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# INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY: SOME THOUGHTS ABOUT ANTI-CORRUPTION (AND OTHER) AGENCIES

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Classical constitutional theory identified three functions of government—law-making, law-enforcement, and adjudication of legal disputes—and assigned them to three distinct branches of government. As this tripartite framework began to break down over the course of the twentieth century, constitutional theorists identified a fourth function—the protection of the constitution itself. The corruption of high-level public officials can undermine democracy, in large part by generating public cynicism about the possibility that government can act for the general good. In principle, a structurally independent institution suggests itself as the solution, such as electoral commissions and anti-corruption institutions. This paper presents two case studies of institutions supporting democracy in South Africa and Brazil. It suggests that those who design these institutions, and those who staff them, should be sensitive to the complicated interactions between independence, necessary to ensure that high-level corruption comes under scrutiny, and accountability, necessary to ensure that anti-corruption investigations are well-integrated into the nation's system of government as a whole.

## I. INTRODUCTION: INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

Classical constitutional theory identified three functions of government—law-making, law-enforcement, and adjudication of legal disputes—and assigned them to three distinct "branches" of government—the legislative, the executive, and the judicial. This tripartite framework began to break down over the course of the twentieth century. Constitutional theorists identified a fourth function—the protection of the constitution itself.[1]

What institution could serve *that* function? Carl Schmitt and Hans Kelsen, two major figures in continental constitutional theory, agreed that any institutions serving that function would have to be "above politics", where "politics" referred to the ordinary everyday process by which legislation was made.[2] Schmitt argued that a

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[1] Much of this Section is drawn from part I of Mark Tushnet, "Fifth-Branch Institutions: South Africa" in David S. Law, ed, *Constitutionalism in Context* (Cambridge University Press, forthcoming).

[2] See *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Lars Vinx trans., Cambridge University Press, 2015).

president elected by the nation as a whole could be above politics in that sense, Kelsen that only a specially designed constitutional court could be. In the end, Kelsen won the argument and constitutional design came to assign the function to such courts.[3]

By the end of the twentieth century, constitutional theorists and designers came to understand that threats to a democratic constitution could come from many sources, and that a constitutional court might not be the best institution to deal with some threats. For example, representative democracy is said to require that districts be drawn "fairly" and elections conducted in a reasonably "free and fair" manner; the latter might require some supervision of campaign tactics. Constitutional courts could perform these functions, but there might be better ways to design an electoral commission or an electoral court than to rely on an institution designed to address "legal" questions about constitutional power. Similar institutions are state auditing bureaus, which guard against misapplication of public funds (sometimes for efficiency's sake, sometimes to identify corruption), and the Control Yuan in the *Constitution of the Republic of China (Taiwan)*, which has jurisdiction over several democracy-related matters. Chapter 9 of the *Constitution of the Republic of South Africa*[4] collects several of these institutions under the heading "Institutions Protecting Constitutional Democracy".

Some design issues are common to all institutions of this variety. Consider electoral commissions. Drawing district boundaries blends legal or normative considerations with political ones. The legal ones may be a combination of "one person, one vote" with concerns for ensuring appropriate representation of important geographically concentrated interests, and ensuring that elections will result in governing coalitions. The political ones may be to protect the interests of existing political parties and incumbents. Constitution designers might be concerned that giving the power to draw district lines to legislators will lead to outcomes in which the latter, political interests are overvalued, the normative ones undervalued.[5] Much the same is true of qualification for the ballot. Some aspects might be purely technical, as in determining the validity of signatures and counting them. Other aspects, though, might be

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[3] I think it important to note that contemporary constitutional courts differ from the one Kelsen envisioned, in three ways. First, Kelsen focused on protecting the *structure* of democratic government by ensuring that the boundaries between parliamentary and executive power, and between national and subnational power, were respected. Contemporary constitutional courts have come to protect individual constitutional rights as components of the democratic constitutional order. Second, some courts that perform the function of protecting the constitutional order are the apex courts of the ordinary judiciary rather than specialized and separate from that judiciary. Kelsen's design assumed that judges on the ordinary courts would be chosen and promoted solely on the basis of technical legal merit, as in the model civil law jurisdiction, and that such judges would not have the right combination of legal technique and political support to be able to perform the function. And third and most important, the idea that constitutional courts could be "above politics" has come under sustained pressure from scholars (and politicians) influenced by American Legal Realism and its cognates in other nations.

[4] *Constitution of the Republic of South Africa, 1996*, No 108 of 1996.

[5] And, though this is not a focus of attention here, they might also be concerned that judges on a constitutional court would overvalue the normative "legal" interests and undervalue or be incompetent in evaluating the political ones. The task of drawing district lines is what Lon Fuller called a "polycentric" one, and he argued that judges on ordinary courts could deal with them only by transforming them into purely legalistic problems. For Fuller's argument, see Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard Law Review 353. Though Fuller overstated the limits of judicial capacity, experience does suggest that there is a *tendency* for courts to wrestle polycentric tasks into a shape that they are more comfortable with. Other parts of this Lecture expand on this observation.

politically charged, as in militant democracies where some parties are barred from the ballot because of their programs. Again, giving legislatures the power even to count signatures, much less to determine which parties can appear on the ballot, risks excessive political input into an outcome that, while partly political, has important technical and normative components.

