

# JUDICIAL ANTICORRUPTION CAMPAIGNS AS QUESTS FOR JUDICIAL REPUTATION

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## I. INTRODUCTION

Why do some countries prosecute political corruption while others do not? The studies of judicial systems seem to place the answer to that question within the realm of the quality of judicial independence and the quality of judicial institutions designed to protect judicial independence.<sup>2</sup> While useful, this answer does not explain why some countries, which share the same or a very similar system of judicial independence or comparable levels of corruption, behave in different ways. Often, it is said that the questions of the political will to tackle corruption is what precludes such developments in these countries, and it is highlighted that, in any event, the prosecution of political corruption does not necessarily

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<sup>2</sup> Anne Van Aaken, et al., *Do Independent Prosecutors Deter Political Corruption? An Empirical Evaluation across Seventy-Eight Countries*, 12 AM. L. & ECON. REV. 204 (2010).

lead to lower levels of corruption.<sup>3</sup> The latter implies that the study of the prosecution of political corruption is less important, as it is also less efficient than the preventive measures and the legislative frameworks that prevent or make corruption less likely.

However, massive and systemic prosecutions of political corruption happen, even in corrupt settings. The three largest anticorruption campaigns led by the judiciary—which occurred in Italy, Brazil, and Romania—have happened in the ambient of widespread political corruption, in which the most prominent members of the legislative and executive branches of government in those countries were involved. Moreover, they happened despite the absence of the political will to tackle corruption. These campaigns have been explained in the literature dealing with judicial systems as instances of judicial revolutions,<sup>4</sup> anticorruption crusades,<sup>5</sup> prosecutorial overreach,<sup>6</sup> consequences of judicial independence,<sup>7</sup> neoliberalism-fueled activities of the legal professionals,<sup>8</sup> or

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<sup>3</sup> Maria Popova & Vincent Post, *Prosecuting High-Level Corruption in Eastern Europe*, 51 COMMUNIST AND POST-COMMUNIST STUD. 231 (2018).

<sup>4</sup> David Nelken, *The Judges and Political Corruption in Italy*, 23 J. L. & SOC'Y 95 (1996); Donatella Della Porta, *A Judges' Revolution? Political Corruption and the Judiciary in Italy*, 39 EUR. J. POL. RSCH. 1 (2001).

<sup>5</sup> Michael Hein, *The Fight Against Government Corruption in Romania: Irreversible Results or Sisyphean Challenge?*, 67 EUROPE-ASIA STUD. 747 (2015); ROUTLEDGE CORRUPTION & ANTI-CORRUPTION STUD., CORRUPTION AND THE LAVA JATO SCANDAL IN LATIN AMERICA (Paul Lagunes & Jan Svejnar, eds., 2020).

<sup>6</sup> George Mészáros, *Caught in an Authoritarian Trap of Its Own Making? Brazil's 'Lava Jato' Anti-Corruption Investigation and the Politics of Prosecutorial Overreach*, 47 J. L. SOC'Y S54 (2020); Martin Mendelski, *15 Years of Anti-Corruption in Romania: Augmentation, Aberration and Acceleration*, 22 EUR. POL. & SOC'Y 237 (2021); STANTON H. BURNETT & LUCA MANTOVANI, *THE ITALIAN GUILLOTINE: OPERATION CLEAN HANDS AND THE OVERTHROW OF ITALY'S FIRST REPUBLIC* (1998).

<sup>7</sup> See generally Fábio Kerche et al., *Os Conselhos Nacionais de Justiça e do Ministério Público no Brasil: Instrumentos de Accountability?*, 54 REVISTA DE ADMINISTRAÇÃO PÚBLICA 1334 (2020).

<sup>8</sup> Fabiano Engelmann, *The 'Fight Against Corruption' in Brazil from the 2000s: A Political Crusade through Judicial Activism*, 47 J. L. SOC'Y S74 (2020); Fabio De Sa e Silva, *From Car Wash to Bolsonaro: Law and Lawyers in Brazil's Illiberal Turn (2014–2018)*, 47 J. L. SOC'Y S90 (2020).

politically motivated prosecutions.<sup>9</sup> Also, comparisons between the three have been drawn, in particular between the Italian and Brazilian campaigns.<sup>10</sup> While I agree with the authors that the campaigns have much in common in terms of their emergence, development, and result, as well as that they produced significant challenges to the overall balance between the branches of government within the countries, I feel they have been underexplored from a theoretical standpoint.

Motivated by a desire to fill this gap and inspired by the approach of professors Garoupa and Ginsburg to the matter of judicial reputation,<sup>11</sup> I treat these campaigns in this paper as quests for judicial reputation.<sup>12</sup> In the following section, I introduce the notion of judicial reputation, explaining the development of this concept. Subsequently, I introduce the three anticorruption campaigns, introducing the specific contexts in which they have occurred, the ambient of corruption, and a succinct description of their main characteristics, in the sense of both the behavior of judicial institutions and the existence of corrupt networks within the three societies. In this part, I attempt to draw a list of elements that belong to the concept of judicial reputation, and I explain their existence in all three of the jurisdictions surveyed. In so doing, I expand the notion of judicial reputation, demonstrating that it may be used to explain the behavior that has led not only to specific policies and court decisions but also to a series of judicial actions described as anticorruption campaigns. This is followed by a discussion of explanatory approaches. In this section, I argue that the application of the theory of judicial reputation as the explanans for the development of campaigns leads to a more nuanced and holistic explanation of the campaigns compared to the other legal theoretical approaches used by other authors, such as the legal culture or path dependency theory. In addition, I note the useful

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<sup>9</sup> DAVID CLARK, FIGHTING CORRUPTION WITH CON TRICKS: ROMANIA'S ASSAULT ON THE RULE OF LAW (2017); CRISTIANO ZANINE MARTINS ET AL.,: LAWFARE: UMA INTRODUÇÃO (2019); MATTIA FELTRI, NOVANTATRÉ: L'ANNO DEL TERRORE DI MANI PULITE (2016).

<sup>10</sup> Alina Mungiu-Pippidi, *Explaining Eastern Europe: Romania's Italian-Style Anticorruption Populism* 29 J. DEMOCRACY 104 (2018).

<sup>11</sup> NUNO GAROUPA & TOM GINSBURG, JUDICIAL REPUTATION: A COMPARATIVE THEORY (2015).

<sup>12</sup> The argument that judicial reputation had to do with the anticorruption campaign in Italy has been made in passing by Garoupa and Ginsburg, *supra* note 11, at 189 and in LUCIA MANZI, THE EFFECTIVE JUDICIAL PROSECUTION OF SYSTEMIC POLITICAL CORRUPTION (2018) (Ph.D. dissertation, University of Notre Dame) (ProQuest), but without exploration of how the particular view of judicial reputation drove the judges and prosecutors to the campaign.

conclusions that may be drawn from some of these approaches concerning the design of the judicial systems and the anticorruption campaigns as such.

## II. THE THEORY OF JUDICIAL REPUTATION

### A. History

Judicial reputation was a concept that originated within the U.S. legal system. As the courts relied on precedents to justify their decisions, it was observed that not all sources of precedents were viewed in the same way by the judges: some were cited more often than others. Thus, in 1936, Mott introduced the concept of judicial reputation as a synonym for judicial influence. According to him, judicial reputation correlated to the number of citations of one judge by other judges.<sup>13</sup> In a system in which the promotion of judges was based on their reputations as well as on their political orientations, citations could be understood as legal capital, a source of prestige and privilege to those recognized as leading voices of the judiciary. Furthermore, reputation can also predict the outcome of the decisions of the courts in a specific group of cases<sup>14</sup> and might be based not necessarily only on what the judges decide but also on what they refrain from deciding or considering.

The gradual evolution of transnational courts, such as the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR), represents an excellent illustration of this. For both courts, a fitting example may be a desire to preserve themselves from what might be perceived as an unnecessary overreach in judicial decision-making. This is what prompted the ECtHR to adopt a margin of appreciation doctrine that limits its own exercise of jurisdiction in matters that are to be left to the national judicial systems of the Council of Europe (CoE) member states to decide.<sup>15</sup> In the case of the ICJ, this reputation may, for example, explain its decisions concerning the jurisdictional

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<sup>13</sup> Rodney L. Mott, *Judicial Influence*, 30 AMER. POL. SCI. REV. 295 (1936).

<sup>14</sup> Gerard S. Gryska, et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143 (1986) (explaining how this mechanism worked concerning sex discrimination cases).

<sup>15</sup> Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT. L. & POL. 843 (1999) (explaining how the search for a consensus within the ECtHR and the court's rejection to act as a supranational voice of rationality and morality may be harmful in the long run).

immunities of the state where the Court sought to highlight the importance of non-legal options for resolution of the case.<sup>16</sup> In the U.S. legal system, for example, the reputations of Supreme Court Justices Cardozo and Frankfurter differed greatly: while the first was built on rhetorical strength applied to decision-making, the latter was built on restraint.<sup>17</sup>

Judge Richard Posner explored judicial reputation as one of the key topics of his work, seeking to connect it to the general law and economics that he used in his legal analysis and, in particular, the analysis of judicial behavior. Famously, Posner built on the previous concept of judicial reputation to define judges as rational actors who seek to maximize the utility of the judicial function.<sup>18</sup> However, even for him, fame and reputation were strongly connected, with the latter also being a prominent feature of extraordinary judges.<sup>19</sup>

Judicial reputation originated within the common law system, where judges were appointed at the mid-stages or later stages of their careers based on their merits. When a judge or prosecutor was appointed, his prior work and his leanings toward certain interpretations of the law were the decisive factors that guided the decision of the legislator or other state organ regarding the appointment.<sup>20</sup> In contrast, in civil law jurisdictions, reputation was less important, as the vast majority of the judges were career-based judges who would enter the judiciary at the very beginning of their career, usually on the basis of a rigorous exam that would be administered after they passed their bar exams.<sup>21</sup> These judges would then gradually climb the ladder of the judiciary. The

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<sup>16</sup> For a critique of this stance, see GIANLUIGI PALOMBELLA, *Theory, Realities and Promises of Inter-Legality*, in INTER-LEGALITY 375 (Jan Klabbers & Gianluigi Palombella, eds., 2019). For an overview of the case, see The International Court of Justice, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), <https://www.icj-cij.org/en/case/143>.

<sup>17</sup> Mark B. Rotenberg, *Politics, Personality and Judging: The Lessons of Brandeis and Frankfurter on Judicial Restraint*, 83 COLUM. L. REV. 1863 (1983) (reviewing BRUCE ALLEN MURPHY, THE BRANDEIS/FANKFURTER CONNECTION (1982); H.N. HIRSCH, ENIGMA OF FELIX FRANKFURTER (1981)).

<sup>18</sup> Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 14 (1993).

<sup>19</sup> Michael H. Cardozo, *Judicial Reputation Evaluated: The Cardozo Instance*, 12 CARDOZO L. REV. 1915, 1917 (1990).

<sup>20</sup> For the uses of judicial reputation in predicting appointments, see Thomas J. Miceli & Metin M. Coşgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31 (1994).

<sup>21</sup> Garoupa & Ginsburg, *supra* note 11, at 28–35.

differences between the common law and civil law systems bring about a difference in the consideration and understanding of the concept of reputation. For the merit-based appointments of common law jurisdictions, the practice of issuing separate opinions was and still remains important as “they undercut the idea of a homogenous, uniform, bureaucratic judiciary.”<sup>22</sup> Unlike this approach on merit and diversity, for the career-based appointments of the civil law jurisdictions, the individual opinions of the judges mattered less, as the appointments were much less based on the personality of the judges or their political leanings. Further, in civil law countries, the conformity of individual judges with the opinions of the supreme judicial bodies (usually, the supreme courts) mattered much more as a factor in the decisions on the quality of the judicial decision-making by an individual judge or prosecutor.<sup>23</sup>

Garoupa and Ginsburg build on the previous development of the concept of reputation developed by U.S. authors, but their ambitions for the concept go far beyond what was stated previously. They use judicial reputation “to explain how judges respond to the incentives provided by different audiences and how legal systems design their judicial institutions to calibrate the locally appropriate balance between audiences.”<sup>24</sup> First, they want their concept of reputation to expand beyond the borders of common law countries. Second, they have taken judicial reputation as a concept already well developed in U.S. law and academia, turning it into a central concept that explains important features of the functioning of the judicial branches in different countries. For Garoupa and Ginsburg, reputation explains compliance with the decisions of the judiciary, in which case reputation matters, as the judiciary “has no influence over either the sword or the purse,”<sup>25</sup> meaning they lack the prerogatives of operating a budget and mobilizing the police and the army, which the other two branches possess. Compliance with the decisions of the courts is thus derived from reputation.<sup>26</sup> Also, the concept of reputation explains the importance of the perceptions of both judges and candidates for judicial positions regarding the quality of the judicial system itself. Judges, as much as other professionals, need to believe in the qualities of the judicial system of which they are a part. The system itself should be interested in

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<sup>22</sup> *Id.* at 31.

<sup>23</sup> *Id.* at 30–31.

<sup>24</sup> Tracey E. George & G. Mitu Gulati, *Courts of Good and Ill Repute: Garoupa and Ginsburg's Judicial Reputation: A Comparative Theory*, 83 U. CHI. L. REV. 1683, 1684 (2016).

<sup>25</sup> THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (Gideon ed., 2001).

