aimed at undermining politics. By defending undisclosed corporate interests, the expert bureaucrats had placed themselves above public and democratic debate and used their position as public servants to guarantee interests that were also political. This is yet another case that illustrates how bureaucracies are

not politically neutral. They can try to hide behind seemingly technical arguments, legitimized by the secure positions they occupy, access to which is restricted to those who pass a supposedly technical and meritocratic exam. However, they are engaged in political decision-making processes, which must be open to public debate to ensure the different types of social interest are represented.

My own career experiences have shown me the limits of hermetic decisions made by the bureaucracy. To ensure that the best decisions are made, it isn't enough that highly trained professionals, rendered legitimate by recruitment through an equitable civil service hiring process, fill key positions in the state. These professionals must generate information that supports the political choices of the elected leaders. As suggested by political scientists Robert Dahl and Charles Lindblom, there is a limit to how far bureaucratic thinking can go in resolving social conflicts, and instead of reciprocal exclusion, a combination of administrative and political rationality and intelligence is required for decision-making in democratic environments.

This does not mean that the debate surrounding the LAI in the Chamber of Deputies was any less bureaucratic than the debate in the executive branch. It was undoubtedly more open to various worldviews and generated an unabashedly political decision, which even in conflict with technical experts was the best solution to the problem.

Problems like this are typical in bureaucracy. Where is the line between issues that require only technical debate and those that can and must be subject to additional political scrutiny? Is there such a thing as a purely technical issue? Is there a technically neutral bureaucracy that can make decisions devoid of political interests? These questions will be discussed in the chapters that follow, but it is already clear that this tension can only be resolved with more democracy, not more bureaucracy.

5. The Battisti Case

Abstract: This chapter explores the dangers of political abdication. When Justice Minister Tarso Genro failed to guide a bureaucrat on a politically sensitive asylum case, the resulting decision lacked legitimacy and exposed the limits of bureaucratic neutrality. The case underscores the importance of political responsibility in democratic governance.

Keywords: CONARE; political responsibility; bureaucratic neutrality; Tarso Genro; Luiz Paulo Barreto; international law

One day in November 2008, when I was serving as Justice Minister Tarso Genro's Secretary for Legislative Affairs, I was in my boss's office to deal with some department matter.[1] Luiz Paulo Barreto, the executive secretary for the Ministry, was just about to leave the office, where he and the minister had discussed the case of Cesare Battisti, convicted of two homicides in Italy, a verdict that had been called into question because of serious concerns about due process. In addition to serving as executive secretary for the Justice Ministry, Barreto was also chair of the National Committee on Refugees, or CONARE, the agency responsible for assessing requests for refugee status. A few hours later, the committee would be reviewing Battisti's request for asylum.

As a career employee with the Justice Ministry, Barreto had headed the former Department of Foreign Nationals for many

1 Pedro Abramovay served as secretary of legislative affairs from 2007 to 2010.

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years under the presidency of Fernando Henrique Cardoso. When Lula took office, former Justice Minister Márcio Thomaz Bastos (2003–7) offered Barreto the post of executive secretary. I remember our joking that if there were a Max Weber trophy for public servants, the laurel would go to Barreto. Throughout the 1990s and 2000s, he had negotiated a good share of the agreements on foreign nationals and immigration in Brazil.

Barreto had also unwittingly starred in one of the most infamous episodes of the Lula administration, perhaps the only real attack on freedom of the press by a government that respected this principle (although the administration never received due credit for its posture in this regard). I am referring to the expulsion of *New York Times* journalist Larry Rohter.

In 2004, Rohter had written a very aggressive article suggesting that Lula was a heavy drinker and had suffered childhood abuse by his father; the then-president had reacted by ordering the journalist out of the country. At the time, Justice Minister Márcio Thomaz Bastos was on an official trip to Europe. Barreto, who had built his career as a public servant defending the rights of foreign nationals in Brazil and therefore knew Lula's order violated fundamental principles of the Constitution, was summoned to sign the edict. As an acting minister in an administration less than a year and a half old, Barreto was unable to hold sway. He later played a decisive role in helping the justice minister, now back in Brazil, to convince the president to reverse his decision. This episode highlights the tension between the position of high-level career public servants and the political decisions they have to administer.

More than four years after the Larry Rohter affair, Barreto was about to experience the tension between his public servant role and politics yet again, no doubt one of many such moments. He was just leaving the minister's desk (which, legend has it, belonged to Getúlio Vargas) when I came in. As I approached Tarso, I remember hearing Barreto ask, "Well then, how do I vote, Minister?" "Vote your conscience," Tarso replied, adding: "In fact, I bet your vote will be the tiebreaker."

The two men had been discussing whether or not to grant Cesare Battisti refugee status, because Barreto was about to attend the meeting of the CONARE committee that would vote on the matter. The Italian had been convicted in Italy for murders committed by the Red Brigades in the 1970s, but Battisti denied his guilt and claimed the charges were a matter of political persecution.

Socialist president François Mitterrand had granted him refugee status in France, and right-wing Jacques Chirac did not overturn the decision when he came to office. However, when Nicolas Sarkozy arrived on the scene with his tougher stance on terrorism, Battisti's refugee status was revoked and he fled to Brazil, where he filed for asylum. Like all refugees in Brazil, his request was evaluated by CONARE, which comprises representatives of various ministries who vote on whether to approve or deny asylum. Brazil has a long tradition of granting refugee status to foreigners from countries of very diverse political regimes.

This is, of course, a technical decision, yet one with myriad political dimensions. When evaluating the request, the committee must consider the political situation in the applicant's country and whether or not persecution has occurred. While those making the call have wide latitude to decide whether such persecution has taken place as defined under pertinent international legislation, they always run the risk of upsetting or fueling tensions with other countries.

In order to establish whether a petitioner has truly suffered persecution, a technical analysis must combine an understanding of national and international law with the aforementioned political assessment of the situation in the person's country of origin. Both national and international laws on refugees are designed to protect petitioners from pressure in their homeland. In other words, these laws are meant to keep countries from extending their political persecution of a given citizen into the realm of international diplomacy by exerting undue diplomatic pressure on the country where asylum has been requested. Still, such pressure is at times brought to bear. So CONARE members are

always navigating between technical and political analyses when making their decisions. It is precisely in order to protect refugees from this scenario of undue political pressure that Brazilian law contains a curious provision: if a refugee is granted asylum, it is definitive. Only if their request is refused can they lodge an appeal with the justice minister.

I greatly admire the Tarso Genro Ministry, and many of the episodes discussed here took place during the time I worked for him. Today it seems clear to me that his exchange with Barreto—to which I paid scant attention at the time—was perhaps the minister's biggest mistake in the whole Battisti affair. The error wasn't granting asylum, but Tarso's seemingly unpretentious advice that Barreto vote his conscience.

Today we know this case had a profound impact on relations between the Lula administration and both Italy and the Supreme Court, while also providing ammunition against the government and the Workers' Party (PT). Even former President Bolsonaro mentioned the episode.

I don't know if the outcome could have been foreseen, but it is apparent this decision should not have been delegated to a career public servant. Barreto ended up playing two roles, as a tenured civil servant and as number two at the Justice Ministry, unquestionably a political position. But the moment Tarso Genro failed to issue clear political instructions to Barreto, telling him instead to vote his conscience, the minister shifted all the weight and political consequences of the decision onto the public servant.

Only after he had more thoroughly analyzed the case, following this episode, did Tarso Genro make a firm decision about granting asylum. In other words, at the time of his exchange with Barreto, the minister had yet to speak with the president and could not assure the public servant that the government would back a decision to grant refugee status. And someone with Barreto's experience knew the decision would be controversial. With the government's requisite political backing and as chair of CONARE, he had, for instance, granted asylum to a Colombian priest accused of murder and terrorism in his home country, a

decision ratified ten to one by the Supreme Court a year before the ruling on Battisti.

Barreto left the minister's office that same day and headed to the room where the vote would take place. I don't believe he made a strictly technical decision there. More to the point, the question is whether a strictly technical decision was even possible in such a potentially explosive case from a political angle. The committee's vote came to a tie and, just as the minister had predicted, Barreto cast the deciding ballot—but this time he didn't vote as he had in the case of the Colombian priest. Instead, he voted to deny Battisti refugee status.

Had Barreto voted in favor, the matter would have ended there, because it would have been much harder to politicize the case. But, as we know, if CONARE denies asylum, the request may be appealed to the justice minister. The decision to turn down Battisti's request, even if only by one vote, grounded subsequent attacks on Tarso Genro's reversal of the decision, and the reasoning always followed the same track: the minister's decision was political because it overturned a ruling by a technical agency, CONARE. It didn't matter if the decision had been based on sound arguments or if these arguments were in line with national or international law. If the debate had been purely technical, it would have to focus solely on assessing whether the justifications presented by CONARE were better and sounder than those raised by the minister. However, given the fetishization of an administrative agency, that is, CONARE, the mere fact that the committee had reached a different decision, even if by a slim majority, helped promote the idea that CONARE's technical—and therefore allegedly correct—view contradicted the minister's political—and therefore erroneous—view.

But here's the billion-dollar question: Could Barreto have voted any other way? When CONARE grants refugee status, the ruling cannot be appealed. Barreto alone would bear the onus of the decision—a decision that, we now know, was monumental and almost pushed Brazil to an institutional crisis. But what if Tarso Genro had weighed the importance of the case and assured

Barreto that the government would stand behind him if he voted to grant asylum? Or what if he had said the government was in favor and that, unless Barreto saw any technical impediments, he should vote to approve the request? Well, the case would never have been sent to the minister and it would have been much easier to defend the decision.

The Battisti case had multiple ramifications. Books and articles have been written on the subject; I myself have spoken about it many times. But what interests us here is this poorly resolved tension between bureaucracy and politics, between the role of public servant and that of political agent. The artificial separation of these two roles almost always comes back to bite its crafters—whether in response to the winds of reality, when politics is detached from bureaucracy, or in response to the winds of politics, when technical decisions do not take politics into account.

This issue also demonstrates an effort to establish the superiority of bureaucracy over politics, but not in the same way as the case of the Access to Information Law. If the latter saw bureaucracy fighting for space and primacy in decision-making, here we see politics omitting itself from a decision that should be eminently political. In other words, here is a case whose consequences can be traced to politicians' negligence in the decision-making process, as they allowed bureaucrats to prevail and thus be held accountable for the political aftermath of a ruling they were not qualified to make.

In this case, politics was represented by Justice Minister Tarso Genro, and the bureaucracy by civil servant Barreto. When the minister told the civil servant he should let his conscience rule, he was shirking his political responsibility and therefore evading accountability. The outcome was a decision-making process with little legitimacy. Furthermore, the case reveals another corollary of political abstention: it shrinks the space for creativity and innovation because it is the nature of bureaucracy to preserve the status quo and continuity. Since bureaucracy is not responsive to political decisions, it generally tends to make predictable choices or choices based on experience or an understanding of the law.

This conservative decision-making is inherent to bureaucracy, which draws criticism for failing to innovate and remaining stuck in time. As a public servant, Barreto let his thinking be governed by both the bureaucratic penchant for maintaining the status quo and his fear of making decisions not within his remit. So he stuck to what was sure and safe. The point is, without political support or incentive, there is little room for innovation within bureaucracy—as we saw in the case of the Access to Information Law and will see in other cases here. To ensure responsive innovation, it is therefore essential that politics not abstain from acting in consort with bureaucracy, stimulating and accompanying its innovations, and guaranteeing space and protection, so that it can go further in its decisions.

The Battisti case demonstrates the consequences of political omission during decision-making: it may lead to the delegitimization of decisions while at the same time producing decisions that fall short of what is needed, conservative choices that do not foster innovation or experimentation. The question that remains is: In a democracy, when can politics abstain from making political decisions? We will explore this question in the next part.

PART III

Democracy Struggling to Balance: Bureaucratic Disdain for Politics

6. Drug Policy

Abstract: Here the authors examine how ideology can override evidence in policymaking. Despite data showing the racially discriminatory effects of Brazil's drug laws, President Dilma Rousseff rejected reform proposals based on personal beliefs. This case reveals how political conservatism can suppress bureaucratic expertise and perpetuate harmful policies.

Keywords: drug law; incarceration; racism; evidence-based policy; war on drugs; structural inequality

One morning, I opened the newspaper and immediately saw the headline: "Government Proposes an End to Prison Time for Small-Time Traffickers." I suddenly felt a chill, the kind often experienced by those who work in government. It begins the exact moment you finish reading the headline of an interview you've given. Of course, it's not just those who work in government who get this chill. It's just that in Brasilia, there's an ever-present—even positive—tension between media and political actors, fueled by frequent encounters in the capital's restaurants and bars.

It wasn't the headline I was expecting, and one not at all in line with what I'd said. Moreover, you only have to read the interview, published January 11, 2011, eleven days into the Rousseff administration, to notice that the phrase "small-time traffickers" doesn't even appear.

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I'd been working in government for eight years and thought it was time to move on. But an offer from former Attorney General José Eduardo Cardozo to head up the National Secretariat for Drug Policy (SENAD) had appealed to me, given the potential to bring about change in an area where, in my estimation, the government had done very little up to then.

My involvement with the issue began when I worked at the Justice Ministry. Back in 2007, a group from the São Paulo Prison Pastoral, sponsored by Federal Deputy Paulo Teixeira (PT), had approached us at the Office of the Secretary for Legislative Affairs to talk about a recent problem.

Despite the new Drug Law enacted in 2006—which, in theory, was more progressive in that drug users were no longer sentenced to prison time—the Pastoral had noticed that prisons were filling up with poor people who clearly had no connection to crime and were often merely users. It was a new prison population.

This information was quite important when it came to thinking seriously about drug policy. How was it possible that a law designed to send fewer people to prison was having the opposite effect? We came up with the idea of including the issue in the call for proposals under the newly launched Thinking About the Law initiative, which relied on a network of universities to perform comprehensive research on issues important to the legislative debate. The initiative would be tasked with conducting a technical assessment of the impacts of the 2006 law.

The team selected for the assessment was excellent. It was a consortium between the University of Brasilia (UnB) and the Federal University of Rio de Janeiro (UFRJ), led by Ela Wiecko and Luciana Boiteux, two eminent researchers in the field. Their findings were conclusive: the new law had led to an explosion in the number of people incarcerated. If, on the one hand, prison sentences for users had been eliminated, on the other hand (and this had been an integral part of negotiations for the law's passage), prison sentences for traffickers had increased.

