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Maria Luiza Kurban Jobim

Court of Appeals, Rio Grande do Sul, Brazil

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Ongoing Debates about Gambling Regulation in Brazil: Between Current News and Prospective Laws, An Uncertain Future Ahead

MARIA LUIZA KURBAN JOBIM*

BRAZIL, ONE OF THE COUNTRIES COVERED BY THE BINGO PROJECT,¹ has been travelling an intricate path towards gambling regulation. When we presented our completed research at the final Bingo Project conference in 2016², we mentioned the existence of two simultaneous processes towards gambling regulation, one initiated in the Senate and the other in the Chamber of Deputies. Unsurprisingly, when this volume went to print, both drafts were still in the Congress, waiting for further discussions and final approval.

Economic and political turmoil in Brazil have led to a crisis in the social security and public security fields, since 2016.³ As a result, the process towards gambling legalisation remains uncertain. However, in contrast to the legal stagnation surrounding gambling, actors on the ground have continued to take significant steps which may oblige judges and legislators to act against chaos and disorder.

To foster economic growth, one of the states covered by our research, Rio Grande do Sul, has demonstrated a strong willingness to work with the gambling industry. In particular, the State Secretary of Public Security's interest in gambling revenue for the state may be behind this willingness.⁴ Media items also show that Rio Grande do Sul has a strong interest in taking advantage of a wide range of gaming modalities, both in the public and in the private sector. At a moment when parts of Brazil are facing public order challenges — in 2018, Rio de Janeiro was subject to a federal intervention⁵ aimed at restoring safety and security — the goal of these innovations is to link potential economic gains from gambling to public security and reinforcement of the Brazilian criminal justice framework through, for instance, the construction of prisons and addition of human resources. Although the idea of using gambling revenue to invest in improving the police and prison systems may be unique to Brazil, the link between gambling and economic growth is a common thread in the spread of gambling throughout the world.

However, recent scandals surrounding the gambling sector, including money laundering and drug dealing, have stirred up controversy in public opinion regarding

* Research Assistant, The Bingo Project, and law clerk at the Court of Appeals, Rio Grande do Sul, Brazil.

¹ The Brazilian case study for The Bingo Project was conducted by Toni Williams and Maria Luiza Kurban Jobim. Information available at <www.kent.ac.uk/thebingoproject/about/research-team.html> [perma.cc/Q9CM-XBP9].

² Maria Luiza Kurban Jobim, "Ready, Set and Go Back: The Role of the Judiciary in Brazil's Bingo Ban" (Presentation delivered at the conference "All Bets are Off: Reflecting Critically on Gambling Regulation within and Across Borders", University of Kent, Canterbury, Kent, UK, 23 June 2016), [unpublished].

³ Lucio Vaz, "Reforma da Previdência de Dilma tinha pontos em comum com a de Temer," *Congresso em Foco* (20 March 2017), online: <congressoemfoco.uol.com.br/noticias/reforma-da-previdencia-de-dilma-tinha-principios-e-temas-identicos-aos-de-temer/> [perma.cc/YQT3-VBCX].

⁴ Carlos Rossling, "Schirmer apoia legalização do jogo de azar: 'nos daria até R\$ 10 milhões por ano'," *GaúchaZH* (8 November 2017), online: <gauchazh.clicrbs.com.br/geral/noticia/2017/11/schirmer-apoia-legalizacao-do-jogo-de-azar-nos-daria-ate-r-100-milhoes-por-ano-cj9rf6ket003k01qgir26v9j3.html> [perma.cc/55R9-59N4].

⁵ According to the Brazilian Decree 9.288/2018 (Decreto Federal nº 9.288, de 16 de fevereiro de 2018).

legalization. From those who oppose legalization, there is a strong feeling that since no reliable, strong surveillance mechanism can be developed to monitor the sector, any gains from gambling in Brazil will be outpaced by the cost to government and society in general.⁶

For example, in 2017, several people accused by Interpol of forming an international criminal organisation were arrested in Porto Alegre. They had been living in the city for a few years, and had invested money in the housing, diamond, and gambling industries.⁷ The 2017 construction of a gambling house in Porto Alegre was widely covered by the local press. Lawyers supporting the investors described the law against gambling as outdated in the twenty-first century and thus was “legally inapplicable.” The building itself, pictured below, illustrates many features of the Brazilian bingo industry in the mid-nineties (the time frame covered by our research): it is large, with the capacity to welcome hundreds, opulent and well-staffed.