<sup>26</sup> Garoupa & Ginsburg, *supra* note 11, at 24–25.

the ideas that the judges have about it, as a system with a bad reputation will attract bad candidates, including those seeking personal enrichment or to indulge their laziness.<sup>27</sup> Channeling legal philosopher Ronald Dworkin, Garoupa and Ginsburg claim that judicial reputation explains the team production of the judiciary, the understanding that no holder of a judicial office operates alone but is akin to the writer of a serial novel.<sup>28</sup> When they talk about reputation, they do not mean just the reputation of an individual judge or a court but also the reputation of the judiciary as a whole; they distinguish between individual and collective reputation.<sup>29</sup>

For these reasons, judges' and prosecutors' reputations are shaped not only by their behavior and their conformity with institutional and operational independence, but also by the views of their audience. Garoupa and Ginsburg define the 'audience' as the judicial councils, the judges of the higher courts, the wider legal community, and the general public.<sup>30</sup> Based on this classification, we differentiate between the legal and political audience, which may be domestic or international.<sup>31</sup> The internationality of the audience became important as a factor, as the interaction of legal practitioners and scholars around the world has intensified since 1990, fueled by the rise of globalization. Ginsburg and Garoupa see this development as primarily driven by the rise of citations of foreign judgments in national cases and the emergence of transnational networks of judicial councils and judicial associations.<sup>32</sup> Numerous posts and offices created in transnational and international judiciaries provided career opportunities that motivated judges to build their reputations within national systems so that they might progress more easily to these positions.<sup>33</sup> Meanwhile, consideration of the domestic audience primarily involves domestic public opinion. This means that, when taking action, judges will seek to play to domestic and international audiences to improve their personal reputations. Moreover, these actors will not abide only by the three aforementioned constraints on their work, but they will seek creative ways to conform to the principles by which they are bound when playing to the interests of domestic and international audiences.

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<sup>27</sup> *Id.* at 82.

<sup>28</sup> *Id.* at 24.

<sup>29</sup> *Id.* at 22.

<sup>30</sup> *Id.* at 60 (explaining that judges may want to impose their own visions of justice).

<sup>31</sup> *Id.* at 141–66.

<sup>32</sup> *Id.* at 171.

Despite judicial reputation expanding to encompass different legal systems and their features, Garoupa and Ginsburg simply define judicial reputation as “the stock of assessments about the actor’s past performance.”<sup>33</sup> They also acknowledge that judicial reputation is linked to judicial independence. Regardless of the legal culture or legal system in which they operate, judges universally portray themselves as impartial and nonpartisan. Yet, judicial reputation does not end with independence. Instead, judicial reputation encompasses behavior that touches upon all the concepts previously mentioned.

However, in applying the theory of judicial reputation to civil law systems, Garoupa and Ginsburg encounter a problem. Namely, from a more formal and traditional point of view, judges and prosecutors in these systems depend primarily on three things: i) the disciplinary framework guiding their work, ii) the application of legal reasoning to the cases they adjudicate or lead and the attitudes that the appellate courts or international and transnational courts will take toward their decisions, and iii) the scope of duties entrusted to them by the constitution and the laws.<sup>34</sup> Granted, the disciplinary framework and legal reasoning are both subject to interpretation that requires specialist knowledge of how the legal systems function. Decisions of the appellate courts, while sometimes relevant for judges’ progress in the systems where their promotion depends on the quality of decisions measured as conformity with the judgments of the appellate courts, are not necessarily grounds for disciplinary action—let alone dismissal.<sup>35</sup> Additionally, in the ordinary functioning of the legal system, we rarely see judges removed from positions of power and questioned before the public on their actions, just as we rarely see judges influencing the media and explaining their actions. This is especially true for civil law jurisdictions in which, according to the old French maxim, “the

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<sup>34</sup> *Id.* at 15.

<sup>35</sup> Cf. John O. Haley, *The Civil, Criminal and Disciplinary Liability of Judges*, 54 AM. J. OF COMP. L. 281 (2006) (presenting a comparative overview of accountability of judges in the United States).

<sup>36</sup> See Katarzyna Gajda-Roszczynialska & Krystian Markiewicz, *Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland*, 12 HAGUE JOURNAL ON THE RULE OF LAW [H.J.R.L.] 451 (2020) (Neth.) (explaining how the Polish government promoted disciplinary sanctioning of judges that was often based on their views concerning the legitimacy of changes that the government made to the legal system).

judge is the silent interpreter of the law.”<sup>36</sup> All of this creates a problem when applying judicial reputation to civil law systems.

To address this problem of applicability of their theory, Ginsburg and Garoupa first provide evidence that the hybridity of the existing legal systems is becoming a widespread feature of their design and that “clear” systems no longer exist.<sup>37</sup> However, and more importantly, judicial councils have emerged in many civil law jurisdictions as the primary bodies protecting judicial self-governance and independence.<sup>38</sup> Ginsburg and Garoupa view these bodies as mediators between judges and society that implement judicial reputation into the design of legal systems.<sup>39</sup> In a wider frame, society views judges as their agents, a view significantly promoted in U.S. literature of judicial relationship from an economic analysis of law standpoint.<sup>40</sup>

It is not the task of this paper to address the principal–agent theory or the law and economics approach to the judiciary in its entirety. It will suffice to say that when we apply the principal–agent model to existing judicial systems, we observe that judges and prosecutors might be understood as agents entrusted with the task of being, respectively, society’s arbiters and prosecutors of crimes. The principal in this case is society, the citizens of the state whose interest in an independent judicial system resolves their disputes and promotes order and fairness, as the judiciary interprets. The tension between judges and prosecutors as the agents and society as the principal may emerge because of the asymmetry of information, which prevents society from having a clear oversight of their action, leading to the famous “Who guards the guardians?” dilemma.

### *B. The Judicial Councils in Italy, Brazil, and Romania*

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<sup>37</sup> See generally JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA (4th ed. 2018) (presenting a comparative overview of civil law systems).

<sup>38</sup> Garoupa & Ginsburg, *supra* note 11, at 50, 53.

<sup>39</sup> See Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 GER. L. J. 1257 (2014) (arguing that councils are instrumental in preventing accountability of judges).

<sup>40</sup> Garoupa & Ginsburg, *supra* note 11, at 59–60.

<sup>41</sup> See Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535 (2011).

Generally, all judiciaries tend to view themselves as independent; no judiciary prides itself on being subservient to the legislature or executive. As judicial independence allows the judiciary to service society as an independent arbiter and act as a constraint on the power of the executive and legislative branch,<sup>41</sup> it becomes necessary for the judiciary to be organized in such a way to perform these tasks with little or no interference while remaining connected to the citizens in whose name the tasks are carried out. However, unlike legislators, who are usually elected directly, judges and prosecutors, generally, are not appointed by citizens.<sup>42</sup> Instead, judges are usually appointed either by the executive (usually the justice ministry or a president), parliaments, independent judicial councils, or a mix of these.<sup>43</sup> In jurisdictions that are the subject of this work, the role of selection and appointment of judges and prosecutors to their positions has been granted to the judiciary and, in the case of Brazil, prosecutorial councils. The role of these councils is not merely constitutional (defense of the independence of judges) and technical (participation in the appointment of judges and preparation of the budget for judicial institutions) but also that of a mediator between the expectations of the society and the judges.<sup>44</sup> In the following section, we will see what that meant for the different institutional setups in the three countries of our case study.

Italy established one of the first judicial council institutions in their 1947 Constitution.<sup>45</sup> The Supreme Council of the Judiciary (Consiglio Superiore della Magistratura, CSM), was set up in 1958 and tasked with securing the independence of judges from political influence.<sup>46</sup> Although the original idea of an independent, self-

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<sup>42</sup> See Hamilton, *supra* note 25, at 235, 238.

<sup>43</sup> Notable exceptions to this rule existed in traditional societies and still exist in some jurisdictions in the United States.

<sup>44</sup> See Pablo Castillo-Ortiz, *The Politics of Implementation of the Judicial Council Model in Europe*, 11 EUR. POL. SCI. REV. 503 (2019) (U.K.) (identifying the different institutional setups of judicial governance in Europe).

<sup>45</sup> Garoupa & Ginsburg, *supra* note 11, at 105.

<sup>46</sup> While judicial councils exist within common law systems, their role are not equal to judicial councils developed after the Italian model. See John J. Parker, *The Judicial Office in the United States*, 23 N.Y.U. L. Q. REV. 225 (1948).

<sup>47</sup> See Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMPAR. L. 103, 106–07 (2009).

governing body for the Italian judiciary dates back to the 1920s,<sup>47</sup> the emergence of the model codified in the Italian Constitution of 1947 was inspired by the democratic constitution-making that occurred immediately following the defeat of fascism in World War II and a clear political will presented to define Italy as a democratic country.<sup>48</sup> With its membership derived primarily from the judiciary (two-thirds of the members) and with remaining members appointed by the parliament (also with the inclusion of the President of the State and the Supreme Court of Cassation since 1975), the body was tasked with securing the self-governance of the judicial branch and breaking the political involvement in the work of the judiciary.<sup>49</sup> As described by Violante, the initial demands from the judges in the constitutional drafting phase was that only members of the judiciary sit in this council; this was rejected as it was felt that a lack of participation from any other branch of government would make the judiciary too independent and disconnected from the overall system of power distribution in the country.<sup>50</sup>

It proved difficult to break political involvement in judicial matters. Despite a firm constitutional commitment to democracy, post–World War II Italy was highly polarized between the conservative Christian Democrat party (Democrazia Cristiana, DC) and the Communist Party (Partito Comunista Italiana, PCI). This political polarization had two main contradictory effects on the judiciary. On the one hand, as witnessed in particular during the so-called “years of lead” in the 1970s and early 1980s, which saw many illegal, terrorist, and organized crime activities carried out in Italy, the judiciary was under strong pressure to be complicit.<sup>51</sup> On the other hand, both main political actors in the country played within the democratic field—counting on the judiciary’s independence not because they were committed to the rule of law, but because they

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<sup>47</sup> See Carlo Guarnieri, *Magistratura e Politica: Il Caso Italiano [The Judiciary and Politics: The Italian Case]*, 21 IT. J. POL. SCI. 3, 15 (1991).

<sup>48</sup> See generally LUCIANO VIOLANTE, MAGISTRATI [MAGISTRATES] 3–41 (It.) (2009) (explaining the institutional evolution of the Italian judiciary).

<sup>50</sup> See Patrizia Pederzoli & Carlo Guarnieri, *The Judicialization of Politics, Italian Style*, 2 J. MOD. ITAL. STUD. 321, 329 (U.K) (1997).

<sup>51</sup> Violante, *supra* note 49, at 26.

<sup>52</sup> Romano Canosa & Amedeo Santosuosso, *Il Processo Politico in Italia [Political Process in Italy]*, 23 CRITICAL DEL DIRITTO 9 (1982) (explaining the choice of the Italian state to use primarily the judicial means in countering the wave of terrorism that the “years of lead” campaign brought).

counted on the realistic possibility that they could find themselves out of power and that the judiciary, if not independent, could easily be weaponized against them.<sup>52</sup> Thus, the parties were willing to maintain judicial independence because it preserved political competition and prevented the creation of a one-party dictatorship. As such, the intense political competition in Italy did not diminish but, rather, contributed to the independence of the judiciary.

This can be attributed to two specific institutional features. First, the organization of the Italian judges in different judicial associations that have greatly contributed to a move from the restrained formal independence granted by the 1958 establishment of the CSM to a real independence.<sup>53</sup> Despite these associations being based on their political leanings, they have been instrumental in making the position of judges stronger and building more trust within the judiciary itself. Belonging to an association meant not only a chance to stand up for the rights of judges but also to cultivate stronger contacts and work on expression and strengthening of professional culture.<sup>54</sup> Second, the role of the prosecutors (pubblico ministero) who, being a part of the judiciary, have retained institutional independence over the direction of the criminal investigations that was superior to those of their colleagues in most other democratic European jurisdictions.<sup>55</sup> This reduced their chance of instrumentalization by either the organized crime networks or the security sector, which both operated in the country in sometimes intertwined roles.<sup>56</sup>

From the late 1970s, the judicial councils of Italy became blueprints of a sort for judicial councils in other parts of the world, such as Spain, Portugal, and Brazil. In the 1990s, the Italian model was accepted in an even wider fashion as a part of the efforts of the World Bank, European Union, and judicial non-governmental

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<sup>53</sup> See Matthew Stephenson, *When the Devil Turns... The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003) (arguing that political actors do not attempt to capture the judiciary because they count on the balance of power produced by electoral outcomes); see also, Violante, *supra* note 49, at 47 (expressing skepticism of the Italian left toward the judiciary, which they viewed as conservative).

<sup>54</sup> See ANDREA CAPUSSELA, THE POLITICAL ECONOMY OF ITALY'S DECLINE 27 (2018).

<sup>55</sup> Manzi, *supra* note 12, at 92–95.

<sup>56</sup> Guarneri, *supra* note 48, at 142–43.

<sup>57</sup> See generally ALEXANDER STILLE, EXCELLENT CADAVERS: THE MAFIA AND THE DEATH OF THE FIRST ITALIAN REPUBLIC (1996) (describing the life of magistrate Giovanni Falcone, who spent his career trying to prosecute the Mafia, who then assassinated him for these efforts).

organizations to promote democracy and the rule of law.<sup>57</sup> Just as post–World War II Italy did, Brazil and Romania, which have used it as an inspiration,<sup>58</sup> have undergone important transitions: dictatorships that rested on authoritarian, and even fascist, traditions have fallen.

The establishment of a judicial council in Brazil in the era of military dictatorship that conducted serious and widespread abuses of human rights was a move to legitimize the regime before its international critics.<sup>59</sup> In 1988, after a democratic transition, the council was suspended; it was understood to be of little practical use as it was controlled by many of the cadres loyal to the dictatorship. In 2004, however, the judicial council was reinstated as the country attempted to solidify the judicial independence that took root between the mid-1980s and that time.<sup>60</sup> The prosecutorial council was also created, with the main difference being that the president of the country retained the right to appoint the chief prosecutor, with the proviso that the candidate was one nominated by the prosecutorial council.<sup>61</sup> Overall, Brazilian public prosecutors were regulated as a hybrid institution; appointed by the Parliament at the proposition of the executive, they were not part of the judiciary, as their Italian and Romanian colleagues were, yet they retained significant investigative and discretionary powers that considerably

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<sup>58</sup> Today, more than 60% of countries in the world have some sort of a judicial council that ensures judicial independence. However, in the late 1980s, this percentage was only 10%, and when the council was set up in 1958, there were few large jurisdictions (such as France) outside of the U.S. that had that model. But, compared to France, the Italian judiciary was much more insulated from political control. See Garoupa & Ginsburg, *supra* note 47, at 106–107; see also LINN A. HAMMERGREN, DO JUDICIAL COUNCILS FURTHER JUDICIAL REFORM? LESSONS FROM LATIN AMERICA 28 (2002) (discussing similar experiences in Latin America).