The thing is, the distinction between users and traffickers is completely fluid under the law, left to the discretion of judges,

and based on criteria such as "quantity of substance seized, place and conditions of the drug deal, and the accused's social environment and personal situation as well as conduct and background." In the absence of any objective criteria, it is the subjective criteria of police officers, almost always seconded by judges, that ultimately prevails. As a result, racism and classism can find fertile ground to flourish. The data clearly show that whites in more affluent areas of cities are classified as users, even when in the possession of larger amounts of drugs than Black people, who tend to be considered traffickers. So, whites are users and Blacks are traffickers.

I had never before advocated for the legalization of drugs. Even though I'd always thought banning them was pointless, I must say I found it hard to associate myself with a movement that, in Brazil, seemed based more than anything else on the middle-class right to smoke a joint. Of course, academics were already talking about racism's role in the construction of drug policy, but that had not translated into the way legalization activists approached the issue. It is also why social movements and left-wing parties were quite wary when it came to the topic.

Naturally, we can't simply attribute the left's blindness about the effects of the war on drugs to the fact that legalization in Brazil is seen more as a matter of concern to the middle class and an issue of individual rights. The blindness certainly has something to do with the ideology that surrounds the issue. And it is only by recognizing the underlying values as an ideology that we can comprehend how individuals and social movements feel alienated from the debate. This value system is expressed in the assertion that the only way to deal with drugs is through the indiscriminate use of force to eradicate production and consumption of so-called illicit substances. It is a maxim that has been exhaustively repeated for at least two generations, and although proven to be ineffective, it has nonetheless kept other alternatives from even being considered.

In the United States, research with glaring methodological flaws was long used to support public policies. Take, for example,

the myth that marijuana kills neurons.[1] Its origin was a 1974 study in which researchers forced monkeys to smoke the equivalent of one marijuana cigarette five days a week for six months; two monkeys died within ninety days. Although marijuana was blamed for the animals' deaths, we now know the deaths were caused by carbon monoxide. The war on drugs ideology afforded protection for bad research, and this idea persisted for decades.

Alienation, the fruit of this ideology, allows an assessment of drug policy to be based on indicators of process rather than on indicators linked to general policy objectives, which in this case would be to improve public health and safety. Instead, the assessment is anchored in the number of prisoners, the quantity of drugs seized, and in some countries even the number of deaths. Stated another way, if people are using more drugs and more people are dying because of drugs yet the police are making more seizures and more arrests, policy managers are able to present their failure as if it were success. Acceptance of this nonsense can only be explained by ideology—and the extent to which it has led to alienation.

Here again we see the fallacy of believing the technical approach can handle any and every problem. The building of sophisticated mechanisms to assess the impact of a drug policy based on process indicators supports and legitimizes a policy that is totally contaminated by ideology. But questioning this ideology, which hinders proper analysis and action, is seen as a political or ideological attempt to attack the work of bureaucrats.

There is a story that, to me, illustrates how certain ideologies can blind civil servants who are convinced they are engaged in bureaucratic work, unaffected by political interference. A former director of the Federal Police once asked me: "Do you know why crack use has proliferated in Brazil?" My thought was that if someone knew the answer, perhaps we could come up

1 Fabricio Pamplona, "Maconha mata neurônio: a origem do mito (1/3)," *Medium*, October 24, 2017, https://medium.com/tudosobrecannabis/maconha-mata-neur%C3%B4nio-a-origem-do-mito-1-3-ab661bfb48ba.

with an effective policy to stop its use. And if a particular person was responsible, maybe we could even hold them accountable. The director's response was surprising. He explained that the Federal Police had instituted a very sensible policy—inspired by international recommendations—to control chemical precursors, which are the legal substances used to manufacture illicit drugs, namely the acetone, ammonia, and ethyl ether that are applied to the coca paste to obtain cocaine.

So, knowing that Bolivia, the largest exporter of cocaine at the time, produced coca paste but imported the precursor chemicals from Brazil, the police were able to quite effectively control the export of these substances to the neighboring country. The result: cocaine producers found it much harder to produce cocaine in Bolivia, so they moved their laboratories to Brazil. Well, crack happens to be a by-product of cocaine production. Since it is cheaper and less refined, there's little point in exporting it, especially in light of the cross-border risks entailed. But with local production, Brazil was beginning to have its own supply of crack, so selling it started to make sense.

I don't know if the hypothesis voiced in no uncertain terms by the former Federal Police director was in fact the real reason behind the entry of crack into Brazil. What strikes me is that he, who actually defended the thesis that crack was one of Brazil's biggest problems at the time of our conversation, told the story about how the institution responsible for the proliferation of crack in Brazil was … the Federal Police. His story blamed the entry of crack into Brazil on the success of the precursor policy.

On top of that, there was no remorse in his account of the exercise. For him, it was not a case of recognizing that a mistake had been made, because ultimately the police had done their part in the fight against drugs. This is how we see alienation operating through the ideological blinders that shield the eyes of those who implement policy. Each cog in the wheel just wants to know if it is doing a good job, if it has met its immediate objectives—no one is concerned about evaluating the end goal. Has drug abuse decreased? Has violence lessened? Has public health improved?

When there is an ideology that shapes the actions of the state, questioning the overall direction of the machine is not necessary and often not even allowed.

What the study commissioned by the Thinking About the Law initiative achieved was precisely to question this ideology. It was clear that the impact of public policy was falling on the poorest Brazilians, which means Black people. Whose interests was this public policy really serving? It was after I looked at solid data on the racist and classist effects of enforcing the Drug Law that I concluded it was not a middle-class issue at all. From then on, somewhat encouraged by several members of the Lula administration who thought it was time for a breakthrough in the drug debate, I began to speak publicly about the issue. In 2009, as secretary of legislative affairs, I gave a series of interviews arguing that people caught with small quantities of drugs should receive alternative sentencing. I took part in (unsuccessful) attempts to change the Drug Law and engaged in (successful) discussions with Federal Supreme Court (STF) justices so the court would declare as unconstitutional the ban on alternative sentencing for these people.

This major digression is important for understanding what happened in the interview I gave to *O Globo*. When I received the invitation to join SENAD from Minister José Eduardo Cardozo, chosen by newly elected President Dilma Rousseff to head the Justice Department, he already knew my position, and all he asked was: "Let's not start off the new administration by calling for the legalization of drugs. You know we have to be careful, right?" I did know that, so much so that I had never advocated in public for legalization. I assured him that my position would be the same as the one I had maintained in the Ministry, and which had recently been endorsed by the STF: we needed to clear prisons of first-time offenders caught with small quantities of drugs who had no connection to organized crime.

I gave interviews to the newspapers *Folha de S.Paulo*, *O Estado de S. Paulo*, *Correio Braziliense*, and *O Globo*, keeping my comments in line with what I had agreed to in my talk with the

minister. Most of the journalists were somewhat disappointed since there was nothing new in what they were hearing. But it turns out that a lack of news can be a very dangerous thing—it was a slow time for the media that January, during the early days of a new administration, so editors felt compelled to dig news up. That's probably why the editor of *O Globo* decided to highlight my interview, printing the now infamous headline on the front page.

The interview was far more measured than any I'd ever given on the subject. All I had done was agree with the recent STF ruling. But the headline set the tone for how my statements would be read. I called the minister. He answered and, in a low voice, told me to come to his office immediately. I later learned he had just been in the office of President Rousseff, who was shouting about the interview while taking her pen to the newspaper.

I wasn't in the room to hear what the president said, but four people who were there told me, at different times, how the conversation went. The president yelled that she was conservative on this issue, that her administration would never propose such a thing, that I had no authority to make any proposals for her administration, and that it was ridiculous to say there are people caught with small quantities of drugs who have no connection to organized crime.

When I met with the minister, he was holding the newspaper the president had marked up. I immediately offered my resignation. The opinions were indeed mine, and she was the president. It made no sense for her to have a secretary whose positions were so far removed from hers. The minister insisted it was just a misunderstanding and that the headline had distorted my interview. I agreed in part, but it was what she had said in the conversation that scared me.

After a week of negotiations, the minister called me again: "The president has authorized me to appoint you to the Office of Judicial Reform. She said she likes you and would like you to stay on in the government. I know you'll do a great job." Despite the pressure on me to stay—Brasilia is like a whirlpool that's constantly pulling people in—I turned down the appointment

and left for a teaching assignment at the Fundação Getúlio Vargas School of Law in Rio de Janeiro.

The drug issue often gets added to the list of topics the government prefers to keep quiet so as not to clash with more conservative sectors in Congress. This was not the case on that occasion. The president seemed to have a personal conviction that the conservative approach was the right one. There was no concession: she was carrying out her policy.

It is certainly interesting to note, however, that a president who was elected on the basis of her reputation as a manager, as an expert bureaucrat rather than a politician, a president who became famous for demanding PowerPoint presentations full of figures, would make a decision without first listening to technical analysis or assessing data on the subject. But there are some issues where the ideological weight of the prevailing worldview is so heavy that even people who are generally open to convincing, evidence-based analyses are unwilling to listen to arguments that challenge "common sense."

Because of this, topics that are sensitive to an ideology as strong as the war on drugs can only be tackled by a strong movement, organized outside the state and then coming in, starting with the real victims of public policies. Reforms devised by people in suits and ties, sitting in air-conditioned offices in Brasilia, are unlikely to succeed. Only the emergence of a political movement that comes from marginalized poor communities can challenge the power of the ideology regarding drugs.

There are several things that could be discussed on the basis of this incident: the effects of the relationship between the media and politics, the way politics deals with controversial issues, and even drug policy itself and structural racism. But we're going to focus on one specific aspect: the primacy of politics over bureaucracy. Unlike in the previous case, where we saw the negative consequences of the primacy of bureaucracy over politics, in this case we are faced with the downside of what happens when politics does not make technical discussion part of the equation.

In the field of public administration studies, there is a growing belief that good policies should be based on evidence. But this seemingly obvious idea is far from being standard practice for many governments, including that of Brazil. More often than not, what we find in public policies is a lack of good use of evidence in decision-making, as a recent book edited by Natalia Koga and colleagues from Brazil's Institute for Applied Economic Research (IPEA) shows.

If in the Battisti case, bureaucracy without politics proved to be a conservative way to avoid risk, the drug issue shows how politics can impose conservative limits on the bureaucracy. The war on drugs ideology manages to make the debate impervious to new arguments, and even if expert bureaucrats have the evidence-based ability to demonstrate that public policy grounded in common sense is not yielding benefits, the cost of innovation may be too high for politics. When there is something as deeply ingrained as a logic of war, as with drugs, questioning this evidence-based view causes considerable tension.

President Rousseff was no expert on the subject, but she had a strong opinion based on common sense, not on evidence. The policy of the war on drugs is in line with this thinking: drugs are bad for you, so if the power of the state is used to ban drugs, fewer people will use them. It turns out that this game, which seems to make intuitive sense, has been played for decades and has only ever met with resounding failure all around the world. Besides not working, it has done enormous damage in the form of violence, increased incarceration, and the inability to find more effective solutions, to name just a few consequences. Looking at the evidence would allow us to overcome ideology-induced blindness and make room for new policies, but the process involved in doing so is quite complex.

The alignment between the president's personal view and the prevailing view of society, the accommodation of this policy to structural racism, and the political cost of making a change of this magnitude meant technical arguments alone could not lead to a shift in perspective. By choosing to act according to

her personal beliefs and contrary to the evidence, President Rousseff not only went over the heads of the bureaucracy and bureaucrats but failed to commit herself to solving a problem that has serious social ramifications. At the same time, and as a consequence, she limited the opportunities for political debate while curtailing any criticism she might have faced by agreeing with the bureaucrats.

Why then can it be a problem for democracy if politicians disregard expert bureaucrats? There is a lot of discussion about the notion of quality of government, or what's referred to as "good governance." As political scientist Bo Rothstein asserts, good governance depends on a day-to-day exercise of politics in which the government is responsive and transparent in its decisions, impartial in its actions, complies with the law, and guarantees the legitimacy of the state based on its decisions. Good governance therefore also comes down to the quality of the decisions the government makes and its ability to be effective and legitimize state action. When a government fails to deliver quality public services or be effective, it weakens its legitimacy, which can become a risk to democracy itself, as authors like Dahlström and Lapuente suggest.

When politicians ignore bureaucrats in the decision-making process, they compromise and limit their own ability to make good decisions and to thus ensure effectiveness. While disregarding the bureaucracy in political decisions may increase momentary governability by reducing conflict, it can also have negative long-term effects by reducing the government's ability to deliver quality public services, prime examples of which are seen in the perpetual war on drugs, increasing violence, and structural racism. By choosing not to ground actions in technical, bureaucratic reasoning in order to avoid conflict, governments fail to address major social problems. As a result, these problems gradually undermine the state's legitimacy and have an increasingly detrimental effect on society.

Another situation in which politics often overrides bureaucracy is when politicians interfere with the work of expert bureaucrats

and the values of neutrality that legitimize bureaucratic rationality. During the Bolsonaro administration, reports of this type of interference have proliferated in Brasilia and were recently compiled in the book *Assédio Institucional no Setor Público* (Institutional harassment in the public sector), edited by José Celso Cardoso Jr. and colleagues from the IPEA Employee Association. There are numerous examples in the environmental realm, such as interference in decisions to impose environmental fines and criticisms of civil servants leveled in public by both the president and minister. But there are also many other accounts describing the delegitimization of the bureaucracy, such as the ban on civil servants participating in meetings or serving on committees that make administrative decisions, or the ban on accessing information systems for the purpose of monitoring decisions, among others.

Takeover of the Office of the Comptroller General (CGU)

Early in the Temer administration, Torquato Jardim, attorney and former Superior Electoral Court (TSE) justice, was offered the role of minister of the CGU under somewhat awkward circumstances. Established when the Lula administration gave ministerial status to the CGU, which had been instituted by FHC, the ministerial agency was responsible for huge advances in the fight against corruption but had recently suffered a major blow. Temer had appointed Fabiano Silveira as minister, but just months after taking office, Silveira had been caught on tape giving advice to individuals targeted in the Operation Carwash investigation, a landmark anti-corruption probe begun in March 2014 (explored in Chapter 7).

Jardim, the new head of the Ministry, broadcast a video to all CGU public servants to set out his management guidelines, saying that those who had no political affinity with the Temer administration should resign. He made it clear—and

staff recorded it—that working in the Ministry meant having "political, philosophical, and ideological compatibility with the transitional government" of Temer. He continued, saying, "Those who find themselves irreconcilably incompatible, in any way, under any circumstances, must have the integrity to immediately seek their resignation."[2]

This is an excellent example of the complexity of the notion that ministers define the political vision, which public servants then implement. Clearly, in a regulatory body whose main purpose is to fight corruption, the idea that its expert bureaucrats should have a political-electoral affinity with the government is absurd.