In principle, a structurally independent institution suggests itself as the solution, but the devil is in the details. The electoral commission or specialised electoral court must operate in a way that elicits agreement from the political parties themselves. How are its members to be selected? What role should political actors play in choosing members, or confirming them once chosen? Should there be a requirement of partisan balance? How can that be achieved in a nation with a weak, multi-party system, or in one with a dominant party? What role should civil society organisations play in choosing members of the commission?

Anti-corruption institutions can also be seen as institutions supporting constitutional democracy and thus prime candidates for fifth-branch status. Corruption undermines public confidence that the government is "for the people", and such confidence makes important contributions to democratic stability. More than in the case of anti-corruption institutions, the political aspects of electoral commissions are close to the surface. Some design questions might receive easier answers in one or the other context. For example, it is easier to see that electoral commissions should be multimember bodies than to see that anti-corruption institutions might have a plural head. The blend of technical expertise and political sensitivity—a version of independence and accountability—might be different for electoral commissions and anti-corruption institutions. Their deep structure is similar even so.[6]

The recurring rationale behind the creation of independent democracy-supporting institutions is that the traditional institutions—legislatures and executives specifically, but to some degree courts as well—have incentives or handicaps that skew them away from performing certain democracy-supporting tasks well. Legislators have obvious political interests in drawing district lines, and courts may approach issues with too legalistic a cast of mind. In addition, as just discussed, each institution combines expertise and politics. The central problem in designing democracy-supporting institutions may be figuring out ways to cabin the mission-commitment associated with each institution's required expertise without introducing a new but equally troublesome set of skewed incentives.

In some nations, some of the work of institutions supporting democracy assigned in other nations to distinct institutions is assigned to the courts, and particularly to the constitutional court. Sometimes that results from a lack of capacity in the national political system as a whole, as when, for example, the number of trustworthy

[6] Other institutions that arguably protect constitutional democracy are ombudsman offices and human rights commissions. Such institutions are designed to promote transparency and thereby political accountability. Yet, if the institutions of interest are needed, as I argue elsewhere, because of conflicts of interest within the political branches and because of some need for expertise, ombuds offices and human rights commissions might not fit well within the category: Ombuds offices provide supervision of executive bureaucracies akin to that provided by standard forms of administrative review, at lower cost to the complainant but with less remedial power. Human rights commissions have similar investigative and publicity roles. See Mark Tushnet, "Institutions Protecting Constitutional Democracy: Some Conceptual and Methodological Preliminaries" (2019) 69 University of Toronto Law Journal (forthcoming).

decision-makers is small.[7] But, as we will see, assigning the task to judges can create real threats to the idea that courts are ordinarily "above politics" even in a world where the public understands that ordinary judging does involve political judgment to some extent.

The courts' core task is to protect the constitution by declaring legislation and executive actions unconstitutional. Doing so will sometimes or often embroil the courts in political controversy. Asking the courts to resolve contentious issues associated with elections, as an electoral commission would, might exacerbate their political involvement—as when they are called upon to determine the outcome of hotly contested elections—and, sometimes, inhibit popular support for their performance of their core function. On the other hand, effective resolution of politically contentious issues about elections and the like might enhance the courts' reputation for the evenhanded administration of the law and strengthen popular support for their core work. The short-term response to the decision in 2017 to void Kenya's presidential election was quite favourable to the courts, even among some supporters of the candidate whose victory was taken away, But the response to the United States Supreme Court's decision in 2000 effectively awarding the presidency to George W Bush,[8] in contrast, appears to have been heightened polarisation in views about the Court.

National constitutions differ in the extent to which they use courts to do the work of supporting democracy rather than specialised institutions, even when it is clear that it would be possible to staff such institutions. One matter for further research is whether, or under what conditions, choosing the courts to supervise electoral fairness and investigate corruption is a sound design decision.

Finally, what of constitutional courts as the original institutions supporting constitutional democracy? The design issues associated with them are well known and need not be addressed in detail here. One point, though, seems worth making: Good constitutional design counsels giving constitutional courts as little additional work to protect constitutional democracy as possible, given the political conditions when the design occurs. The reason is that each institution's tasks blend expertise and politics. State auditors must have financial expertise, but must be alert to the ways in which political discretion can properly be exercised in making financing decisions on the public's behalf. Constitutional courts must have legal expertise, but must be sensitive to the ways in which a nation's politics interact with its constitution.

The proportions of each vary among the institutions. The blend that is best for a constitutional court is almost certainly not the blend that is best for an electoral commission, and similarly for the blend best for an anti-corruption institution. More concretely: The jobs done by electoral commissions can involve constitutional courts in what Ran Hirschl calls "mega-politics".[9] These include the determination of who the nation's president will be, or whether a popular political party will be barred from the ballot. The jobs done by anti-corruption institutions can have similarly large political dimensions.

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[7] In a civil law tradition with investigating magistrates, giving such magistrates authority to investigate corruption may seem natural.

[8] *Bush v Gore* 531 US 98 (2000) [*Bush v Gore*].