<sup>59</sup> I stress that the full replication of the Italian model was not done in either of the countries; rather, the elements of the Italian model served as a basis for its development by domestic and international legal experts involved in this undertaking. See Michal Bobek & David Kosar, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 GER. L. J. 1257, 1268 (2014).

<sup>60</sup> Garoupa & Ginsburg, *supra* note 11, at 115.

<sup>61</sup> *Id.* at 116.

<sup>62</sup> Fábio Kerche et al., *The Brazilian Councils of Justice and Public Prosecutor's Office as Instruments of Accountability*, 54 REVISTA DE ADMINISTRAÇÃO PÚBLICA 1334 (2020) (explaining the institutional evolution of the judicial and prosecutorial councils in Brazil).

expanded beyond the prescriptions of the 1988 Constitution.<sup>62</sup> Specifically, the Brazilian prosecutors were free to create special investigatory teams and have greatly profited from the wide discretion given to them concerning the usage of plea bargain agreements.<sup>63</sup> Thus, while using a somewhat different configuration from the Italian and Romanian prosecutors, the institutional independence and the powers of the Brazilian prosecutors were on an equal footing. So too, the proliferation of the association of judges and prosecutors allowed these two groups to specialize and advocate for those issues that they considered relevant and related to their political goals.<sup>64</sup>

In Romania, the judicial council was created in 1991 following the adoption of a new constitution that took place upon the fall of the communist dictatorship of Nicolae Ceausescu and, as in Brazil, as an attempt by the new government to consolidate its international standing.<sup>65</sup> Initially following the French judicial council as its institutional model, the council was stripped of most of its powers in 1997 but, following external pressure primarily from the E.U. member states, reformed and restrengthened in 2003.<sup>66</sup> Just as in Brazil, the judicial council in Romania has conducted no vetting procedure, which has effectively meant that all the judges that were a part of one of the most totalitarian regimes of former Eastern European states have largely remained in their places.<sup>67</sup> In 2003, the role of the prosecutors who were, just as in Italy, a part of the Romanian judicial system was also reformed; some of their authority, such as that to decide on the pretrial detention of the accused, was removed from them, but their institutional independence, primarily from the Ministry of Justice, was

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<sup>63</sup> Fábio Kerche, *Ministério Público, Lava Jato E Mão Limpas: Uma Abordagem Institucional [Public Ministry, Lava Jato and Mani Pulite: An Institutional Approach]*, 105 LUA NOVA: REVISTA DE CULTURA E POLÍTICA 6 (2018).

<sup>64</sup> Marjorie Marona & Fábio Kerche, *From the Banestado Case to Operation Car Wash: Building an Anti-Corruption Institutional Framework in Brazil*, 64 DADOS: REVISTA CIÊNCIA SOCIAIS 3 (2021) (describing the effects of said changes to the role of the Public Prosecutor Office in Brazil).

<sup>65</sup> Engelmann, *supra* note 8, at S75–78.

<sup>66</sup> Marína Urbániková & Katarína Šipulová, *Failed Expectations: Does the Establishment of Judicial Councils Enhance Confidence in Courts?*, 19 Ger. L. J. 7, 2128 (2018).

<sup>67</sup> Bianca Selejan-Guțan, *Romania: Perils of a “Perfect Euro-Model” of Judicial Council*, 19 GER. L. J. 1708, 1714 (2014).

<sup>68</sup> *Id.*

strengthened.<sup>68</sup> Following the strengthening of the judicial councils, numerous judicial and prosecutorial associations formed—not so much on political grounds as on the different views of the judicial system that gradually began to emerge but took little role in the development of policy or legislation. It would only be later, when the backlash against the judiciary began, that the judicial associations began to play a prominent role in the protection of judicial independence.<sup>69</sup> Additionally, we see that the emergence in all three judicial councils was tied to the Romanistic legal tradition and democratic transition.<sup>70</sup>

### III. THE ANTICORRUPTION CAMPAIGNS

#### A. Italy (1992–2001)

Due to its high perception of corruption, Italy stood (and still stands) as an outlier to the other developed democracies of the West.<sup>71</sup> This phenomenon has intrigued researchers, who have proposed different explanations, including cultural,<sup>72</sup> criminal,<sup>73</sup> economic,<sup>74</sup> and political.<sup>75</sup> However, there is a consensus that the existence of a “market of corrupt exchanges” was one of the defining features of the Italian political and economic system of the late 1980s.<sup>76</sup> The main characteristics of a system of political corruption were a focus on securing votes through connections with organized

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<sup>67</sup> *Id.* at 1711.

<sup>68</sup> Martin Mendelski, *EU-Driven Judicial Reforms in Romania: A Success Story?*, 28 E. EUR. POL. 23, 32–33 (2012).

<sup>69</sup> Cf. Castillo-Ortiz, *supra* note 44, at 513, 515.

<sup>70</sup> See generally Miriam A. Golden & Eric C. C. Chang, *Competitive Corruption: Factional Conflict and Political Malfeasance in Postwar Italian Christian Democracy*, 53 WORLD POL. 588 (2001).

<sup>71</sup> DIEGO GAMBETTA, *Why Is Italy Disproportionately Corrupt? A Conjecture*, in INSTITUTIONS, GOVERNANCE AND THE CONTROL OF CORRUPTION 201 (Basu Kaushik & Tito Cordella, eds., 2011).

<sup>72</sup> Alberto Vannucci & Salvatore Sberna. *Mafia and Political Corruption in Italy*, in ITALIAN MAFIAS TODAY: TERRITORY, BUSINESS AND POLITICS 92 (Felia Allum et al., eds., 2019).

<sup>73</sup> See generally Capussela, *supra* note 54.

<sup>74</sup> Silvia Colazingari & Susan Rose-Ackerman, *Corruption in a Paternalistic Democracy: Lessons from Italy for Latin America*, 113 POL. SCI. Q. 447 (1998).

<sup>75</sup> See generally DONATELLA DELLA PORTA & ALBERTO VANNUCCI, THE HIDDEN ORDER OF CORRUPTION (2012).

crime networks,<sup>77</sup> mass evasion of the implementation of the political party financing law, and its misuse in connection with awards in public procurement.<sup>78</sup> This market of corrupt exchanges had its own legal interpretation before the judicial bodies, that of the “ambient extortion” (concussione ambientale) in which the existing implicit agreements between the public administration officials allowed them to extort funds from the entrepreneurs and citizens often without any applied threat or aggression.<sup>79</sup>

The beginning of the judicial anticorruption campaign, called Mani Pulite (Clean Hands), is considered to be the arrest of an official of the PSI, Mario Chiesa, in April 1992, by the magistrates of Milan.<sup>80</sup> The arrest and Chiesa’s eventual confession led to the revelation of the illicit network of party financing that was under his control in the city of Milan.<sup>81</sup> The investigations would spread across the country and include seventy prosecutorial offices (procura), but most of the key cases would be investigated and charged by the Milanese pool of magistrates, with the magistrate Antonio di Pietro becoming the key public face of the investigations.<sup>82</sup>

The investigations into political party financing had existed in Italy before; in 1974, the magistrates in Genoa uncovered a corruption scheme that allowed domestic and international oil companies to pay bribes to Italian political parties in exchange for favorable regulation.<sup>83</sup> The revelations led to more stringent but inefficient regulation of party financing; the regulation’s design and

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<sup>76</sup> Edward Luttwak, *Italy's Ancien Régime*, 31 SOC'Y 70 (1993).

<sup>77</sup> The mass evasion of the political party financing legislation is best evidenced by the speech of then president of PSI, Bettino Craxi, who in 1993 publicly stated that most of the financing of the Italian political parties came from illicit sources. See TV Zoom Channel, *Tangentopoli Il discorso di Bettino Craxi in Parlamento nel 1992*, YOUTUBE (Feb. 17, 2012), <https://www.youtube.com/watch?v=Jud08s96QfY>.

<sup>78</sup> Tullio Padovani, *Il confine conteso: metamorfosi dei rapporti tra concussione e corruzione ed esigenze improcrastinabili di riforma* [The Disputed Border: Metamorphosis of the Relationship between Extortion and Corruption and the Urgent Need for Reform], RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 1302 (1999).

<sup>79</sup> Alberto Vannucci, *The “Clean Hands” (mani pulite) inquiry on corruption and its effects on the Italian Political System*, 8 Em. Debate, Belo Horizonte, 2, 62–68 (2016).

<sup>80</sup> *Id.*

<sup>79</sup> James L. Newell, *Magistrates Going into Politics: Antonio Di Pietro and Italy of Values*, in THE ROUTLEDGE HANDBOOK OF CONTEMPORARY ITALY 227–36 (2015).

<sup>80</sup> Capussela, *supra* note 54, at 154.

implementation incited illicit financing.<sup>84</sup> These investigations, however, gave support to the rise of the phenomenon of “attack judges,” who believed that they carried out their tasks not to protect the powerful but to affirm new societal values<sup>85</sup> and who were freed from the scrutiny of their supervisors by a process of institutional flattening that gave operational freedom to lower-level magistrates.<sup>86</sup> Interpreting their constitutional duties as carrying out the distribution of justice as a public good, the Italian magistrates of the 1970s focused on far-reaching investigations in the fields of political terrorism and organized crime, with many of them losing their lives as a result of terrorist activities or attacks by organized crime groups.<sup>87</sup>

Carried out with the same rigor, but with a different focus, Mani Pulite focused primarily on political corruption and the kickbacks (*tangenti*) that were paid by the companies to be awarded public contracts.<sup>88</sup> The newspaper called the network of kickbacks Tangentopoli (Kickback City or Bribesville), and the judicial actions against the numerous political and business figures Mani Pulite (Clean Hands).<sup>89</sup> The popularity of the judges, who received numerous letters from citizens and whose names were chanted in football stadiums, evidenced the unprecedented public support of the campaigns.<sup>90</sup>

Public support for Mani Pulite was not just a result of the unpopularity of the Italian political class. The investigations against the key actors of the Italian political class (*classe dirigente*) came after a series of high-profile Mafia investigations, which culminated in the judgment of January 1992, when the Supreme Court of Cassation sentenced some of the leading organized crime

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<sup>81</sup> Martin Rhodes, *Financing Party Politics in Italy: A Case of Systemic Corruption*, 20 W. EUR. POL. 54 (1997) (arguing that this inadequate legal framework is responsible for much of the illicit activities of Italian political parties).

<sup>82</sup> Violante, *supra* note 49, at 47.

<sup>83</sup> See generally Manzi, *supra* note 12 (arguing that this process of institutional flattening took place as an internal struggle within the judiciary over the control of the judicial council).

<sup>84</sup> Violante, *supra* note 49, at 53–55.

<sup>85</sup> Illicit party financing in Italy also had other sources and destinations, for example, the funds coming from the Soviet Union intended for the PCI.

<sup>86</sup> Gianluca Passarelli & Dario Tuorto, *The Lega Nord goes south: The electoral advance in Emilia-Romagna: A new territorial model?*, 31 POL. GEOGRAPHY 7, 419 (2012).

<sup>87</sup> Enrico Pozzi, Antonio di Pietro: *Invenzione di un Italiano*, <https://uniroma1.academia.edu/enricopozzi>.

figures to severe prison terms.<sup>91</sup> This judgment was the pinnacle of the process that crippled organized crime's grip on the Italian South and a culmination of a series of large-scale campaigns against organized crime that were faced with much resistance. Despite its successes, Mani Pulite never fully succeeded in eradicating the organizations, which retaliated by killing prominent judges and politicians, culminating in the 1992 killings of judges Falcone and Borsellino, heroic figures who had spearheaded the anti-Mafia investigations.<sup>92</sup> The public outcry against these killings was unprecedented, creating a mass citizens' constituency that demanded justice.<sup>93</sup> This citizen constituency had little faith in the other two branches of government—the executive and the legislative—and saw the actions of the Mani Pulite pool of judges as bringing legality, order, and justice into the Italian political and legal systems.<sup>94</sup>

This is not to say that the judiciary was completely insulated from the pervasive corruption and distrust that characterized the Italian political system of the 1980s. Investigations into the dealings of the secret Masonic Lodge P2 at the beginning of the 1980s uncovered seventeen magistrates among its members.<sup>95</sup> The 1987 referendum on the civil responsibility of judges for their decisions (which ultimately failed due to low turnout) also signified the distrust that the citizens had concerning the judges.<sup>96</sup> However, their overall standing was superior to that of the other two branches, and their past collective actions confirmed the good reputation that they enjoyed, strengthening the credibility of their actions.

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<sup>87</sup> Raimondo Catanzaro & Joseph Castagna, *A Watershed Year for Both Mafia and the State*, 8 ITALIAN POL. 134, 138 (1993).

<sup>88</sup> Violante, *supra* note 49, at 53–55 (listing the names of 24 Italian magistrates that were killed by organized crime groups).

<sup>89</sup> Piercamillo Davigo, *La Giubba del Re [The King's Coat]*, in INTERVISTA SULLA CORRUZIONE 98 (1998) (explaining the wide public support enjoyed by the investigative judges for their actions).

<sup>90</sup> Leonardo Morlino & Marco Tarchi, *The Dissatisfied Society: Roots of Political Change in Italy*, 30 EUR. J. POL. RSCH. 41 (1996) (explaining the dissatisfaction of the Italian citizens with the political class).

<sup>91</sup> Violante, *supra* note 49, at 91.

<sup>92</sup> For a pessimistic assessment of the Italian legal system regarding this and other developments, see Maria Rosaria Ferrarese, *Civil Justice and the Judicial Role in Italy*, 13 JUST. SYS. J. 168 (1988).

