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ARTICLE

Hidden Continuities?: The Avatars of "Judicial Lustration" in Post-Communist Romania

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Abstract

This Article grapples with the instrumentalization of the past in Romania, in the specific context of "judicial lustration" measures. It argues that decommunization and lustration policies, which could not be pursued in the immediate aftermath of the collapse of state socialism in 1989, were weaponized much later and used in order to advance other purposes. In 2006, an expedited judicial vetting procedure, in the context of the EU-driven fight against corruption, was repurposed by the center-right as a lustration instrument. In the same year, the dismantling of an intelligence service created after 1991 in the Justice Ministry (SIPA) to monitor 'vulnerabilities' in the justice system has set in motion a long series of failed attempts to bring closure to the question regarding the service's archives, fomenting continuities of suspicion until today. More recently, in 2018, a form of 'mock-judicial lustration' has been used by the political left to deflect or at least delegitimize repressive anti-corruption policies. The new "lustration procedure" implicitly equated the recent cooperation between prosecutors and intelligence officers, in the context of the fight against corruption, with past practices of collusion between the members of the judiciary and the communist *Securitate*. These three episodes of 'dealing with the past' are reviewed in order to showcase path-dependencies. Such path-dependencies are not linked only with carryovers from or throwbacks to the communist past. Rather, pre- and post-communist deficiencies of modernization, combined more recently with gaps in post-accession monitoring by the EU Commission, create continuities of peripheral instrumentalism. Various narratives, such as decommunization, the fight against graft, judicial reform and the rule of law are used to legitimize short-term consequentialism, evincing a resilient, structural resistance to legislative and legal normativity.

Keywords: Lustration and decommunization; anticorruption and judicial reforms; EU conditionalities; path-dependencies; rule of law ideologies

A. Introduction: Hidden Continuities?

The past is never dead. It's not even past.[1]

In 2019, the General Prosecutor of Romania, Mr. Augustin Lazăr, was forced to retire early, right after he had submitted his candidacy for another three-year term. He retired because it was discovered that, as a young prosecutor in charge of overseeing the Aiud prison during the 1980s, Lazăr repeatedly denied parole to anti-communist dissidents. The disclosure was made by two former detainees who had themselves been denied parole by Lazăr.

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[1]William Faulkner, Requiem for a Nun (1951)

The name of Aiud carries crushing symbolism. To be sure, in the 1980s, the penitentiary was used primarily as a place of detention for common criminals. Yet in the earlier, "Stalinist" period of Romanian Communism (1945–1964),[2] the place served as a ruthless maximum security center for the mass incarceration and "re-education" of political detainees. A monumental calvary was completed in 1999 to commemorate the victims. It overlooks the "Slaves' Ravine," the prison's common grave.

In his defense, the General Prosecutor responded to the accusations by pointing out that his signature had merely been a formal rubberstamp in the process. True, he had been "appointed by rotation" as a member of those parole committees, yet the substantive decisions on the fates of political prisoners were foreordained. The military prison administration, and by implication the communist secret police known as the *Securitate,* decided everything in such matters. All he did was apply the law—for example, determining whether the requisite sentence fractions had been executed before early release and whether disciplinary infringements had been committed. Institutional apologies for "questionable pre-1989 practices"—"legally instituted but characterized by a deficient ethical component"—and personal regret for the suffering of anticommunist fighters—"to whom we owe the fact that we now live in a democratic country, member of the EU"—were expressed.[3] However, Lazăr found no reason to either resign or withdraw his candidacy for a new term at the helm of the Public Ministry. These ham-handed statements struck a dissonant chord. It did not help that in his orations Lazăr routinely mentioned—inadvertently implying overlaps or continuities of legal values—that his career had, after all, spanned over 36 years of unblemished professional work as a prosecutor.

This scandal resulted in a clash of paradigms. At the time, the General Prosecutor was perceived and presented by the Romanian political and civil society center-right as a torchbearer of anti-corruption and the rule of law. These two concepts are used in the center-right discourse as shibboleths which, in their broader ideological context, go hand in hand with the motif of anti-communism.[4] To wit, one of the most common slogans chanted during the 2017–2019 anti-corruption demonstrations was "the Red Plague," directed at the Social Democratic Party (*Partidul Social Democrat*, PSD). The social democrats—the mainstream left—are interchangeably portrayed by the Romanian right as a "corrupt" and "successor" party.

Furthermore, the General Prosecutor's Office had recently finalized the indictment in the so-called "Revolution File."[5] A 198-page long section of the document was leaked promptly to the center-right press. Brazilian-style leaks, together with perp-walks with press in attendance, have slowly become a diverting and informative staple of Romanian high-profile criminal litigation.[6] In the case, early post-revolutionary social-democratic leaders, including Ion Iliescu —President of Romania from the years 1990–1992, 1992–1996, and 2000–2004[7]—were brought

[2]Stalin, of course, died in 1953. In Romania, the Stalinist policy of hardline repression, which began in 1945 and was entrenched in 1947, after the abolition of the monarchy and the proclamation of the Soviet-backed People's Republic, lingered on however until 1963–1964. After 1962, a period of thawing of the regime gradually replaced collective political repression. Three pardon decrees were adopted from 1963 through 1964, leading eventually to the liberation of all political detainees.

[3]Augustin Lazar, *Augustin Lazăr: Nu sunt ofițer, subofițer, agent sau colaborator al fostei Securități*, YOUTUBE (Apr. 9, 2019), https://www.youtube.com/watch?v=-S6SNvGO5RI.

[4]Bogdan Iancu, *Status Quo Hegemony?: Conflicting Narratives About the "Rule of Law,"* VERFBLOG, (Oct. 6, 2020), https://verfassungsblog.de/status-quo-hegemony/.

[5]Magda Grădinaru, *Augustin Lazăr pleacă. Povestea Premiului de la GDS și cine profită de pe urma ei*., ZIARE (Apr. 19, 2019), https://ziare.com/augustin-lazar/procuror-general/augustin-lazar-pleaca-care-a-fost-povestea-premiului-de-la-gds-si-cine-profita-de-pe-urma-ei-1558519.

[6]Alin Ionescu, *Dosarul Revoluției: Procurorii susțin că Ion Iliescu a comis un act de trădare prin solicitarea intervenției militare din partea URSS, dar faptele s-au prescris G4media*, CDN (Apr. 18, 2019), țhttps://cdn.g4media.ro/wp-content/uploads/2019/04/Extras-rechizitoriu-Dosarul-Revoluției.pdf.

[7]Iliescu was elected in 1990 and served a short presidential term under the provisional, post-revolutionary constitutional framework (Decree Law 92/1990). The Constitutional Court (Ruling 1 of 8.09.1996, M.Of. 213/9.09.1996) cleared the way for his candidacy in 1996 with the reasoning that his only "constitutional mandate" had been that of 1992–1996 after the entry

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up on charges of crimes against humanity, which allegedly occurred during and immediately after the 1989 Revolution.[8] Should this indictment ever result in definitive convictions, it would have a delegitimizing effect on the PSD. Conversely, convictions would constitute a political marketing bonanza for the Romanian right and President Klaus Iohannis. In recognition of his contribution to Romanian *Vergangenheitsbewältigung* and to his role as last anti-corruption bastion against the "corrupt" Social-Democratic Party,[9] Mr. Lazăr had been awarded prizes by high-brow, anti-communist, civil society NGOs. The "Timişoara Society," named after the eponymous city where the Romanian Revolution started, bestowed upon him the Hope Prize. The Group for Social Dialogue in Bucharest conferred upon the General Prosecutor its prestigious yearly award "for special merits in the fight against corruption." Mr. Lazăr duly collected the first accolade, but was, in the end, compelled by mounting public pressure to forgo the second ceremony. Daniel Morar, chief prosecutor of the Romanian anti-corruption watchdog between 2005 and 2013, who is currently a Constitutional Court justice, returned his own 2011 award in protest.[10] A member of the Social Dialogue Group resigned and another suspended himself. The General Prosecutor eventually announced that he would bequeath the Bucharest honor, as a kind of compensatory hand-me-down, to a political prisoner that he had not paroled when he was a young magistrate and, more generally, to the Romanian Former Political Detainees Association. In the event, the award was granted but without a public ceremony. Shortly thereafter, Lazăr retired.

The moment as such was politically salient and was amplified by the Social Democratic Party[11] and segments of the media close to the party. The PSD followed up by sending—in lieu of its own MPs—the two former political prisoners that had accused the Prosecutor General to the Cotroceni Presidential Palace to represent the party in mandatory consultations before the convening of a presidential consultative referendum.[12] That referendum obliquely targeted the social-democrats as the party of corruption. Organized on May 26, 2019—the same day as that year's European Parliament elections—the consultation was structured along directly or implicitly anti-corruption related themes: No pardon or amnesty applicable to corruption crimes; no ordinances in the fields of crimes, punishments, and judicial organization; and extending the right to challenge ordinances

into force of the 1991 Constitution, and thus that his renewed candidacy did not conflict with the constitutional limitation on maximum two presidential terms. Iliescu did not win the election of 1996, but the ruling made possible his candidacy and eventual election for another term in 2000.

