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# Lawfare: The Criminalization of Democratic Politics in the Global South

*By*

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and Valeria Vegh Weis

*Translated by*

Federico Barea and Casey Gough



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# Foreword to the Spanish Edition

The authors, three renowned professors of the Law School of the University of Buenos Aires, analyze in depth a phenomenon that, though found worldwide, has developed systematically and with an undesirable frequency in Latin America: the use of the judiciary, especially in the application of criminal law, to interfere in politics.<sup>1</sup> This is *lawfare*, a legal war with illegitimate ends, as my lawyers put it in 2016. As part of a decades-long fight against social policies designed to eradicate poverty and diminish deep social inequalities, the elites of our region, together with the defenders of the interests of international financial capital, have promoted corruption to the category of a “cosmic evil,” pointing to it as the origin and cause of all social problems. Of course, no one approves of corrupt rulers. But this sort of fight against corruption is merely a pretext used by those sectors to attack governments legitimately elected by popular vote.

The courts have become the sphere in which those defeated at the polls seek to impose their own interests over popular sovereignty. In this way, some sectors of the judiciary and of the different organs of the justice system, with the opportunistic support of the hegemonic media, have attacked popular governments concerned with the defense of national interests. Their objective is to criminalize and destroy politics, trying to instill in the collective conscience the idea that all politicians are corrupt. The physical destruction of the adversary is no longer adequate; what is desired is his legal and political death.

Under the pretext of fighting corruption, they violate the legal principle of due process and the constitutional guarantees of the accused. As the authors of this book point out, every case that has occurred in the different countries of our region follows the same method: a part of the press, politically involved, fabricates a fact and widely disseminates it (a lie told a thousand times eventually becomes a “truth”); relying exclusively on this fictional news, the judicial police opens an investigation; the public prosecutor’s office goes in search of elements that can formally support the accusation; even when no evidence is found, the accusation is still often filed, as happened in Brazil, with the assertion that “I have no proof, but I am convinced.” Then it is only necessary to “identify some judges willing to collaborate,” either because they see their long-awaited chance for fame, or a more concrete, personal advantage. Every

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1 Former president of the Federative Republic of Brazil between January 1, 2003 and December 31, 2010.

news cycle exposes the intimate and private life of the defendants on the basis of these so-called *vazamentos* (information leaks), a term which camouflages the operation of shrewdly selecting one or more facts and transmitting them with full intention to “colleagues” in the media, especially on television. Faced with the impossibility of proving something that did not happen, the accusers resort to illegal wiretapping, compulsory subpoenas, and preventive imprisonment of both the accused and their families. Such are the mechanisms used to achieve the “confession” of the Informant (this is the name given in Spanish-speaking countries to those who “are capable of inventing any situation to obtain a benefit”), for whom the “reward” is freedom itself and, at least in Brazil, the chance to keep a good part of the proceeds of the crime they confessed to committing. Once the confession has been extracted from the informant then, even without the slightest additional proof, the accused is tried and convicted. If the crime is still not proven, then the bizarre category of an “indeterminate fact” is invoked. The circus is complete when the condemnatory sentence is confirmed by a court that remains partial and committed to the political and economic interests of the ruling classes.

These are the legal means for imprisoning an enemy and preventing him from intervening in political life. The mass media, with television at the forefront, then assume the task of incessantly spreading the judicial decision, thereby granting legitimacy to an absolutely spurious process.

With the enemy removed from the political arena, the way is open for the election of men and women loyal to the interests of the market and indifferent to the needs of the population, especially the poorest. National sovereignty is violated by the sale of large public companies, always sold at prices far below their actual worth, in operations that reveal a total disregard for the environment and for so many other basic rights of the people.

The research carried out by these three authors describes very well what happened in many countries, including Brazil, where they tried to impose political and legal death on me. I was a victim of the machination analyzed here: based on false news published in a newspaper, I was investigated, prosecuted and convicted by the so-called “Operation Car Wash” (*Operação Lava Jato*), which condenses the worst of the Brazilian justice system. Today, no one doubts that there were sectors of the Federal Police and the Federal Public Prosecutor’s Office, under the orders of a notoriously biased judge eager for self-promotion, that formed an organization guided by the objective of annulling my political rights in order to prevent me from running again for the presidency of the Republic and to ensure the Workers’ Party (*Partido dos trabalhadores*, PT) its fifth consecutive term in office. With a speed never before seen in the conduct of other proceedings, the Federal Regional Court confirmed the sentence,



fulfilling the public promise expressly made by its president that the case would be judged before the elections.

They did not take into account my defense. They did not take into account the unconditional support given to me by the social movements, the workers and all those people who, from different parts of the country, held the moving Free Lula Vigil (*Vigília Lula Livre*) in front of the federal police building where I was imprisoned. They did not take into account the reactions of the international political and legal community. And instead of leaving Brazil, as they suggested, I decided to go to jail and, from there, face the cowards who accused me without evidence. It was not in vain, since at least one of the greatest conquests of civilized societies, and one that our Federal Constitution guarantees, was already reestablished by the Federal Supreme Court: the presumption of innocence. A measure that put an end to my unjust imprisonment, which was determined before the higher court ruled on the appeal filed in my defense.