The judges seemed ready to exploit their popularity, helping to make the campaigns a public relations event of the first order and dominating the news and publications on the Italian political scene of the 1990s. The media strategy, which undoubtedly involved leaks of materials to the press<sup>97</sup> coupled with a rather liberal use of preventive detention, contributed to a wave of suicides that accompanied the campaigns, with forty-one individuals taking their lives before the judgments in their cases were reached and, in some cases, even before the investigations were ended. This led to criticisms over the use of pretrial detention for extorting charges and the use of the media campaign against the persons investigated.<sup>98</sup>

The central cases that occupied the public imagination were the trials regarding the major companies in Italy: leading car maker Fiat, the Fininvest Group owned by the wealthy tycoon Silvio Berlusconi, and Enimont, a joint enterprise between the Italian state-owned oil company ENI and the private Ferruzzi Group, which was to become one of the leading global petrochemical companies.<sup>99</sup> These plans failed to materialize, leading Enimont to be renationalized by the Italian government in 1990.<sup>100</sup> To facilitate this process, over the course of this two-year affair, at least \$94 million in bribes were paid by the Ferruzzi Group to a corrupt middleman broker, who facilitated their distribution to corrupt politicians.<sup>101</sup> These funds were used for personal enrichment as well as for party financing. The Enimont case implicated the involvement of all Italian political parties, as well as the PSI secretary general and former prime minister, Bettino Craxi,<sup>102</sup> who eventually fled the country to avoid finishing the trial in which he was ultimately sentenced for corruption.<sup>103</sup>

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<sup>93</sup> Nelken, *supra* note 4, at 110 n.21.

<sup>94</sup> See generally BURNET & MANTOVANI, *supra* note 6, (exploring the criticisms and arguments concerning the abuse of power by the Italian magistrates).

<sup>95</sup> See generally Alessandro Bonanno, et al., *Global Agro-Food Corporations and the State: The Ferruzzi Case*, 60 RURAL SOCIO. 2, 274–96 (1995).

<sup>96</sup> Silvia Colazingari & Susan Rose-Ackerman, *Corruption in a Paternalistic Democracy: Lessons from Italy for Latin America*, 113 POL. SCI. Q., 447, 451–54 (1998).

<sup>97</sup> Rhodes, *supra* note 81, at 69.

<sup>98</sup> Alessandro Bonnano, et al., *Corporate Crime in the Global Era: The Enimont Case*, 23 CRITICAL SOCIO. 63, 72 (1997).

<sup>99</sup> *Italian Ex-Premier is Declared a Fugitive*, N.Y. TIMES (July 22, 1995), <https://www.nytimes.com/1995/07/22/world/italian-ex-premier-is-declared-a-fugitive.html>.

Two years after the launch of the investigations, one-third of the lower house of the Italian parliament and one-quarter of the upper house had been under investigation together with more than two thousand former and current holders of official positions.<sup>104</sup> Going beyond illicit party financing, the campaign uncovered that the vast portions of the country's public offices effectively functioned as tax evasion mechanisms and as tools for allocation of public resources to private interests.<sup>105</sup> The campaign contributed to the demise and/or transformation of the major Italian political parties PSI, PCI, and DC, as well as the Liberal Party, and the appearance of several new actors, such as the regional Lega Nord and the Forza Italia movement of the media magnate Berlusconi.

The backlash against the campaigns was, at first, limited to legislative moves that would limit the maneuvering space for the magistrates. In 1993, an attempt was made to amend the legislation governing the immunity of members of parliament for criminal acts and, in 1994, to effectively decriminalize some illicit party financing.<sup>106</sup> The outcry of the public and the open opposition of the magistrates to both of these measures made the President of the Republic refuse to sign the former; the latter was withdrawn by the government, which was afraid of losing its public stature.<sup>107</sup> An attempt by the magistrates to introduce solutions that would make the prosecutions more efficient by combining the two criminal acts of corruption and extortion by a public official were rejected.<sup>108</sup> The inspections by the Justice Ministry into the works of the Milanese pool of judges intensified during this period and were a source of pressure by the new Berlusconi government against the judges.<sup>109</sup> Beginning in 1995, the backlash took a more personal note. Prosecutions against di Pietro and Davigo for an alleged attempt at a coup d'état started and ended in the late 1990s, with both

<sup>99</sup> Donatella Della Porta & Alberto Vannucci, *The 'Perverse Effects' of Political Corruption*, 45 POL. STUD. 516, 516 (1997).

<sup>100</sup> PIERCAMILO DAVIGO & GRAZIA MANOZZI, LA CORRUZIONE IN ITALIA: PERCEZIONE SOCIALE E CONTROLLO PENALE [CORRUPTION IN ITALY: SOCIAL PERCEPTION AND CRIMINAL CONTROL] 264 (2007) (explaining the patterns of extortion of money by public officials).

<sup>101</sup> GIANNI BARBACETTO ET AL., MANI PULITE, LA VERA STORIA 20 ANNI DOPO [MANI PULITE: THE TRUE STORY 20 YEARS LATER] 35 (2012).

<sup>102</sup> *Id.* at 44.

<sup>103</sup> Francesco Cingari, *La corruzione pubblica: trasformazioni fenomenologiche ed esigenza di riforma* [Public Corruption: Phenomenological Transformations and the Need for Reform], 20 DIRITTO PENALE CONTEMPORANEO 33, 34 (2012).

<sup>109</sup> David Nelken, *Stopping the judges*, 11 ITALIAN POL. 194, 187–04 (1996).

magistrates cleared of charges. But the trial was not without consequences, as it prevented di Pietro from maintaining the post of Minister of Public Works, a position that he was to acquire following the 1996 elections.<sup>110</sup>

These elections marked the beginning of the end for the campaign, which happened due to several factors. The first was the effect of the statute of limitations which led to the expiration of the time within which legal actions could have been brought against a person, resulting in acquittals.<sup>111</sup> The second was the perception of the magistrates themselves that they needed legislative and logistical support—which was lacking—and that their actions were supported only when directed against the political establishment. That is, the Milanese pool judges had much greater ambitions than just to prosecute the individuals responsible for political corruption and change the corruption-related legislative framework; they viewed their task as bringing about a moral rejuvenation of society and a change of its political class.<sup>112</sup> Building on their popularity, they sought to mobilize media support for their actions, as evidenced by their strong media presence and outreach.<sup>113</sup> However, in the view of the magistrates, the overall societal perception of their actions shifted from support to a perception that they wanted to change the way of life of the country, and this belief led to a decrease of interest and support for their actions.<sup>114</sup> After the 2001 elections and the victory of Silvio Berlusconi—one of those investigated over the course of Mani Pulite, both for bribery and for the activities of his media empire, Fininvest—the attacks against the judges intensified, and the media became polarized regarding their efficiency.<sup>115</sup> The trial of Giulio Andreotti, the former prime minister and one of the leading Italian political figures of the postwar period, which ended with an acquittal in 2003, could be considered the final episode of Mani Pulite.

#### *B. Brazil (2014–2020)*

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<sup>104</sup> See generally Simon Parker, *The Government of the “Ulivo”*, 12 ITALIAN POL. 125, 127 (1997).

<sup>105</sup> Alberto Vannucci, *The Controversial Legacy of ‘Mani Pulite’: A Critical Analysis of Italian Corruption and Anti-Corruption Policies*, 1 BULL. OF ITALIAN POL. 242, 252 (2009).

<sup>106</sup> Violante, *supra* note 49, at 170.

<sup>107</sup> Della Porta, *supra* note 4, at 14–16.

<sup>108</sup> Vannucci, *supra* note 106, at 250.

<sup>109</sup> *Id.*

Following its transformation from a military dictatorship that lasted from 1964 to 1985 to a democracy—which was formally established with the passing of a new Constitution in 1988—the democratic development of Brazil followed a slow but gradual path of entrenchment of democratic institutions.<sup>116</sup> The Brazilian judiciary was a part of this process. As we described earlier, its judicial council, established in 1979, was dissolved in 1988, as it was perceived as untrustworthy. Its refoundation in 2004 was to be a guarantee of a more independent and freer judiciary and may be seen in a wider context as an attempt to consolidate a judicial branch of government that would be more accountable and limit the misuses of public power that often appeared in the forms of corruption, with which all governments of Brazil had struggled since the return to democracy in 1985.<sup>117</sup> The corruption scandals, which involved public companies, members of the National Congress and government, and political clientelism in the form of vote buying, were pervasive.<sup>118</sup> Much of this was a result of a complex federal system that, coupled with the absence of a strong democratic tradition, led many legislators to switch their allegiances from one party to the other, relying on their own clientelist networks among the voters to support them.<sup>119</sup> The operation of these networks was facilitated by the Brazilian presidential system, in which the presidents, while strongly positioned in the constitution, in practice rarely enjoyed the parliamentary majority needed to govern. This, in turn, facilitated the creation of numerous political parties, a higher number than in most democratic countries in the world.<sup>120</sup>

The Brazilian judiciary acted to prosecute some of the perpetrators of illegal political financing; in 2006, more than fifteen legislators were tried and convicted for trading their votes in support of government initiatives as a part of the Mensalão

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<sup>110</sup> See generally Glenda Mazarobba, *Between Reparations, Half-Truths and Impunity: The Difficult Break with the Legacy of the Dictatorship in Brazil*, 13 SUR-INT'L J. HUM. RTS. 7 (2010).

<sup>111</sup> Benjamin Fogel, *Brazil: Corruption as a Mode of Rule*, 51 NACLA REP. ON THE AMERICAS 153 (2019) (explaining the history of political corruption in Brazil).

<sup>112</sup> See generally Simeon Nicter, *Vote Buying in Brazil: From Impunity to Prosecution*, 56 LATIN AM. RSCH. REV. 3 (2021).

<sup>113</sup> Scott W. Desposato, *Parties for Rent? Ambition, Ideology, and Party Switching in Brazil's Chamber of Deputies*, 50 AM. J. OF POL. SCI. 62 (2006).

<sup>114</sup> *Id.*

scandal.<sup>121</sup> This scandal helped kickstart a mini citizen-led anticorruption campaign that led to the adoption of legislation preventing electoral participation for those individuals with a criminal record and the passage of the freedom of information law.<sup>122</sup>

The inspiration for what was to become the Brazilian judicial anticorruption campaign came from Italy. In 2004, Judge Sergio Moro, one of the leading figures of the Lava Jato trials, wrote an article in which he openly advocated for a similar campaign to happen in Brazil.<sup>123</sup> Portraying a somewhat idealized view of Mani Pulite, Moro, relying on the work of Della Porta and Vanucci, emphasized the key role that the Italian judicial council, the CSM, had had in the development of the aforementioned Italian “attack judges,” who viewed themselves not as employees of the state but as agents of society. More than just the cadres, Moro was also inspired by what he viewed as the key elements for the success of the strategy—the use of preventive detention—which was, for him, instrumental in obtaining confessions.<sup>124</sup> He understood their use as a demonstration of the famous logic of the prisoner’s dilemma—“If I do not confess, others will confess”—in practice.<sup>125</sup> Indeed, the use of pretrial detention and plea bargaining in the Lava Jato campaign was one of the fundamental features of the prosecutorial strategy that focused on the gathering of evidence and breaking the “corrupt pact” between the bribers and the bribees. Additional sources of inspiration for the prosecutors were the doctrines borrowed from international criminal law<sup>126</sup> that were focused on

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<sup>115</sup> Timothy J. Power & Eric D. Raile, *Coalitional Presidentialism and Side Payments: Explaining the Mensalão Scandal in Brazil* 4-5 (Univ. of Oxford Brazilian Stud., Programme, Occasional Paper 03-08, 2008) (explaining the coalition governments and bargaining strategies of the political actors as the reasons behind the scandal).

<sup>122</sup> Gregory Michener & Carlos Pereira, *A Great Leap Forward for Democracy and the Rule of Law? Brazil’s Mensalão Trial*, 48 J. OF LATIN AM. STUD. 477, 483 (2016) (explaining the effects that the prosecution of legislators and mediators in the corrupt activities had on the democratic development of Brazil and the accountability of public officials).

<sup>123</sup> Sergio Moro, *Considerações sobre a operação mani pulite* [Considerations on the Mani Pulite Operation], 8 REVISTA CEJ 56 (2004).

<sup>124</sup> *Id.* at 58.

<sup>125</sup> *Id.*

<sup>126</sup> Marona & Kerche, *supra* note 64, at 24–25; see also Neha Jain, *The Control Theory of Perpetration in International Criminal Law*, 12 CHI. J. INT'L L. 159, 165–66 (2011) (explaining the Claus Roxin’s theory of criminal responsibility of indirect perpetrators in international criminal law).

the establishment of responsibility of the individual perpetrators that were operating the criminal network.

The Lava Jato campaign started in 2014 when an inquiry into the operations of a carwash in Brasilia uncovered a network of black market currency dealers, one of whom was linked to the executive of the state-owned oil company Petrobras.<sup>127</sup> The site of the carwash inspired the federal police, and subsequently the media, to name the initial investigation Lava Jato (Portuguese for carwash).<sup>128</sup> The investigation of the corrupt Petrobras official led to further revelations of a corrupt network within that company that distributed contracts of inflated value to firms, receiving in return kickbacks that were distributed to political parties. The kickbacks followed a scheme like those uncovered in Italy in the 1990s; the parties in power were allocated a certain percentage from the illicit gains under their share of participation in power at the national level.<sup>129</sup> From Petrobras, the investigations led to Odebrecht, the largest construction company in South America (and a frequent subcontractor of Petrobras), which was found to have a department called the Division of Structured Operations, which had overseen the facilitation of payments of \$828 million for domestic and transnational bribery.<sup>130</sup> Having facilitated some of the payments using U.S. dollars, the company fell under the jurisdictional nexus of the FCPA, which allowed the U.S. Department of Justice (DoJ) and the Securities and Exchange Commission (SEC) to bring charges against the company for the acts of corruption.<sup>131</sup> The U.S. DoJ law enforcement agencies and courts fined Odebrecht \$2.6 billion for the breaches of U.S. law that took place over the course of the company's activity in the first and second decade of this century.<sup>132</sup> The fines against the company in Brazil were made on

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<sup>127</sup> Lagunes, *supra* note 5, at 3.

<sup>128</sup> Fausto de Assis Ribeiro, *The Accidental Trojan Horse: Plea Bargaining as an Anticorruption Tool in Brazil* 9 (Int'l Inst. of Soc. Stud., Working Paper No. 627, 2017).