[9] Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts" (2008) 11 Annual Review of Political Science 93.

Constitutional courts will inevitably be drawn into political controversy more openly than in the ordinary constitutional case when they perform these tasks. The US Supreme Court's decision in *Bush v Gore*—which not only determined who the President would be but arguably set the course of political development in the United States up to the present—is exemplary. So too is the role of Brazil's Federal Constitutional Court in trying political corruption charges.

To some extent political controversy about the core actions of constitutional courts is not problematic in itself, because their core work does have political dimensions. Heightened controversy resulting from giving constitutional courts additional work that could be done by other institutions might be problematic, though. By drawing the court into greater political controversy, it might reduce the public support that most scholars believe an important buttress to its ability to perform its core functions of directly protecting the constitution.

## II. Anti-Corruption and the Protection of Constitutional Democracy—Two Case Studies

Policy-oriented corruption studies abound. They tend to focus on the cultural and political conditions facilitating or limiting corruption and on the economics of corruption. They devote relatively little attention to questions of institutional design of anti-corruption agencies, perhaps because, as noted below, the details of design seem to have little relationship to the success or failure of those agencies. Not surprisingly, then, they devote even less attention to the location of anti-corruption agencies within a constitutional order.

Here I offer two brief case studies of some aspects of anti-corruption investigations in South Africa and Brazil, with the aim of illuminating how anti-corruption efforts fit into and affect the operation of other core constitutional institutions. The sketches are brief because, commensurate with the complexity of the corruption schemes, the investigations were quite complex. I have singled out some episodes and elements of the investigations that, in my view, help us understand the broader issues associated with anti-corruption agencies as institutions protecting constitutional democracy.

### A. *South Africa*

As noted earlier, Chapter 9 of the *Constitution of the Republic of South Africa* identifies a number of institutions supporting constitutional democracy. It does not include an anti-corruption agency. Initially, anti-corruption efforts were placed in the ordinary ministries concerned with justice and policing. Efforts by President Thabo Mbeki to exercise political control over corruption investigations led to an important Constitutional Court decision giving the anti-corruption effort constitutional protection against politically motivated interference, though the precise contours of that protection remain unclear. Nonetheless, corruption investigations eventually led to the removal of Mbeki's successor Jacob Zuma from office.

Two aspects in the background of all these developments frame the following discussion. First, since the end of apartheid South Africa has been a "dominant party" state, with the African National Congress ("ANC") having a substantial majority

of parliamentary seats.[10] Internally, though, the ANC was something like a coalition. Initially the components derived from the nation's chief labor organisation and the South African Communist Party, and the party was held together by the astute and charismatic Nelson Mandela. When he voluntarily left politics, leadership passed to factions centered on Thabo Mbeki and Jacob Zuma. These factions were partly personalistic, partly programmatic, the latter involving disagreements over the best policies to achieve economic growth and enhance the wealth of the nation's black population. To build support, both factions engaged in patronage politics, which sometimes were the vehicle not only for faction-building but straight-forward individual-level corruption.

Second, the initial South African Constitutional Court was extremely strong and able. Its members were quite distinguished lawyers who had provided legal support to the ANC during apartheid or had led the legal opposition to apartheid. As presidents, Mbeki and Zuma weakened the Court, appointing less distinguished lawyers and hoping to increase their influence on it. As we will see, those efforts were partly, but only partly, successful.

### 1. *The Events*

The institutions leading anti-corruption efforts in South Africa were the South African Police Service ("SAPS"), the ordinary police force under the control of the Minister of Justice, and the National Prosecuting Authority ("NPA"), headed by a Director of Public Prosecution who reports to the Minister of Justice as well. In 1999 Parliament created a special unit, the Directorate of Special Operations ("DSO"), within the NPA, charged with investigating "national priority crime," defined to include corruption, organised crime, and financial crimes. Known as the Scorpions, the DSO was by all accounts a rather effective agency whose successes created bureaucratic tension with the SAPS.

Though President Mbeki was never accused of corruption himself, there is no doubt that corruption was widespread during his administration. One major example was the "arms deal". The deal combined hopes for investment in military modernisation with kickbacks to influential ANC members. Zuma's chief financial adviser was prosecuted as part of the arms deal investigation. This led to a major confrontation between Mbeki, who as President was thought to control the Scorpions, and Zuma. Zuma won the intraparty fight and forced Mbeki out of his position as ANC head, and quickly out of the presidency.

The Scorpions figured in the factional conflict, and Zuma's faction, and so the ANC in parliament, supported legislation dissolving the Scorpions and transferring its power to the SAPS, in a unit that came to be known as the Hawks. Businessman Hugh Glenister managed to get the Constitutional Court to consider a constitutional challenge to the Scorpions' replacement by the Hawks, contending that the Scorpions had, but the Hawks lacked, the degree of independence of political control that, he contended, the Constitution required.

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[10] For most of the relevant period the ANC's majority was just short of the number needed to amend the Constitution, and no opposition party was willing to lend its votes to allow controversial amendments to pass.