The effects of explicit political interference in the operations of a regulatory body were clear. There was a dramatic drop in compliance monitoring of municipalities as well as in the number of public servants dismissed and the number of audits conducted to detect financial mismanagement.[3] Civil society organizations, such as Transparency International, which are instrumental in suggesting actions to fight corruption and strengthen transparency in any democratic government, criticized the new administration and completely shut down any potential dialogue.

The Temer administration's policy regarding the CGU was not an isolated incident. Along with the failure to appoint the person at the top of the list voted on by members of the Public Prosecutor's Office and public criticism regarding Operation Carwash, the Temer administration, born from the process of unseating President Rousseff, represented a clear turning point away from efforts by Workers' Party administrations to build a republic. It was precisely direct political control over regulatory bodies such as the CGU that enabled the endeavor to staunch the

2 Luísa Martins, "Ministro sugere que servidores da CGU sem identificação com Temer deixem os cargos," *O Estado de S. Paulo*, June 2, 2016, https://politica.estadao.com.br/noticias/geral,ministro-sugere-que-servidores-da-cgu-sem-identificacao-com-temer-deixem-os-cargos,10000054954.

3 Malu Delgado, "Como o governo Temer debilitou o Ministério da Transparência," *Deutsche Welle*, June 28, 2017.

bleeding and put the brakes on Operation Carwash—an endeavor that reached its pinnacle when a recorded phone call between Senator Romero Jucá and Sérgio Machado came to light, lending fuel to the drive to impeach President Rousseff.[4]

The attempt to politically restrict CGU staff reveals several of the aspects we've already discussed. First, it makes it clear that despite the need to act neutrally, public servants are social actors who are not immune to having political and party ties or defending specific interests. But what really matters here is the political interference in state bureaucracies, whose consequence is a clear imbalance in the relationship between the two. Politicians who seek to interfere in the bureaucracy and exert control over it and its values have been widely described by a number of contemporary studies of populism. Although the case in question is not one of populism, looking at these studies helps us understand the problems posed by this tension. In analyzing cases such as Turkey, Hungary, the United States under Trump, and Venezuela, authors like Michael Bauer and colleagues argue that a government can try to undermine the bureaucracy by interfering in its procedures, diminishing its power to act, or demanding that the machine be politically aligned. This is what we saw in the case of the CGU: a blatant attempt to politicize the bureaucracy by demanding it commit to the government and not to the state, which is to say, to the politicians in charge at the time and not to the laws and the administrative establishment.

How can we ensure that an entity like the CGU, which is part of the regulatory system, has legitimacy if it becomes politicized and its officials have to make decisions based not on technical considerations but on political ones? How can we ensure the legality of these officials' decisions if their credibility has been called

4 In May 2016, a conversation came to light that had taken place the previous March between then Senator Romero Jucá and former Senator Sérgio Machado, in which the senator advocated the removal from office of President Dilma Rousseff under an agreement "with the Supreme Court" to "stop the bleeding" caused by Operation Carwash.

into question? These are the types of questions that arise from a process of political interference in the bureaucracy—which, in the end, can lead to the weakening of the bureaucracy and a strengthening of authoritarian and populist governments, as several studies have shown.

7. The ENCCLA Anti-Corruption Network and Operation Carwash

Abstract: This chapter traces how a well-intentioned anti-corruption network (ENCCLA) evolved into a technocratic force that challenged democratic politics. The authors argue that Operation Carwash, while initially rooted in institutional reform, became a vehicle for bureaucratic overreach and political bias, illustrating the risks of unchecked bureaucratic autonomy.

Keywords: ENCCLA; Operation Carwash; anti-corruption; bureaucratic autonomy; judicial activism; patrimonialism

The country that saw Lula end his second term of office in late 2010 with an approval rating of 87 percent could never have imagined that less than eight years later he would be taken into custody on corruption charges.[1] His arrest was the culmination of Operation Carwash, a federal investigation into a wide-ranging network of Brazilian construction companies that had won billion-dollar government contracts in Brazil and abroad. The courts would eventually overturn many of the charges brought as a result of the controversial investigation, which drew fire itself when a series of chats between prosecutors and lead judge

1 Robson Bonin, "Popularidade de Lula bate recorde e chega a 87%, diz Ibope," in *Política*, December 16, 2010, https://g1.globo.com/politica/noticia/2010/12/popularidade-de-lula-bate-recorde-e-chega-87-diz-ibope.html.

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Sergio Moro were leaked. The exchange of messages revealed illicit practices and suggested to some that the corruption probe had potential political motivations—an interpretation reinforced when Moro was appointed Justice Minister for Jair Bolsonaro just months after signing President Lula's arrest warrant.

It is not our intention to discuss Operation Carwash and its consequences in these pages, but we would like to point out that the investigation itself was only possible thanks to profound changes made to the government's anti-corruption mechanisms during Lula's first two terms of office. This chapter examines how the Lula administration reinforced a state structure that actually ended up assuming the role of political opposition to the Workers' Party.

After Lula won the 2002 elections and before he took office, he paid courtesy visits to six public figures to thank them for their support, express his respect for the history of struggles in Brazil, and share the vision of the country that his victory was intended to represent. Lula called on Maria Amélia, widow of historian, writer, and public intellectual Sérgio Buarque de Holanda and mother of singer-songwriter Chico Buarque; economists Celso Furtado and Maria da Conceição Tavares; Apolônio de Carvalho, a famous militant from the Brazilian left and first official member of the Workers' Party (PT); Evandro Lins e Silva, former Supreme Court justice and minister under João Goulart; and Raymundo Faoro, writer and former president of the Brazilian Bar Association.[2]

Faoro, who passed away in 2003, was a source of great inspiration during Márcio Thomaz Bastos's tenure as the first justice minister under Lula. So much so that the government decided to name the offices of the Justice Ministry in his honor: Palácio Raymundo Faoro. During the renaming ceremony, Lula spoke of the connection between the honoree's work and the Ministry's program: "We must once again believe that institutions exist to

2 Fábio Zanini, "Eleito se reunirá com 'velha guarda,'" *Folha de S.Paulo*, November 4, 2002, www1.folha.uol.com.br/fsp/brasil/fc0411200211.

serve and not to be subordinated to the tastes of those in charge of them."

There is no doubt that its anti-corruption discourse helped the Workers' Party win the election. And while it is true that part of the publicity campaign for Lula's first candidacy—led by advertising strategist Duda Mendonça under the slogan *Xô, Corrupção* (Get Out, Corruption)—featured a horde of mice gnawing away at the Brazilian flag, the program executed by the government was less moralistic and much more focused on the goal of transforming institutions. In a way, Minister Thomaz Bastos embodied this vision, with his aim clearly being not to turn dishonest people into honest ones but to fight to transform institutions. The adjective of the day was "republican,"[3] and the central idea was that a republic could be built on impersonal relationships, thereby combating the patrimonialism described by Faoro.

The Justice Ministry, with the collaboration of the newly created Office of the Comptroller General (CGU), implemented a heavy-duty program. It established the Department of Asset Recovery and International Legal Cooperation; bolstered the Federal Police by substantially increasing investments in technology, raising salaries, and holding more frequent competitive civil service recruitment processes; appointed to the Office of Attorney General the individual who had ranked first of three candidates voted on by members of the nationwide Public Prosecutor's Office; and pledged to be radically transparent. In 2004, the Justice Ministry took the bold step of posting all contracts and expenditures online. While this may seem trivial today, it was revolutionary back then, and the CGU used it as a pilot for its Transparency Portal.

In addition to embracing the executive branch's specific agenda, the Justice Ministry led a broader move for change that

3 Through an online search of the archives of the newspaper *Folha de S.Paulo*, excluding the terms "EUA" (USA) and "United States," we identified a 54 percent increase in the occurrence of the words *republicano* and *republicana* (republican) in the pages of the paper during 2003–10, as compared to the previous eight years.

required concerted action among the branches. The creation of the Office of Judicial Reform signaled active support not just for a constitutional reform of the judiciary—a matter on the table since 1992—but also, and especially, for the creation of the National Council of Justice. After the passage of Constitutional Amendment 45, the heads of the three branches signed the State Pact in Favor of a More Agile and More Republican Judiciary, which had an agenda of legislative and institutional changes.[4]

The government had even more ambitious ideas about putting a stop to money laundering and corruption. In 2003, a new mechanism was devised under the leadership of the Justice Ministry: the National Strategy to Combat Corruption and Money Laundering, or ENCCLA.[5] This innovative network brought dozens of agencies together to forge an anti-money laundering culture in Brazil.

At the time, there had been only a few investigations or court cases involving money laundering in Brazil, and no one had as yet been convicted. Although pertinent legislation had been in place since 1998, Brazil had no policy for combating the practice nor any tradition in this regard. One of the choke points was the lack of coordination between actors, which included the Public Prosecutors' Office, the federal police, the judiciary, public and private banks, and Brazil's Federal Tax Authority. For example, public policies had never been applied to the judiciary, which basically operated like a public records office; all cases were processed the same way, in the order they were filed, as if the judicial branch were a kind of inanimate public service machine. What would be the sense of prioritizing a particular crime?

The ENCCLA anti-corruption network changed all that. Participating agencies were summoned annually to a three-day meeting that defined the group's broad goals, along with specific ones for each agency, to be met over the course of the year.

4 Pacto de Estado em Favor de um Judiciário mais Rápido e Republicano.

5 The network was originally called the "National Strategy for Fighting Money Laundering" (*Estratégia Nacional de Combate à Lavagem de Dinheiro*). The word "corruption" was only later added to the title.

Goals included institutional changes within certain agencies, the adoption of new systems, and even the drafting of legislative proposals, which participating groups would agree upon and then submit to Congress.

To help the judiciary contend with procedural hindrances, ENCCLA devised an electronic system for freezing bank accounts. Prior to this, the judiciary had to send notifications to each bank, receive hard copies of data on the banks where the suspect had accounts, and then issue an official document ordering assets to be frozen. ENCCLA was the force behind other innovations as well: the expansion of both the electronic procurement system and the number of courts specializing in money laundering; the design of a nationwide plan to train police officers, prosecutors, and judges to handle money laundering cases; and the creation of anti-money-laundering laboratories.

In addition to these measures, the network negotiated and proposed bills. The Anti-Money Laundering Law, the Anti-Corruption Law, the Criminal Organizations Law, and the Access to Information Law are just a few examples of legislation that was extensively discussed before moving on to Congress for debate.

ENCCLA had an undeniable impact. The Brazilian state sharply enhanced its ability to combat both corruption and money laundering as a result of its coordination capacity and the agreements made within the network. But how was it even possible to bring together institutions that had no history of working together? What impact did ENCCLA have on the broader debate on these topics?

I took part in several ENCCLA meetings starting in 2004, the first as special advisor to Minister Thomaz Bastos and the last, in 2010, as the national secretary of justice. What struck me from the start were the relationships that developed between the actors. I'm not talking about upper echelon staff, like higher court judges—who often attended only the opening or closing of an event—but about a wider group of staff from the CGU, Federal Court of Accounts, Federal Tax Authority, Central Bank, and Federal Police, along with federal attorneys, prosecutors, and

judges, all of whom would spend three days together, usually at some resort.

During those three days, in addition to countless meetings where goals were set and results presented, very strong bonds were formed between the actors—often stronger than their ties to their own agencies—and this in turn bred a sense of mutual commitment. The follow-up meetings, where goals were monitored, were somewhat informal in comparison with the usual Brasilia meetings, and this was clearly a product of the annual gatherings.

It was during these meetings that I met key figures in the future Operation Carwash investigation and witnessed how these relationships took shape. This applied not just to people in Curitiba, headquarters of the initial investigation, but to a whole community of staff from different areas who were beginning to develop an ethos specific to career civil servants devoted to the mission of ridding the country of corruption. I gradually realized that this group of public servants (some from the executive, like the CGU, the Federal Audit Court, and the Federal Tax Authority, and some from the Public Prosecutor's Office and the judiciary) put a certain distance between themselves and us, we who hadn't been vetted through an intensely competitive recruitment process. This impression was accentuated during the first meeting after the news broke about the *mensalão*, a major political corruption scandal in which government and private figures were found guilty of using public funds to buy political support. It was as if the career public servants represented the state whereas we represented the government—and as if agendas should be defined *by* the state and *in spite of* the government. (Or perhaps *against* the government?)

It is interesting to note that in 2003, most of these staff members, whose opinions were not very highly valued in their workplaces, came from agencies that had been practically gutted, where salaries were low, and few recent hires had been made. It was the government that gave them a stage and a certain status. The active policies put in place by the Lula administration, the Justice Ministry, and the CGU, among other bodies, not only invested in the professional development of these public servants

and in improving their working conditions but also established the ENCCLA anti-corruption network itself. These coordinated efforts by public servants could never have arisen spontaneously, through their own organizing. Rather, this was evidence of the project inspired by Faoro and led by the Justice Ministry, which lent its public prestige and political legitimacy to the drafting of policies meant to transform public institutions.

Yet this distance between career and non-career public servants was not as great as the distance between career personnel and political actors. There was a willingness to debate with us, and over the years we developed a certain closeness. But the career staff's acerbic view of the political class as a whole grew ever more blatant. Even career public servants who held relatively top-level positions of trust in the administration often felt more loyalty to the hundreds-strong group of public servants who met in ENCCLA spaces than to the posts they held. They took pride in saying they had managed to convince their bosses to accept points agreed on at ENCCLA meetings.

How were ENCCLA agendas defined? Who set priorities? At first, under Márcio Thomaz Bastos, the minister himself and his office would monitor things closely, but the committee gradually gained autonomy and the executive had less influence in defining its agendas. More accurately, the executive still wielded significant clout, but almost as a counterweight that tried to bring in other viewpoints, while the vision of more autonomous civil servants was crystallizing at the same time.

And what underpinned these more autonomized views? Primarily, an international anti-corruption agenda. In the groups that adhered to UN, OAS, and OECD conventions, as well as meetings of the Financial Action Task Force, there were mechanisms for establishing agendas based on international commitments and for pressuring signatory countries to make headway in implementing the conventions.[6]

6 Financial Action Task Force (FATF), or in Portuguese: Grupo de Ação Financeira contra a Lavagem de Dinheiro e o Financiamento do Terrorismo.

The groups met in cities like Washington, Paris, and Vienna. Brazil would send public officials who were largely ENCCLA members. There they were introduced to agendas formulated by staff from the international organizations and also by the representatives of some of the governments in attendance. The agendas weren't necessarily a direct expression of the conventions or agreements signed by Brazil; often they were proposals that went well beyond the signed text. The public servants would pledge to return the following year and show real progress on the agenda discussed.