[8]In essence, they are accused of fomenting a state of confusion and chaos that resulted in unnecessary casualties after the collapse of the regime, thus facilitating their power grab. It should be noted that in this context, even though—pursuant to an amendment of 2003—the constitution refers in Article 1 to "the spirit of the Revolution of 1989," the social and political spectrums are deeply divided even over the term itself with some preferring "the so-called Revolution," or *loviluție*, which is a portmanteau oxymoron fusing the root and ending of the Romanian words denoting coup d'état *and* revolution.

[9]For context, this episode happened when the flagship of Romanian anti-corruption, Laura Codruța Kövesi, had been removed in 2018 by the center-right President upon the request of the center-left Minister of Justice, which represented an important battle in a larger, high-stakes institutional infighting at the apex of the Romanian dual executive. The President was forced to do so by a Constitutional Court decision, DCC 358/2018, interpreting the legislative removal procedure against the background of the Constitutional requirements—according to Article 132, prosecutors are under "the authority of the Minister of Justice." According to the Court, this provision implies that the minister has the upper hand over the President in the procedure. Meanwhile, in a gloss on, and judicial "anti-populist" sequel to *Baka v. Hungary*, the ECtHR held that the removal had breached Articles 10 and 6 of the European Convention on Human Rights. *See* Kövesi v. Romania, App. No. 3594/19 (May 5, 2020) http://hudoc.echr.coe.int/fre?i=001-202415.

[10]*Judecătorul CCR Daniel Morar renunță la premiul primit în 2011 de la GDS, nemulțumit că Grupul l-a premiat în 2019 pe Augustin Lazăr*, DIGI24 (Apr. 16, 2019) https://www.digi24.ro/stiri/actualitate/justitie/judecatorul-ccr-daniel-morar-renunta-la-premiul-primit-in-2011-de-la-gds-magistratul-nemultumit-ca-grupul-l-a-premiat-in-2019-pe-augustin-lazar-1114431.

[11]I will use Romanian institutional acronyms throughout. Unless otherwise indicated, all translations are mine.

[12]MH Vineri, *UPDATE PSD a trimis la consultările cu Iohannis pe tema justiției doi foști deținuți politici la Penitenciarul Aiud care se declară victime ale procurorului general /Iohannis: Mă bucur că v-au trimis pe dvs*, HOTNEWS (Apr. 12, 2019), https://www.hotnews.ro/stiri-esential-23083974-psd-trimite-cotroceni-doi-fosti-detinuti-politici-penitenciarul-aiud-care-declara-victime-ale-lui-augustin-lazar.htm.

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before the Constitutional Court.[13] In the end, both the election and the referendum were won by the center-right, serving as a springboard to a landslide victory by the incumbent, Mr. Iohannis, in the presidential election held later that year.

Under the inevitable biological pressures of changing generations, the decommunization discourse will be purified of biographical boomerang effects. Thus, practical tensions and embarrassments will eventually be rendered moot. However, this particular episode is revealing of aspects that illustrate the overarching themes in this Article.

My argument is threefold. First, counterintuitive though it may seem, thirty years after the collapse of state socialism, the past is neither dead nor even past. After all, the anecdote above showcases the applied truth of the Faulknerian insight. With its avatars—path dependencies and discursive tropes—the legacy of communism still haunts the public sphere and is now in competition with the revived specters of pre-communist times, such as voter suppression modalities, entrenched inequalities, geographical fragmentation and urban/rural divides. Second, as evidenced by the broader context in which Mr. Lazăr's career predicament unfolded, lustration as a transitional justice tool morphed into something altogether different. The confrontation with the past could not be practically carried out after 1989. It was picked up by the center right much later, in the pre-accession period. In that context, lustration was weaponized and used in tandem with the new discourses and obsessions of the 2000s, anti-corruption and the rule of law. Thus, anti-corruption politics as a fight for "the successful imposition of the corruption label"[14] became joined at the hip with a militant form of anticommunism striving to impose on political opponents the delegitimizing "communist" label. A backlash inevitably occurred. As we shall see, the intersection of lustration and anti-corruption resulted in countervailing attempts by the political left to use a new type of "lustration" procedure in order to delegitimize and fend off repressive anti-corruption in 2018. Third, and related, a tradition of generalized legal instrumentalism links all Romanian lustration episodes. As also shown by the introductory biographical-political vignette, the dense web of intervening interests in the story, neither of which has much to do with lustration per se, reveals deep-seated instrumentalism in handling the communist past and its effects on the judiciary. Undeniably, practical carryovers from and throwbacks to communism were problematic in the early phase of the transition, whereas more recent inroads of intelligence services in the justice system do not bode well for the future of Romanian constitutional democracy. Nonetheless, as it shall be argued, the underlying drives of "judicial lustration" policies, old and new, evince propensities towards pretextual uses of legal means and justificatory narratives to achieve short-term results. In all instances, instrumental lustration interacted with equally instrumental rule of law ideologies.[15]

[13]The referendum boosted participation in the elections (49%) and elicited overwhelmingly favorable turn-out (42.28%) and favorable response (80%) results. Immediately after the elections, the then-leader of the PSD, Mr. Liviu Dragnea, was definitively convicted on appeal by the High Court, for a corruption crime (abuse of office). He went to prison forthwith. Dragnea was, in essence, convicted for colluding—while he had served as political party leader in a southern county—in the fictitious hiring of two employees in the local Child Protection Services Department. In reality, they worked for the local party branch. The High Court itself had postponed pronouncement of the sentence for a week and rendered it on Monday right after the elections. The PSD lost the elections and the referendum—eroded by the anticorruption discourse but also by its own mismanagement and blunders.

[14]András Sajó, *From Corruption to Extortion: Conceptualization of Post-communist Corruption*, 40 Crime L.& Soc. Change 171, 172 (2003) ("Political [electoral and judicial] competition is about the successful imposition of corruption labels and, at the same time, about normalizing corrupt practices."). *See also* Daniel Smilov, *Anti-corruption Bodies as Discourse-controlling Instruments: Experiences from South-East Europe, in* Governments, Ngos And Anti-Corruption 85–101 (Luís de Sousa, Barry Hindess & Peter Larmour eds., 2008).

[15]The rule of law is, of course, not an ideology in and of itself, but can be instrumentalized as such. For an excellent definition of rule of law as ideology, see Maximilian Steinbeis, *Rule of Law as Ideology*, VerfBlog (Oct. 9, 2020), https://verfassungsblog.de/rule-of-law-as-ideology/. For rule of law as morality tale and performing art, see Stephen Humphreys, Theater of the Rule of Law: Transnational Legal Intervention in Theory and Practice (2010).

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I shall substantiate and draw together the three strands of my argument by scrutinizing legislative and constitutional judicial lustration processes against the foil of wider political-constitutional discourses. My Article inquires, more precisely, into the context and implications of hidden continuities—real and alleged—by comparing: (1) 2006 (post)communist lustration measures targeting the judiciary and the protracted discussions about the declassification of the SIPA archive—SIPA was an intelligence service that functioned within the Ministry of Justice from the early 1990s until 2006—with a more recent event; namely, (2) the cooperation of judicial institutions with the Romanian Intelligence Service (*Serviciul Român de Informații*, SRI), in the context of the fight against corruption on the basis of classified protocols. This latter phenomenon was addressed by 2018 legislative changes, providing for the vetting of collaboration of prosecutors and judges with the *post-communist* intelligence services, according to rules and procedures that are strikingly similar with those applicable to earlier, post-communist lustration proper. The broader underlying message is therefore, paradoxically, one of continuity.

The Article is structured in five sections. Part B provides a note on anti-corruption and intelligence. The discussion on lustration and continuities will be more easily understood against this contextual backdrop. Part C reviews post-communist lustration; a second articulation of the same part will analyze the SIPA archive controversy. SIPA is an ongoing episode that allows a seamless transition to more current concerns. The following juncture of the article, Part D, presents the protocols episode, foiled against the background of the Romanian and European fight against corruption, and the 2018 legislative changes that seek to roll back anti-corruption by using a mock-lustration procedure. My Article closes in Part E with a tentative conclusion.