Dividing five-to-four, the Constitutional Court agreed with Glenister.[11] Controversially finding support from international commitments South Africa had made, the majority first found that the Constitution did indeed require that the anti-corruption agency have sufficient independence from political control (despite the fact that there was no specific constitutional provision to that effect). Corruption, according to the majority, "blatantly undermines. . . the institutions of democracy".[12] To combat it, the Constitution implicitly required an independent anti-corruption agency. The majority found that the Hawks were not sufficiently independent. It examined both structure and what it called "operational control", by which it appeared to mean the way in which the Hawks actually went about investigating and, importantly, refrained from investigating. It also emphasised that the appearance of independence might be as important as actual independence. This mattered because, whatever the reality, the public appeared to believe that Zuma had reduced the unit's independence by replacing the Scorpions with the Hawks. Structural defects included the absence of special protections against removal beyond those available to all police officials and the possibility of reappointment as head of the Hawks, which might lead incumbents to curry favor in hopes of reappointment. Most important, though, was the fact that the Hawks' work would be coordinated through a Cabinet committee, which nominally would be concerned only with general policy but which was likely to shape policy in light of specific investigations. The thought was that, having a specific investigation in mind, the committee could gerrymander the list of topics the Hawks were authorised to investigate to bar them from looking into individual targets the committee wished to protect.

The majority observed that any anti-corruption agency had to be subject to parliamentary oversight, but found that the oversight mechanisms for the Hawks were too intrusive. Dissenting Chief Justice Sandile Ngcobo disagreed. He concurred that the Hawks had to have some degree of independence from political control, but stressed, more than the majority did, that accountability through oversight was required as well. Anti-corruption agencies "should not be a law unto themselves."[13] "What is required are legal mechanisms that will limit the possibility of. . . interference in the operational decisions".[14] After outlining what he believed were some specific requirements, the Chief Justice found that the Hawks' structure had "important safeguards" against improper political control.

The government responded to this decision by making cosmetic changes in the legislation about the Hawks. Glenister and his allies were unsatisfied and again prevailed in the Constitutional Court.[15] This time the decision was written by the new Chief Justice Mogoeng Mogoeng. Mogoeng's appointment had been controversial; he was the Court's junior justice when appointed chief justice, and many thought that he would be too deferential to Mbeki and the ANC. In this iteration of the Hawks case, though, Mogoeng ruled against Mbeki. The majority went systematically through

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[11] *Glenister v President of the Republic of South Africa* [2011] 3 S Afr LR 347 (CC) [*Glenister*].

[12] *Ibid* at para 166.

[13] *Ibid* at para 123.

[14] *Ibid* at para 120.

[15] *Helen Suzman Foundation v President of the Republic of South Africa*, CCT 07/14 No. 27, 2014. The case was joined with Glenister's case, CCT09/14, and is referred to either as *Helen Suzman Foundation* or *Glenister III*. Both cases are reported at [2015] 2 S Afr LR 1 (CC).

the changes the new legislation had made, and found that most of them enhanced the Hawks' independence. But, one key objection remained. The new statute continued to give the government the power to control the topics the Hawks could investigate, a power that the initial *Glenister* case feared could give the government the power to determine who the investigation would target. Having encountered what it clearly believed to be government obstruction, the Court "severed" the unconstitutional oversight mechanism, thereby in effect giving the Hawks' leader complete discretion to identify targets.

Eventually Zuma was forced to resign as president, as a result of an investigation by the Chapter 9 Office of Public Protector, whose responsibilities include investigation of "improper acts with respect to public money". News reports revealed that Zuma had used more than a million dollars in public funds for home improvements, nominally to increase his personal security—though the improvements included a chicken coop and a swimming pool. In January 2014 the Public Protector issued a report on the matter, but Zuma and his faction within the ANC refused to do anything in response. In 2016 the Constitutional Court held that the report placed Zuma under a legal duty to repay the money, which he did.[16] Zuma's troubles accumulated. His opponents contended that the actions he had taken in connection with his house justified his impeachment. His allies in parliament blocked that effort, but the Constitutional Court held that the Assembly's Speaker had a constitutional duty to promulgate rules for impeachments and that Parliament had a constitutional right to determine whether what Zuma had done satisfied the constitutional requirements for impeachment. All this and more culminated in Zuma's resignation as President in early 2018.

## 2. *Legal and Constitutional-Policy Analysis*

Lon Fuller was skeptical of courts' ability to deal effectively with "polycentric" disputes because, in his view, the conceptual tools of legal doctrine—of doctrine as such—were unsuited to such problems. He suggested, for example, that courts might transform otherwise intractable polycentric problems into ones they were comfortable dealing with, by squeezing them into familiar categories. The initial *Glenister* case provides support for Fuller's suggestion. The doctrines the courts deployed to move the anti-corruption investigations along were clearly problematic, as Chief Justice Ngcobo's dissent showed.

At the most general level the Scorpions/Hawks problem shows that designing anti-corruption agencies requires striking a balance between independence and accountability. One recent study suggests that the design choice is "between 'legal' mechanisms, which involve apolitical expert bodies such as prosecutors' offices, 'political' mechanisms, which run through elected bodies such as legislatures, or some mix of the two." The author observes that none of the options "is obviously optimal."[17] The reason is clear: Anti-corruption investigations of high-level officials are

[16] *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11.