<sup>129</sup> Elizangela Valarini & Markus Pohlmann, *Organizational Crime and Corruption in Brazil: A Case Study of the “Operation Carwash” Court Records*, 11 INT'L. J. L., CRIME & JUST. 59 (2019).

<sup>130</sup> Fergus Shiel & Sasha Chavkin, *Bribery Division: What is Odebrecht? Who is Involved?*, INT'L .CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Jun 25, 2019), <https://www.icij.org/investigations/bribery-division/bribery-division-what-is-odebrecht-who-is-involved/>.

<sup>131</sup> See Nicolás Campos et al., *The Ways of Corruption in Infrastructure: Lessons from the Odebrecht Case*, 35 J. ECON. PERSP. 171, 172 (2021).

<sup>132</sup> *Id.* at 185.

the basis of so-called leniency agreements that allowed the company to evade bankruptcy and closure in exchange for revelations of all the communication and documents related to corrupt activities.<sup>133</sup> The disclosures of these documents led to a chain of prosecutions that began in the countries of South America.<sup>134</sup>

Spectacular as they were, the events on the international front did not overshadow those in Brazil, where revelations of corruption only exacerbated the crisis of trust in the political leaders. After more than a decade of economic growth and a reduction in poverty and inequality, Brazil faced an economic recession that triggered protests in the country's largest cities.<sup>135</sup> President Dilma Rousseff, winner of the 2014 elections, was impeached in 2016, and an unstable political climate brought on by her impeachment and the recession led to the election of President Bolsonaro in 2018.<sup>136</sup> This would have hardly been possible without the indictment and judgment in 2017 of Lula, the former president and the frontrunner for the 2018 presidential elections. It was this event, as we will later see, that triggered the backlash against the campaign.

The actions of judges and prosecutors in Brazil were focused not only on the enforcement of legal norms. They saw Lava Jato as an opportunity to further elevate the status and relevance of anticorruption through legislative changes and as an opportunity to break with the immoral, corrupt practices of the past. On the legislative front, prosecutors have proposed a wide range of legislation to strengthen the anticorruption framework and limit the due process rights of accused individuals.<sup>137</sup> The side of moral rejuvenation was seen in the initiative to use the monetary penalties incurred on the companies and individuals recovered by the U.S. DoJ—not as income for the U.S. or Brazilian budget but as a donation to the Lava Jato Foundation for use in wider societal

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<sup>133</sup> Raquel de Mattos Pimenta & Otavio Venturini, *International Cooperation and Negotiated Settlements for Transnational Bribery: A Study of the Odebrecht Case*, 17 REVISTA DIREITO GV 1, 8 (2021) (explaining the functioning of this legal mechanism in Brazil).

<sup>134</sup> Shiel & Chavkin, *supra* note 124.

<sup>135</sup> Thomas J. Vicino & Anjuli Fahlberg, *The Politics of Contested Urban Space: The 2013 Protest Movement in Brazil*, 39 J. URB. AFF. 1001, 1001–03 (2017) (explaining the recession and dissatisfaction with PT rule as triggers for the protests).

<sup>136</sup> See generally Wendy Hunter & Timothy J. Power, *Bolsonaro and Brazil's Illiberal Backlash*, 30 J. DEMOCRACY 68 (2019) (arguing that the combination of these factors brought the decline of PT and the consequential election of Bolsonaro).

<sup>137</sup> De Sa e Silva, *supra* note 8, at S95–96.

mobilization activities and education against corruption. Eventually, the implementation of this deal was struck down by the Brazilian Supreme Court as illegal under Brazilian law.<sup>138</sup>

Just as the crux of the work in Mani Pulite fell to the Milanese pool of judges, the task force of the Federal Prosecutors' Office in Curitiba carried out most of the investigations related to Lava Jato. This was achieved thanks to a practice that allowed the Prosecutors' Office to self-authorize the initiation of a criminal investigation.<sup>139</sup> As the task force was initially focused on the crimes related to the company Petrobras, whose headquarters were located in Curitiba, the jurisdiction of the 13th Federal Regional Court (of which judge Moro was a member), located in Curitiba, was established. Extensive media coverage of the campaign and the excellent communication strategy of the prosecutors allowed the leading role in the judicial processes to be given to the trial judge Moro and the leading prosecutor Deltan Dallagnol. In particular, Dallagnol, who won an international award from the leading international Non-Governmental Organization (NGO), Transparency International, became a national celebrity.<sup>140</sup> He used this position to promote not just the idea of the Lava Jato Foundation, but also an ambitious project of moral rejuvenation of society.<sup>141</sup> In this sense, the Lava Jato prosecutors sought to mobilize public opinion; they succeeded in obtaining the support of many civil society organizations,<sup>142</sup> in particular for the aforementioned legislative changes called Ten Measures against

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<sup>138</sup> João Victor Freitas, *A Plan To Share FCPA Penalties with Brazil has Been Thwarted... by Brazil: The Supreme Court's Invalidation of the Lava Jato Foundation*, GLOBAL ANTI-CORRUPTION BLOG (May 3, 2019), <https://globalanticorruptionblog.com/2019/05/03/a-plan-to-share-fcpa-penalties-with-brazil-has-been-thwarted-by-brazil-the-supreme-courts-validation-of-the-lava-jato-foundation/> (explaining the background and the reasoning behind this decision).

<sup>139</sup> Marona & Kerche, *supra* note 64, at 4–5.

<sup>140</sup> Brazil's Carwash Task Force Wins Transparency International Anti-Corruption Award, TRANSPARENCY INT'L. (Dec. 3, 2016), <https://www.transparency.org/en/press/brazils-carwash-task-force-wins-transparency-international-anti-corruption>.

<sup>141</sup> Deltan Dallagnol, *A luta contra a corrupção: A Lava Jato e o futuro de um país marcado pela impunidade*, Sextante (2017); De Sa e Silva, *supra* note 8.

<sup>142</sup> ANA LUIZA ARANHA, *Lava Jato and Brazil's Web of Accountability Institutions: A Turning Point for Corruption Control? in CORRUPTION AND THE LAVA JATO SCANDAL IN LATIN AMERICA* 94, 109 n. 27 (Paul Lagunes, Jan Svejnar ed., 2020).

Corruption, most of which were later rejected by the Brazilian National Congress.<sup>143</sup>

The backlash against the campaign was, at first, political and came from the leftist Workers' Party (Partido dos Trabalhadores, PT), as well as from international public opinion. Considered a legendary political figure by the Brazilian and Latin American left, Lula, former President of Brazil and leader of the PT, was nominally charged with corruption for receiving an apartment and donations to his political foundation in exchange for appointments of executive directors of Petrobras.<sup>144</sup> Beyond these nominal charges, the content of the indictment clearly stated the intention of the office of the prosecutor to establish a narrative of a state of political corruption in Brazil and to expose Lula as behind the operations of extortion and embezzlement of public funds.<sup>145</sup> This was the first indictment against Lula but not the first instance in which he was accused of corruption; some of those convicted in the earlier Mensalão scandal claimed that the vote-buying of legislators back in 2006 had happened with his knowledge, but the prosecutors, citing lack of evidence, did not include him in the trial.<sup>146</sup> Lula's supporters, both domestic and international, decried the prosecutions as illegal, mobilizing the support of the international legal community and the United Nations Human Rights Committee in favor of Lula.<sup>147</sup> Books in which lawyers exposed what, in their view, were the illegalities committed in the process<sup>148</sup> were published, and letters of support for his release were signed.<sup>149</sup> What raised the suspicions of the

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<sup>143</sup> Paul Lagunes et al., *President Bolsonaro's Promises and Actions on Corruption Control*, 17 REVISTA DIREITO GV 1, 24 (2021).

<sup>144</sup> See Office of the Federal Public Prosecutor, Republic of Parana, Task Force Lava Jato (Indictment against Lula) (2016), <https://www.conjur.com.br/dl/denuncia-lula-apartamento.pdf> (last visited Oct. 24, 2021).

<sup>145</sup> *Id.* at 5–10, 18–21.

<sup>146</sup> Michener & Pereira, *supra* note 116, at 481–82.

<sup>147</sup> *Binding Nature of UN Treaty Body Decisions Rejected by Brazil's Electoral Court*, OPINIO JURIS (Sep. 14, 2018), <http://opiniojuris.org/2018/09/14/binding-nature-of-un-treaty-body-decisions-rejected-by-brazils-electoral-court/> (last visited Oct. 24, 2021).

<sup>148</sup> CAROL PRONER ET AL., COMENTÁRIOS A UMA SENTENÇA ANUNCIADA: O PROCESSO LULA [COMMENTS ON AN ANNOUNCED SENTENCED: THE LULA PROCESS] (2017) is a gathering of the expertise of prominent Brazilian legal experts to criticize the Lula trial.

<sup>149</sup> *Juristas estrangeiros se dizem chocados e defendem libertação de Lula* [Foreign Jurists Say They are Shocked and Defend Lula's Release], FOLHA DE SAO PAOLO (Aug 11, 2019), <https://www1.folha.uol.com.br/poder/2019/08/juristas-estrangeiros-se-dizem-chocados-e-defendem-libertacao-de-lula.shtml>.

public in particular were the media leaks (made by Judge Moro) of conversations between Lula and then-President Rousseff, in which she allegedly offered a ministerial position in the government to Lula.<sup>150</sup> Had he accepted such a position, which would have offered him temporary immunity from prosecution, the prosecution would have been suspended, at least for a while.

An event that gave wings to these accusations was a 2019 security breach of the mobile phone of Dallagnol that exposed his conversations with Judge Moro, in which Moro seemingly instructed Dallagnol as to which evidence he should suggest for presentation at the trial.<sup>151</sup> Furthermore, the material leaked from the mobile phone included conversations between the members of the prosecution team that revealed their strong political preferences against the political candidates coming from the PT.<sup>152</sup> For many Brazilians, in particular those with leftist tendencies, the trial lost its legitimacy.<sup>153</sup> Following the arrest of the alleged hacker of the phone, the documentation came to be lawfully possessed by the state to be used in the retrial of Lula, which the Supreme Court in Brazil ordered in March 2021.<sup>154</sup> In April of the same year, the Supreme Court decided that in this trial, the court of Curitiba would have no jurisdiction, and in December, the Office of the Prosecutor revoked the charges against Lula, for the expiry of statute of limitations made the crime impossible to prosecute.<sup>155</sup>

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<sup>150</sup> *Release of tapped phone calls between Lula and Rousseff sparks mass protests in Brazil*, THE GUARDIAN (Mar. 17, 2016), <https://www.theguardian.com/world/2016/mar/17/release-tapped-phone-calls-lula-rousseff-deepens-brazil-chaos>.

<sup>151</sup> *Exclusive: Leaked Chats Between Brazilian Judge and Prosecutor Who Imprisoned Lula Reveal Prohibited Collaboration and Doubts Over Evidence*, THE INTERCEPT (Jun. 9, 2019), <https://theintercept.com/2019/06/09/brazil-lula-operation-car-wash-sergio-moro/>

<sup>152</sup> *Id.*

<sup>153</sup> Ezequiel Gonzales-Ocantos, *The Criminalization of Corruption in Latin America: Causes and Consequences of Lava Jato*, YOUTUBE (Oct. 13, 2020) [https://www.youtube.com/watch?v=C0SiWJ1QnDY&ab\\_channel=DavidRockefellerCenterforLatinAmericanStudies](https://www.youtube.com/watch?v=C0SiWJ1QnDY&ab_channel=DavidRockefellerCenterforLatinAmericanStudies) (between the 18- and 35-minute marks). Note, however, that these focus groups were organized prior to the revelations of the collusion between Dallagnol and Moro—it is reasonable to conclude that later surveys would have revealed even more division and skepticism.

<sup>154</sup> *Brazilian Judge Strikes Down Lula da Silva's Graft Convictions*, FINANCIAL TIMES (Mar. 8, 2021), <https://www.ft.com/content/41f096a3-f091-485f-873b-d107c61d570d>.

<sup>155</sup> *MPF reconhece prescrição e pede arquivamento de ação contra Lula [MPF Recognizes Limitation and Asks for a Filing of Lawsuit Against Lula]*, CON JUR BRAZIL (Dec. 7, 2021), <https://www.conjur.com.br/2021-dez-07/mpf-arquivamento-acao-lula-triplex>.

However, if it can be said that the prosecution of Lula greatly increased the likelihood of the election of Jair Bolsonaro, it is clear that Bolsonaro did not return the favor to the prosecutors or the judicial branch as a whole. Proposals to introduce a stricter penal responsibility for political corruption as well as most of the other measures proposed in the Ten Measures against Corruption proposal were rejected by the political allies of the President.<sup>156</sup> Instead, appointments of prosecutors became more politically controlled than before, as evidenced by the appointment of Augusto Arras for Head prosecutor in 2019.<sup>157</sup> Divisions among the members of the judicial branch intensified, with some judicial associations openly supporting Judge Moro and prosecutor Dallagnol against the criticism coming from the political and legal commentators, while other associations openly criticized Lava Jato and its handling by the prosecutors and judges.<sup>158</sup> While Dallagnol's resignation, which came in September 2020 for private reasons, may be considered the end of the Lava Jato campaign;<sup>159</sup> the formal disbanding of the Lava Jato Task Force came some months later.<sup>160</sup>

### *C. Romania (2010–2018)*

There are two significant distinctions that differentiate the Romanian anticorruption campaign from Mani Pulite and Lava Jato. First, the Romanian campaign did not have an opening case that prompted the investigations (the role played by the Mario

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<sup>156</sup> Lagunes et al., *supra* note 137, at 14.

<sup>157</sup> EMILIO PELUSO MEYER, CONSTITUTIONAL EROSION IN BRAZIL, 97–98 (2020).