B. Anticorruption and Intelligence: Note on Context

After 1989, the *Securitate*, a hated symbol of Romanian state socialism, was immediately disbanded. In the aftermath of violent inter-ethnic clashes between Romanians and Hungarians in Transylvania in early 1990, the Romanian Intelligence Service (*Serviciul Român de Informații*, SRI) was established in its stead, first on the legal basis of a decree. The law on national security, 51/1991, which serves as a framework law for all security agencies, was adopted in the summer of 1991 and the organic law of the Service was passed in early 1992 (Law 14/1992). Both statutes have withstood the following decades with few and limited alterations. Whereas the SRI is a new institution, created legally from a clean slate, practical needs and path dependencies made a certain degree of cadre recirculation inevitable. Conversely, apprehensions about the *Securitate* have predetermined a few limitations. Notably, Article 13 expressly stripped the SRI of criminal procedure attributions. This is not a Romanian peculiarity. Some Western constitutions either expressly entrench, or are interpreted according to standards requiring, a strict separation between intelligence and criminal law enforcement agencies. In Germany, for instance, a separation principle, pressed by then-fresh memories of the Gestapo, was a part of the Allied certification requirements applying to the Basic Law. Even if, in the end, it was not embedded in the 1949 text as such, the principle of clear-cut separation between police and intelligence (*Trennungsgebot*) forms a part of a "block of constitutionality" derived by *Bundesverfassungsgericht* jurisprudence from fundamental rights guarantees and the principle of the rule of law.[16]

In other aspects, pre-democratic path dependencies prevailed; the SRI is a militarized structure, as the *Securitate* was. The director of the service is a "civilian" elected by Parliament, in joint session, upon presidential nomination. Notably, however, there is no time or term limitation, only

[16] *See* Michael Lysander Fremuth, *Wächst zusammen, was zusammengehört? Das Trennungsgebot zwischen Polizeibehörden und Nachrichtendiensten im Lichte der Reform der deutschen Sicherheitsarchitektur,* 139 (1) ARCHIV DES ÖFFENTLICHEN RECHTS 32–79, para. 48ff (2014). The *Trennungsgebot* was, however, entrenched in the state constitutions (*Landesverfassungen*) of Sachsen, Brandenburg, Thüringen, on account of fresh memories of Stasi exploits.

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the possibility for Parliament to remove him or her upon the proposal of the President or upon the motion of one third of the total number of deputies and senators (Law 14/1992, Art. 23). Since this is a public dignity position equated to a ministerial rank, one is, in principle, appointed for the duration of one's natural life. No other public official enjoys this legal status. Procedure-wise, even though this is a legislative norm, one may compare the one-third requirement with the more modest quarter of the Members of Parliament ("MP") constitutionally needed to table a motion of censure. Deputy directors are, in practice, high-ranking career officers; they are appointed by the President of Romania, upon the SRI director's proposal. By law (Law 14/1992, Arts. 6 and 42), the service has the right to operate commercial enterprises, as the *Securitate* did, which generate profits that accrue to its budget. Little is known of the service, even the number of its employees is classified and much of what is circulated in the local press and political debates consists of rudimentary conspiracy theories. A measure of secrecy is quite reasonable, even genetically coded in such structures. Yet, the degree is unusually high. Starting in 2015, not even the regular full activity reports have been made public, which does little to quell justified misgivings and conspiratorial overtones alike.[17]

A hard fact that may neither be ignored nor concealed is the budget. The budget of the service has skyrocketed in recent years, standing now at approximately 560 million euros.[18] In 2020 alone, it was increased by over 10.8 percent. To compare, the budget of the German counterpart, the Office for the Protection of the Constitution, is significantly more modest and grows at a more leisurely pace. At 390.8 million euros in 2018,[19] it was increased to 467.1 million euros in 2020.[20] The disparity between the rough figures is striking, considering the population and the gross domestic product differentials between the two countries. Similar comparisons may be made between the security structures of Romania and other, much more affluent Western EU members. Some perplexities stem also from the difference between the budgetary allocations for internal and external intelligence services. The budget of the Romanian foreign intelligence service (SIE) was roughly equivalent to 65 million euros in 2019 and was decreased in 2020 by almost 2 million, whereas all other security structures, including the SRI, were generously outfitted. To compare, the current allocation of the German foreign intelligence watchdog, the *Bundesnachrichtendienst* (BND), stands at a towering 977.8 million euros,[21] a considerably higher amount than that received by its internal equivalent, the *Bundesamt für Verfassungsschutz*. These figures and extrapolations hold true even when weighed against federal peculiarities.[22] In a "seeing like a state"

[17]*See* Serviciul Roman De Informatii, *Raportul de Activitate: Al Serviciului Roman de Informatii in Anul 2014*, https://www.sri.ro/assets/files/rapoarte/2014/Raport_SRI_2014.pdf. Reports available until 2014 were forty-page synthetic documents, which contained precise statistical breakdowns concerning the number of notifications made to specific prosecutorial structures and the number of surveillance warrants, including the numbers of national security warrants and their relative increases. From that year onward, the service has cavalierly posted one-page reports about access to information requests by citizens and petitions received in each calendar year.

[18]*See* Serviciul Roman De Informatii, *Bugetul pe anul 2021*, https://www.sri.ro/assets/files/bugete/Buget_SRI_2021.pdf. The budgetary allocation as such was not increased, but in fact was reduced by 0.4% in 2021. Yet, this decrease was compensated by a significant growth of 14% in commitment appropriations. Moreover, in recent years a routine practice has been the appropriation of additional moneys by second-term budget adjustments.

[19]*See* Bundesministerium des Innern, für Bau und Heimat, *Bundeshaushaltsplan 2018: Einzelplan 06* (2018), https://www.bundeshaushalt.de/fileadmin/de.bundeshaushalt/content_de/dokumente/2018/soll/epl06.pdf. *See also* Bogdan Iancu, *Rashomon in Bukarest: Korruptionsbekämpfung als Kampfzone* 69 Osteuropa 205–18 (2019) ("Durchblick: Politik und Gesellschaft in Rumänien").

[20]*See* Bundesministerium der Finanzen, *Bundesamt für Verfassungsschutz* (2021), https://www.bundeshaushalt.de/#/2020/soll/ausgaben/einzelplan/0626.html.

[21]*See* Bundesministerium der Finanzen, *Bundesnachrichtendienst* (2021), https://www.bundeshaushalt.de/#/2020/soll/ausgaben/einzelplan/0414.html.

[22]A similar relation exists in France where the General Direction of Internal Security (DGSI) budget has been roughly less than half that of the foreign service, the DGSE. *See* Bernard Bajolet, *DGSE, a tool for the reduction in uncertainty?*, Revue Defense Nationale (Jan. 2014), https://www.defense.gouv.fr/english/content/download/236148/2670065/DGSE%2C%20a%20tool%20for%20the%20reduction%20in%20uncertainty%20-%20Revue%20Defense%20Nationale%20-%20january%202014.pdf.

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logic,[23] it is therefore not unreasonable to infer that Romania increasingly perceives its own citizens as the primary source of national threats and insecurities. Admittedly, the comparison above is imperfect. Some functions of the SRI—surveillance, for instance—are either shared or in the remit of other intelligence services. In Germany, for example, the BND is in charge of signal intelligence. Some of its domestic functions—for example, airport security—are not exercised by intelligence agencies in other jurisdictions. In Germany, to use the same comparative foil, this would be a public security service provided by the Federal Police.

Even with all these qualifications, the size of the budget, its accelerated growth in a very short time span, and the correlation of the growth with anti-corruption are impossible to dismiss. Although correlation is, in the abstract, not causation, the budget of the SRI has taken an upward curve in perfect lockstep with the progress of the fight against corruption. To wit, in 2002 it stood at about 100 million euros, in 2013 at 252.6 million,[24] and now at 560 million, which over time yields an almost six-fold increase in less than two decades, a doubling in less than one.[25]

Romania, like Bulgaria, until now has also been subject to a post-accession EU conditionality, revolving around anti-corruption.[26] Arguably one of the most problematic facets of the fight against corruption is the enhanced cooperation of the anti-corruption prosecutors with the SRI.[27] The relationship was apparently built on the legal basis of a National Defense Council (*Consiliul Suprem de Apărare a Țării,* CSAȚ) decision, still classified to date (17/2005), declaring corruption as a threat to national security. According to accusers, this classified decision resulted in a *sub rosa* addition to the law. Yet, prior public documents expressly declaring corruption a national security threat can be easily identified.[28] The nature as such of corruption presupposes a "leap of faith" logic that simultaneously relies on and defies quantification, because increases in the numbers of indictments and convictions can be read either as proofs of success in eradicating the underlying phenomenon or as validations of the seriousness of the problem and the need to do even more to address it. By direct implication, the latter reading reinforces the mandate of the institutions that carry the "fight" against the phenomenon. This dialectic is particularly problematic if intelligence services are directly involved in repressive anti-corruption, since the

[23]James C. Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed (1998). I am only borrowing the *bonmot*, not the argument, which is centered on limits to planning and to decontextualized rational modernism.

[24]*See* Serviciul Roman De Informatii, Bugetul pe anul 2013, https://www.sri.ro/assets/files/bugete/Bugetul_SRI_pe_anul_2013_aprobat_prin_Legea_bugetului_de_stat.pdf.