[17] Aziz Z Huq, "Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design" (2018) 65 UCLA Law Review 1506.

deeply implicated in politics, and mere technical expertise is not the only qualification investigators should have.[18]

Further, even the legalistic dimension of design poses difficulties. Courts assessing whether specific offices satisfy constitutional requirements for balancing independence and accountability necessarily must cast their arguments in doctrinal terms. Yet, the concepts of independence and accountability resist "doctrinalisation". As the legislation adopted in the wake of the first Scorpions/Hawks case shows, it is extremely difficult to give a reasoned explanation for why marginal changes in design details balance the competing concerns either appropriately or inappropriately. As events unfolded, it seems that the Court's decision to allow the Hawks' investigations to proceed unimpeded worked well. The reason, though, may well have been that the justices understood in a way that could not be openly articulated that Mbeki and then Zuma were indeed deeply corrupt and that something had to be done about them. Fuller might describe what the Court did as forcing a desirable outcome into an ill-fitting doctrinal framework.

### 3. *Conclusions as to South Africa*

One important finding in studies of anti-corruption efforts is that institutional design is largely irrelevant: Designs that seem good in the abstract work badly, and designs that seem bad (because, for example, they give one potential target of investigation an effective veto power) can work well.[19] That finding is supported by the South African case study. The precise details of institutional design—where the Scorpions or the Hawks were located within the nation's constitutional structure—appears to have had little to do with the successful outcome.

The South African case shows that investigations of high-level corruption can succeed even in a system with a dominant party. The Constitutional Court ruled consistently against Zuma, and its decisions kept the issue of his corruption on the public agenda in the face of Zuma's efforts to ignore the allegations. And the Public Protector, a Chapter 9 institution, played an important role. The condition of success appears to have been the existence of reasonably stable intra-party factions, and perhaps the existence of an anti-Zuma faction that was not merely the vehicle for the personal advancement of another party leader.

## B. *Brazil*

Brazil's party system is near the opposite pole from South Africa's. Parties in Brazil are in the main quite fluid, vehicles for the advancement of particular political leaders and difficult to sustain once their leader leaves the scene. Such party systems are

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[18] In addition, the precise contours of the technical expertise required to investigate corruption are unclear—perhaps some facility at working with complex financial arrangements, some insight into how bribes and similar actions can be concealed, and the like.

[19] What appears to matter is sustained commitment by national leaders to rooting out corruption, as in the "gold standard" cases of Singapore and Hong Kong, the former a dominant-party system, the latter a colonial one when corruption was effectively eliminated.

generally prescriptions for chaotic governance and often for the displacement of democratic rule, discredited by that chaos, by authoritarian rule.

Recently Brazil had a major anti-corruption investigation that simultaneously rooted out substantial corruption, devastated the leadership of one of the nation's leading parties, and contributed to the election of a president with clear authoritarian tendencies and himself tainted by corruption.

### 1. *The Events*

The Lava Jato (Car Wash) scandal began with an investigation of bribes paid by construction companies seeking valuable contracts, to high-level employees of Brazil's semi-public oil and gas company Petrobras.[20] The public corruption dimension of the scandal was in essence this: members of the federal cabinet nominated Petrobras officials. Those officials in turn solicited and received bribes from construction companies (on an enormous scale). The officials then paid off the cabinet members.

The effect of the Lava Jato investigation on Brazil's political system was substantial. The left-leaning Workers Party led by Luiz Inácio Lula da Silva had formed the government in 2003. As a result the politicians implicated in the scandal were from that party. Further, like many left-leaning parties around the world the Workers Party could not rely upon direct support from wealthy contributors who, of course, leaned to the right. Bribes and other forms of corruption were in part, though only in part, a means of filling the party's treasury and augmenting what some politicians might fairly have regarded as inappropriately low salaries. So, in addition to enriching public officials, the bribes had some effect in strengthening the Workers Party within an overall political system of quite weak parties.[21]

The most dramatic effect the investigation had on Brazil's politics occurred as the 2018 elections approached. Lula's protégé Dilma Rousseff having been impeached for purely political reasons, Lula was again running for president and appeared to be the leading candidate. The Lava Jato investigators charged Lula with corruption—accepting quite costly improvements in housing he used, to be paid for by one of the construction companies that had bribed Petrobras officials. Lula was disqualified from the ballot immediately after his conviction was affirmed by an appellate court, leading to the election of Jair Bolsonaro to the presidency.

The Lava Jato investigation was a coordinated effort by the Federal Public Prosecutors' Office, which is decentralised with substantial independent authority in state-level officials, and the Federal Police Department, under the control of the national Ministry of Justice. Judge Sergio Moro, a well-respected judge even prior

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[20] The scandal got its name from an early stage in the investigation, which revealed money laundering processed through a chain of car washing stations. In what follows I rely heavily on an unpublished paper by Mariana Mota Prado (University of Toronto) and Marta Machado (Fundação Getúlio Vargas, São Paulo) [Prado & Machado].