<sup>158</sup> For support for Dallagnol and Moro, see *Fraudes de Deltan Revelam Seu Interesse Na Pec Do CNMP, Diz Advogado*, CONGRESSO EM FOCO (Oct. 19, 2021) <https://congressoemfoco.uol.com.br/temas/ministerio-publico/fraudes-de-deltan-revelam-seu-interesse-na-pec-do-cnmp-diz-advogado/> (documenting that the complaints filed against Dallagnol were left unprocessed until the statute of limitations expired); *A saída de Sérgio Moro do governo*, ASSOCIAÇÃO JUIZES PARA A DEMOCRACIA (Apr. 24, 2020), <https://www.ajd.org.br/noticias/2594-nota-publica-a-saida-de-sergio-moro-do-governo> (documenting criticism of the left leaning judicial associations against the Lava Jato campaign).

<sup>159</sup> *Head of Brazil's "Car Wash" Anti-Graft Task Force Quits with Team's Future in Doubt*, REUTERS (Sep. 15, 2020), <https://www.reuters.com/article/uk-brazil-corruption-idUSKBN25S614>.

<sup>160</sup> *Brazil Dismantles Anti-Corruption Task Force behind Lava Jato*, ORGANIZED CRIME AND CORRUPTION RESEARCH PROJECT (Feb. 8, 2021), <https://www.occrp.org/en/daily/13817-brazil-dismantles-anti-corruption-task-force-behind-lava-jato>.

Chiesa case in Italy or the inquiry into the broker exchange office in Brazil), nor did the campaign have a name attached to it by either the judiciary or the media. Second, while both the Lava Jato and Mani Pulite campaigns had certain international elements (more pronounced in the case of Lava Jato due to the involvement of the U.S. DoJ and the Swiss prosecutors<sup>161</sup> in the case), Romania's anticorruption campaign, while being fully carried out by domestic officials, had a stronger international element to it. The internationality came because the requirement for the fight against corruption was a part of the wider rule of law conditionality that was imposed on the country as a part of its negotiations with the E.U. and the later (2007) accession to the E.U.<sup>162</sup>

Along with Bulgaria, Romania was the only new E.U. member state subjected to the Co-operation and Verification Mechanism (CVM), a monitoring tool devised by the E.U. to focus the efforts of the country on curbing corruption as a key element in the entrenchment of the rule of law.<sup>163</sup> While the rule of law entrenchment was not to be based only on the prosecution of corruption, the CVM relied heavily on prosecutions as one of the key metrics of success.<sup>164</sup> Thus, the country's progression toward the satisfaction of rule of law standards was based on the successful evaluation of the work of the prosecutors.

These two differences do not, however, discount the significance that the campaign had on the domestic judicial or political actors or the public, as its other elements are like those in Italy or Brazil. The Romanian market of corrupt exchanges had a similar structure to that of Italy and Brazil. The Italian and Brazilian markets were focused on securing the votes of parliamentarians and citizens, the allocation of the public procurement, and with it the funds for the political parties whereas the Romanian market was somewhat more focused on personal

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<sup>161</sup> Hacked Chats Expose Questionable Methods Used by Swiss and Brazilian Prosecutors, SWISSINFO.CH (Feb. 8, 2021), <https://www.swissinfo.ch/eng/hacked-chats-expose-questionable-cooperation-between-swiss-and-brazilian-prosecutors/46371446>.

<sup>162</sup> Aneta B. Spendzharova & Milada Anna Vachudova, *Catching up? Consolidating Liberal Democracy in Bulgaria and Romania After EU Accession*, 35 W. EUR. POL. 39 (2012) (explaining the relevance of the rule of law conditionality for entrenchment of liberal-democratic values).

<sup>163</sup> Radu Carp, *The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism*, 10 UTRECHT L. REV. 1 (2014).

<sup>164</sup> See Martin Mendelski, *Europeanization and the Rule of Law: Towards a Pathological Turn*, 40 SE. EUR. 346, 358–59 (2016).

enrichment and crimes of lower material value, (i.e., fictitious employment).<sup>165</sup>

Italy	Brazil	Romania
Private and mixed-ownership companies paid political parties for favorable public procurement and tax evasion.	Political parties extorted money from the state-owned oil company and the largest construction firm for personal enrichment and party financing.	Persons in positions of power engaged in personal enrichment and promotion of party cadres.

**Table 2.** Specific features of the corrupt market exchange networks in the three countries.

The Romanian campaign also came after a period of democratic consolidation that followed a split with the past. However, the fall of Ceausescu's regime in 1989 did not bring lustration (vetting)<sup>166</sup> of the old cadres of the dictatorial government. The judges and prosecutors who had supported and operated the system, known as the toughest in Eastern Europe, were largely left unchecked—a policy that only Romania and Bulgaria of all the new E.U. member states implemented.<sup>167</sup> As previously noted, the judicial council was already established in 1991, but with very few checks on who could be a part of it, indicating that it relied on communist judges and prosecutors. In 2005, the council was stripped of one of its competencies, namely the

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<sup>165</sup> Fictitious employment is employment, usually within the public administration or state-owned enterprise, in which a person, usually a party loyalist, is employed in a certain post, often without having any qualifications for it or at a post created to fit the qualifications of the person and not the needs of the public office or enterprise. See *Romania's Dragnea Faces New Trial Over Trump Inauguration Lobby*, BALKAN INSIGHT (May 17, 2021), <https://balkaninsight.com/2021/05/17/romania-dragnea-faces-new-trial-over-trump-inauguration-lobby/> (detailing charges against the ex-Romanian prime minister made for crimes of lower material value).

<sup>166</sup> See generally Kieran Williams et al., *Explaining Lustration in Central Europe: A “Post-Communist Politics” Approach*, 12 DEMOCRATIZATION 22 (2005) (explaining the relevance of the process); Bogdan Iancu, *Post-Accession Constitutionalism with a Human Face: Judicial Reform and Lustration in Romania*, 6 EUR. CONST. L. REV. 28 (2010) (explaining the relevance of lustration for the Romanian judiciary).

<sup>167</sup> *Id.*

appointment of judges and prosecutors for the creation of the specialized Directorate of National Anti-Corruption (DNA). Instead, this body was created by the appointment of prosecutors by the president and the Ministry of Justice with the judge, Daniel Morar, and prosecutor, Laura Codruta Kövesi, handpicked for the position by both the president and the European Commission.<sup>168</sup> Following the model established in Spain, the DNA was attached to the high court in Bucharest with fourteen separate offices located across the country.<sup>169</sup> Retaining its independence from both the court and the executive branch, the DNA relied on the recruitment of younger, less experienced cadres, shaped by their experience and their training at the judicial academy.<sup>170</sup> Hence, the year 2006 may mark the start of the anticorruption campaign that would, however, pick up its pace of prosecutions only in 2010.

Between 2010 and 2017, the Romanian judiciary prosecuted close to 4,500 corruption cases, including eighteen former ministers, several generals, the speaker of the parliament, two head prosecutors, two prime ministers, one president, one prince, prominent members of the legal community, and hundreds of state officials.<sup>171</sup> All of this was done with a 92% conviction rate that was praised by the CVM's E.U. observers while at the same time being criticized as evidence of rigged trials.<sup>172</sup> The high conviction rate and the high number of those prosecuted did not significantly lower the perception of corruption<sup>173</sup> but it may have helped increase the public's trust in the work of the judiciary and other state organs.<sup>174</sup>

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<sup>168</sup> Mendelski, *supra* note 6.

<sup>169</sup> Anca Jurma, *DNA (National Anti-Corruption Department): A Specialized Structure for Combating High Level Corruption in Romania*, 9 J. E.-EUR. CRIM. L. 9, 10 (2014).

<sup>170</sup> Ramona Coman & Cristina Dallara, *Judicial Independence in Transition*, 233 Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, 835–81 (2012).

<sup>171</sup> Mungiu-Pippidi, *supra* note 10, at 106.

<sup>172</sup> Jurma, *supra* note 163, at 16; David Clark, *Romania's Corruption Fight is a Smokescreen to Weaken Its Democracy*, THE GUARDIAN (Jan. 20, 2017), <https://www.theguardian.com/world/2017/jan/10/romania-corruption-fight-is-a-smokescreen-to-weaken-its-democracy>.

<sup>173</sup> *Corruption Perception Index*, TRANSPARENCY INTERNATIONAL, <https://www.transparency.org/en/cpi/2020/index/nzl> (last visited Dec. 24, 2021) (detailing that the perception of corruption in the country oscillated between 2012 and 2020 but remained rather high).

<sup>174</sup> *World Justice Rule of Law Index 2020*, WORLD JUSTICE PROJECT, <https://worldjusticeproject.org/rule-of-law-index/pdfs/2020-Romania.pdf> (last visited Dec. 12,

Thanks to the investments made by foreign donors to strengthen civil society, Romania developed a culture of anticorruption protests and mobilization that saw the DNA prosecutors as agents of legality. Unlike Brazil and Italy, in which the lead prosecutors deliberately sought a public outreach, Laura Kovesi, as “the face of the campaign,” did not seek publicity but was more made into a hero by the foreign press.<sup>175</sup> Romania was one of the few countries at the time that declared corruption a national security threat,<sup>176</sup> allowing for a significant role of its national security agency, the Serviciul Roman de Informatii (SRI), in the investigations.<sup>177</sup>

It was the criticisms of this role of the SRI that would lead to a political and legal backlash against the campaign. Not only did the SRI, using formally legal court authorizations, intercept telecommunications at a rate that exceeded that of the United States, a country that has fifteen times the population of Romania,<sup>178</sup> but it was also suspected of using the informers within the judiciary as agents and effectively operating the investigation teams mixed with those of the prosecutors’ offices and the police. Effectively, this could mean that the SRI, acting under the pretext of protection of national interests, decided on who would be prosecuted.

The 2016 election victory of the Social Democratic Party (Partidul Social Democrat, PSD), the political force that controlled much of Romania’s transition from socialism to capitalism<sup>179</sup> in the post-1990 period and whose leading figures were tried and convicted for corruption, strengthened the backlash.<sup>180</sup> This party saw itself as the main victim of the campaign, and upon its return to power in 2016, it worked to establish a narrative that the real rulers of the country are the hidden centers of power within the intelligence

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2021) (detailing the discrepancy between the relatively high law and order values and the quality of criminal justice system).

<sup>175</sup> RADU ANDREI PÂRVULESCU, DECOUPLED RATIONALISATION: JUDICIAL ANTICORRUPTION AND FRAGMENTATION OF PARLIAMENT AND THE MAGISTRACY, 1, 15 (2021).

<sup>176</sup> As evidenced by the U.S. government’s recent designation of corruption as a core national security issue, this designation is becoming more common.

<sup>177</sup> Mendelski, *supra* note 6, at 14–15.

<sup>178</sup> Mungiu-Pippidi, *supra* note 10, at 110.

<sup>179</sup> Florin Abraham, *Romania Since The Second World War: A Political, Social and Economic History*, 120–22 (2017).

<sup>180</sup> See generally Ionut Chiruta, *Challenging the Rule of Law in Romania: The Metamorphosis of Political Discourse Towards Populism*, 70 PROBLEMS OF POST-COMMUNISM 1, 76–93 (2023).

agencies and the judiciary.<sup>181</sup> That narrative was to justify the subsequent measures to establish political control over the judiciary, to loosen the anticorruption legislative framework, and to go after lead prosecutor Laura Kovesi. In 2016 and 2017, the judgments of the Romanian Constitutional Court ordered the Romanian parliament to limit the scope of certain corrupt criminal acts, such as the abuse of public office.<sup>182</sup> Furthermore, the Constitutional Court declared some of the co-operation protocols between the SRI and Romanian institutions unconstitutional, rendering the use of evidence collected by the SRI inadmissible and thus slowing down the pace of the investigations.<sup>183</sup>

The 2017 attempt to deregulate certain elements of the criminal act of misuse of public office by lowering the financial threshold that would represent the constitutive element of the criminal act to €44,000 led to massive demonstrations against the government. The demonstrations revealed that corruption and the fight against corruption have become one of the key divisive issues in Romanian society that lead to the mass mobilization of NGOs and citizens.<sup>184</sup> The divisions did not bypass the Romanian judicial community, with more than one thousand predominantly younger judicial office holders demonstrating not only against these norms but against the creation of a separate judicial inspectorate that would investigate the crimes of judges.<sup>185</sup>

In 2017, the inspections of the work of the DNA by the Ministry of Justice led to requests for Kovesi's removal on charges that she had abused her office and violated the principles of

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<sup>181</sup> See generally Ionut Valentin Chiruta, *Using the Past in Populist Communicational Strategies: How the Memory of Securitate is Instrumentalised in Romanian Politics*, 3 POPULISM 223 (2020) (explaining the exploitation of fears created in the past in the politics of contemporary Romania).

<sup>182</sup> See generally Judgments of the Constitutional Court of Romania Decision No. 392 (Rom.) (June 2016); Judgments of the Constitutional Court of Romania Decision No. 405 (Rom.) (June 2016).

<sup>183</sup> Judgment of the Constitutional Court of Romania Decision No. 51 (Rom.) (Feb. 2016), <https://perma.cc/59W8-ZG8S>.

<sup>184</sup> Daniel Brett, *Romania's Protests: A Response to a Three-Pronged Assault on Anti-Corruption Measures*, LSE EUR. POL. AND POL'Y BLOG (2017), <https://blogs.lse.ac.uk/europppblog/2018/09/19/why-romanias-protests-have FAILED-to-bring-about-real-change/>.

<sup>185</sup> DRAGOS CALIN, *The Romanian Judicial System: Current Issues and the Necessity of Avoiding Regress*, in STRATEGIES FOR STRENGTHENING DEMOCRACY, 30 YEARS AFTER THE FALL OF THE BERLIN WALL, 15–21 (2019).

separation of powers. The claim was that by launching an investigation into the alleged procedural violations of the Romanian government in the legislative procedure for the adoption of the said law, Kovesi had violated the constitutional principle of the separation of powers.<sup>186</sup> Following charges that she plagiarized her doctoral dissertation, Kovesi was removed from office in July 2018, after which she took the Romanian state to the European Court of Human Rights, successfully claiming that her right to freedom of speech and due process had been violated.<sup>187</sup> Her removal did little to damage her domestic or international reputation. As one of the leading European corruption fighters, she was appointed to the newly created position of European Public Prosecutor in 2019.<sup>188</sup> This series of events from 2018 to 2019 may be understood to constitute the end of the campaign.