[25]The budget has continued to grow unabated since 2018. Two protocols have been censored by the Constitutional Court and other questionable enabling norms have been voided. *See infra* Section D. Nonetheless, as a distinguished Romanian constitutional scholar noted, hundreds of similar protocols have "flourished," unchallenged and classified, in the context of the fight against corruption. *See* Elena-Simina Tănăsescu, *Romania—Another Brick in the Wall Fencing the Fight against Corruption*, VerfBlog (Mar. 19, 2019), https://verfassungsblog.de/romania-another-brick-in-the-wall-fencing-the-fight-against-corruption/. Furthermore, once a process is set in motion, for example, an institutional appetite for 10% yearly budgetary increases, it creates path dependencies, which are difficult to reverse.

[26]The post-accession mechanism for Romania has four benchmarks; three of which expressly address the fight against corruption, whereas one judicial reform is perceived as interlinked. The CVM was established on the basis of Commission Decision 2006/929/EC and was initially designed with both a sunset clause, which was scheduled to lapse three years after the 2007 accession, and a safeguard clause, which in turn incorporated by reference safeguard clauses in the Treaty of Accession. The CVM has in the meanwhile been extended, seemingly indefinitely. *See The Reports on Progress in Bulgaria and Romania,* COM (2021), https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en.

[27]Martin Mendelski, *15 Years of Anti-corruption in Romania: Augmentation, Aberration and Acceleration*, 22 Eur. Pol. & Soc'y 237, 258 (2021).

[28]Although this particular decision is classified, the public report of the national defense council for the year 2005 openly identifies corruption as a national security threat. *See* Consiliul Suprem de Aparare a Tarii, *Raportul* (2005), https://csat.presidency.ro/files/documente/Raport_CSAT_2005_2ro.pdf.

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open-ended mandate reinforces the preexisting "inbred potential for abuse of state power" inherent in the malleable concept of "national security."[29]

C. Instrumentalism, Act I: Post-Communist Lustration and Judicial Reform

I. Post-Communism and 'Lustration Proper'

A few prefatory lines are also needed to understand the vagaries of Romanian judicial lustration—especially since the implications of personnel continuities and institutional path-dependencies are under-researched. Reams of articles were written, especially in the first two decades of post-communist transition, about the impact of communism on the quality of judicial reasoning.[30] As time went on and the first wave of Eastern enlargement was in the works, the doctrinal stress moved towards a then-influential and timely sub-theme—formalism. Legal formalism, as the reasoning went, was the supposed methodological penchant of the post-communist judiciary and was impeding the adaptation of Central and Eastern judiciaries to the more sophisticated environment of the newer, multi-layer hermeneutic setting of ECHR and EU law.[31]

Less attention was paid to the quality of the human capital with which the countries that exited in 1989 from behind the Iron Curtain had to work. The more rudimentary, "transmission belt" needs of state socialism for law and lawyers resulted in less demand for the legal profession and a structural demand for a relatively rudimentary set of legal skills.[32] Whereas the number of trained lawyers was diminutive in comparison with Western liberal democracies,[33] state socialism was a "rule by law" society. Even discretionary decisions in "telephone justice" form needed to be given legal imprimatur. By the same token, the need to pay the virtues of legality the proverbial hypocritical price resulted, in turn, in the consequence that the legal profession was—relative to other occupation—more intensively surveilled.

The scarcity of skills and personnel is a general condition, which could be encountered in all post-communist societies; only the degrees have differed as a direct function of the relative harshness of state socialism in each country. After 1989, the fast adjustment to a form of market economy resulted in a spike in the need for trained lawyers. New courts were established, the bar association membership multiplied exponentially, and public notaries were in much greater need. This meant that, in the early years, many socialist-trained cadres secured judgeships or prosecutorial positions with lax forms of professional checks and even looser evaluations of the aptness to serve a rule of law state (as the new democracies strove to become).

[29]*See Venice Commission Report on the Democratic Oversight of Security Services*, CDL-AD 010, para. 57ff (2015).

[30]*See, e.g.*, Zdenek Kühn, The Judiciary In Central And Eastern Europe: Mechanical Jurisprudence In Transformation? (2011); Rafal Mańko, *Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom*/Sinthome, 7 Pólemos 207–33 (2013). For a recent review and critique of this trend, see Péter Cserne, *Discourses on Judicial Formalism in Central and Eastern Europe: Symptoms of an Inferiority Complex?*, 28(6) Eur. R. 880–91 (2020).

[31]This paradigm has come under scrutiny and contestation. In *Central European Judges Under The European Influence*, roughly half of the contributors still subscribe to the formalist *motif*, whereas the rest of the authors and the editor challenge it as inaccurate or obsolete. *See* Central European Judges Under The European Influence: The Transformative Power Of The Eu Revisited 392 (Michal Bobek ed., 2015) (referring to formalism as a free-floating, empty signifier, "universal insult for whatever type of judicial vices reproached").

[32]Adam Czarnota, *Rule of Law as an Outcome of Crisis: Central-Eastern European Experience 27 Years after the Breakthrough*, 8 Hague J. Rule L. 311, 315 (2016) ("The dominant type of legal theory during communism was simplistic legal positivism in a Marxist sauce. Marxist philosophy provided a sort of rhetoric but was not taken seriously by legal academia nor by the legal profession. Vulgar legal positivism was functional and instrumental to justify any new type of regulation.").

[33]For an excellent, singular legal-sociological study, see Erhard Blankenburg, *The Purge of Lawyers After the Breakdown of the East German Communist Regime,* 20 L. & Soc. Inquiry 223 (1995) (comparing the numbers of various professionals, quantified as rate per million, in the GDR and FRG, respectively, at the moment of Reunification—for instance, thirty-eight attorneys per one million inhabitants in the East, 902 in the FRG).

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Due to the nature of the transitions, either resulting from negotiations—for example, Poland, Bulgaria, Hungary—or from foundational violence, inevitable recoil, and ensuing post-communist elite recirculation in Romania, lustration was impracticable, if not impossible, in the first decade after the regime change.[34] Conversely, when the times were more propitious for decommunization, in terms of domestic political will to implement such measures, two sets of hurdles made vetting both legally and normatively problematic. First, from a normative or ethical standpoint, anti-communism is—albeit still a politically adroit trope—the less convincing the further one moves away in time from the changes of 1989. Put differently, the more time passes, the more disingenuous and histrionic the decommunization discourse becomes, being driven primarily by "blame and shame," de-legitimization, and self-legitimization needs. The "populist" drive to use latter-day anti-communism strategically is, in this respect, evident in the overall ideology that animates the more recent Polish constitutional crises[35] and, slightly more subdued, in the long-drawn-out Hungarian constitutional imbroglios. In the worldview, representations of both the Hungarian FIDESZ and the Polish PiS—anti-communism with Eastern European "brutalist" flair: "Anti-Bolshevism"—features largely and means in essence opposition to various forms of social progressivism. Second, this somewhat counterintuitive relation between time and lustration is recognized in law. The European Court of Human Rights has drawn a sliding scale correlation between the Convention legitimacy of lustration measures, viewed by the Strasbourg Court strictly as instruments of "militant democracy" and the stability of a newly democratic state. Otherwise put, and albeit paradoxically quite sensibly in retrospect, decommunization was appropriate when the times were not politically ripe for it. These policies become increasingly suspect—under the ECHR as interpreted by the ECtHR—once they are politically feasible on the ground.[36]

The Romanian lustration law (Law 187/1999 on Access to the Personal File and the Disclosure of the Securitate as Political Police) was adopted towards the tail end of the "Convention years," meaning the 1996–2000 transition in power. In that interval, center-left post-communist elites were—for the first time—replaced in the political branches by a loose center-right parliamentary coalition and a center-right President, Emil Constantinescu. The law contained a general procedure by which persons who had collaborated with the former communist *Securitate* as political police were to be vetted, whereas "lustration lies" in their affidavits were to be criminally sanctioned. This peculiar turn, collaboration with the Securitate *as political police*, resulted from political compromises and from a deep ambivalence that existed even within the center-right parliamentary majority, as to the appropriate ambit of Romanian "confrontation with the past." In practical effect, the phrase was meant to ensure that only the provision of information leading to infringements of fundamental rights would be punished. In other words, to separate the wheat —for example, people who were compelled to sign an agreement to collaborate under duress but provided no actionable information, hence did in fact no harm to others, during state socialism— from the chaff, such as collaboration with harmful intent and effect.

The law would be implemented by the National Council for Studying the Former Securitate Archives (CNSAS), whose task was to make these individualized, fine-grained determinations. The CNSAS is an independent agency ("autonomous administrative authority," according to Art. 117, Romanian Constitution), led by a college of eleven members. Out of these, nine are elected by the Parliament upon nominations made by the parliamentary groups, according to the political configuration of the Houses and two upon the nominations made by the

[34]Technically, lustration is the term primarily used to describe the vetting of collaborators with the communist intelligence services, decommunization as the vetting of former party nomenklatura. *See* WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 234 (2005). Although in Romania only the first policy was put into effect, in order to avoid repetition, I use the terms interchangeably.