Figure 1: The Winfil casino in Porto Alegre.

Not everyone was excited about the opening of the gambling house. The Public Prosecution Office opposed the project from the beginning, on the basis that (i) the activity lacked the necessary legal basis in order to run; (ii) it was being used as a tool to commit other crimes, such as money laundering and arms trafficking; (iii) it lacked transparency with regard to identification of patrons and owners; and that (iv) surveillance would never be feasible, since the principles of fairness and safety, as well as the lack of

⁶ Wagner Mendes, “Ofensiva quer barrar legalização de jogos de azar no País,” *O povo* (12 January 2018), online: <www.opovo.com.br/jornal/politica/2018/01/ofensiva-quer-barrar-legalizacao-de-jogos-de-azar-no-pais.html> [perma.cc/BD3N-TCSU].

⁷ Humberto Trezzi, “Tchecos presos em Porto Alegre exploram jogos, diamantes e imóveis,” *GaúchaZH* (06 October 2017), online: <gauchazh.clicrbs.com.br/grupo-de-investigacao/noticia/2017/10/tchecos-presos-em-porto-alegre-exploram-jogos-diamantes-e-imoveis-cj8g417su00f001mqqn09t5a4.html> [perma.cc/2GZG-S6KJ].

legal regulation at the Federal level, could mean that any state-level legislation would be found unconstitutional for invading powers that belong to the federal Union.⁸

In different parts of the globe, the blurry distinction between gambling and gaming has been exploited by some parts of the gambling industry seeking to get away from strict regulation. While this grey area was theoretically used in the Brazilian scenario, in reality, the industry has preferred to play according to the (unclear) rules governing gambling. For instance: in 2017, to avoid problems with the Public Prosecution Office and Police, the establishment pictured above (Winfil) claimed that no money bets were (yet) being accepted. A few days later, a police operation later proved the opposite: guns of unclear origin were seized and sums of money were found in slot-machines. This operation resulted in the closure of the establishment.⁹ The company insisted that it would reopen soon (this seems to be true, since in 2018 the lights are still on, day and night), and that it will open similar houses in different cities around Rio Grande do Sul.¹⁰ Meanwhile, foreign companies (based in the US and Spain) were already in contact with local stakeholders in São Paulo to find potential venues for gambling.¹¹

The complexities of the regulatory regime in terms of criminal law (not to mention public law) are illustrated by the way that one of the divisions of the Court of Appeals in Rio Grande do Sul (*Turmas Recursais do Tribunal de Justiça do Estado do Rio Grande do Sul [TJRS]*) has been acquitting gambling establishment owners. The reason is that the 1941 legislation¹² is outdated in the current societal context. This notion, that the legal prohibition of gambling is no longer binding (and not received by the Brazilian Constitution of 1988¹³), has enormous implications. As a result, the case was brought straight to the Brazilian Supreme Court. The Supreme Court recognised the relevance of the topic on social, economic, political and juridical grounds and, saw a coherent question to be answered, accepting the case.¹⁴ There are unconfirmed rumours that the Court will decide the matter in 2018.

⁸ Fabiano Dallazen, “Decisão foi equivocada, diz procurador sobre liminar que proíbe apreensão de máquinas caça-níqueis,” *GaúchaZH* (31 October 2017), online: <gauchazh.clicrbs.com.br/porto-alegre/noticia/2017/10/decisao-foi-equivocada-diz-procurador-sobre-liminar-que-proibe-apreensao-de-maquinas-caca-niqueis-cj9fkbbq004hp01lce84nfw5.html> [perma.cc/2D3H-Z3H6].

⁹ Adriana Irion & Bárbara Muller, “MP e Polícia Civil fazem operação em casa de jogos na zona sul de Porto Alegre,” *GaúchaZH* (30 October 2017), online: <gauchazh.clicrbs.com.br/porto-alegre/noticia/2017/10/mp-e-policia-civil-fazem-operacao-em-casa-de-jogos-na-zona-sul-de-porto-alegre-cj9em646j00uu01pgnjx1nvop.html> [perma.cc/22J6-RSB5].