One of the cases that really stands out for me was the matter of terrorism. In 2016, when the administration of Dilma Rousseff threw its support behind the bill that criminalized terrorism, I wrote a text criticizing the measure and showing that members of the Treasury Ministry staff who had taken part in Financial Action Task Force meetings were directly responsible for passage of the law:

> The FATF (Financial Action Task Force), also known by its French acronym GAFI [...], created to enhance international cooperation in the fight against money laundering, acquired superpowers in 2001 when it also became responsible for financial measures to combat terrorism.[7]

Here is how that came about: As part of its role, the FATF would make a series of recommendations to participating countries and then publish a list of those who failed to comply. If a country were listed, this could seriously affect its credit. During Lula's first two terms in office (2003–10), FATF bureaucrats had tried to pressure Brazil into drafting specific legislation to criminalize terrorism. They had failed, because this wasn't one of the group's recommendations. The recommendation that came closest in this

7 Pedro Abramovay, "Projeto de Lei sobre Terrorismo: A Culpa é do Levy," *Quebrando o Tabu*, August 20, 2015, https://www.facebook.com/quebrandootabu/posts/projeto-de-lei-sobre-terrorismo-a-culpa-%C3%A9-do-levyum-projeto-de-lei-muito-perigos/942594352463619/?locale=pt_BR.

regard was to criminalize the financing of terrorism, and Brazil had already done so. Since the criminalization of terrorism was not an official FATF recommendation, Brazil couldn't be placed on the list for its failure to adopt this type of legislation.

In 2015, the fifth year of her presidency, Dilma Rousseff appointed Joaquim Levy to the post of finance minister, and FATF bureaucrats went back at it. Although the matter should have been completely off the table, the bureaucrats terrorized the new minister about it, warning him that Brazil ran the risk of being downgraded unless it passed a law criminalizing terrorism—which simply wasn't true. Under this pressure, Levy convinced the president and justice minister that the country could indeed be listed if it didn't adopt legislation along these lines, with disastrous consequences for our credit at the time. So the government submitted a bill to Congress.

While it's true that the bill included the caveat that the law shouldn't be enforced against legitimate social movements, we know interpretation of the law could be flexible enough to affect protesters who were not terrorists at all. Sadly, Brazil, which had resisted tremendous pressure from the Bush administration to adopt measures that would have weakened its democracy, was brought to its knees by the bureaucracy of an intergovernmental agency that made threats it couldn't follow through on. The bill, which had been hatched in spaces where there was very little concern over Brazilian security or democracy, made it to the Senate. Yet it was hoped that legislators would safeguard Brazil's sovereignty by blocking it.

In the post-9/11 world, fear of terrorism had eroded solid democratic institutions. In Brazil's case, it was the fear of fiscal adjustments that seemed ready to play this role. Hillary Clinton is still paying a political price for supporting Bush's anti-terror measures. History will hold accountable those who were obedient to a finance minister who was subservient to international bureaucracy and thus agreed to hand over part of our democracy.

This example is perhaps the most radical. Many of the measures Congress passed at that time were extremely positive. In

fact, they had the virtue of producing more robust institutions in the fight against money laundering and corruption. The Justice Ministry's Department of Legislative Affairs, which I headed from 2007 to 2010, always engaged in productive dialogue with the ENCCLA network. In some cases, our objectives coincided broadly, as with the Access to Information Law; in other cases, especially involving more punitive measures that in our view could have led to increased incarceration, we were more resistant. In short, at times our role was merely to furnish arguments intended to enhance certain projects and not accept the standing agenda with our eyes closed.

Let us now examine how bureaucracy came to enjoy greater autonomy after enactment of the 1988 Constitution, starting from the moment when politics decided to strengthen it. ENCCLA showcased this process neatly, spearheading a process that created an essentially anti-political culture of investigation. The network was also the driving force behind Operation Carwash, the most radical confrontation between the autonomized bureaucracy and politics.

Operation Carwash was a large corruption investigation that began in 2014. The operation was led by the Federal Police with support from the Federal Prosecutor's Office and the Federal Court of Paraná. It started as a probe into a money laundering scheme, but it quickly uncovered a vast corruption network involving state-owned oil giant Petrobras, major construction companies, politicians from various parties, and business executives. The operation led to the arrest of high-profile figures, including former president Luiz Inácio Lula da Silva (whose conviction was later annulled by the Supreme Federal Court), executives from major corporations, and former lawmakers. Over time, Operation Carwash came under criticism for alleged misconduct by prosecutors and one of the lead judges of the operation, Sergio Moro, including accusations of bias and improper collaboration with the prosecution. Moro became justice minister in Bolsonaro's government in 2019. In 2021, the Supreme Court ruled that Moro had acted with partiality in judging Lula. The operation was formally concluded in 2021.

In June 2019, *The Intercept Brasil* published snippets of conversations that had taken place on the messaging app Telegram between then-federal Judge Sergio Moro, then-prosecutor Deltan Dallagnol, and others involved in Operation Carwash—a scandal within the *Operação Lava-jato* corruption investigation that became known as *Vaza-jato*, or Leakwash. By then, these informal kinds of exchanges had become common throughout the anti-corruption community, which cut across sectors of the executive branch, the Public Prosecutor's Office, and the judicial branch, all of which shared the tacit understanding that these public servants—who enjoyed legitimacy because they were highly vetted career public servants and now participating in international networks—had a responsibility to purge the republic of politics.

Once again, we see an imbalance between the bureaucracy and politics, but in this case the alleged primacy of the former went even further. To understand this, we need to return to Bourdieu: a bureaucracy does not just act as a group of public servants that seeks to safeguard the state by defending laws to the detriment of politics but is a social force that takes advantage of its position and its capital to reap political gains—even if this means going against politics itself.

To understand this case, we must consider who makes up Brazil's bureaucracy, especially those who occupy posts in the justice system and the Public Prosecutor's Office. According to a survey of Brazilian magistrates, 62 percent of them are men; 65 percent were born in Brazil's wealthier, politically more powerful South and Southeast regions; 80.3 percent identify as white; more than 20 percent have family members who are magistrates; and 51 percent have family members in other legal careers.[8] In 2020, when the starting salary for magistrates was BRL 24,000 a month (roughly USD 4,660), the average monthly salary for the profession was BRL 35,000 (roughly USD 6,800), with some 8,000

8 Conselho Nacional de Justiça. *Censo sociodemográfico dos magistrados brasileiros* (Brasilia: CNJ, 2018), www.cnj.jus.br/wp-content/uploads/2019/09/a18da313c6fdcb6f36478967 2b64fcef_c948e694435a52768cbc00bda1197 9a3.pdf.

judges receiving monthly earnings of over BRL 100,000, or USD 19,400. This amount, well above the ceiling permitted by the Constitution, represents the sum of various perks and benefits guaranteed members of the judiciary, such as a housing allowance, tuition allowance for their school-aged children, overtime pay, and payment for unused vacation time. The profile for the Public Prosecutor's Office is much the same. According to the study "Ministério Público: Guardião da democracia brasileira" (Public Prosecutor's Office: Guardian of Brazilian Democracy), compiled in 2017 by the CESeC, an academic institution dedicated to public security and human rights, 70 percent of Brazilian prosecutors are male and 76 percent are white. Moreover, the majority come from privileged social backgrounds, with their families enjoying an above-average level of education.

In other words, this bureaucracy represents a very specific slice of society: high-income white men from the South and Southeast who manage to protect their own privileges inside a government machine that pays them above-average salaries and who often accumulate perks that set them apart from the rest of the state bureaucracy and Brazilian society.

These actors constitute a social force that possesses social, economic, and intellectual capital even before they rise to public posts but who subsequently take advantage of their status and positions inside the state in order to differentiate themselves from other social actors. The idea of social force becomes even more evident when we observe how these actors build support structures by constructing and reinforcing social ties from within spaces of solidarity, where they can foster mutual support and strengthen certain ideas within the state. They thus constitute a group or social force that defends a certain agenda and gains legitimacy by using capital over which they wield a monopoly, for example, overseeing procedures that effectuate justice and control.

What is fundamental is that in this case the ideas defended by the group are intended to undermine politics while disguised by an overvaluation of the bureaucracy and meritocracy—of

those who see themselves as different from others and morally and socially superior to politicians. What happened with ENCCLA bears a great resemblance to the case of the Access to Information Law, where the bureaucracies of Itamaraty and the Defense Department also acted as social forces endeavoring to protect their own interests at the expense of politics and the public interest.

A complementary way of understanding this phenomenon is to see these actors as a social force that operates within the Brazilian state while availing itself of the state's features. Corporatism and bureaucratic insulation are contaminated by participation but not in a way that moves them toward procedural universalism, as the Constitution somehow intended. Nor does this lead to the formation of bureaucratic rings, as described by Fernando Henrique Cardoso, a situation in which governmental bodies exhibiting an insulated, technical bureaucracy work in tight collaboration with specific sectors of society, especially the industrial bourgeoisie, and whose goal was to modernize Brazilian capitalism. Here, participation pushes the bureaucracy toward electoral politics, completely subverting the republican meaning of the Constitution itself.

An analysis of the judiciary branch and the Public Prosecutor's Office may prove useful. Throughout the period we are examining, Brazil invested heavily in careers in both the judiciary and the Public Prosecutor's Office (which is not subordinated to any of the three powers and therefore not part of the judicial branch). In 2022, the country spent 1.6 percent of its GDP on the judiciary, whereas Portugal, France, England, Argentina, Chile, Colombia, Germany, the United States, and Italy each spend less than 0.4 percent.[9] In addition to paying higher salaries, recent administrations have taken a series of measures to bolster the

9 On Brazil's spending, see Conselho Nacional de Justiça, *Quanto vale o Judiciário?* (Brasilia: CNJ, 2024), https://www.cnj.jus.br/artigo-quanto-vale-o-judiciario/#:~:text=Recente%20relat%C3%B3rio%20do%20Tesouro%20Nacional,1%2C6%25%20do%20PIB.

political weight of all public institutions whose mission is to combat corruption—and this includes the ENCCLA network.

The process we are exploring here demonstrates that the government machine was occupied by a social group that, once inside, managed to further increase its privileges and guarantee its legitimacy exactly because it was part of the bureaucracy. Thus, recalling Faoro, the history of the Brazilian state can be seen as the domination of the state by the economic elites, who seek to strengthen themselves. Its leading strata takes the state "as their own," as Fernando Haddad, referring to Faoro, said in an article published by the magazine *piauí*.[10] And in seizing the state structure, patrimonialism may even absorb those in charge of combating corruption.

In her book *A política da Justiça: blindar as elites, criminalizar os pobres*, Luciana Zaffalon, supervisor general of the Brazilian Institute of Criminal Sciences, a nongovernmental organization, explores how patrimonialism works to structure relations between the state executive and judicial branches and the Public Prosecutor's Office. The book focuses on São Paulo, but its analysis can be applied to the whole country. The author shows how the job benefits enjoyed by São Paulo judges and prosecutors can be traced to supplementary credits approved by the state executive without the approval of the Legislative Assembly, something that is prohibited by the state constitution; furthermore, their negotiation ensured the judiciary's submission to the executive. That is, the state judicial branch would tend to favor the state government when handing down decisions, in exchange for salary advantages. The fact that members of the judiciary who had been recruited through competitive civil service processes and entrusted with the mission of combating corruption were then granted benefits exceeding the ceiling defined in the constitution and had negotiated these terms in a

10 Fernando Haddad, "Vivi na pele o que aprendi nos livros: um encontro com o patrimonialismo brasileiro," *piauí*, no. 129 (June 2017), https://piaui.folha.uol.com.br/materia/vivi-na-pele-o-que-aprendi-nos-livros.

rather untransparent fashion with an executive branch at times suspected of corruption, evinces the traps that are set when a country succumbs to the fetishization of the bureaucracy.

It seems contradictory to be talking about clientelism and corporatism when it comes to career civil servants who were hired through isonomic selection processes under the aegis of a democratic constitution. However, rather than being obliterated by the Constitution of 1988, the patterns that have long governed the functioning of the Brazilian state simply acquired new features and dynamics. So much so that the idea of a state characterized by clientelism and corporatism endured in parts of the country even after 1988, camouflaged by the mystique of technical, meritocratic superiority. In the case of Operation Carwash, there were some career civil servants who represented a social force that accessed (and sometimes monopolized) different types of capital, taking advantage of their position to solidify their legitimacy within the state, even though this served to usurp state resources and undermine politics itself or was contrary to the public interest.

Viewed through the prism of the patterns of relations proposed by Edson Nunes, Operation Carwash was built through a process of bureaucratic insulation, forged by ENCCLA. It was imbued with the corporatist sentiment reinforced by the Lula administration's reform of the state and reflected the procedural universalism typical of judicial activities while clashing with the participatory pattern and clientelist logic. Yet it goes on to equate the two patterns, treating democracy as if it were tantamount to clientelism. After successfully bringing down the government and keeping the frontrunner from seeking reelection, Operation Carwash openly engaged in a political dispute, taking advantage of the winds of the participatory pattern. This began when former Judge Sergio Moro aligned himself with the Bolsonaro administration and, later, when he tried to run for president.

It is clear how it became possible to reinforce corporatism at the same time that bureaucratic insulation produced reforms meant to strengthen republican institutions and procedural

universalism. Also clear is how clientelism flourished at the same time that increased participation was yielding its finest fruits. And so patterns of relations between the state and society continue to rearrange themselves. Participation disrupted the earlier balance but not necessarily in a positive manner, in the same way that, as suggested by Edson Nunes, the appearance of each of the previous patterns disturbed the existing balance, with both positive and negative consequences for the country's economic and democratic development.

PART IV

Democracy Striking a Balance:
Politics and Bureaucracy Foster Democracy

8. The Thinking About the Law Initiative

Abstract: This chapter presents a successful model of collaboration between politics, bureaucracy, and academia. The initiative used university research to inform legislative debates, enhancing the quality of public policy. It demonstrates how democratic deliberation and technical expertise can coexist productively when guided by transparent, participatory processes.

Keywords: legislative process; university partnerships; evidence-based policymaking; SAL (Department of Legislative Affairs); democratic deliberation; AGU (Federal Attorney General's Office)

I moved to Brasilia in January 2003, at the start of the first Lula administration. There was an unusual shortage of personnel for putting together the first leftist government since redemocratization, and I had already worked for a year in the São Paulo mayor's office. Perhaps that's why newly elected Senator Aloizio Mercadante asked me to be his legal advisor. I was twenty-two and fresh out of college.

As the only legal advisor to government leadership in the Senate, it was up to me to draft a weekly report about the bills that would be voted on in the Senate's main committee: the Committee on the Constitution, Justice, and Citizenship (CCJ).