[35]Marta Bucholc & Maciej Komornik, *Die PiS und das Recht-Verfassungskrise und polnische Rechtskultur,* 66 OSTEUROPA 79, 93 (2016).

[36]David Kosař, *Lustration and Lapse of Time: 'Dealing with the Past' in the Czech Republic*, 4(3) EUR. CONST. L. REV. 460 (2008).

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President and Prime-Minister, respectively. The two nominees proffered by the heads of the Romanian dual executive are to be selected subsequent to consultations with NGOs. Determinations of collaboration with the Securitate as political police are legislatively defined as providing information in any form to the Securitate, "denouncing political activities and attitudes inimical to the totalitarian communist regime and aiming at the curtailment of fundamental human rights and liberties." [37]

From the beginning, the activity of the CNSAS was surrounded by an appearance of adhockery and arbitrariness. The final decision on vetting a particular individual was made by vote within a group of political appointees. Moreover, the administrative rulings are not final and can always be reversed upon finding new information. Furthermore, albeit established right after the adoption of Law 187/1999, this institution floated for a long time in a limbo of complacency and inconsequentiality. The actual files of the former secret police were withheld by the institutional inheritor of the *Securitate* archival legacy, the Romanian Intelligence Service. The SRI guarded its treasure jealously and the CNSAS had to work for the better part of a decade with a few thousand files. With the return to power of the post-communist center-left in 2000, the political interest in providing a center-right "pet project" watchdog with resources naturally decreased.

Things picked up again in 2004, when a center-right coalition won the presidency and, eventually, the government after the election of President Traian Băsescu (he served two terms, 2004–2009; 2009–2014). Confrontation with the communist past is a mainstay of the domestic center-right ideational core. Furthermore, anti-communist rhetoric remained then, and has remained until now, the staple anti-PSD rallying cry. Measures were therefore promptly taken to revive the enthusiasm of early-90s oppositional anticommunism, first by a 2005 decision of the National Defense Council ordering the SRI to transfer twelve kilometers of Securitate archival shelves to the CNSAS, followed in 2006 by the publication of the final report of the Presidential Commission for the Analysis of the Romanian Communist Dictatorship.[38]

But now lustration was embedded in a new, more complicated discursive and policy/political configuration. The older domestic trope of anti-communism coexisted with the fledgling discourses of European Union post-communist political *acquis*, consisting in judicial reform and, increasingly, anti-corruption. These newer obsessions are metonymically referred to in Eastern European parlance, translated from the "duckbill" constitutional jargon of the European Union Commission conditionalities, as "the rule of law."[39] Latter-day Romanian anti-communism is also cross-hybridized with a neoliberal agenda,[40] lagging somewhat behind mainstream Central and Eastern European trends.

At the time, European Union pre-accession conditionalities needed to be prioritized policy-wise. Legislative measures taken after the 2004 change in government were supported by the Presidency and crafted by a newly appointed Justice Minister, Monica Macovei, with a view to streamline existing judiciary legislation with anti-corruption policies. A special prosecutor's office

[37]Law 187/1999, Art. 5 (3), http://www.cnsas.ro/documente/cadru_legal/LEGE%20187_1999.pdf.

[38]*See* Comisia Prezidențială Pentru Analiza Dictaturii Comuniste Din România, Raport Final (2006), http://old.presidency.ro/static/rapoarte/Raport_final_CPADCR.pdf.

[39]András Sajó & Renáta Uitz, The Constitution Of Freedom: An Introduction To Legal Constitutionalism 446, 447 (2017) ("When the limits of terminology (and imagination) are reached, the subject itself is described with reference to surface similarities of familiar creatures."). The authors use this analogy in order to point out that, like calling a platypus a "duckbill," on the basis of fragmentary, novel information, was in its time an attempt to control new realities by the use of inherited, imperfect heuristics, terms inherited from national fundamental law may mean in transnational constitutionalism slightly different things. I am borrowing this illuminating metaphor from the authors and using it in the same way as they do, to point out, in this particular context, that my critical reference to the rule of law as sometimes (mis)used or misapplied in the language of conditionalities (for instance, to mean solely the successful prosecution of repressive anticorruption policies) does not in any way denote my opposition to the rule of law as classical liberal-constitutional concept aiming first and foremost to protect the individual against state violence. In this latter sense, see Judith N. Shklar, *Political Theory and The Rule of Law, in* The Rule of Law: Ideal or Ideology (Allan C. Hutchinson & Patrick Monahan eds., 1987).

[40]Bojan Bugarič, *Neoliberalism, Post-Communism, and the Law*, 12 Ann. Rev. L. Soc. Sci. 313 (2016).

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with exclusive prosecutorial competence over high- and medium-level corruption, initially set up in a weaker form in 2002, was overhauled as an autonomous integrity watchdog in 2006. The National Anticorruption Directorate (DNA) is formally a "directorate" of the General Prosecutor's Office, but functionally the body is fully independent from the latter. Large-scale amendments were also passed in 2005 to the judiciary laws.[41]

Some provisions tinkered with institutions and procedures. Yet, as an overarching common denominator, the guiding philosophy of the 2005 judicial reform package was that the previous and pending institutional and legislative changes aimed at bolstering judicial self-government and anti-corruption could only function if institutions were to be overhauled in terms of personnel; more precisely, staffed with younger magistrates. Presumably untainted, more anti-corruption prone, more supranational-law-receptive generational forces[42] would sweep aside old habits, as a "wind of generational change" and replace the old, putatively "closet communist" judicial elites. Many legislative provisions seeking to effectuate this generational turnover—for example, rules providing for early termination of judicial leadership mandates—were, however, promptly voided by the Constitutional Court of Romania (CCR) on non-retroactivity and judicial independence grounds.[43] At this precise juncture, judicial reform as anti-corruption policy meets lustration.

In the context of wider efforts to reform the judiciary, in the case of judges and prosecutors occupying apex positions in the system, a parallel, exceptional procedure was introduced by a 2006 amendment: Any form of cooperation was sufficient to bar a magistrate from acceding to positions of leadership in the justice system. The amending act, an emergency ordinance, was sponsored by the justice ministry, proceeding upon the not fully unreasonable intuition that many people in the target age group could have been expected to have had cooperated with the Securitate in one way or another. A blanket vetting rule would disqualify all of them and achieve the purpose of the early termination provisions, which had just been declared unconstitutional. The exceptional and parallel vetting mechanism applicable to judges and prosecutors occupying administrative leadership positions—for example, court president, chief or general prosecutor—and to those elected by their peers to the Superior Council of Magistracy was based on factual evidence. Incidentally, this would also result in the effect that such determinations by the CNSAS would be "ministerial" (*compétence liée*), not discretionary administrative decisions establishing relative individual guilt. In the logic of the 2006 change, a signature on an agreement to collaborate or the finding of any informative note or a payment receipt would be enough to disqualify an individual from running for election to the high council or for appointment to a high position, or force them to step down.

However, the implementation of this spate of lustration measures in Romania bogged down in January 2008, when a Constitutional Court decision declared Law 187/1999 regarding the access to the personal file and the disclosure of the Securitate as political police unconstitutional in its entirety.[44] According to the reasoning, the administrative mechanism for determining relative guilt was held unconstitutional on separation of functions grounds and due to the lack of due process guarantees. But the court also invalidated the procedure applicable to magistrates, with

[41]These amendments strengthened the hold of the executive over apex prosecutorial appointments. Both the Prosecutor General and the Chief Prosecutor of the DNA are appointed for the same terms of office, using the same procedure—by the President at the nomination of the Minister of Justice with the Superior Council having a right to render an advisory opinion on the nomination.

[42]Younger judges are, in fact, much more inclined to set aside national constitutional law in conflict with European Union law. *See* Manuel Guțan & Cristina Parau, Transnational Networking And Elite Self-Empowerment: The Making Of The Judiciary In Contemporary Europe And Beyond 268 (2018) (noting that the percentage is exponentially higher in the case of the lowest-level judges—at trial courts, *judecătorii*). How sophisticated their understanding of the relationship is, however, is often another matter. *See, e.g.*, *infra* note 84 and accompanying text.

[43]Bogdan Iancu, *Post-Accession Constitutionalism with a Human Face: Judicial Reform and Lustration in Romania*, 6(1) Eur. Const. L. Rev. 28 (2010).

[44]DCC 51/31.01.2008, M.Of. 95/06.02.2008 (Rom.).

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the argument that it determined blameworthiness and assigned collective responsibility in the absence of a clear proof of individual guilt.[45] Hence, this decision invalidated both blanket lustration—on principle—and differentiated relative guilt vetting by the lustration watchdog (on points of procedure). In the aftermath, the disclosure of former collaborators was nipped in the bud, whereas the CNSAS was transformed into a quasi-research institution. The current lustration procedure—adapted in response to the Court's objections—relies on the Court of Appeals determinations of collaborator status. Judgments can be appealed to the High Court. In the new administrative law setting, the Council acts merely as a plaintiff.[46]

Interestingly, and appositely as a transition to the next subsection, the reasoning of the CCR in what concerns the blanket vetting of high-ranking of judicial collaborators, rested upon the logic that collaboration with the communist intelligence services was covered by a "presumption of honesty." The Court inferred this conceptual subspecies from the guarantee of the presumption of innocence. A corollary of this innovative axiom is that a magistrate may collaborate with the intelligence services in "honest," in other words, socially useful and legitimate ways.