¹⁰ Adriana Irion et al, “Os argumentos dos empresários para abrir casas de jogos no RS,” *GaúchaZH* (06 October 2017), online: <gauchazh.clicrbs.com.br/grupo-de-investigacao/noticia/2017/10/os-argumentos-dos-empresarios-para-abrir-casas-de-jogos-no-rs-cj8f7ltkq008j01mqzssiy0.html> [perma.cc/9S5B-CRKW].

¹¹ Felipe Resek, “Las Vegas já busca locais para cassinos em SP; Anhembi é uma das apostas,” *Estadão* (17 July 2017), online: <sao-paulo.estadao.com.br/noticias/geral,las-vegas-ja-busca-locais-para-cassino-em-sp-anhembi-e-uma-das-apostas,10000063348> [perma.cc/R72U-48VP].

¹² Specifically, article 50 of the Decreto-Lei nº 3.688/1941.

¹³ TJRS, Recurso Crime Nº 71006284962, Turma Recursal Criminal, Turmas Recursais, Relator: Luis Gustavo Zanella Piccinin, Julgado em 07/11/2016.

¹⁴ Tema 924. RECURSO EXTRAORDINÁRIO. CONTRAVENÇÃO PENAL. ARTIGO 50 DO DECRETO-LEI 3.688/1941. JOGO DE AZAR. RECEPÇÃO PELA CONSTITUIÇÃO FEDERAL. TIPICIDADE DA CONDUTA AFASTADA PELO TRIBUNAL A QUO FUNDADO NOS PRECEITOS CONSTITUCIONAIS DA LIVRE INICIATIVA E DAS LIBERDADES FUNDAMENTAIS. ARTIGOS 1º, IV, 5º, XLI, E 170 DA CONSTITUIÇÃO FEDERAL. QUESTÃO RELEVANTE DO PONTO DE VISTA ECONÔMICO, POLÍTICO, SOCIAL E JURÍDICO. TRANSCENDÊNCIA DE INTERESSES. EXISTÊNCIA DE REPERCUSSÃO GERAL. RE 966177 RG/RS. D.J.: 10 out 2016.

In 2017, another division of the TJRS ruled that the criminal prohibition *does* exist, is still in force, and that a criminal law cannot be revoked simply by practice; the prohibition could be only revoked formally, by the law, and not informally, by social acceptance. According to this TJRS unit, the prohibition continues to operate in accordance with society's needs and interests:

Notwithstanding the controversy and even considering the current behaviour and the opinion of part of society that tolerates clandestine gambling, art. 50 of the Brazilian Misdemeanour Code was not revoked by any later legislation and it is still now in force. The public order *lato sensu* (public order, public health, rights and liberties of the people), an implicit clause in a free constitutional and democratic order, demarcates the limit of fundamental rights restrictions.

(...)

If the topic is morally controversial, there is an empirical basis for the legislative decision to criminalise the practice. Remember that pathological gambling is considered a mental illness, with diagnostic and well-established criteria. (...) And the fact that "society tolerates the official game" does not serve to allow a part of the Judiciary to make the logical leap to the conclusion that society must tolerate all games of chance..¹⁵

The costs of legal uncertainty in all Brazilian domains — from practice to law, from politics to economy — are clearly visible. To those who are strongly against gambling legalization, the costs of illegality can be just as detrimental as the potential negative effects of legalization. Recent news reports have suggested the opacity of rules leads to both the potential corruption of public servants (who allegedly blackmail owners and allow clandestine activity to be run by turning a blind eye) and extortion by other individuals and gangs. Drug dealers apparently also take advantage of this grey area: they supposedly “help” to provide security to these illegal establishments. This sort of

¹⁵ Author's translation. The original reads: “Não obstante a controvérsia, ainda que se possa discutir se o comportamento hodierno de parcela da sociedade denota algum grau de tolerância à atividade desenvolvida de forma clandestina, o art. 50 da Lei das Contravenções Penais não foi derogado ou revogado pela legislação superveniente, encontrando-se em plena vigência. A ordem pública *lato sensu* (ordem pública, saúde pública, direitos e liberdades das demais pessoas), cláusula implícita numa ordem constitucional livre e democrática, serve de limite para a restrição de direitos fundamentais

...Se a questão é moralmente controversa, há base empírica a tornar, pelo menos, razoável a opção legislativa no sentido da criminalização. Basta lembrar que o jogo patológico é considerado um transtorno mental, com critérios diagnósticos bem definidos. Pode-se objetar, e com alguma pertinência, que nem todo jogador será patológico, mas tal argumento, universalizado, impediria também a existência de delitos de drogas, para ficar no paroxismo, pois nem todo usuário será dependente químico. E o fato de que a sociedade tolera o jogo oficial, não serve, num salto lógico, para dizer, um órgão fracionário do Poder Judiciário, que a sociedade deve tolerar jogos de azar.” TJRS, Apelação Crime Nº 70074080524, Primeira Câmara Criminal, Tribunal de Justiça do RS, Relator: Jayme Weingartner Neto, Julgado em 18/10/2017.