Today I am free, but I am not free. My political rights are still curtailed, even before the appeal I lodged with the higher court has been judged.

My congratulations to Professors Cristina Caamaño, Valeria Vegh Weis, and Raúl Zaffaroni, who, with academic rigor, have shown how “true criminal law” has been distorted and given rise to “shameful criminal law,” which serves to transform the judiciary into an instrument of political persecution of all those here in our beloved Latin America who raise their voices and arms in defense of the abandoned, who stand firm in the face of the powerful representatives of international financial capital and the rulers servile to the market god. I ardently hope that the authors’ objective is achieved: “to take the study of law out of the ivory tower” and place it “at the service of the people.”

*Inácio Lula da Silva*

President of Brazil (2022–2026)

# Prologue

It seems that all the geniuses in the history of the world created their brilliant works in times of plague, and so we could hardly do less! If Isaac Newton discovered gravity, then at least during the pandemic we might, in our distant corner of the world, have our own small revelation: to bring the stratospheric language of the judiciary down, by sheer force of gravity, to a level all of us can understand.

Yes, ladies and gentlemen, our contribution would be to decode the encrypted record of the courts that is causing so much confusion. And it was enough to turn on the television to realize that what has really been quarantined is criminal law! Truth be told, criminal law has been beaten to a pulp and then some. When one of the incumbents falters (i.e., democratic elections are not won, the opposition is too strong, or a distracting measure is needed to sweep the reserves) criminal law assumes a role it has no right to play.

This concerned us because we three authors have studied and taught passionately at the Law School of the University of Buenos Aires (and yes, it is politically correct to use “passionate” to describe the unpaid, or almost unpaid, work of public university teaching). The three of us have learned and taught that the state exercises violence, and that the best thing to do is to keep it contained so that we do not all become its victims. We have also learned and taught that state violence, in times of democracy, is exercised by the police in the form of punitivity, and that if we want to stop it, the best tool is constitutional guarantees. What are these guarantees? That I will not be imprisoned without a conviction, that I will be allowed to exercise my right to defend myself against the accusations levied against me, that the judge who resolves the case will not be angry with me, and many others. Yes, the three authors have learned and taught that constitutional guarantees are not tantamount to a Bolshevik revolution; they prevent punitivity from getting completely out of control (and imprisoning us all).

The three authors have also enjoyed the incomparable privilege of visiting different offices and buildings within our beloved Argentine judiciary. We know very well the good and the bad of our penal system and how dangerous it can be for judges to use their power to benefit one politician or harm another. Judges have to be there to ensure that constitutional guarantees are complied with, and if they are distracted by also having to conduct investigations, they simply will not be able to handle it all.

The three of us – Raul, Cristina, and Valeria – are worried. Our democracy is too young and courageous to be put at risk by judges who respond to foreign

agendas or careerism. We know that only a strong and attentive society can prevent us from being manipulated, and that under grandiloquent accusations of corruption, puppet politicians who open the doors to financial totalitarianism are putting on a show for us. And we are committed to bringing academia – and especially legal academia – out of its supposedly apolitical ivory tower. Law is too deep in the mud to pretend to be neutral. This book is intended to help put academia at the service of the people. It falls to us to do so by clarifying the obscure language in which the judiciary speaks, and by exposing the distortions of the media in an effort to encourage an open and honest conversation about what sort of judiciary and criminal law we really need. Having made this effort, the book really has only one goal: that we pay attention, because history is made by the people.

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## Notes on Contributors

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Comptroller of the Argentine Federal Intelligence Agency, member of the INECIP Board of Directors, and Visiting Lecturer at the University of Buenos Aires School of Law. She was a prosecutor for the Correctional and Criminal Court of Appeals, Secretary of the Operational Security for the Department of National Security, Director of the Committee on Criminal Law, Lecturer at the University of the Madres de la Plaza de Mayo, and Lecturer and Member of the Advisory Board for the UBA Higher Education in Federal Prison Program. She is the author of *Manual práctico para defenderse de la cárcel* (Inecip, 2006), *Manual para el preso extranjero* (Inecip, 2009), and *El delito de administración fraudulenta* (Fabian Di, 2013). She was the Argentine expert in *Ejecución de la pena privativa de libertad: una mirada comparada*, published by the Eurosocietal Program in 2014.

### *Eugenio Raúl Zaffaroni*

Doctor of Juridical Sciences, Notary, Professor Emeritus of the University of Buenos Aires, Secretary General of the Latin American Association of Criminology and Penal Law, and Vice President of the International Association of Penal Law. He holds honorary degrees from forty-five Latin American and European universities. In 2009 he received the Stockholm Prize in Criminology. He served as a Justice of the Argentine Supreme Court, and as General Director of the United Nations Latin American Institute for the Prevention of Crime and Treatment of Offenders. He is currently serving as a judge on the Inter-American Court of Human Rights. He is the author of *Criminology and Criminal Policy Movements* (University Press of America, 2013), *Manual de Derecho Penal* (Ediar, 2006), *Tratado de Derecho Penal. Parte General* (Ediar, 2004), *Derecho Penal* (Ediar, 2000) and *La Palabra de los Muertos* (Ediar, 2011).

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