II. The SIPA Archives

Pursuant to the adoption of Law 51/1991 on national security, the Independent Operative Service (SIO) was established in the same year. It was subordinated to the General Prison Administration, which was, and still is, subordinated to the Justice Ministry. According to the national security law, the national intelligence authorities are the SRI, the Foreign Intelligence Service (SIE), the Guard and Protection Service (SPP), and "specialized structures" within the ministries of internal affairs, defense, and justice. The activities of these bodies are coordinated by the National Defense Council (Supreme Council for National Defense, CSAȚ); the 1991 Constitution provides for parliamentary oversight.

In 1997, SIO was institutionally restructured by government decree as a functionally autonomous entity, renamed SIPA (Independent Service for Protection and Anticorruption) and located directly within the Justice Ministry. In 2004, another government decree again reorganized the service, now renamed DGPA (General Directorate for Protection and Anticorruption), with reformulated attributions and legal personality, as the "designated intelligence authority" within the Ministry of Justice.[47] Ostensibly, the main purpose legally attributed to SIO-SIPA-DGPA was to identify security risks in the prison population, but, as the institution morphed, so did its powers and objectives. As a designated specialized security structure, SIPA started to collect information on the "vulnerabilities" of judges and prosecutors, court reporters, attorneys, and policemen. Apparently, it also held and collected information on the relationships between post-communist, then-sitting judges and prosecutors, and the former *Securitate*.[48] A particularly

[45]*Id.* ("It results from the text that in this case it is not inquired into whether the vetted person has performed political police activities, and it is not verified whether the intelligence services sought to suppress the opponents of the regime or whether they served national security purposes. In this way, the law creates the premises of a form of collective moral and juridical responsibility, for the simple act of taking part in the activity of the intelligence services, without guilt and without the existence of fundamental human rights and liberties infringements . . . institut[ing] the premises of a collective moral and legal responsibility in the absence of a reprehensible deed and without establishing guilt, thus infringing the provisions of Art. 1 Sec. (3) of the Constitution and the principle of the presumption of honesty underlying Art. 23 Sec. (11) of the Fundamental Law.").

[46]Sometimes, compromising documents are still leaked to the press. A handful of determinations have in the meanwhile found their way in court. The most prominent of these since 2008 is currently pending. In an unexpected turn of events, the Bucharest Court of Appeals determined in 2019, upon the CNSAS motion, that Traian Băsescu, two-term President of Romania (2004–2009; 2009–2015), the bastion of Romanian anticommunism, was a collaborator of the *Securitate*. The judgment has been appealed by the latter. Having held public office for decades, former President Băsescu had received over the years scores of *non-collaboration* verdicts from the CNSAS.

[47]HG nr. 637/29.04.2004, M.Of. Nr. 417/11.05.2004.

[48]A 2019 CNSAS board resolution announced the intention of the Council to request from both the SRI and the MoJ the files concerning collaboration of judges and prosecutors with the communist political police. *See* Consiliul National pentru

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troublesome aspect was the apparent recirculation of previous *Securitate* cadres in the staff of the post-communist SIPA.[49]

In 2006, the structure was disbanded overnight by government decree 127/2006, at the initiative of the serving Justice Minister Monica Macovei. The minister inspected the site and, according to an employee later subpoenaed by a parliamentary inquiry committee, took with her a ledger.[50] She later appointed a commission of initially five persons—of which in the end two persons remained—to do an archival inventory within three months. Under these limitations, the failure to produce a comprehensive report was a foregone conclusion. The inventory could not be made and the archive remained sealed.[51]

Although the issue resurfaces on the agenda of every single government, no final report was ever adopted. In fact, a decision on the archive has been deferred for over fifteen years. Seven new commissions were appointed by orders of successive ministers of justice, in 2007, 2008, and 2013. None of these completed its mandate or reached a definite conclusion that could serve as a basis for political and administrative decisions, regarding declassification, destruction of documents, criminal complaints, or further classification, as the case may be. The reports of these commissions were also classified—some for over a decade.

Three recently declassified documents, dating back to 2008, reveal that envelopes with various sums of money were found in the sealed archive and show irregularities indicating that the archives may have been tampered with, such as: Missing documents, duplicates, annotations according to which certain files had been photocopied, and the like.[52] A reasonable concern comes from the fact that personal files on judges and prosecutors—including information about their private lives and information on SIPA informers among magistrates—would constitute a treasure trove of blackmail material. Furthermore, whereas the activity of this service ended in 2006, judges and prosecutors whose files would have been compiled by SIPA/DGPA agents in the period between 2001 and 2005 would now, in their majority, be serving in apex courts and the upper echelons of the Public Ministry. Yet, what the archive precisely contains and thus what the implications are, is still unclear. Multiple accusations and counteraccusations were made, but no basis exists to definitively substantiate or authoritatively dispel them and bring closure to this matter.

A joint parliamentary inquiry commission of the Chamber of Deputies and the Senate was formed in 2017. Its work resulted in a 2018 report, which was put together hastily on the basis

Studierea, *Comunicat de Presa* (2019), http://www.cnsas.ro/documente/comunicate%20presa/2019/Comunicat%20presa%202019.04.09_1.pdf.

[49]The head of this structure, General Marian Ureche, resigned in 2003 amid suspicions that he had been a high-ranking *Securitate* officer. These suspicions, which he tried to stifle by resigning, were later substantiated. *See* Domnului Dacian Ciolos, *Scrisoare catre premierul Dacian Ciolos sa retraga proiectul de HG pentru reinventarierea arhivei SIPA*, UNJR (Aug. 17, 2016), http://www.unjr.ro/2016/08/17/scrisoare-catre-premierul-dacian-ciolos-sa-retraga-proiectul-de-hg-pentru-reinventarierea-arhivei-sipa/ (concerning an open letter by the National Union of Romanian Judges asking PM Cioloș to withdraw the draft Government Decision aiming to do an inventory of the SIPA archive).

[50]Yet, according to a 2018 investigation by the counterterrorism and organized crime prosecutorial division of the General Prosecutor's Office (DIICOT), no proof could be established regarding criminal acts committed by either the minister or the members of commissions appointed by her to do an archival inventory.

[51]The archive is currently sealed and stored in the main administrative building of the National Prison Administration (*Administrația Națională a Pentinenciarelor*, ANP) in Bucharest. The ANP is subordinated to the Ministry of Justice. As of 2017, according to a post by then-minister of justice Tudorel Toader, it had been visited twenty-two times, by members of the various commissions created each with the mission to do an inventory, and then eventually disbanded. *See Arhiva SIPA – o pată pe obrazul justiției române !*, Ministerul Justitiei (Feb. 26, 2006), http://www.just.ro/en/arhiva-sipa-o-pata-pe-obrazul-justitiei-romane/ (Rom.).

[52]Reports 0097, regarding the activity of the commission established by Order of the Minister of Justice 2418/C of September 24, 2007 and 096 concerning the activity of the commission established by OMJ 1348/C of May 31, 2007, as modified by OMJ 1489/C of 11.06.2007 (both declassified by Government Decree 410/09.06.2017). At the time of writing this Article, all documents could be found on the website of the MoJ. *See* MOJ, http://www.just.ro/en/category/arhiva-sipa/.

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of fragmentary information found in the declassified reports and a limited set of hearings.[53] Some of those subpoenaed refused to appear—most notably former-justice minister Macovei. She accused the whole process as a political witch-hunt or scapegoating. In her narrative, a center-right anti-corruption warrior like herself was merely harassed by the corrupt center-left parliamentary majority. Some requests for information—notably from the SRI—remained unanswered. Government Decision 410/2017, based on the few reports one can now consult which were declassified and made public, also provided for the appointment of yet another commission. This commission was tasked with the power to sift through the archive and formulate proposals to the Ministry of Justice regarding classification, reclassification, declassification, and—as the case might be—destruction of compromising documents, and the transferring of personnel files and historical documents to the National Archive.

In the platform of the center-right cabinet that took power from the left in 2019, one of the objectives proposed either to reach by "structured dialogue" a consensus on a substantive set of solutions in order to "eliminate all potential risks of blackmail" or to seal the entire archive until such time when consensus among "stakeholders"—such as, CSM, professional associations, and Parliament—may be reached.[54] Until now, no decision was made either way.[55]

A bill initiated by the government was submitted to the public consultation procedure in 2020—somewhat surreptitiously—three days before Christmas Eve.[56] According to this novel initiative, another commission is to be formed. It will comprise equal numbers of representatives of the Ministry of Justice, the Prison Administration, and the CNSAS. The entity will vet the SIPA/DGPA documents, with a view to eventually turning the archive over to the CNSAS. It is impossible to predict what will happen to this last project; failure has been in the past a foreordained conclusion. After all, the very reason why a bill was necessary was the closing, without any resolution on the matter, of the three-year sunset clause provided by government decision 410/2017 for the activity of the commission instituted—on paper only—by that act.