[21] The Menselão scandal, a predecessor to the Lava Jato investigation, involved payments made by the Workers Party to parliamentarians to keep them loyal to the party. The payments were concealed by taking them from advertising budgets of state-owned companies. Though clearly illegal and largely understood to be so by the participants, the payments also served a party-maintenance function.

to the investigation, was the supervising magistrate. The investigation's official venue was the state of Curitiba, one of Brazil's more conservative states.

One member of Brazil's Constitutional Court called Lava Jato a "spectacular investigation", meaning that it was an investigation-as-public-spectacle. In the name of transparency the investigators maintained a web-site that was updated with information as it became available. Perhaps even more dramatic, Judge Moro authorized the investigators to make recordings of conversations between Lula and Dilma and then released them to the public. The most damaging of the recordings, from Lula's point of view, had actually occurred *after* the authorisation to record had ended.[22] The recordings included a conversation about the Dilma's planned appointment of Lula as her chief of staff, which would have transferred the investigation from Judge Moro to the constitutional court. The day after the recordings were released to the public, Judge Moro placed a note in the official file—itself publicly available—stating that he had not noticed that the conversation occurred after the surveillance was to be ended, and offering a legal justification for releasing the recording notwithstanding the termination of the authorisation to record.

The circumstances and targets of the investigation led Workers Party supporters to suspect that it was politically motivated. The timing of the investigation into Lula himself, the quite indirect connection the payments for home improvements had to core examples of corruption, and particularly the concededly unlawful recording and then release of the Dilma-Lula recordings all contributed to the sense among those on the left that something more than pursuit of corruption was going on. Each aspect of the investigation that critics wondered about could be given a charitable non-political explanation. For example, only Workers Party officials could be targeted because the Workers Party had formed the government during the period covered by the investigation. Yet, Brazil's culture of corruption was deep-rooted, and Workers Party supporters pointed out that corrupt conservatives had not been pursued nearly as aggressively when they were in power. Similarly, Judge Moro defended the unlawful recording as an oversight that occurred under the press of time, and its release similarly innocent. Again, a charitable reading of the events is possible. But, critics suggested, the accumulation of actions too close to the margin of politically motivated investigation placed real pressure on charitable readings.[23]

### 2. *Legal and Constitutional Policy Analysis*

According to most Brazilian legal scholars, the Lava Jato investigation and ensuing prosecutions pushed the limits of the law as previously understood. Almost all the developments were legally defensible though often controversial. It seems clear that

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[22] Judge Moro authorised the recordings on 17 February 2016. At 11:13 AM on 16 March 2016, he entered an order terminating the surveillance. The police and the telephone company received that order around noon. Recording continued, though, and a recording made at 1:32 PM covered a conversation about Dilma's intention to appoint Lula chief of staff the next day. Releasing unauthorised surveillance recordings is a crime under Brazilian law.

[23] In this connection we must note that Judge Moro resigned his judicial post to take a position with the Bolsonaro government as minister in charge of anticorruption. For Moro's critics this served as a post hoc justification for their skepticism about his evenhandedness during the investigation—a justification that might well survive Minister Moro's public claims that he would continue to be even-handed as minister.

prosecutors and judges believed that rooting out corruption was essential to ensuring that, as one judge put it, "judges will not let crime kill the renewed hopes of the Brazilian people."[24]

The prosecutors' and judges' innovations were both procedural and substantive. For example, prosecutors, with judicial approval, expanded the use of a process of compelling suspects to answer questions prior to being formally charged. Prior to the Lava Jato investigation such questioning was authorised, though it rarely occurred, but only after the suspects had refused a request to appear voluntarily and answer questions. The Lava Jato investigators questioned suspects without making such a request. Most notably, they descended upon Lula's house to conduct such questioning, having notified the press of their impending action. The investigators justified their actions by noting a concern about the possibility that suspects would destroy incriminating evidence between the time of a request and their appearance. Yet, such a concern would seem to be present in nearly every case, and yet the courts had previously required strict adherence to the requirement of a prior request. In 2018, the Constitutional Court held that questioning without a prior request was unconstitutional, but it also allowed prosecutors to use material obtained in cases where such questioning had already occurred.

The substantive law of responsibility for corruption also developed during the Lava Jato scandal. Brazilian law clearly prohibited *giving* a bribe. Whether the person who received a bribe committed a crime was less clear. And, even more murky was the status of the politicians in the Lava Jato scandal. The construction companies bribed Petrobras officials. They passed some of the money on to the politicians, but there was no evidence available that those transfers were explicitly in exchange for appointing the Petrobras officials to positions where they could get or even solicit bribes. Even more remote was the responsibility of the President: there was no evidence that Lua had done or even promised to do anything whatever, including appointing ministers who would appoint Petrobras officials who would solicit bribes, that led the construction company to pay for his home improvements.

Judge Moro developed two ideas, the seeds of which were latent in existing law. Existing statutes defined "passive corruption" using the phrase (translated), "in connection with [the official's] position... even if it is to simply perform the obligations [of the office]... but in connection with [the office]."[25] Judge Moro read this to authorise conviction for receipt of gifts without any showing that the recipient promised or did anything to benefit the person giving the "gift" as long, apparently, as the recipient exercised power associated with the office that had some connection to the donor.