#### IV. JUDICIAL REPUTATION AND ALTERNATIVE THEORETICAL EXPLANATIONS OF ANTICORRUPTION CAMPAIGNS

The narrative of the investigations thus far presented suggests that the agency theory and the judicial reputation theory represent an adequate theoretical framework for explaining anticorruption campaigns. The actions of all three judicial spearheads of the campaigns enjoyed wide public support, though this support did not have the same level across the three jurisdictions. In Italy, especially during the first two years of the campaign, it was almost plebiscitary, as evidenced by the popularity of the Milanese pool of judges, while in Romania and Brazil, the popularity of those prosecuted dictated the polarization toward the judicial campaigns. Based on the political considerations of the population in Romania and Brazil, the prosecutors were considered a part of a political plot to destroy a certain political option (PT in Brazil and PSD in Romania) or a welcome effort to clean the country of corruption. Internationally, the Romanian campaign had done much to elevate the international standing of the country, earning

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<sup>186</sup> Constitutional Court of Romania, Judgment 358/2018 (May 30, 2018), <https://lege5.ro/Gratuit/gi4dgojyga4q/decizia-nr-358-2018-asupra-cererii-de-solucionare-a-conflictului-juridic-de-natura-constitutionala-dintre-ministrul-justitiei-pe-de-o-parte-si-presedintele-romaniei-pe-de-alta-parte> (last visited Dec. 24, 2021).

<sup>187</sup> Kövesi V. Romania, 318 EUR. CT. H.R. (2020).

<sup>188</sup> *Parliament wins its battle: Kövesi to become first EU Public Prosecutor*, EURACTIV (Sep. 25, 2019), <https://www.euractiv.com/section/justice-home-affairs/news/parliament-wins-its-battle-kovesi-to-be-the-first-eu-public-prosecutor/>.

praise from the E.U. authorities and preventing a freeze in the E.U. structural funds allocation.<sup>189</sup> The Italian campaign, on the other hand, did not elevate the standing of the country but actually worsened the country's reputation for corruption.<sup>190</sup> Regarding Brazil, the reaction of the international audience was mixed, as the initial overwhelming support was replaced by doubts over the (il)legality of the prosecutorial actions.<sup>191</sup>

The judges and prosecutors, especially in the Italian and Brazilian investigations, operated with a strong presumption that what lies at the core of the corrupt behavior of political actors is a lack of a normative ideal for the establishment of a freer and more just society. Seeing the main institutional actors of that view in the political parties and their leadership, the prosecutors viewed them as criminal organizations that needed to be dismantled or heavily punished for their actions. Thus, they perhaps acted without full awareness of the consequences that their actions would lead to but with full awareness of the inevitability of the political crisis that would emerge or be intensified.

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<sup>189</sup> Parvulescu, *supra* note 169, at 14.

<sup>190</sup> Edward Luttwak, *Italy's Ancien Régime*, 31 SOC'Y 70 (1993) (explaining the international perception of Italy upon revelation of its corrupt scandals in the 1990s).

<sup>191</sup> *What did Lava Jato, Brazil's anti-corruption investigation, achieve?*, THE ECONOMIST (Mar. 9, 2021), <https://www.economist.com/the-economist-explains/2021/03/09/what-did-lava-jato-brazils-anti-corruption-investigation-achieve>).

<b>Elements of anticorruption campaigns</b>	<b>Italy</b>	<b>Brazil</b>	<b>Romania</b>
Domestic audience	Yes	Yes	No
International audience	No	Yes	Yes
Formal independence of the office of the public prosecutor from the executive	Yes	Yes	Yes
Specialized prosecutorial units	No	Yes	Yes
Pre-existing political crisis of the executive and the legislative branches of government	Yes	Yes	Yes
Political ambitions of the prosecutors	Yes	Yes	Yes
Significant political backlash	Yes	Yes	Yes
Attempts to curb the power of the judiciary and its ability to prosecute corruption	Yes	Yes	Yes

**Table 3.** Judicial reputation as an element of anticorruption campaigns.

The judges and prosecutors did not stop there. Some of the key figures of Lava Jato and Mani Pulite entered politics: Sergio Moro became the Minister of Justice of Brazil, Piercamillo Davigo and Antonio di Pietro refused such positions in government in 1994, with di Pietro starting his own political project, the Italy of Values (Italia dei valori, Idv) in 1998.<sup>192</sup> Laura Kovesi did not enter politics officially, but owing to the political support of European political actors, she became the first European Public Prosecutor.<sup>193</sup> For both di Pietro and Moro, the decision to leave the judiciary was presented as a logical extension of their fight against corruption.<sup>194</sup>

The Lava Jato prosecutors and judges, inspired by the Mani Pulite prosecutors and their handling of the media, deliberately used a media strategy that not only kept the public informed of their actions but also served to shape public opinion toward a desired political outcome.<sup>195</sup> The revelations made following the leaks of Dallagnol's conversations demonstrated their fear that the PT candidate winning the 2018 elections would undo the progress they believed had been made in the fight against corruption. Similarly, the Romanian DNA preferred the political options that were opposed to PSD, as this party was worst hit by the anticorruption campaign, and the Italian prosecutors (at least, prior to the 1994 elections) viewed Berlusconi as a lesser evil compared to the old or reformed political parties.<sup>196</sup> Just like the domestic audience, the international audience was also targeted by their actions. In the case of Romania, this internationalization was institutionalized, as the CVM monitored the efficiency of the Romanian prosecutors, leading to the recommendation of Kovesi for the position of the first European Public Prosecutor. In the case of Brazil, Dallagnol was recognized as an emerging figure in the global anticorruption civil society. While the Italian campaign played the least to the international audience, informal contacts between di Pietro and U.S. diplomats suggest an awareness on his part that he needed to

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<sup>192</sup> JAMES L. NEWELL, *Magistrates Going into Politics: Antonio Di Pietro and Italy of Values*, THE ROUTLEDGE HANDBOOK OF CONTEMPORARY ITALY 227–36 (Andrea Mammone, et al., eds. (2015)).

<sup>193</sup> EURACTIV, *supra* note 180.

<sup>194</sup> Meszaros, *supra* note 53, at S68.

<sup>195</sup> Moro, *supra* note 115, at 58.

<sup>196</sup> Nelken, *supra* note 52.

not be obstructed by external influences on the Italian political scene.<sup>197</sup>

If the judges demonstrated a propensity or an awareness that their actions actively shaped the political landscape, it should also be noted that the political mobilization against them and their actions was also a serious affair. In Italy, di Pietro and Davigo faced investigation for the abuse of office in obstructing investigations and coup attempts.<sup>198</sup> In Brazil, thanks to the expiry of the statute of limitations (and the fact that both Moro and Dallagnol left the judiciary), all disciplinary charges have been dropped, but both of them are facing an uncertain political future after having briefly worked in corporate compliance.<sup>199</sup> Laura Kovesi was removed from office in a procedure that was later disputed by the European Court of Human Rights.

Personal vendettas were not the only tool used to slow down the investigations. Legislative changes that were made to prevent and limit the investigations were also introduced, particularly in Italy and Romania. After coming to power in 1994, the Berlusconi government sought to make the Italian criminal legal system slower so that the statute of limitations for certain criminal acts would expire. This has been successful, ensuring that several important trials end in acquittal.<sup>200</sup> While President Bolsonaro, who came into power in Brazil following the 2018 presidential elections, promised an anticorruption campaign, he failed to deliver on this promise, instead limiting the independence of the prosecutors.<sup>201</sup> The decision of the Romanian Constitutional Court to declare the application of the crime of misuse of public office to many of the corrupt acts prosecuted by the DNA has also significantly impaired the investigations in Romania, as has the decision on the use of data gathered through the means of surveillance.

To summarize, I believe that the judges and prosecutors in all three cases were motivated by more than just a desire to see justice done. I also believe that both the legal culture and the institutional setup of the countries influenced what they did in these campaigns; they sought to root out the corrupt practices of the

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<sup>197</sup> *Mani Pulite, ex console Usa: "di Pietro mi preannunciò l'arresto di Chiesa,"* IL FATTO QUOTIDIANO (Aug. 30, 2012), <https://www.ilfattoquotidiano.it/2012/08/30/mani-pulite-ex-console-usa-di-pietro-mi-preannuncio-larresto-di-chiesa/338126/> (last visited Dec. 24, 2021).

<sup>198</sup> David Nelken, *Stopping the Judges*, 11 ITALIAN POL. 187, 190 (1996).

<sup>199</sup> See generally De S e Silva, *supra* note 8 (describing the role of former prosecutors in corporate compliance).

<sup>200</sup> Vannucci, *supra* note 105, at 252.

<sup>201</sup> Lagunes, et al., *supra* note 137, at 17.

institutional actors, to communicate with both the international and the domestic audience, and to elevate their own standing both within the legal system and outside of its boundaries. Measuring the extent to which they have been successful in their mission would require an assessment beyond the scope of this paper. However, the elements of the campaign outlined in this section leave no doubt that a more holistic view of the campaigns provided by the judicial reputation theory offers enough room to accommodate the political and societal leanings of the judges and their efforts to have a permanent impact on society using both judicial and extrajudicial means (i.e., the creation of foundations in the case of Brazil and a desire to change the political class in Italy), thus making a more accurate portrayal of the actions of the judicial branch within the campaigns.

#### V. LEGAL CULTURE AND INSTITUTIONAL THEORIES AS ALTERNATIVE EXPLANATIONS FOR THE CAMPAIGNS

The theory of judicial reputation is not the only possible theoretical approach that may be used as an explanation for the emergence of campaigns. Researchers exploring campaigns from the standpoint of comparative law have focused on legal culture and path dependency theory as explanations for judicial behaviors and the emergence of campaigns. Analysis based on these approaches often contains a description or analysis of institutions that contributed to the emergence of the campaigns, in that sense resembling the approach used by the theory of judicial reputation.

Both legal culture and path dependency are widely used in comparative law insomuch that they represent a trope within the field.<sup>202</sup> Legal culture, in the widest sense, represents “values, opinions, attitudes, and beliefs about the law.”<sup>203</sup> As such, it may differ between societies, individuals, and societal groups, but in the context of comparative law, it can be understood in two ways. The first is methodological, as an approach that allows us to identify specific traits that exist within a particular legal system (or a family of legal systems), thus mapping the cultural foundation enshrined

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<sup>202</sup> Tom Ginsburg, *Lawrence Friedman's Comparative Law*, Univ. of Chicago, Public Theory Working Paper (2010).

<sup>203</sup> Lawrence M. Friedman, *Toward Comparative Law in the 21st Century: Some Thoughts on the Rule of Law, Legal Culture and Modernity in Comparative Perspective*, 1075–90 (Kluwer L. Int'l (2002)).

in certain legal institutions.<sup>204</sup> The second is more general as a variable that sets the legal system in motion. Given such a wide application of legal culture, why do Garoupa and Ginsburg explicitly state that their theory of judicial reputation is superior to explanations based on legal culture or tradition when much of their work explicitly relies on works based on legal culture<sup>205</sup> and when judicial reputations themselves are heavily based on what was traditionally part of the U.S. legal culture?<sup>206</sup> What they have in mind is that the first approach, in which everything legal is somehow related to culture, fails to distinguish between culture as a whole and culture-based analysis.<sup>207</sup> The latter is something that the theory of judicial reputation itself cannot escape because judicial reputation is related to the judicial culture within a country. However, the theory of judicial reputation retains a unique approach based on the economics of the relations within the judiciary. This is more likely to inform us of the evolutionary path of the judicial culture (i.e., through events such as judicial campaigns) than sharp distinctions based on legal tradition (i.e., that of the career or recognition judiciaries) or long observed behavioral patterns favored by legal culture.

Path dependency theory posits that the “decisions we make depend on past decisions made and issues that have occurred well before the present day.”<sup>208</sup> In its evolutionary form, path dependence is linked to the works of the great German jurist Savigny, founder of the historical school of legal thought, who believed that the gradual evolution of the law that stems from experience, rather than logic, explains the trajectories of the development of the legal system.<sup>209</sup> In its modern form, path dependency explains the persistence of legal rules and their

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<sup>204</sup> Ralf Michaels, *Legal Culture*, (Basedow, Hopt, Zimmermann eds. (2011)).

<sup>205</sup> Compare Nuno Garoupa & Tom Ginsburg, *Hybrid judicial career structures: reputation versus legal tradition*, 3(2) J. OF LEGAL ANALYSIS 411, 411–48 (2011), with Garoupa & Ginsburg, *supra* note 11.

<sup>206</sup> Solimine, M. E., *Judicial Stratification and the Reputations of the United States Courts of Appeals*, 32 FLA. ST. UNIV. L. REV. 1331, 1331 (2005).

<sup>207</sup> Daniel Nelken, *Sociology of legal culture*, 140–43 (Edward Elgar Publishing (2020)).

<sup>208</sup> Jaako Husa, *Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law*, 6 CHINESE J. OF COMP. L. 130 (2018).

<sup>209</sup> Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. OF COMP. L. 95, 95–119 (1989) (explaining the views of Savigny in terms of evolution of law).

embeddedness within a particular legal system.<sup>210</sup> It seeks to determine how legal history and, in particular, the institutions that were created over its course impact the legal systems of today. In so doing, path development pays particular attention to the concept of critical junctures, developments, and events that crucially shape legal systems.<sup>211</sup> Garoupa and Ginsburg are less averse to this approach than to those based on legal culture, as judicial reputation theory itself has a strong interest in institutional development, for example, judicial councils.