In line with the general tenor of this Article, more important than the procedural minutia are the unstated and underlying discursive premises animating specific public acts. In this particular case, by focusing on the CNSAS, a public institution created to deal with research and lustration of the communist period and the *Securitate*, the new SIPA/DGPA bill projects the notion that both the *Securitate* and the communist past outlived the demise of state socialism by seventeen years, until 2006. Serendipitously, that was the year when the Romanian fight against corruption started to pick up steam, through the adoption of the CVM decision—which entrenched a post-accession conditionality centered on the fight against corruption—and the institutional overhauling of the DNA, as a fully autonomous prosecutorial body within a highly autonomous judicial system.

D. Instrumentalism, Part II: Judicial Reform, Intelligence, and Anticorruption

I. Judicial Reform and (as) Anticorruption (2003–2015)

Regarding judicial reforms, Romania had to adopt the standard institutional setting that was proffered by the Commission to earlier post-communist members-in-waiting. This good practice

[53]*See* Parlamentul Romaniei, *Comisia parlamentara de Ancheta a Camerei Deputatilor si Senatului pentru a clarifica aspectele ce tin de desfiintarea Directiei Generale de Protectie si Anticoruptie*, (June 7, 2018), https://www.juridice.ro/wp-content/uploads/2018/06/Raportul-1.pdf (Rom.).

[54]Sectorial policies-Justice; Specific objectives; objective 5. The governmental program can be accessed at (Rom.) https://gov.ro/fisiere/pagini_fisiere/PROGRAMUL_DE_GUVERNARE.pdf.

[55]*See PNL Government Program: Sealing the SPA Archive and Continuing the "Justice District" project/Floring Lordache's Reaction: It's Stupid*, Media Fax (Oct. 24, 2019), https://www.mediafax.ro/politic/programul-de-guvernare-pnl-sigilarea-arhivei-sipa-si-continuarea-proiectului-cartierul-justitiei-reactia-lui-florin-iordache-este-o-prostie-18498110.

[56]*See (Română) Proiectul de Lege pentru pentru instituirea unor măsuri referitoare la arhiva fostei Direcții Generale de Protecție și Anticorupție din subordinea Ministerului Justiției și arhiva fostei Direcții Generale a Penitenciarelor*, Ministerul Justitiei, http://www.just.ro/proiectul-de-lege-pentru-pentru-instituirea-unor-masuri-referitoare-la-arhiva-fostei-directii-generale-de-protectie-si-anticoruptie-din-subordinea-ministerului-justitiei-si-arhiva-fostei-directii-gene/ (Rom.).

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standard consists in judicial self-government or, to borrow Bobek and Kosař's apposite phrase, the "Judicial Council Euro-model."[57] But Romania and Bulgaria were also subjected to anti-corruption conditionalities, which prevailed in the definitional and logistical interplay. Judicial reform parameters were thus themselves reinterpreted in order to maximize judicial independence as a value in and of itself and as a means conducive to the most efficient and effective prosecution of anti-corruption criminal policy. In line with the above, in 2003, the Constitution was amended in early preparation for EU and NATO accessions. The degree of independence from political influence of the Romanian High Judicial Council (*Consiliul Superior al Magistraturii*, CSM), as overhauled in 2003, is significantly higher than the percentage advocated as good standard by the EU Commission and Council of Europe bodies.[58] The main reason for the enhanced autonomy of the Council was the belief that reinforced "independence of the judicial system in its entirety" from the majoritarian branches would be instrumental to the pursuit of the fight against corruption.[59] fourteen out of nineteen Council members are magistrates—both judges and prosecutors— elected by their peers. The Minister of Justice, the Prosecutor General, and the President of the High Court serve *ex officio*, whereas the Senate appoints two civil society representatives with a diminutive role. Subsequently, in 2004, the new judiciary laws were passed, in forms that corresponded with negotiation requirements.

As mentioned above, the entire judicial organization structure was overhauled and readjusted in the interval 2003–2005, in order to serve the EU conditionality-driven imperative of eradicating high-level political corruption. Technically, anti-corruption translates in its repressive dimension in the investigation of high and medium-level corruption crimes by the DNA. In the remit of the DNA are not only classical corruption crimes—active and passive bribery, receipt of unlawful gratuities, trading in influence—but also related and assimilated offenses such as abuse of office. High or medium-level corruption are defined by the quality of the defendant—long list of officials in the anticorruption law 78/2000, from MP to county councilor—the value of the damage to the state, as assessed—over 200,000 euros—or the value of the bribe or the benefits derived from the corrupt act—over 10,000 euros. The reason for this focus on high corruption was a belief that prosecutions at the top will generate a form of trickle-down effects. The exemplary punishment of high-level officials would, by force of example and general deterrence, by creating expectations of probity in the public sphere, and by changing the nature of public sector appointments from patronage to merit, help reduce low-level corruption. The reduction or elimination of corruption would, in time, generate stability and economic growth.

Anti-corruption prosecutions picked up pace after 2006/2007, spiking in the period 2012–2015. After 2015, suspicions of foul play, including selective prosecution, surfaced in the public discourse, especially the center-left-oriented pole. Accusations were reinforced by a string of acquittals in high-profile cases. In a normative, formal juridical paradigm, acquittals per se are not necessarily indicative of prosecutorial misconduct, but rather solid evidence of a healthy judicial system. In this sense, a few acquittals—even in high-profile cases—can be dismissed

[57]David Kosař & Michal Bobek, *Global Solutions, Local Problems: A Critical Study in Judicial Council in Central and Eastern Europe* 15(7) GERMAN L.J. 1257 (2007).

[58]*See* Cristina Parau, *The Drive for Judicial Supremacy, in* JUDICIAL INDEPENDENCE IN TRANSITION 619 (Anja Seibert-Fohr ed., 2012).

[59]*See* Bianca Selejan-Guțan, *Romania: Perils of a 'Perfect Euro-Model' of Judicial Council,* 19(7) GERMAN L.J. 1707, 1740 (2018) (arguing that this admittedly unusual degree of independence as systemic insulation is necessary in order to combat endemic corruption). Perhaps paradoxically, and somewhat in tension with the author's main argument, whenever contrary political will so dictates, pro-anticorruption governments consistently ignore inconvenient advisory opinions issued by the Judicial Council. The executive does so, moreover, in the name of anticorruption *qua* rule of law. Negative advisory opinions to high-level prosecutorial appointments (General Prosecutor, Chief Prosecutor of the DNA) have been traditionally disregarded. Reservations by the CSM as "guarantor of judicial independence" (Art. 133 (1), Romanian Constitution) to a bill introduced in 2021 to scrap the recently-established prosecutorial Section for the Investigation of Offenses Committed Within the Judiciary (SIOJ) were dismissed by the Executive with short ceremony.

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as anecdotal. Nevertheless, when anecdotes pile up, suspicions increase, and one may begin to establish correlations and causations. Furthermore, the exclusive focus on repressive solutions to corruption perceived as a cause of all evils has reinforced a drive towards pushing for results at all costs. Instrumentalism is to a certain extent ingrained in the logic of the endeavor, insofar as the success of repressive anti-corruption is measured in pie-chart quantification statistics: Number of indictments, number of high-profile cases closed—for example, x deputies, y senators, z ministers, harshness of sentences, number of man-year sentences imposed, and so on. The Commission, in whose purview the interpretation and evaluation of all Enlargement conditionalities fall, insisted on a formalist and output-driven understanding of success.[60] This paradigm can however be in tension with the normative values of constitutional criminal law—fair trial guarantees, the rule of lenity, *nullum crimen nulla poena sine lege scripta, stricta, certa, praevia*—which are traditionally focused on the protection of individual rights, not on the notion that a lofty aim justifies the means.

In settings where constitutional values have been insufficiently internalized, due to historical determinations and path dependencies, anti-corruption may thus easily tip over from democratic stabilization mechanism and turn into state-sponsored penal populism.[61] In view of a long line of negative experiences with repressive anti-corruption in semi-stable jurisdictions like Italy or unstable peripheral jurisdictions like Brazil or Romania.[62] The current insistence at the level of international bodies on pushing anti-corruption as the dominant, even exclusive rule of law criterion or conditionality in the Western Balkans by the EU and the Council of Europe[63] or in the Ukraine by the International Monetary Fund, with doctrinal help from the Venice Commission,[64] is all the more puzzling.