“service” is not optional. It cannot be refused¹⁶. Documentaries have illustrated how this sort of compulsory payment to drug dealers (in addition to payments to corrupt local authorities) can escalate into problems beyond just the closure of a gambling establishment, including murder.¹⁷ In sum: in the absence of rules, no one can predict how the games, in fact, are actually played. But they are definitely being played. In 2016, the Public Secretary of São Paulo estimated that 2.7 bingo establishments were being closed each day.¹⁸ According to the data, table bingo and slot-machines were the games most widely provided in these houses.

Legislatively, two important draft bills are being discussed in Brazilian National Congress; one, in the Senate (PLS 186/2014) and the other in the Chamber of Deputies (PL 442/1991). The draft bill in the Senate has amended multiple times. It returned to the Senate agenda at the beginning of 2018.¹⁹ In the special commission session on 7 March 2018, the draft was rejected (thirteen against, two in favour).²⁰ The Chamber of Deputies has not announced when PL 442/1991 will be back for consideration. Meanwhile, politicians have been pointing out the potential for interference from international businesses interested in narrowing the scope of the bill from multiple games of chance (bingo, “*jogo do bicho*,” slots, among others) to casinos only.²¹

In the presence of opinions for and against gambling in the Brazilian scenario, the on-the-ground reality seems to reinforce one of the very basic conclusions of The Bingo Project: half-hearted regulation is worse than either a clear permission or frank prohibition. The continuing uncertainty surrounding the controversial issue is the product of a lack of serious analysis about gambling regulation in Brazil, a subject to which I hope this paper contributes. Only with this kind of rigorous and critical research can Brazil hope to harness gambling in all its modalities as a source of economic and social development.

Statement of Interest: The Bingo project is the first foray into gambling research by Maria Luiza Kurban Jobim. The project is funded by the Economic and Social Research Council (ESRC) in the UK. Some presentations of work from the Bingo have been supported by host organisations, which includes the Universidade Federal do Rio Grande do Sul (UFRGS), intermediated by Prof Claudia Lima Marques, and Brasilcon, an organisation of Brazilian consumer lawyers, judges and public officials.

¹⁶ Cid Martins & Victor Rosa, “Tensão abala elo de facções e jogos de azar,” *Zero Hora* 2d ed (3 December 2017) 28.

¹⁷ *Ibid.*

¹⁸ Felipe Resek, “Polícia fecha 2,7 bingos ilegais por dia na capital,” *Estadão* (17 July 2017), online: <sao-paulo.estadao.com.br/noticias/geral,policia-fecha-2-7-bingos-ilegais-por-dia-na-capital,10000063349> [perma.cc/UD4S-THB6].

¹⁹ Agência Senado, “Legalização dos jogos de azar está na pauta da CCJ,” *Senado Notícias* (05 March 2018), online: <www12.senado.leg.br/noticias/materias/2018/03/05/legalizacao-dos-jogos-de-azar-esta-na-pauta-da-ccj> [perma.cc/D3E7-PGF2].

²⁰ Sara Resende, “CCJ do Senado rejeita projeto que legaliza jogos de azar; plenário ainda pode votar,” *G1 Globo* (7 March 2018), online: <g1.globo.com/politica/noticia/ccj-do-senado-rejeita-projeto-que-regulariza-jogos-de-azar-plenario-ainda-pode-votar.ghtml> [perma.cc/K2R6-7HTJ].

²¹ Magnho José, “Deputado César Halum denuncia ‘maracutaia’ na Câmara para aprovar cassinos,” *BNL Data* (1 March 2018), online: <www.bnldata.com.br/deputado-cesar-halum-denuncia-maracutaia-na-camara-para-aprovar-cassinos> [perma.cc/7RBQ-4DCJ].