Abramovay, Pedro and Gabriela Lotta. *Democracy on a Tightrope: Politics and Bureaucracy in Brazil*. Amsterdam: Amsterdam University Press/Central European University Press, 2026.
DOI 10.5117/9789633867815_CH08

In many cases, my job basically consisted of coordinating the positions held by the various ministries on bills currently on the agenda (which were often contradictory, but that's another story) and of drafting arguments for party senators to use in defending the government's positions. It turned out that although the administration often expressed no opinion on the bills, the senators would wait for guidance (even if the lawmakers occasionally disagreed with this guidance, it was still customary for government leadership to take a position on each bill, or at least offer an analysis). When this happened, I had to prepare a report so that Senator Mercadante, as government leader, could consider the position to be supported in the CCJ.

I had no intention of expressing an opinion on most of the issues discussed. Even when the administration's position was unequivocal, my job was to look for arguments to support the bills. The material we received from the ministries often failed to present the reasoning behind the issues.

The pressure involved in a committee debate allows no room for mistakes. If the leader of the governing party or other senators from the governing base are not prepared for head-to-head confrontation with the opposition, there could be a massacre in the public square, since everything is broadcast live on Senate TV. In other words, parliamentary debate often requires an array of arguments that are much stronger than those of the executive branch, which has more time to draft projects and, most importantly, can choose the timing and, to some extent, determine agendas.

It was a great learning experience. Not only was I able to see the need to build solid arguments and be prepared for counterarguments, but I also came to understand that there was real room for compromise among senators. Of course, during the Lula administration, the Senate was very polarized. At times, the opposition had a majority, and tensions were high. During Lula's first term, the CCJ chair was always held by a member of the opposition party (Edison Lobão and Antônio Carlos Magalhães, both from the Liberal Front Party, or PFL). But because it makes

little sense to compare this to the current level of polarization in Brazilian politics, I'm not going to extrapolate these lessons to the reality of today's Congress.

Even against a backdrop of heated disputes like those that took place in the Senate in the early 2000s, one of the things that most surprised me was the level of engagement among senators. As an advisor, my strategy was to look for other sources of information so we could build stronger arguments in support of bills. As a self-confident young white male, I would reach for the phone and call experts and professors, look for references, and read for hours to formulate the best arguments. I could see that the more solid the arguments, the greater the chances of avoiding polarization between the government and opposition parties and turning the conversation into a debate about public policies, trade-offs, and republican interests.

The Senate is a relatively small body with just eighty-one senators, twenty-seven of whom sit on the CCJ. Since weekly meetings allow the special advisors to get to know the senators well and be called in to negotiations, I witnessed numerous debates on important laws up close, such as the Disarmament Act, the Statute of the Elderly, the Sports Fans Statute, and the Bankruptcy and Reorganization Act, as well as on pension reform and judicial reform. In all these debates, it was possible to negotiate passages with opposition senators and to listen to and propose arguments that actually resulted in changes to the final text of the bill.

It was a transformative experience. The possibility that well-reasoned debates could be constructed during the legislative process had nothing to do with the image I had of the legislative branch—and even of politics—before working in the Senate.

Of course, there were bills that more clearly reflected the interests of the opposition and of the government. In these cases, it was not unusual for an opposition lawmaker to pull me aside to tell me that the government's argument was good but that he would have to vote against it. That was when voting was more clearly aligned along the opposition/government divide. But in

my experience, debate often took place, and arguments had real persuasive power.

It was precisely because of my work on judicial reform (Constitutional Amendment 45) that Minister Márcio Thomaz Bastos invited me to serve as his special advisor. I left the Senate but continued to be involved in negotiating legislative proposals in Congress. My previous experience had shaped my approach to these negotiations. I had not yet completed my master's degree in law or my doctorate in political science when I came across literature on informational theory in a book that features Keith Krehbiel as one of its main authors. Krehbiel contends there is an imbalance of information between the actors involved in the negotiation process. Whether lawmakers or not, some have greater access to information that can actually predict the real impacts of a particular piece of legislation. There are also lawmakers who specialize in certain issues, as well as lobbyists and interest groups. It is because of this imbalance of information that special committees are often set up.

But in this context, it is worth looking at the role of government, whose capacity to generate information is much greater than that of lawmakers. No matter how good a lawmaker's advisors are, they will never be able to generate the information that a ministry, public bank, or government agency can. In fact, lawmakers often come to rely on government managers to draft their opinions and express their views. This is also true of opposition lawmakers.

It is clear there will be some tension. No matter how much the government can present a technical argument or produce data that can enhance the analysis of a bill's potential impact, the government is not a neutral participant in the debate. Its political position represents a crystal-clear bias in the way the information is presented.

This is a key point. How can we prevent the obvious mismatch in the amount of information held by the administration, on the one hand, and lawmakers, on the other, from giving complete control of the debate to the former, thus affecting the autonomy of the latter? We are not talking here about the government's

role in negotiations involving appointments or constitutional amendments; rather, we're talking about bills, perhaps the bulk of them, that aren't necessarily on the administration's list of priorities or have enough of a fiscal impact to be considered priorities but that nevertheless often depend on analysis and data that the government is much better equipped to deliver. Although the Chamber of Deputies and the Senate have highly qualified consultants who are able to conduct detailed analyses on administrative issues, the capacity of the government machine to produce information is unparalleled.

In other words, there is tension between the legislative and executive branches when it comes to legislative debate. The legislative branch needs the executive branch to produce information, yet at the same time, the legislative branch cannot rely on it as an independent source of information. It is a tension much discussed in the literature, particularly in informational theory, which produced a climate I perceived intuitively, and it got me thinking about specific strategies for debate in Congress.

Regardless of the topic, to arrive with a government opinion in hand, no matter how well prepared from a technical standpoint, invariably inspired a certain degree of skepticism. I then realized that some sources outside the government could generate quality information and counter the skepticism of some of the groups in Congress.

The first time I became more directly aware of this at the Justice Ministry was when we hired the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD), at the time headquartered in Brazil, to conduct a study to assess the impact of the 1990 Law of Heinous Crimes on reducing crime in Brazil.

The Ministry obviously possessed the technical expertise and had ready access to data to produce a report on the subject, but it was important that it be prepared by an independent organization, and ILANUD fulfilled that role well. The study showed that the law had had no impact on crime figures and, in fact, had even contributed to prison overcrowding.

In this case, the intended objective was not even legislative change. Minister Bastos presented the opinion to the Federal Supreme Court (STF), which ruled that part of the law was unconstitutional, citing the study as an important reference. The study also played an important role in the subsequent debate in Congress that introduced amendments to the law following the STF ruling.

So when the Office of Judicial Reform of the Justice Ministry sent Congress a package of reforms to the Civil Procedure Code—as part of the 2004 State Pact in Favor of a More Agile and More Republican Judiciary, signed by the heads of the three branches of government—I proposed holding a seminar with economists at the University of São Paulo (USP) to explain the impact the changes could have on reducing consumer interest rates, especially those that streamlined the debt collection process.

The presentation by several economists, who laid out solid studies, was reported in the business sections of various newspapers and served as an important driving force in ensuring the bills were included on the agenda designed to improve the national economy. Armed with these newspaper reports, we joined the Office of Judicial Reform in presenting to Congress arguments that indicated that passage of the bills would lead to a drop in interest rates, and this ended up creating a base of support to get the bills moving.

These experiences made me realize that when one works in a government agency that is not directly involved in political negotiations with lawmakers (over appointments or amendments, for example), it is important to come up with strategies to make room for debate. These strategies begin by seeking independent sources of information that can engender confidence in opposition lawmakers. When I took over as Secretary of Legislative Affairs in early 2007, I was indeed able to establish spaces for substantive debate between Congress and the executive branch as a matter of public policy.

The position of the secretary of legislative affairs was somewhat unusual. The mission of the Department of Legislative

Affairs, later abolished under the Temer administration, was focused on bills: drafting them in the Justice Ministry, issuing opinions in Congress on any that were related to the Ministry, and assessing all those sent to the president for his approval or veto. The wide range of issues on which the office had to express its opinion required open-mindedness on the part of its occupants. Above all, we had to recognize that it was impossible to master all the administrative aspects of the law that was being analyzed or going to be drafted. It was absolutely essential to enlist the support of outside help.

The most important mechanism for seeking support from outside experts came with the launch of the Thinking About the Law initiative, which issued calls for proposals as a way to select universities to conduct studies on the specific topics of interest to the Office of the Secretary. The goal was to put together a group of universities that would serve two purposes. As we recognized our inability to provide in-depth and timely opinions on each and every topic, we'd be able to call on qualified research groups already working on these issues to provide analysis to help draft legislation and adopt policy positions. We would also have the ability to present Congress with independent and credible sources to enhance the space for substantive debate with the legislative branch.

The calls for proposals defined specific topics based on the actual needs of the Office of Judicial Reform in drafting or discussing regulatory proposals. Selection committees that included respected professors, Supreme Court justices, and renowned jurists were then formed. The research centers that the committees then selected were responsible for conducting additional comprehensive research on the topic (whose bill had already been submitted as part of the selection process) and for responding within a relatively short timeframe to objective questions that arose in Congress as the bill moved forward.

Thus, at the end of the process, we not only had at our disposal solid information on important topics, backed by data and arguments, but also recourse to researchers whom we could turn to

when we needed to respond quickly to bills or discussions in Congress. In addition, we often invited the professors to take part in conversations with members of Congress as a way to once again expand the arena for substantive discussion between the executive and judicial branches.

The topics selected varied as widely as the purview of the Justice Ministry, ranging from drug trafficking to consumer law, from intellectual property to a debate on the question of mandatory minimum sentences, from human rights to conflicts over land ownership, from urban planning law to the criminal liability of legal entities, from women's rights to the rights of Indigenous peoples.

The Thinking About the Law initiative greatly improved the work of the Department of Legislative Affairs (SAL) and established a network of the best legal researchers in the country, who discussed issues that were actually being debated in Congress. Work involving the criminal liability of legal entities illustrates the interactions prompted by the initiative.

In the context of the National Strategy to Combat Corruption and Money Laundering (ENCCLA), the government had been under intense pressure to pass a bill that would make legal entities criminally liable in cases of corruption. This is not a simple argument. It stipulates that a certain act represents a crime, and the state can restrict the freedom of anyone who commits that act. With the establishment of artificial persons—legal entities—the discussion then becomes one of whether a legal entity, a company, can commit a crime. Of course, managers or employees can commit crimes and be held responsible, but can a company? Companies can engage in illegal conduct and be fined for it. But criminal law is built entirely on the idea of authorizing the state to restrict freedom, which is why it presupposes a series of protections for those being prosecuted to ensure that the state cannot arbitrarily assault freedom (or even life).

A study conducted by the Fundação Getúlio Vargas School of Law in São Paulo analyzed case law on the subject and conducted fifty interviews with business managers and employees. In the

end, it concluded that holding legal entities criminally liable would have no effect on corruption. Administrative measures such as fines, which are penalties that are not considered criminal, would be much more effective.

Case law showed that because criminal law offers the accused numerous protections, punishment was much more effective when restricted to the administrative arena. Furthermore, the interviews indicated that criminal measures only acted as a deterrent when it came to individual executives; holding legal entities criminally liable was not viewed as a more threatening way to prevent criminal conduct than fines imposed at the administrative level.

With this study in hand, we were able to convince colleagues in the executive branch, particularly the Office of the Comptroller General (CGU), as well as federal deputies engaged with the issue, that the best way to deal with the problem was to make companies involved in corruption administratively liable and avoid establishing criminal liability for legal entities. These measures were incorporated into the bill that eventually became Law 12.846/13, known as Brazil's Anti-Corruption Law. This allowed for the strengthening of compliance offices within companies and prompted an important cultural shift in the corporate landscape.

The link between researchers and legislative debate grew stronger during the period in which the Thinking About the Law initiative operated within SAL. The office gained visibility in the public debate within government, as well as in Congress and civil society, and a number of agendas were advanced in those years, based on the credibility earned by the fact that SAL was able to create arenas for substantive debate within the Legislature.

One of the major lessons gleaned was that administrative and political views could be aligned. The premise of the Thinking About the Law initiative was to give universities complete autonomy, even if this ran counter to the political positions of the Office of the Secretary. The office would never interfere with the activities conducted by academia, but once the scholars

had completed their work, the office was the link between the bureaucratic work and the political discussion.

If we believe that producing quality information is enough to implement public policy, we ignore the democratic need to justify political choices in the appropriate institutional spaces, whether in Congress or in the public debate in general. Shaping public policy without well-grounded technical input allows interest groups to completely hijack the agenda, not to mention that it reduces the chances of achieving the proposed objectives. But this process teaches us that relying on independent sources to produce background information often shifts the discussion away from political dispute and into the realm of substantive argumentation. This does not mean that politics is replaced or overruled by bureaucratic or technical considerations, but rather that each side in the debate will have to openly admit its goals and present sound reasoning; in other words, the bureaucracy thus ensures that politics plays out democratically.

Not everyone thinks this permeability between bureaucracy and politics, between officials in positions of trust and public servants, and even between academia and the public service is positive. There are many public service sectors that view this interpenetration as a threat. An example of this was the letter I received from a professional association of the Federal Attorney General's Office (AGU) telling us to shut down the Thinking About the Law initiative because it was unconstitutional. The alleged violation of the Constitution was disregard for Article 131, which specifies that the AGU is responsible for consulting and providing legal advice to the executive branch. The professional association that notified me asserted that the AGU had a monopoly on the legal research conducted through the initiative. In other words, the executive branch could not heed the information gathered by the universities because all legal knowledge and all legal arguments should come from the AGU alone.

This is obviously a narrow, corporatist legal interpretation that does nothing to strengthen democratic institutions or shape public policy. But it is a widely held interpretation within the

AGU and has serious consequences for the entire debate on law and public policy in the executive branch. The attack on the Thinking About the Law initiative by the professional association of the AGU can only be understood in the context of the AGU attempting to declare its autonomy and seek monopoly over activities related to the law. Nothing could be more menacing to this view of a monopoly on legal opinions than an initiative designed to democratize the legal debate by involving various universities from all over the country, even if the universities' opinions were not binding, meaning the government would not be obligated to implement any approach they suggested. The initiative did make clear, however, that there are alternate views and that these views should be considered by the public servants who are involved in shaping public policy.

Public policy and politics itself can achieve significant gains when allied with the bureaucracy by refining evidence-based decision-making processes. The fruitful relationship between SAL and universities reveals how decision-makers can benefit from sound evidence that elucidates their alternatives and the paths to decisions. As the Thinking About the Law initiative showed, bureaucratic and political views converged thanks to joint action by the Ministry and universities, the former with the autonomy to present alternatives and the latter with the role of choosing and justifying the most politically viable alternative that would be in the public interest.

Democratic participation introduced a virtuous element to the new balance in the patterns of relations between society and the state. Open public debate based on scientific research prompted an alliance between the democratic process and quality bureaucratic work, making it clear that in certain cases, public debate in Congress does not need to rely on the dynamics of clientelism or corporatism.