He also developed the idea of command responsibility, familiar from international criminal law, to go up the chain of command from the actual recipients of bribes to the ministers who appointed the recipients and ultimately to the president who appointed

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[24] Renan Ramalho, *STF confirma ordens para prender Delcídio Amaral e André Esteves, Globo*, online: <http://g1.globo.com/politica/operacao-lava-jato/noticia/2015/11/stf-confirma-ordens-para-prender-delcidio-amaral-e-andre-esteves.html>, cited in Prado & Machado, *supra* note 20.

[25] *13ª Vara da Justiça Federal de Curitiba (JF) (federal district courts on matters of federal interest), Ação Penal No 5046512-94.2016.4.04.7000/PR*, Relator: Sérgio Fernando Moro, 12/07/2017, online: <https://abrilveja.files.wordpress.com/2017/07/sentenc3a7a-lula.pdf>, cited in Prado & Machado, *supra* note 20.

the ministers.[26] Judge Moro's rulings were thus not unprecedented, but they extended previous decisions that had themselves been and that remained, controversial among Brazilian legal scholars.

A final example of pressure on the law requires the presentation of some detail. In 2009 the Constitutional Court held that those convicted of crimes could not be imprisoned until all avenues of appeal had been exhausted. In February 2016 the Court changed the rule, by a vote of six-to-five.[27] The majority held that imprisonment could follow upon the affirmance of a conviction by an intermediate appeals court. Roughly a year later one of the judges in the majority indicated that he had changed his mind: immediate imprisonment was allowed after the initial affirmance only if the defendant presented purely factual questions on appeal; if the defendant presented issues of law, imprisonment had to be deferred until after all appeals had been concluded.

That fit Lula's case precisely, so it would appear that he would not be sent to jail until his appeal to the constitutional court concluded—and that therefore he could appear on the 2018 ballot. The court took up Lula's challenge on 4 April 2018, amid intense public attention. The case presented (for present purposes) two questions: Could he be imprisoned after the intermediate court affirmed his conviction, and were there legal questions that invalidated his conviction? On the face of it there would seem to have been a majority favoring Lula on the first question—the five dissenters from 2016 and the judge who had changed his mind. That was not how things turned out, though. One of the dissenters voted to allow imprisonment after initial affirmance. She took the position that she was bound by the 2016 precedent from which she had dissented.[28] The result was that Lula was imprisoned and disqualified from the ballot.

### 3. *Conclusions as to Brazil*

Anti-corruption investigations are not pure examples of polycentric problems, though their political implications give them some degree of polycentricity. Yet, Fuller's predictions about what happens when courts attempt to deal with polycentric problems have at least some resonance in the Brazilian case.

Fuller suggested, for example, that judges dealing with such problems would, as he put it, depart from the "judicial proprieties". Fuller held essentialist views about those proprieties, and much of what he thought propriety required has become commonplace in adjudication around the world. Even so, Judge Moro's public defense of his role in releasing the Dilma-Lula recordings can fairly be described as extraordinary. And, more generally, Judge Moro invited public attention to his actions, becoming something of a celebrity judge in the process.[29]

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[26] Here Judge Moro built upon interpretations made during the prior Menselão scandal.

[27] *STF, HC 126.292 / SP*, Relator: Min Teori Zavascki, 17/02/2016, DJe, 17/05/2016 (Braz) (discussing the 2009 case), discussed in Prado & Machado, *supra* note 20.

[28] STF, HC 152752, Relator: Min Edson Fachin, 04/04/2018, 127, DJe, 27/06/2018 (Braz), discussed in Prado & Machado, *supra* note 20.

[29] Not directly implied by Fuller's analysis, but worth noting, was the use of a web-site by the investigators to post regular updates on the investigation. This seems more of an innovation related to the growth of internet community, a modification of "proprieties," than a departure from them.

The developments in substantive law, such as the expansion of the concept of "passive corruption" and the doctrine of willful blindness, might also have resulted from the pressures of pursuing high-level corruption. These are similar to the legal moves made in South Africa to make tractable the issues going to the Scorpions' and Hawks' independence from political control. It was not obviously mistaken to think that Lula's acceptance of home improvements was inconsistent with the ethical demands of public service. Without an expanded concept of passive corruption, though, his actions might have escaped sanction.

The Brazilian courts developed the law innovatively to deal with procedural and substantive problems associated with the Lava Jato investigation. Lawyers working in the common law tradition see such development as characteristic of law as such. Yet, though there appears to be nothing intrinsically wrong with that process, it does seem noteworthy that one matter played no articulated role in the judges' decisions: No one appears to have openly taken into account the potential disruption of politics the investigation caused. Or, perhaps more accurately: The judges and prosecutors appear to have believed that the benefits to democracy of an aggressive stance against high-level corruption outweighed the obvious disruption of ordinary politics—and especially the removal of Lula from the presidential ballot—that the investigation was causing. We cannot know yet whether they were correct. But, when coupled with the effective (even if not intended) tilt of the investigation against a leftist party, I believe there is reason to be concerned about the course the Lava Jato investigation took.