Approaches based on the legal culture or path dependency theory are useful for explaining certain elements of anti-corruption campaigns. For example, some of the legal solutions that served as the building blocks of the campaigns relied heavily on elements borrowed from the common law legal system. These elements are the use of plea bargaining as a way of securing witness involvement<sup>212</sup> (which, in the Brazilian case, led to the highest-profile case of the prosecution of former President Lula) and the introduction of judicial councils as the mechanism of judicial self-governance that strengthened the independence of the judiciary, encouraging their campaigns. The adoption of these two legal transplants—in particular, in the Brazilian and Romanian cases<sup>213</sup>—facilitated a more efficient execution of the campaigns. Furthermore, it may be argued that the path dependency of the three legal systems facilitated a backlash against the campaigns; if the campaigns were indeed the result of the reputation-seeking activity of the judges, then the backlash was a natural response that came not necessarily only from the political activities of those seeking to quell the campaigns and to return the political system to its “normal” state. Finally, the embeddedness of certain institutions within a legal system and the results they create provide evidence of the usefulness of a path-dependent approach. For example, the institutional embeddedness of the CSM in Italy not only represented a break from the previous model of the executive-controlled judiciary but produced important outcomes for the emergence of

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<sup>210</sup> See generally John Bell, *Path dependence and legal development*, 87 TUL. L. REV. 787, 787–810 (2013) (describing the relevance of path dependence).

<sup>211</sup> Husa, *supra* note 227.

<sup>212</sup> Aranha, *supra* note 126.

<sup>213</sup> Having been established in the Italian legal system by the 1947 Constitution and institutionalized from 1958 onwards, the Italian judicial council cannot be, unlike their Brazilian institutional “siblings,” considered a legal transplant, but rather a domestic solution to the question of management of the judicial branch.

anti-corruption campaigns.<sup>214</sup> Similarly, the Romanian judicial council did not prevent the backlash that happened against the judiciary in the country but allowed more space for the judicial organizations that were to mobilize resistance against it.<sup>215</sup>

However, I believe that these approaches to anti-corruption campaigns, while useful to a certain degree, do not provide a holistic approach to the campaigns. First, legal culture theory views the civil law/common law distinction as a given, excluding the growing hybridity of the legal systems analyzed.<sup>216</sup> For example, an approach based on legal culture would limit the individual roles that judges and prosecutors have played in defining the international audiences of the campaigns, the use of media, and the elements of the backlash, viewing them as falling outside their scope or less important. As a result, legal culture would reject the role that the reputation of judges plays in explaining campaigns. Second, path dependency theory, or at least some of its strains, acknowledges that gradual bursts of activity may be instances in which the legal system changes in a short period, incorporating some or all of the introduced features into a new paradigm. However, path dependency theory focuses more on the introduction of institutional rules than on the practices and events that shape the legal system. As such, while the campaigns have led to certain legislative initiatives and changes, their immediate effects were not institutionalized—notwithstanding the aforementioned attempts to establish the Lava Jato Foundation in Brazil.

If we look at some of the offered explanations for the emergence of anti-corruption campaigns, we observe that while they mostly rely on empirical data collected by scholars researching the campaigns, traces of the legal culture and path dependency approach are present. For example, Della Porta analyzes the vast amount of data on the evolution of the Italian judiciary from the 1960s onwards, finding that it gradually evolved from a judiciary that colluded with the interests of the executive to a more non-partisan judiciary that had political leanings and sympathies while remaining impartial.<sup>217</sup> She highlights the role of the CSM, which acted as an institutional safeguard for the magistrates, and observes that the collusion between judges and politicians that

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<sup>214</sup> Manzi, *supra* note 12, at 33.

<sup>215</sup> See generally Dragos Calin, et al., *900 Days of Uninterrupted Siege upon the Romanian Magistracy, A Survival Guide*, Konrad Adenauer Foundation (2020) (describing efforts of the Romanian judiciary to resist attempts of political control).

<sup>216</sup> Michaels, *supra* note 157, at 6.

<sup>217</sup> Della Porta, *supra* note 4, at 11–14.

previously existed decreased at the beginning of the 1990s for two reasons: the decrease in the value of the political parties for judges, which occurred as the political parties lost their legitimacy at the beginning of the 1990s, and the civic virtues of the judiciary, which emerged as its values evolved as a result of the fighting role of the judiciary in the 1980s.<sup>218</sup> While I agree with the first conclusion, we must observe that, as Della Porta writes, in 1998 (6 years after the beginning of Mani pulite), at least 200 judges were under investigation for corruption,<sup>219</sup> which is a sign that the presence of the virtues was perhaps not evenly spread throughout the judiciary and that the magistrates of the Mani pulite pool were a trigger for the campaign to commence.

Nelken, who has written significantly on Italian legal culture, limits his explanations, in this regard, to the role that the CSM has played in granting the Italian judiciary its independence and the acknowledgment that the Mani pulite was not the first anti-corruption inquiry of the Italian judiciary, suggesting the possibility that the Italian judiciary was, in a sense, waiting for the right moment to prosecute those responsible for corruption.<sup>220</sup> He observes that the political leanings of the magistrates were undoubtedly present, but also notes that this feeling was hardly uniform for the judiciary as a whole, given that, traditionally, cases of political corruption in the pre-Mani pulite days remained unresolved before the court in Rome, which was known as the place where corrupt judges would simply let a case expire via the statute of limitations.<sup>221</sup> However, the culture-based approach would not be able to identify the anti-corruption activities of the judiciary as a key feature of any of the three legal systems or their judicial actors. Instead, the explanations stemming from culture would necessarily have to borrow from political science and other social sciences to explain the emergence of campaigns.

Pederzoli and Guarnieri similarly acknowledge the role that the CSM played in the evolution of the Italian judiciary,<sup>222</sup> rightly predicting that the introduction of judicial councils in other countries that choose to embrace such a model of judicial self-governance will gradually increase the independence of judges. In their view, however, this will not lead to a judicial revolution but to

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<sup>218</sup> *Id.* at 14.

<sup>219</sup> *Id.*

<sup>220</sup> Nelken, *supra* note 52.

<sup>221</sup> *Id.* at 103.

<sup>222</sup> Pederzoli & Guarnieri, *supra* note 50; see also cf. Violante, *supra* note 104, at 47–66.

internal fragmentation of the judiciary itself along political lines.<sup>223</sup> Indeed, this is what has happened in Romania and Brazil. In both countries, we observe that the activities of the judicial organizations focused on the defense of the independence of the branch and on an effort to criticize prosecutorial overreach. However, Nelken and Guarnieri's argument that the system of mandatory prosecutions<sup>224</sup> in Italy was instrumental to the effects of the campaign does not seem convincing.<sup>225</sup> A system of mandatory prosecutions exists as a counterbalance to the principle of prosecutorial independence, serving as a check on discretionary decision making to ensure that the investigations are carried out without bias.<sup>226</sup> However, the authors citing it fail to make a convincing case for how this principle was crucial for the emergence of the campaigns, and even its thorough application in practice remains a contested point in the literature.

The path dependence approach, characterized by the attention it pays to the events that bring the legal systems to one legal family or another, would certainly highlight the fact that the entrance of Romania into the E.U. has had an important impact on the general trajectory of the legal system. This observation certainly holds: The CVM monitoring mechanism was an important tool that determined the international audience for judicial anti-corruption campaigns. However, the same mechanism was set up for Bulgaria, which failed to produce a similar effect in that country.<sup>227</sup> Or, to use the example of Brazil, there is no doubt that the effect of democratic constitution making that characterized the creation of the 1988 Brazilian constitution set in motion a chain of events that have led to the strengthening of judicial and prosecutorial independence. However, comparable democratization events have occurred in Argentina and other Latin American countries, where important trials and other

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<sup>223</sup> Pederzoli & Guarnieri, *supra* note 50, at 332–334.

<sup>224</sup> Marie Manikis & Peter Grbac, *Bargaining for justice: the road towards prosecutorial accountability in the plea bargaining process*, 40 MAN. L. J. 85 (2017) (explaining the difference between mandatory and discretionary prosecutions).

<sup>225</sup> See David Nelken, *A legal revolution? The judges and Tangentopoli*, (S. Gundle & S. Parker eds.); *The New Italian Republic: From the Fall of Communism to the Rise of Berlusconi*, 199–205 (Routledge) (1995); see also Guarnieri, *supra* note 48.

<sup>226</sup> Giuseppe di Federico, *Prosecutorial Independence and The Democratic Requirement of Accountability*, 38 BRITISH J. OF CRIMINOLOGY 3 (1998).

<sup>227</sup> Radosveta Vassileva, *Sweet Like Sugar, Bitter Like a Lemon: Bulgaria's CVM Report*, Verfassungsblog (Nov. 16, 2018), <https://verfassungsblog.de/sweet-like-sugar-bitter-like-a-lemon-bulgarias-cvm-report/>.

legal events that occurred in the aftermath of these democratizations were perhaps on an even greater scale than in Brazil.<sup>228</sup> However, they have not led to comparable judicial actions inspired by judicial reputation, such as the Lava Jato campaign. Finally, comparative lawyers have noted similarities between the Italian and French systems of organizing prosecutions, finding cultural differences stemming from post-World War II as developments that have led to different standards of exercising discretion among prosecutors.<sup>229</sup> However, this difference does not explain the capacities for dealing with large-scale political corruption—occasional prosecutions of political corruption appeared in France (and in most other European countries) as well, without ever matching the scale of those in Italy.

What is common to the explanations inspired by a legal culture or path dependency approach offered for the campaigns occurring in Romania and Brazil<sup>230</sup> is that they highlight the loss of legitimacy of the legislative and executive branches of power. Unlike judicial reputation theory, which sees the power of the judicial branch as inherent to itself, these explanations see the strength of judges' and prosecutors' actions in the exploitation of the shift in the balance of powers between the branches. In the case of Brazil, judges and prosecutors seem to have counted on public support for their actions, thus acting as representatives of civil society. However, the explanations—at least concerning Italy—downplay the political ambitions of the leading judicial actors, and, in doing so, remain confined to positing that, overall, the judges performed within their constitutional duties. More recent literature, in particular dealing with Brazil, acknowledges the high probability of the existence of a political agenda but remains, in my view, partisan to Lula viewing the politicization of the campaign as a bad thing per se instead of following a more nuanced approach to the political leanings of the judges and prosecutors that the theory of judicial reputation allows us.<sup>231</sup>

One of the key concepts of path development—the idea that there are critical junctures—could provide itself as a “bridge”

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<sup>228</sup> Carlos Martín-Beristain, et al., *Psychosocial effects of participation in rituals of transitional justice: A collective-level analysis and review of the literature of the effects of TRCs and trials on human rights violations in Latin America*, 25(1) REVISTA DE PSICOLOGÍA SOCIAL 47, 47–60 (2010).

<sup>229</sup> David Nelken, *Comparing Legal Cultures* 183–98 (1st ed. 1997).

<sup>230</sup> Mungiu Pippidi, *supra* note 10; Hein, *supra* note 5; Mendelski, *supra* note 6; Lagunes, *supra* note 49; Moro, *supra* note 115.

<sup>231</sup> See e.g., Meszaros, *supra* note 6; de sa Silva, *supra* note 8.

between this concept and that of judicial reputation. Namely, by understanding that not only institutional settings but events, such as judicial anti-corruption campaigns themselves, have features of critical junctures, the concept of judicial reputation could be enriched. Potentially, this enrichment could then help legal theorists to explore the evolution of legal culture as a series of key institutional events inspired by the reputation-seeking activities of judicial branch actors. This would also allow us to properly re-evaluate the introduction of judicial councils in a legal system, something the path dependency approaches view as fundamental. In this view, the councils themselves would not be recognized as a guarantee of the preparedness of the legal system to fight corruption but rather the protection that the judges and prosecutors enjoy from undue disciplinary action.

## VI. CONCLUSION

The theory of judicial reputation offers significant advantages as a theoretical framework for consideration of judicial anticorruption campaigns. First, this theory convincingly explains why judges and prosecutors went beyond their call to constitutional duties. It explains the wide reformist and legislative plans they offered for the rebuilding of their societies and their anticipation that their campaigns might be a turning point for society. Second, it explains why the judges and prosecutors, when provided with an opportunity for political positions, domestic in the case of Italy and Brazil and international in the case of Romania, did not shy away from taking them; they were looking to bolster their individual reputations. Third, the constant leaks of information by prosecutors is more evidence that they were attempts to sway public opinion in their favor through deliberate media campaigns and not mere communication tools. Fourth, the situations preceding the beginnings of the three campaigns were hardly unique for the three countries. For example, strong judicial councils, independent prosecutorial teams, widespread corruption, crises of legitimacy, and the loss of support for the executive and legislative branches of government had existed across Eastern Europe and Latin America in the preceding fifteen years.<sup>232</sup> However, judicial campaigns did not occur in these countries. Certainly, the normative ideal of the

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<sup>232</sup> See Popova & Post, *supra* note 3 (explaining the differences in approaches to corruption between the Eastern European countries); Ezequiel Gonzalez-Ocantos & Viviana Baraybar Hidalgo, *Lava Jato beyond Borders*, 15 TAI. J. DEMOC. 63 (2019) (describing the impact of the operation outside of Brazil).

Italian judiciary forged in the anti-Mafia campaigns of the 1970s and 1980s can, to a certain extent, be the *differentia specifica*, distinguishing it from many jurisdictions of the world. However, the campaigns also occurred in Brazil and Romania, where such a normative ideal, even if present, is much less pronounced in shaping the normative view of the judicial profession by those within it. In fact, the two campaigns contributed precisely to the development of such a normative ideal.

Finally, it is the concept of the judicial reputation that provides for an adequate positioning and understanding of the role that the judicial councils play; they do not guarantee an independent judiciary, as evidenced by the backsliding that occurred in Romania in the aftermath of the campaigns, but rather a judiciary that is more insulated from political pressures and has more opportunity for individualization. Therefore, the paths taken by both the judiciary and other institutional actors in other jurisdictions with comparable legal reforms, institutional setup, and prevalence of corruption were much less intrusive and focused not so much on the prosecution but on the prevention of corruption.<sup>233</sup> Fifth, if we apply path dependency theory to our cases, none of the cases has led to a sharp turning point for the strengthening of the judiciary or to an anticorruption framework. Instead, the effects were those of a reconsideration of the judiciary's role in the distribution of power and a decrease in the scope of authority bestowed upon the judges and prosecutors in the fight against corruption.

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<sup>233</sup> See generally Popova & Post, *supra* note 3.