However, even though this case was successful from one angle, from another we saw that when the AGU decided to take action, the bureaucracy revealed its dark side. The AGU is yet another example of how bureaucracy sometimes declares its autonomy,

for example, when its political agents, acting as a social force, begin furthering their own careers. Like other entities, the AGU underwent a process of empowerment during the first Lula administration; staff numbers grew steadily, while salaries increased considerably,[1] amounting to approximately 500 percent in the case of starting salaries for federal attorneys general. By the end of the Lula administration, the AGU had become one of the most prestigious organizations in the federal capital. This prestige in turn bolstered the notion that the office was autonomous and reinforced the bureaucracy's role as a social force.

What is also striking is that these public servants, now valued in their roles thanks to the government's political decisions, embraced the discussion about the republican strengthening of institutions, which gained traction at the beginning of the Lula administration. But the republican perspective here is one that excludes democracy. In this perspective, well-prepared public servants hired through a competitive recruitment process would be more authorized to lead the nation than politicians who were elected with the help of illegal money or appointed through corrupt processes. In other words, this is a republican vision that opposes rather than complements democracy.

The quest for autonomy that we saw in the case of the AGU also manifests itself in certain legislative proposals, such as the constitutional amendment to grant autonomy to the Public Prosecutor's Office. According to this proposal, the AGU would have budgetary and functional autonomy like both the Public Prosecutor's Office and the judiciary and would no longer be dependent on the executive branch. The difference is that it was the AGU that provided counsel to the executive branch, and there is no such thing as a lawyer independent of their own client. Other proposed legislation would prevent attorneys outside the AGU's ranks from serving as legal advisors to ministries.

1 "Baixos salários fazem advogados públicos deixarem governo," *Consultor Jurídico*, January 22, 2004, www.conjur.com.br/2004-jan-22/baixos_salarios_fazem_advogados_publicos_deixarem_governo.

In essence, these two legislative proposals would have given the AGU the authority to provide the only "correct" legal response to issues involving the executive branch. Thus, if there is only one correct, republican response, it is important to protect legal decision-making spaces from other views, stemming from political or private interests that might corrupt the correct view. This is the idea of bureaucracy as a social force unlike any other because it holds power over certain processes.

However, this view is not compatible with democracy. After all, there is more than one correct legal analysis, depending on the interpreter's worldview—or political view. The demarcation of Indigenous lands, the potential establishment of eternal secrecy for state information, and the determination of quotas for Black people in public service are just some examples of how different political views generate different legal analyses. In other words, the attempt to distinguish legal analyses from political decisions by evoking a neutral law that is inviolable and superior to all others is not only mistaken but also anti-political and anti-democratic. Thus, giving the AGU autonomous power to formulate the government's legal opinion disregards the democratic process. The best legal solution is one that ensures that the government that triumphed at the polls implements its political vision within the bounds of the law. Ensuring that most public sector positions are occupied by qualified public servants is indeed fundamental to building a republican state. Weber reminds us there is no democracy without bureaucracy, but if this state is not beholden to the political view of those elected, democracy will not be the driving force behind the formulation of public policy.

We must also question the notion that public servants will provide a neutral interpretation of the law. Their interpretation will also be political, but it will not be subject to the democratic control exercised by elections.

It is important to emphasize and understand that as a consequence of the democratic process, public service—in this particular case the AGU—must be beholden to the political

ideals of the government that won at the ballot box, but this in no way means that this government can require public servants to treat public resources as if they were their own private property. Ensuring that the ideas of the winning government are implemented according to law is completely different from protecting the private interests of those in power. When the latter happens, it is a blatant misuse of power.

Learning to deal with the tensions between politics and bureaucracy is inherent to strengthening democracy and governments.

9. The Statute of Indigenous Peoples

Abstract: This case highlights how dominant bureaucratic discourse marginalizes alternative worldviews. Despite a participatory process involving Indigenous communities, the proposed statute stalled. The chapter critiques the exclusionary nature of technocratic language and calls for greater inclusion of diverse voices in policymaking.

Keywords: Indigenous rights; participatory process; symbolic representation; structural racism; technocratic discourse; exclusion

In public administration, many virtuous processes fail to produce any changes in public policy. The drafting of the Statute of Indigenous Peoples was one of the most interesting such processes in which I took part while in government. Although the text submitted to Congress was quite innovative, the bill unfortunately didn't move forward.[1] Drawn from discussions with Indigenous communities held at ten regional seminars in different cities across the country, the text addressed thorny issues, such as the exploitation of Indigenous lands for economic

1 While never formally submitted to Congress as a draft bill, Justice Minister Tarso Genro presented the proposed text of the statute to Speaker of the House Michel Temer on August 5, 2009, so it could be submitted as a substitute for draft bill 2057/91, then before the Lower House.

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purposes and points of friction between criminal law and native cultures.

This series of seminars took place in 2008, my sixth year under an administration led by the Workers' Party (seventh if you count my year with the São Paulo mayor's office). By then, I had accumulated a great deal of experience with participatory processes, including my attendance at several of the government's national conferences on youth, housing, women, public security, and communications. These always valuable events had the potential to change the course of both federal public policies and parliamentary debates.[2] After so many conferences, you realize one particular style of speech always ends up carrying the day: a discourse that is charismatic and articulate, addresses the whole array of issues at hand, and is attuned to the political dynamics in the room.

I remember that one day, during a seminar on the Statute of Indigenous Peoples, an Indigenous man asked for the floor. His Portuguese was impeccable, he organized his arguments well, and he was extremely articulate. Clearly, he would win over the crowd. But then a very elderly Indigenous man asked to be heard. Speaking softly in bad Portuguese, he began telling a story about birds, the moon, maybe a snake. To be quite honest, I couldn't really follow him. But the auditorium fell silent, everyone sitting there rapt. Since I was used to a different style of speech, when he finished, I figured that while he had said some nice things, his comments had been disjointed, and he had no chance of influencing the discussion. I was dead wrong. The man's words flipped the debate on its head, and the final decision ran counter to the argument presented so eloquently by the younger man.

This episode made me realize how the kind of argumentation we use in technical contexts is imbued with a style—intonation, vocabulary, cultural references, and much more—that is white,

2 For more, see Thamy Pogrebinschi and Fabiano Santos, "Participação como representação: o impacto das conferências nacionais de políticas públicas no Congresso Nacional," *Dados* 54, no. 3 (2011): 259–305.

male, heteronormative, and so on. In other words, political choices that favor the privileged are embedded in technical discourse itself, not only through content but also through expressions and mannerisms. Perhaps a skilled attorney can never defend viewpoints favorable to Indigenous peoples as adeptly as an elder who has the respect of the community. Just as spaces of power can be impermeable to politics, they are impermeable to other types of discourse and other worldviews that don't necessarily mesh with the usual models of discourse and technical discussion used in these spaces.

Because I had studied at one of Brazil's top law schools, I of course had access to a repertoire of discourses and a speech style that allowed my voice and ideas to be heard in the spaces of power where I moved. In other words, because I was a white man from an upper middle-class family in São Paulo, people paid attention to me, and I quickly earned promotions. In 2002, while still an undergraduate, I worked at the office of São Paulo Mayor Marta Suplicy. By 2008, I was national secretary at the Justice Ministry and once served as interim justice minister. These opportunities aren't given to people with backgrounds very different from mine. This is why these bureaucratic spaces—which enjoy great power inside government, anchoring their legitimacy in the notions of merit and meritocracy—are spaces that reproduce political views shaped by the personal backgrounds of those occupying them, and these backgrounds are almost always very similar. So the idea that politicians can be replaced by bureaucratic experts and that managers—not politicians—are needed often keeps other worldviews from informing the technical debate.

Since the only people who can participate in these technical debates are those who reproduce a discourse that comes naturally to white, upper-class, heterosexual men alone, the discussion is impervious to ideas developed in other contexts. Accordingly, these technical discussions are cloaked in a false neutrality.

No one doubts the need to ground public policy in sophisticated analyses if a policy is to yield the desired result. But the definition of a desirable result is often political, as are the

definitions both of the variables to be considered in targeting an outcome and of the acceptable negative consequences. An expert, even well-intentioned expert bureaucrat often doesn't realize they have excluded certain factors from their analysis, precisely because the voices that care about these factors weren't heard.

My experience at the Indigenous peoples' conference raises some interesting points about the functioning of the state and the relationship between politics and bureaucracy, points well worth pondering.

The routine operations of the state, and especially of the bureaucracy, are generally characterized by hermetic language and processes understood solely by those inside public administration, often excluding anyone on the outside. There is much international literature on these characteristics, designed precisely to set the arena of administration apart from others. By devising an administrative language and rites comprehensible only to a select few, public administration differentiates itself from other social actors and guarantees a monopoly on running the state. The result is an imbalance between those who have mastered knowledge of government and those who depend on someone else for a translation. This imbalance is felt not only in the implementation of services—for example, the vocabulary used by healthcare providers, which leaves part of the population in the dark—but also in politics. In addition to reifying a distinction between "us" and "them," this language is also highly exclusionary when it comes to participation in public policy and the political processes undergirding related decisions.

The myriad national conferences now convened by the government in Brazil afford vital spaces for social participation that goes beyond democracy itself. In addition to involving more people in decision-making, the conferences introduce the state to new kinds of discourse and language. Logic and language that don't seem to belong in the halls of government agencies may suddenly take center stage at a conference and even change the direction of the resolutions that are passed. This is what happened when an elderly Indigenous man spoke words that shifted a collective

debate, although this secretary, who is fluent in the language of the state, hadn't understood him very well. Ultimately, this process allows new ideas and perspectives to make their way into decision-making while simultaneously opening the state up to new languages not necessarily mastered by the bureaucracy.

Furthermore, this case shows how patterns of relations affect diverse structures and can help us understand the relationships between society and state institutions. Structural racism and the centrality of the white heterosexual men who occupy Brazil's spaces of power represent a force that intertwines all of the patterns, even that of participation.

Some numbers on the Brazilian civil service can shed light on this scenario. According to the data platform Atlas do Estado Brasileiro, produced by the Institute for Applied Economic Research (IPEA), Black people accounted for 51.4 percent of civil servants in Brazil in 2019, meaning they were underrepresented, since this demographic made up 55.4 percent of the workforce that year, according to the Brazilian Institute of Geography and Statistics (IBGE). However, most of these employees (55.3 percent) worked in municipal government, where they generally performed tasks related to healthcare and educational services, thus earning lower salaries than other government employees. Nearly 60 percent of municipal civil servants earned less than BRL 2,500 per month, or roughly USD 633, whereas only 14.4 percent of federal employees fell into this wage bracket. Looking at the public job spheres that concentrate the highest salaries, the proportion of Black employees is much lower. In 2019, 56.6 percent of federal civil servants were white, while Blacks and browns accounted for around 35 percent—and this was five years after affirmative action quotas began to apply to civil service recruitment, in 2014. The discrepancy is even more striking in the case of limited term appointments to positions of power. According to the 2019 breakdown of such appointments at the DAS-6 employment classification level, just below the post of minister, where much power is wielded and salaries are high, 65 percent were white men, 15.4 percent were white women, 13.3 percent were Black

men, and 1.3 percent were Black women (the remainder did not report their gender or race).

These data show how much the Brazilian state, even with its system of equitable civil service entrance exams and affirmative action quotas, fails to represent the racial profile of the Brazilian population. Moreover, the data demonstrate just how male and how white the power structures are.

The case of the contrasting Indigenous speakers reveals two aspects of the relationship between participatory patterns and how white men are preordained to occupy spaces of power in Brazil. On the one hand, my initial perception was that the discourse model represented by the first speaker, more in line with what is expected in spaces dominated by white men, would prevail at the conference, an attitude that indicates how even participatory spaces are generally colonized by a worldview centered on the ruling classes and their race and gender profile. Even under progressive administrations, gender, racial, and Indigenous policies are not just formulated by white men; they are formulated by applying the political logic of white men. Thus, oppressed groups aren't the subjects of their own transformation but rather the objects of public policies drafted in realms of power wholly dominated by white men.

Political scientist Luis Felipe Miguel has described this process as:

> a feedback loop in which those harmed by patterns of inequality find it harder to be represented (in formal decision-making spaces), while at the same time their absence from decision-making processes contributes to the reproduction of these patterns. Material and symbolic elements conjoin to make it less likely for individuals from groups harmed by inequalities to take political action.[3]

3 Luis Felipe Miguel, *Democracia e representação: territórios em disputa* (São Paulo: Editora Unesp, 2014), 301.

It is worth reflecting on Florestan Fernandes's analysis of the white brand of abolitionism defended by the Brazilian elite. The brand that eventually held sway was led by white men from the same social circles as the owners of enslaved Africans, meaning that this abolitionism was "ideologically and politically limited by the conventionalism inherent to the average cultural horizon of the circles of masters themselves."[4] This is one reason why abolition was restricted to the so-called Golden Law (*Lei Áurea*), rather than extending emancipation to formerly enslaved people.

The story of the elderly Indigenous man reveals something else: when a democratic space is constructed to include true symbolic representation of groups harmed by inequality, a force can emerge from within the collectivity and transform the correlation of forces. This seemingly simple example does less to substantiate the emergence of a new rule and more to illustrate the exceptional nature of the situation. It also signals the need to rethink the representation of traditionally subaltern groups within power structures and suggests pathways to strengthening the new participatory pattern.

From the perspective of this book's broader argument—the relationship between bureaucracy and politics—we could say that the technocratic vision stifles the symbolism that comes from the representation of traditionally excluded groups. It collides, for example, with such affirmative action measures as quotas and any questioning of the presence of white men in spaces of power. It is through politics that this can be addressed—although not necessarily overcome. The potential to do so lies in broader participation by sectors historically excluded from these spaces, breaking through symbolic barriers so policymaking not only targets these populations but transforms them into actors who are policymakers.

4 Fernandes, Florestan. *A revolução burguesa no Brasil: ensaio de interpretação sociológica*, 2nd ed. (Rio de Janeiro: Zahar Editores, 1976), 164.

10. The Dry Law

Abstract: This chapter recounts the successful passage of Brazil's drunk driving law. It exemplifies how political leadership, informed by bureaucratic expertise and grounded in legal creativity, can produce effective policy. The case contrasts with others in the book by showing a harmonious balance between politics and bureaucracy.

Keywords: drunk driving; legal innovation; administrative vs. criminal law; policy effectiveness; behavioral change

In 2007, the first year of Tarso Genro's tenure as justice minister, the number of traffic fatalities had been on a steady climb in Brazil, with the data showing a whopping 66,000 traffic deaths that year. The minister asked me, as secretary of legislative affairs, to look into how Brazilian traffic laws might be altered to reduce fatalities.