## III. Conclusion

The case studies presented here offer some cautionary lessons about institutions designed to protect constitutional democracy. In South Africa and Brazil the anti-corruption investigations succeeded in punishing corrupt leaders. Yet in South Africa institutional design appears to have mattered relatively little, and in Brazil the overall contribution of the investigation to political stability—to constitutional democracy itself—is open to serious question. In this concluding section I suggest that these lessons might derive from some systemic characteristics of anti-corruption agencies, and in particular from their polycentric and inevitably political nature. If so, we might want to investigate whether similar lessons might be drawn from studies of how other institutions for protecting constitutional democracy work.[30]

As both case studies show, corruption of high-level officials undermines democracy, in large part by generating public cynicism about the possibility that government can act for the general good. In some forms, though, corruption is not a pure "bad". To some extent the Menselão payments to legislators were a way to enhance the ability of a governing party to carry out its program where parties were generally weak and unable to govern effectively. And, equally to some extent the arms deal scandal was an effort to build state capacity and strengthen the economy. In both the "collateral" aspect of private enrichment might well have overwhelmed the public benefits of corruption. Any institution dealing with corruption, though, has to be sensitive to

[30] I note that constitutional courts are such institutions, and that the skeptical questions raised here about anti-corruption agencies are cousins to those raised in the literature skeptical of constitutional courts.

possible adverse effects upon democracy itself. And looming above all this is one lesson of the Lava Jato investigation, which may have exacerbated rather than eased public cynicism about politics and may have contributed to the electoral success of Jair Bolsonaro. Here too we have to acknowledge that the disruption of Brazilian politics in the short run might contribute to building a more robust democracy in the long run—though at the moment that seems much more a hope than a prediction.

The general lesson from the case studies is that anti-corruption agencies are not merely technical or professional, but are deeply implicated in national politics. We might think that this observation has some implications for designing these agencies.[31] For example, we might think that the qualifications of the agency's head should include some real-world political experience as well as training in investigation and prosecution. Or we might think that well-designed agencies would be headed by a commission rather than a single individual, so that deliberation among the leaders could reduce the risk of over-enthusiastic enforcement by an individual leader.

More generally, one design goal is to create an anti-corruption institution dealing (at least) with high-level officials that can draw distinctions between core cases of corruption and more marginal ones in which the private enrichment was part of a larger practice that might have some democracy-promoting features. Ideally, the institution would be designed so that its leadership would have some degree of sensitivity to the strength or weakness of the nation's democracy, and so some sensitivity to the degree to which corruption impairs democracy. But, achieving that sensitivity without subjecting the institution to the kind of political control that the judges in the *Glenister* cases worried about is quite difficult.

As I have noted several times, though, design appears to have little effect on outcomes, at least where outcomes are defined with reference to substantial reductions in corruption. Perhaps the most we can ask for is that those who design these institutions, and those who staff them, be sensitive to the complicated interactions between independence, necessary to ensure that high-level corruption comes under scrutiny, and accountability, necessary to ensure that anti-corruption investigations are well-integrated into the nation's system of government as a whole.

A final observation returns to polycentricity. Running through all these illustrations is a single theme: Corruption investigations are different from investigations of "ordinary" crimes. The boundaries of the crimes are less clear, and the techniques used to commit them involve distinctive forms of deception. Judges run the risk of applying rules appropriate for ordinary criminal investigations to corruption investigations. Just as censors specialise in censorship and prosecutors specialise in prosecution, judges specialise in law. Yet, because the problems of corruption are not (merely) legal, the best way of addressing them might not be (entirely) through law. Acting in the service of constitutional norms designed to promote democracy, judges might weaken democracy by perpetuating corruption *or* by seeking to root

[31] One pervasive difficulty, which probably cannot be alleviated by design, is that of "mission commitment," that is, the impulse of a person charged with investigating corruption to find it everywhere. It might be that "over"-enforcement of anti-corruption law would have long run benefits in generating a culture of honesty among public servants. In the short run over-enforcement imposes serious personal costs on officials who have committed relatively minor sins.

it out too vigorously. This suggests a need for caution—in technical terms, judicial deference—when reviewing the actions of anti-corruption agencies.

Anti-corruption investigations routinely result in criminal prosecutions, as they should. But courts are more than the venues for criminal trials. In the modern world courts are also supervisors of the behavior of the anti-corruption agencies. This is obviously true of investigating magistrates in civil law systems, but we have seen that constitutional courts regularly police the agencies' activities. The political dimension of corruption and its eradication may make such policing more problematic than ordinary exercises of judicial review of the constitutionality of government actions. Judges on constitutional courts may be more "legalistic" than appropriate. That is, they will try to fit the legal problems they deal with into a body of doctrine developed without attention to the special problems posed by the law of corruption. The modifications of substantive and procedural law in Brazil, and the South African Court's struggle to articulate why the Hawks' structure was unconstitutional, illustrate the limits of legal doctrine—which, as Fuller suggest, would occur if we see corruption as a polycentric problem.

I doubt that there is any formal "solution" to these difficulties. Eliminating a judicial role in supervising anti-corruption efforts is impossible in the modern world. Perhaps the best we can do is rely on scholars to issue cautionary notes—like this one—with some regularity, and hope that judges will come to understand the delicacy of their role. Perhaps anti-corruption *prosecutors* should be comfortable crusading against corruption, but in my view, judges should be more cautious.