The Department of Legislative Affairs has to deal with such a wide array of duties and issues that no structure could produce quality information on every topic. While we had sought the help of outside actors when developing the Thinking About the Law initiative, in this case we looked elsewhere for assistance—from public servants.

Listening to public servants is one of the most valuable ways to access the knowledge already existing inside the state. Political agents often have ready-made ideas regarding the issues at hand, based on solid public policy studies conducted at the best

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universities, but government employees often have a kind of practical knowledge that can produce public policy much more efficiently by combining evidence with experience.

So when I was given the task of reviewing traffic legislation, I began by reading a few papers on the topic that cited some of the causes for the high number of accidents in Brazil. Next, I went to meet with staff at the Federal Highway Patrol, which answers to the Justice Ministry. Members of the force corroborated the idea that there were two major reasons for highway accidents in Brazil: head-on collisions caused by reckless passing and, primarily, drunk driving.

To curb illegal passing, we suggested that the infraction be raised from the category of "serious" to "extremely serious" (as one of the chief causes of highway fatalities in Brazil, why hadn't this offense been assigned the heaviest penalty in the traffic code in the first place?).

But the thorniest question was how to deal with drunk driving. When I heard the conclusions of the highway patrol staff, the first thing I wondered was why we didn't use breathalyzers in Brazil. This question may sound odd in 2021, when breathalyzers have become part of the traffic landscape, but in 2007, at the time of this conversation, a breathalyzer was something out of a Hollywood film—there were only two such devices in use across the whole country. We heard stories about people being forced to take the test while traveling abroad, but nothing like that existed here.

The answer I got from the police triggered the line of thinking that led to what is now known as the *Lei Seca*—or Dry Law: "Well, whenever we try to use breathalyzers, people claim they can't be forced to incriminate themselves, so they won't blow into the tube, or they manage to get the charges dropped later. So we decided to quit buying them and to give up on enforcement." Never before had I heard such a clear explanation for the under-enforcement, or virtually non-enforcement, of drunk driving laws. Based on this analysis, it was easier to understand what our mission at the Department of Legislative Affairs should be. It simply wasn't

possible that the right to non-self-incrimination—respected in many countries around the world—could make it virtually impossible to control drunk driving.

The right to not incriminate yourself is a well-established principle in Brazilian criminal law. Yet it should be noted that it is not an explicit constitutional norm. In other words, nowhere in the Constitution does it expressly state: "No one shall be obliged to produce evidence against themselves." Instead, it is a derivative of the right to remain silent: when the Constitution guarantees a detainee the right to remain silent, it can be extrapolated that the person has the right to non-self-incrimination. This finds support in the American Convention on Human Rights, which guarantees that anyone accused of a crime has "the right not to be compelled to be a witness against himself."[1]

Based on the text of the Constitution and on the Human Rights Convention, the right to non-self-incrimination is a type of entrenched constitutional clause, meaning it cannot be removed, even through a constitutional amendment. But it is also true that both the Brazilian Constitution and the Human Rights Convention guarantee this right only to someone accused of a crime. Since a traffic violation is not a crime, this argument cannot be used by someone who is trying to get out of a fine.

Herein lay the crux of the matter: more than a simple traffic violation, drunk driving is classified as a criminal offense. And because it is, it exits the administrative sphere of the state and enters the criminal sphere, where the result of the state's action might not be just a fine but could also involve depriving the accused of their freedom. When a matter falls in the criminal sphere, the accused, quite correctly, has recourse to a set of guarantees for their defense that don't necessarily exist in the realm of administrative law. And this includes the right to not produce evidence against yourself.

1 American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, November 22, 1969, https://www.oas.org/en/iachr/expression/showarticle.asp?artID=62&lID=1.

Of course, my first impulse was to say: Let's decriminalize drunk driving. If we levied steep fines on drunk drivers but didn't classify the infraction as a crime, it might enable more effective enforcement of the laws and reduce the number of accidents. The perfect solution? Not exactly. Starting from the understanding that traffic fatalities are largely caused by drunk driving, what chance did we have of convincing the public that the number of accidents would decline if drunk driving were no longer deemed a crime? Zero. I can't imagine a David Ogilvy or Don Draper being able to design an ad campaign that would make this proposal sound reasonable. Even today, I think this alternative might have been the best and most efficient, but that's beside the point.

We had to find another way to make enforcement feasible. Reasoning that the offense should carry an administrative rather than criminal penalty, we came up with an alternative infraction: refusing to take a breathalyzer test. In other words, we equated driving under the influence of alcohol with refusing to submit to a test that could prove you had been drinking. Same fine, same consequences: the driver would lose their license and their vehicle would be impounded. This measure would not lead to criminal charges since it would not be a crime; drunk driving would be. But it did make it possible to fine whoever refused to take a breathalyzer test.

It was a simple measure, but it had profound implications, which led to a real cultural shift in the relationship between alcohol and driving. After going through Congress, the law underwent some changes, including the Lower House's decision to switch from a tolerance level of up to 0.3 grams of alcohol per liter of blood, as defined in the original draft, to zero tolerance. There is no way to know whether this had a symbolic effect. What we do know is that as soon as the law passed, thousands of breathalyzers were purchased, the number of checkpoints multiplied, and today drivers run the real risk of being pulled over to see if they've been drinking. The concrete possibility that a drunk driver might be caught truly affected driver behavior—even though this meant

reducing the application of criminal law and strengthening the application of administrative law.

The law achieved astounding results. While more than 66,000 people had died in vehicular accidents in 2007, the last year before the law went into effect, by 2009 the number had dropped 20 percent to just over 53,000.

The combination of evidence gathering, conversations with career civil servants, analysis of the political risks of the proposed solution, and legal creativity aimed at truly modifying behavior was fundamental to achieving this remarkable reduction in traffic deaths.

The Dry Law case can be seen as a counterpoint to the drug policy case. Both dealt with a contentious issue that could interfere directly with human rights. Any government leader who seriously wants to advance policy in these spheres will have to contend with opposition from both society and politics—with the aggravating factor that discourse alone will do nothing. This means politicians must not only put the issue on the agenda; they have to put actions into practice and bear the onus of implementing coercive measures. Finally, this was a policy that concerned a variety of actors, and its implementation did not depend solely on the federal government but also on the support of state and municipal administrations.

It is apparent that a very novel approach to reconciling political and bureaucratic interests was used here. In the first place, a real effort was made to hear the technical perspective of the civil servants who work with policy. The bureaucracy offered politicians alternatives, and then the latter evaluated the alternatives and their potential impact. When the feasibility of each proposal became clear, it was up to the politicians to present the most viable alternative for the context—not necessarily the most desirable but the one that would be most possible, the one that could ensure the action would be efficacious. After the decision had been made to propose a new type of violation, it was again up to politicians, this time in Congress, to alter the proposals put forward. In the end, the law that passed was not

only highly enforceable but also effective. In other words, the appropriate use of technical and political decisions in conjunction with negotiations in both the executive and legislative branches boosted the chances that the policy would be effective. What resulted was a case where a good balance between politics and bureaucracy strengthened democracy and government.

11. The Internet Bill of Rights[1]

Abstract: This chapter details a groundbreaking participatory process to draft Brazil's Internet Bill of Rights. Through open online consultation, diverse stakeholders reached a consensus that was later upheld in Congress. The case illustrates how democratic deliberation can overcome powerful interest groups and produce robust, legitimate policy.

Keywords: digital rights; net neutrality; participatory legislation; collaborative policymaking; internet governance; public consultation

> What we need in this government is discussion. Businesspeople know how much we discuss, without rancor, without insults, without trying to bring a competitor down … It means engaging in debate, strengthening our democracy and seeing it through to its fullest potential […]. This law is not intended to fix internet abuse. What it's really trying to do is to impose censorship. What we need, Tarso Genro, my friend, is to maybe change the Civil Code, or who knows, change something else. What we need is to hold the people who work on digital matters involving the internet accountable, but not by prohibiting or punishing. [This bill] is the police-state equivalent of drafting

1 For more detailed information on this case, see Pedro Abramovay, "Sistemas deliberativos e processo decisório congressual: um estudo de caso sobre a aprovação do Marco Civil da Internet" (PhD diss., Universidade do Estado do Rio de Janeiro, 2017), www.internetlab.org.br/wp-content/uploads/2019/04/tese-Pedro-Abramovay.pdf.

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> a law that lets people into the homes of others to find out what they're doing, even confiscating their computers. It's not possible, it's just not possible.[2]

It was a cold June afternoon at the 2009 International Free Software Forum (FISL) in Porto Alegre when President Lula suddenly went off-script at the sight of a banner in the audience calling for him to veto the bill sponsored by Senator Eduardo Azeredo (PSDB). The bill had come to be known as the internet's AI-5, referencing what is considered the most brutal of seventeen decrees issued by the military dictatorship in the years following the 1964 coup d'état.

The bill was Brazil's version of an effort that had been seen in several countries to restrain internet freedom as the first decade of the new century came to a close. For some, the internet posed enormous risks in the form of bank fraud, piracy, pedophilia, and trafficking drugs to children. The only way they saw to contain such risks was to broaden criminal law to cover cybercrime. Frightened moralists and opportunists who don't miss a chance to propose a new crime in exchange for votes defended the new law, which was backed by the banking and entertainment industries.

But the internet was not just about these things. On the contrary, it was a space of freedom, representing expanded access to unimaginable levels of information and culture, along with the potential to connect people and create collaborative networks at a much lower cost. It also inspired a culture of cooperation and partnership, as well as free software movements that could allow us to rethink democracies and seek new models for the distribution of power. Behind this libertarian vision was a vibrant civil society movement, which had originated in the free software debate and was now fighting for a free internet. On that June afternoon, it was holding a banner in front of the president.

2 "President of Brazil's Address to FISL 2009," *Electronic Frontier Foundation*, https://www.eff.org/issues/cybercrime/president-brazil-2009.

Until that day, the government had not made its position clear. FEBRABAN, the Brazilian banking federation, was lobbying hard to have new types of criminal offenses defined and had received the support of several sectors of the government as well as the Federal Police, all while the free internet movement was pushing in the opposite direction. The Department of Legislative Affairs (SAL) was involved in the conversation because of the discussion on criminal law, not the internet. Our team was reluctant to introduce new types of crime.

FISL was the major driving force behind the free internet movement, and the fact that the president was attending the event provided an opportunity to talk about something the movement had been fighting for through various presidential campaigns: the urgent need to defeat Azeredo's bill. FISL proposed that internet regulation be based on the principle that rights should be affirmed within a civil framework that recognized the rights of users rather than within a legal framework that criminalized them. Some members of the movement had met with Lula to explain their position ahead of his speech. When Lula saw the banner, he fired off a proposal to establish a civil framework. And he tasked Minister Tarso Genro with drafting it.

This decision, which was key to the way things unfolded, was not at all a foregone conclusion. The Justice Ministry was involved in discussions on the Azeredo bill precisely because it concerned criminal law, but when the debate shifted to civil regulation of the internet, the matter could have gone to the Ministry of Communications. It just so happened that the Communications Minister at the time was Hélio Costa (PMDB), who was not at all in favor of the free internet movement.

Tarso Genro accepted the assignment and immediately put me in charge of the process. The issue was quite controversial. In addition to banks, the Federal Police, and the free internet movement, the matter was being closely monitored by internet providers and telecommunications companies.

It was a daunting challenge, not only due to the degree of controversy but also to the issue's very complexity. SAL lacked

the necessary expertise to draft a bill that could withstand such a challenge. Our instinct, as a group of young progressives that made up the department, was to align ourselves with the position of civil society. Yet even with the president's signaling, we knew that the correlation of forces was complicated, especially when the bill reached Congress (and I had no idea how much worse things would get).

One of the lessons I learned from Minister Genro was that there has to be some form of external pressure to push an agenda forward. This is the complete opposite of the notion that public policy can be made behind closed doors by bureaucrats who test out their hypotheses in a laboratory before presenting them to the public. In the eyes of a politician and manager like Genro, the public is part of policymaking and will be an important element of pressure for the outcome, lending legitimacy to the idea in a wider political debate and contributing different perspectives that could make the policy more effective.

Aside from this internal context, which already provided fertile ground for introducing a public debate on the matter, our team—attuned to innovations in technology, especially regarding models for the collaborative construction of knowledge—had for some time been seeking a topic on which to establish a forum for the collaborative construction of legislation. In other words, just as it is possible to collaboratively build and aggregate knowledge on Wikipedia, we thought, why not replicate the model in drafting a bill?

We had tried something like this before, but the Ministry's IT department had shot down the idea, claiming it would jeopardize the Ministry's digital security—an example of the bureaucracy's resistance to any kind of innovation. Today the idea seems simple, but in 2009, the bureaucracy was totally against any process by which the public could directly interact through the Ministry's website. But this would be the perfect opportunity to test out the idea. Due to the issue's complexity, there was much to gain from a process of open public debate. Collaboration could only improve the outcome.

To sidestep resistance from the IT department, we were able to host the site on a public social network established by the Culture Ministry (culturadigital.br). We also signed an agreement with the Center for Technology and Society at the Getúlio Vargas Foundation to help coordinate the discussion.

It was the world's first experience in collaboratively drafting a bill. Of course, public consultation had already been tested, but the dynamic is completely different. The government generally drafts a bill and presents it for public input, eliciting suggestions that then go straight to the government, which decides whether or not to incorporate them. That was not how we wanted it. Our idea was that the government would mediate the public input, but the debate itself would take place between the actors, thus completely changing the dynamic involved in negotiating a bill.

We began by establishing the law's guiding principles, the topics that should and should not be included, and the direction the bill would take. We used a set of principles drawn up by the Internet Steering Committee, on which anyone could comment, criticize, and suggest priorities to be added to the debate. Once that phase ended, SAL used the input generated through discussions to prepare an initial draft of the bill, which was then posted online, along with a section for comments. Discussions at this point in the process were much more specific, critiquing and proposing individual changes to the draft's legal text.

In the beginning, civil society groups contributed the most. More established interest groups continued to lobby through traditional channels. Once the participatory process was launched, we decided we would only consider publicly posted contributions. Meetings held behind closed doors or even printed materials were inadmissible. This decision ended up moving the entire negotiation process online, where it was conducted in public and supported by reasoned arguments.

When, for example, the Brazilian Internet Association (ABRANET), a major interest group involved in the process, came to us with their contributions, its representatives told us they really liked the idea of the collaborative project. We thanked

them and asked them to post their suggestions through the portal. ABRANET argued that the portal was for ordinary citizens, not a group like theirs, so SAL began posting their contributions for them, and people started commenting on the posts, agreeing with some things and disagreeing with others. And so ABRANET was forced to take part in the debate and accept the platform, responding publicly to the comments.

A proposed law generally comprises a process in which interest groups meet with the government, not knowing their respective positions in advance. There is no need to convince the general public, just whoever is leading the negotiations. Groups that are unable to engage with the government but could make important contributions are not heard, and the final product does not take into account all of society's views. This was completely different in the Internet Bill of Rights process. The arguments had to be expressed in public, which increased public confidence in the process and forced the various parties to engage with each other.

The process did not see any massive level of citizen participation, but that was never the goal, especially on a topic as technical as this one. A few thousand comments were received, posted by a few hundred individuals and a few dozen organizations, but we managed to capture what was out there. Someone might even disagree with this or that item in the bill, but they would understand why it was there, and this influenced public acceptance, at least among actors interested in the negotiations. And through the long process of argumentation and discussion—the debate lasted eighteen months—the various polarized groups managed to work toward a public agreements.

Key to this was the commitment on the part of staff at SAL, which was largely made up of young employees who had either been competitively recruited or were appointed to positions of trust and later sat for competitive exams. Working in partnership with civil society, these public servants understood the importance of the mediating role SAL played in the success of an innovative process and were essential to preserving the administrative integrity of the debate.

When submitted to Congress, the bill's proposed text received the support of all of the groups that had taken part in the discussion, groups that had been at radically opposite ends of the spectrum before the process began.

As first rapporteur, Federal Deputy Alessandro Molon (at the time affiliated with the PT) decided to replicate the online collaborative consultation process, deeming it important to continue using the same method to give the legislative branch the opportunity to continue the conversation the executive had started. He also observed that because the process had been conducted publicly and was documented, it had essentially changed the way negotiations transpired in Congress. After all, interests and arguments had already been expressed, debated, and responded to. And changing what had already been agreed to always prompted a huge reaction. Molon noted,

> The process in the executive branch meant the contributions made through participation in the legislative branch were better reasoned, [...] because several games had already been played on the field and the players were warmed up. Everyone already knew what was in play, what was in dispute, and what interests were at stake. You weren't starting from scratch. [...] That's in comparison to any other bill we'd seen there [in the Chamber].[3]

There was one new aspect, however. Brazil's telecommunications companies, which had not actively participated in the debate, realized the bill touched on issues that were very important to them, such as net neutrality.[4] In other words, the telecoms would no longer be able to interfere in the content they broadcast,

3 Molon made this statement during an interview given to Pedro Abramovay for his doctoral dissertation.

4 In an interview, Eduardo Levy, president of SINDITELEBRASIL, the main lobbying body for telephone companies, said that phone companies only realized how important the bill was once it reached the Legislative branch.

for example, by offering packages where one streaming service would run faster than another. This was an issue that profoundly affected their business model. Not having taken part in the collaborative consultation, these companies resorted to traditional means of pressure and relied on Congressman Eduardo Cunha (PMDB) as their main advocate. And it was around Cunha's efforts to fight the Internet Bill of Rights on behalf of the telecoms that the great clientelist coalition against the priorities of the Rousseff administration was established: the Blocão—the big bloc.[5]

Despite the efforts of Cunha and the telecoms, the Internet Bill of Rights was approved. A detailed analysis of the back and forth in the negotiations clearly shows that the public alliance between the various actors forged during the consultation process laid the groundwork for the agreement that enabled the bill's passage, despite opposing pressure from powerful interests.[6]

German philosopher Jürgen Habermas, one of the leading scholars of democracy in the twentieth century, contends there is greater political strength in an argument that is crafted in the public sphere. He calls this the "force of the better argument."[7] Some of his critics point to a certain naïveté in the idea, or even an element of depoliticization. The better argument for whom? But the idea is very useful for understanding the process seen in this

5 Felipe Seligman described what was happening in an article published in March 2014. "Dissatisfied with what they considered little space within the government, at least nine base parties (PMDB, PP, PSD, PDT, among others) have formed an informal 'big bloc' of more than 250 deputies, who are pressing for [the creation of] new ministries and the release of funds they had requested via amendments for the year of 2013. The bloc's main leader is none other than Eduardo Cunha, who three weeks ago began attacking the PT and President Rousseff, even threatening to pull out of the inter-party alliance. Eager to see the government meet with failure, he began recruiting colleagues to overturn the Internet Bill of Rights. Political factors thus began reinforcing their technical stance against the bill." Felipe Seligman, "Por trás da disputa política a força das teles," *Agência Pública*, March 19, 2014.

6 This process is described in depth in Pedro Abramovay's doctoral dissertation.

7 Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, vol. 1 of 2 vols. (Boston: Beacon Press, 1984), 25.

case and even in helping understand this relationship between the political and the bureaucratic construction of an argument.

The "better argument" does not mean a decision that is intrinsically better than any other possible decision. For Habermas, the force of the argument comes from its having emerged from an unforced public debate, which puts forth all the reasons and information available at a particular point in time. When this happens, there is an inherent force that results from rational motivation. In other words, the better argument is not the correct answer to a question; rather, it is an argument made on the basis of a rationally motivated decision-making process, the fruit of discursive debate.[8]

We can therefore conclude that the agreement reached through the deliberative process coordinated by the Justice Ministry created an unlikely alliance between actors who had previously found themselves on opposing sides, an alliance forged on the basis of the better argument rather than on a mere process of negotiation or bureaucratic imposition. Its force made it possible to defeat the powerful and well-connected interests of the telecoms, even in the context of a weakened government.

Analysis of this case also shows that the actors who engineered the agreement had no vested interest. Free internet movements, security sectors, content producers, and internet providers all considered the possibility of pulling out of the agreement and supporting a text that would strengthen their own position, over and above what was agreed to in the executive branch. And it is true that the final approved text is not identical to the one initially introduced, but the compromise reached around the three major issues in the collaborative process was safeguarded. Whenever any of the parties to the agreement tried to wriggle out of it, the vote was a no-go. When the agreement was realigned, with the support of the government, it was possible to defeat Cunha's bloc.

8 Jürgen Habermas, *Between Fact and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1998), 227.

The Internet Bill of Rights case describes a policy-building process that managed to reconcile the various elements discussed in this book. The beauty of this process in particular is the interaction between the bureaucracy and politics: at no point did the former choose to suppress the latter, which in turn understood how to listen to the former. In fact, there was more than one bureaucratic response; there were actually several, and there was no single best solution. Varied and distinct polarized interests were brought together in a political process that succeeded in forging public agreements based on a technical argument. The polarization was actually key to generating the necessary political energy to lend legitimacy to the process.

The political process is at the heart of democracy and allows not only the reconciliation of different interest but also a balanced mix between bureaucracy and politics. In this case, there was no trampling of the bureaucracy or of technical knowledge—they were included, heard, and debated. Nor did politics surrender its role, instead acting as the mediator in a process of public and collective debate. The solution was mutually agreed, debated, and shaped collectively.

Ultimately, betting on the political process and social dialogue—even in an environment of conflicting interests—makes it possible to temper the state's various grammars. In the Internet Bill of Rights, the participatory pattern of relations managed to gain more ground than corporatism, clientelism, and insulation by realizing the idea that political dialogue should be at the forefront. It is through political dialogue that the tension between society and the state can curb the private occupation of public power and increase the likelihood that the public interest will prevail.

Conclusions

The tension between a strong, independent bureaucracy and the disputes innate to democracy is key to building a healthy, efficient democracy—one that not only delivers quality public services but also makes room for politicians to address public demands, rather than leaving the task solely to bureaucrats who oftentimes embody interests masked by the fetishism of meritocracy.

The case of Brazil since enactment of its 1988 Constitution demonstrates that patterns of relations between the state and society, such as clientelism, corporatism, and bureaucratic insulation, can only be confronted through structural reforms that replace these patterns with ones appropriate to a democratic republican country, to wit, procedural universalism and participation. The examples analyzed in these pages also highlight the risk of allowing the ascension of a bureaucratic, meritocratic discourse that seeks its own legitimacy over that of politics while actually disguising specific individual or group interests.

The Brazilian state's structural problems will be resolved neither by meritocratic discourse nor by well-meaning, well-educated young people who, ensconced in their offices, engage in technical analyses of measures intended to end corruption and hone the state. If the state is to enforce the Constitution—building a free, just, and caring society, eliminating poverty, reducing inequality, and promoting the welfare of all, without discrimination—we must rely on both bureaucracy and politics. Through public negotiations led by elected representatives and based on analyses conducted by expert bureaucrats, democracy can devise new ways for the state to play a role in the economy.

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After 1988, Brazil achieved its greatest advances thanks to political action and the new grammar of citizenship forged since then. The establishment of Brazil's national health system, SUS, was a consequence of a robust social health movement in the 1980s and 1990s. From the *Bolsa Família* financial assistance program to the PRONAF family farming program, policies aimed at reducing inequality and poverty have likewise been the product of politics and social movements. The same can be said of policies related to quotas, disarmament, the eradication of child labor, the Internet Bill of Rights, the Unified Social Assistance System, and the demarcation of Indigenous territories.

The idea of making further progress along these lines may seem daunting, especially given the Congress that Brazil has seen in recent years and the apparent shift of political news to the police pages. But without involving democracy and politics, there is no way to reclaim the state from private hands. Just the opposite, meritocracy isolated from political debate serves only to obscure the forces now holding the state hostage to private interests.

A blind belief in bureaucracy and merit is usually a subterfuge that conceals power relations and shrouds political choices often intended to keep certain groups in power. When technocratic discourse is embraced and the bureaucracy valued above all else, business sectors with defined interests, along with structural racism and sexism, obstruct true political competition and further restrict access to power by those already rendered disadvantaged by inequality.

In a republic without democracy, true interests are always camouflaged. Faoro ends his book *Os donos do poder* (The power holders) lamenting the fact that the liberal institutions built on Brazil's Portuguese heritage have represented "new fabric in an old dress, new wine in an old goatskin, without the dress ripping or the goatskin bursting." In a country so deeply branded by the grammars of clientelism and corporatism, the fetishism of meritocracy is a trendy new wine poured into an old goatskin; it is nothing more than a reiteration of the grammars of bureaucratic

insulation and procedural universalism, which, as we know, have failed to help the country overcome its inequalities. And particularly when tensions between earlier patterns and the pattern of participation give rise to the fetishism of meritocracy, it also lays fertile ground for fresh forms of authoritarianism, grounded in the belief that a government composed of the "best" can simply dispense with democratic processes. This is why we would do well to remember we can only build solid, democratic republican institutions through an alliance between well-prepared bureaucrats working within the government to produce quality information and politicians engaging in dialogue with the public and accepting the expansion of mechanisms of popular participation.

These constituent features of the Brazilian state stand in the way of full progress toward a democratic republican country. Tackling them demands a far-reaching political pact that will create an efficient state capable of entering into dialogue with the working class and the business class, with the poor, with Black people, Evangelicals, women, and minorities. This dialogue will be waged in the streets and at the ballot box and not in offices occupied by people who fear—or scorn—democracy.

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Pedro Abramovay

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Gabriela Lotta

Glossary

EN	PT	ACRONYM
Access to Information Law	Lei de Acesso à Informação	LAI
Anti-Corruption Law	Lei Anticorrupção	LAC
Anti-Money Laundering Law	Lei de Combate à Lavagem de Dinheiro	
Brazilian Health Regulatory Agency	Agência Nacional de Vigilância Sanitária	ANVISA
Brazilian Institute of Criminal Sciences	Instituto Brasileiro de Ciências Criminais	IBCCRIM
Brazilian Institute of Geography and Statistics	Instituto Brasileiro de Geografia e Estatística	IBGE
Brazilian Internet Association	Associação Brasileira de Internet	ABRANET
Brazilian Social Democratic Party	Partido da Social Democracia Brasileira	PSDB
CESeC	Centro de Estudos de Segurança e Cidadania	CESeC
Committee on the Constitution, Justice, and Citizenship	Comissão de Constituição, Justiça e Cidadania	CCJ
Criminal Organizations Law	Lei de Organizações Criminosas	
Democratic Labor Party	Partido Democrático Trabalhista	PDT
Department of Asset Recovery and International Legal Cooperation	Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional	DRCI
Department of Foreign Nationals	Departamento de Estrangeiros	
Department of Legislative Affairs	Secretaria de Assuntos Legislativos	SAL
Federal Attorney General's Office	Advocacia-Geral da União	AGU
Federal Audit Court	Tribunal de Contas da União	TCU
Federal Supreme Court	Supremo Tribunal Federal	STF
Federal Tax Authority	Receita Federal	RFB
Financial Action Task Force	Grupo de Ação Financeira contra a Lavagem de Dinheiro e o Financiamento do Terrorismo	FATF
Growth Acceleration Program	Programa de Aceleração do Crescimento	PAC
Institute for Applied Economic Research	Instituto de Pesquisa Econômica Aplicada	IPEA
Liberal Front Party	Partido da Frente Liberal	PFL

Ministry of Public Administration and State Reform	Ministério de Administração e Reforma do Estado	MARE
National Agency for Supplemental Health	Agência Nacional de Saúde Suplementar	ANS
National Council of Justice	Conselho Nacional de Justiça	CNJ
National Electrical Power Agency	Agência Nacional de Energia Elétrica	ANEEL
National Refugee Committee	Comitê Nacional para os Refugiados	CONARE
National School of Public Administration	Escola Nacional de Administração Pública	ENAP
National Secretariat for Drug Policy	Secretaria Nacional de Políticas sobre Drogas e Gestão de Ativos	SENAD
National Strategy to Combat Corruption and Money Laundering	Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro	ENCCLA
National Telecommunications Agency	Agência Nacional de Telecomunicações	ANATEL
Office of Judicial Reform	Secretaria de Reforma do Judiciário	SRJ
Office of the Comptroller General	Controladoria-Geral da União	CGU
Operation Carwash	Operação Lava-Jato	
Operation Leakwash	Operação Vaza-Jato	
Party of the Brazilian Democratic Movement	Partido do Movimento Democrático Brasileiro	PMDB
Popular Party	Partido Popular	PP
Public Service Administrative Department	Departamento Administrativo do Serviço Público	DASP
Social Democratic Party	Partido Social Democrático	PSD
State Pact in Favor of a More Agile and More Republican Judiciary	Pacto de Estado em Favor de um Judiciário mais Rápido e Republicano	
Superior Electoral Court	Tribunal Superior Eleitoral	TSE
Transparency Portal	Portal da Transparência	
Unified Social Assistance System	Sistema Único de Assistência Social	SUAS
United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders	Instituto Latino-Americano das Nações Unidas para Prevenção do Delito e Tratamento do Deliquente	ILANUD
Workers' Party	Partido dos Trabalhadores	PT

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