Aside from high-profile acquittals, several other problematic features of Romanian anti-corruption confirm fears of politicization or hijacking of the agenda, mandate overreach, and spill-over effects. One is an ever-growing need for wiretap warrants and surveillance of all kinds, with a spillover effect from the tactics of anti-corruption prosecutions to criminal justice in general. A widely quoted statistic by Radu Chiriță, barrister and human rights professor at the

[60]More generally on formalism in the positing and evaluation of rule of law conditionalities, see Lisa Louwerse & Eva Kassoti, *Revisiting the European Commission's Approach to the Rule of Law in Enlargement* 11(1) HAGUE J. RULE L. 223 (2019); Martin Mendelski, *Das europäische Evaluierungsdefizit der Rechtsstaatlichkeit*, 44(3) LEVIATHAN 366 (2016).

[61]JOHN PRATT, PENAL POPULISM (2007). I am borrowing the phrase and extrapolating the main insight from the author's thesis. Pratt defines the concept differently and more limitedly, as extravagant and unrealistic (populist) social demands, in opposition to/questioning the modern state's criminal law practices. On Romanian penal populism and anticorruption populism. *See* Tamás Kiss & István Gergő Székely, *Populism on the Semi-Periphery: Some Considerations for Understanding the Anti-Corruption Discourse in Romania, in* PROBLEMS OF POST-COMMUNISM (2021); Alexandra Mercescu, *The Covid-19 Crisis in Romania, or on How One Cannot Escape (Bad, Legal) Culture*, Exceptions (May 11, 2020), http://exceptions.eu/2020/05/11/the-covid-19-crisis-in-romania-or-on-how-one-cannot-escape-bad-legal-culture/?fbclid=IwAR2lcofX6H7VUa1k2DDxU3XYbVe7fzQkNXdT2l3V4DpsNgD8u4wL5-3NOWo.

[62]For a parallel between Romanian and Italian anti-corruption, see Alina Mungiu Pippidi, *Explaining Eastern Europe: Romania's Italian-Style Anticorruption Populism,* 29(3) J. DEMOCRACY 104, 116 (2018). The Brazilian anti-corruption crusade (Operation Carwash) is still reeling from the 2019 *Intercept* leaks, showing extensive patterns of political collusion between the prosecutor Deltan Dallagnol, the investigating judge, and future Bolsonaro Justice minister, Sergio Moro. These disclosures—although the ruling was based ostensibly on narrower jurisdictional grounds— arguably led to the quashing by the Supreme Federal Tribunal, in April 2021, of former president Lula da Silva's conviction. For context, see Thomas Bustamante, Peluso Neder & Emilio Meyer, *Operation Car Wash on Trial: What to Expect from Brazilian Federal Supreme Court's Rulings on Lula da Silva*, VERFBLOG, (Mar. 10, 2021), https://verfassungsblog.de/operation-car-wash-on-trial/.

[63]Andi Hoxhaj, *The EU Rule* of *Law Initiative Towards the Western Balkans,* 13 HAGUE J. RULE L. 143, 165, 172 (2021) ("The governments in the Western Balkans have been described as stabilocracies . . . and the leaders of the government can be understood as autocrats that capture the state, and claim to secure stability in the Western Balkans region pretending to champion European integration."). It is the reader's educated guess whether the combination of formalism and anticorruption that characterizes current rule of law standard-setting trends will produce, in the given context, more stable stabilocracies—alternatively, to use Hoxhaj's synonyms: 'semi-autocracies' or 'hybrid democracies'—or more rule of law.

[64]Bogdan Iancu, *Quod licet Jovi non licet bovi?: The Venice Commission as Norm Entrepreneur*, 11(1) HAGUE J. RULE L. 189, 221 (2019).

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University of Cluj-Napoca, reveals the sky-rocketing of requests for intercept warrants by the prosecution and quasi-unanimous judicial decisions authorizing such requests.[65] Another, albeit less tractable, ground for concern is the cooperation between judicial authorities and the SRI in the context of the fight against corruption on the basis of classified inter-institutional protocols—for example, memorandums of understanding, cooperation agreements.

II. 2018: New 'Lustration,' New Reform

In 2016, the parliamentary elections brought to power a parliamentary majority dominated by the center-left, whose governments cohabitated until 2019 with the center-right president. Repressive anti-corruption is, as already mentioned, a center-right political and legal idiom. The center-left, hit hardest by anti-corruption prosecutions, has recently started to openly oppose it. The political-institutional polarization replicates social and geographical cleavages between historical regions: The right fares better regionally in the formerly Austro-Hungarian provinces of Transylvania and the Banat and countrywide better in the bigger urban agglomerations. The electoral bases of the left are smaller towns and the countryside and, geographically, the so-called Old Kingdom (Romania before 1918). Political oppositions induced by anti-corruption populism and overreactions to it feed on but also deepen the other contradictions.[66] Increasingly, polarization reverberates in fault lines within the judiciary itself—between judges and prosecutors, between younger and more senior magistrates, and between magistrate associations with diametrically opposed public positions on anticorruption and judicial organization measures.[67]

In 2018, the social-democratic and liberal-conservative parliament amended the three laws, 303, 304, 317/2004, on the status of judges and prosecutors, the organization of the judicial system, and the Superior Council of the Magistracy (*Consiliul Superior al Magistraturii*, CSM), respectively. These statutes, generically referred to in Romania by the sobriquet "Justice Laws," are organic, meaning that they are infra-constitutional and an absolute majority is needed to revise them.[68] Changes to the judiciary laws are also subject to the additional precondition of having to request a prior advisory opinion from the CSM on the draft law or ordinance.

Aside from the procedural hurdles, the 2018 changes straddled a general context fraught with protracted conflict at the apex of Romania's bifurcated executive, revolving around the dominant quasi-constitutional discourse of the past fifteen years—anti-corruption.[69] Romanian anti-corruption is focused on repressive policies. Indictments by anti-corruption prosecutors, followed by convictions are proxies for measuring its success. Consequently, any changes to the judiciary laws are socially and politically contested also in terms of their real or perceived tendency to bolster or diminish the effectiveness of the fight against corruption.

[65] *Statistică cereri interceptare 2010-2015*, RADUCHIRITA, http://raduchirita.com/interceptari.pdf.

[66] Kiss & Székely, *supra* note 58.

[67] For example, the Romanian Judicial Forum Association (Asociația FJR) and the Association "Movement for the Defense of the Prosecutors' Status" (AMASP) constantly defend—albeit in juridical narration—positions that coincide with center-right political standpoints. Conversely, positions expressed by other associations, such as the Association of Romanian Magistrates (AMR) or the Union of Romanian Judges (UNJR) are more often than not closer to the left end of the spectrum. The trend towards internal politicization is sociologically understandable, generated by extreme systemic autonomy from clear lines of democratic and social accountability. *See* Simone Benvenuti & Davide Paris, *Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model,* 19(7) GERMAN L.J. 1641, 1669 (2018).

[68] Romanian organic legislation, similar to its Spanish and French equivalents, constitutes an enhanced legislative category, in between ordinary legislation and constitutional amendments. The subject matters in which organic laws must be adopted are itemized in the Constitution. Ordinary legislation is a residual in terms of subject matter; ordinary laws are passed by simple majority. Constitutional laws may be modified, subject to the eternity clause limitations in Article 152, by qualified, two-third majorities in both houses—or a three-fourth majority in joint session, if mediation fails—followed by a valid confirmatory referendum.

[69] Mendelski, *supra* note 27; Kiss & Székely, *supra* note 58.

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The common denominator of the new provisions is an emphasis—not always adroitly placed—on seniority and accountability, extending, for instance, the length of the judicial trainees' apprenticeship at the National Magistrate Institute and introducing or reinforcing seniority requirements for promotion or secondment.[70] Two categories of changes, however, appeared from the onset problematic or at least peculiar. Both were defended by the center-left-dominated parliamentary majority as aiming at the promotion of judicial accountability and at ridding anticorruption from its alleged evils of targeted, politicized prosecutions. Conversely, the center-right, whose ideological meta-narrative is anti-corruption and whose political flagship is the Presidency, impugned all amendments as attempts by a corrupt, populist and anti-European parliamentary majority to shield itself from just prosecution.

The first category comprised, for instance, the introduction of individual responsibility for judicial errors committed with bad faith or gross negligence[71] Presented by the governing coalition as the 'silver bullet' to kill judicial irresponsibility, individual civil liability in damages for judicial errors is one of the blunter, most ineffective tools of judicial accountability and has been long recognized as such.[72] More divisive still have been the 2018 amendments by which another apex prosecutorial structure, the Section for the Investigation of Offences Committed within the Judiciary, was established. The justification in this latter case was that the autonomous prosecutorial watchdog, the DNA had blackmailed or browbeaten courts, by opening *sua sponte* criminal files on high-profile judges or by simply keeping dormant criminal corruption investigations opened as a result of various complaints. The implication is that, in so doing, the DNA implicitly intimidated judges and made them compliant, in order to secure high-profile convictions.

The second class of rules, which is the direct subject of this section, comprises provisions forbidding not only judges and prosecutors but also assistant-magistrates, experts in the Justice

[70]For instance, the duration of the practical training at the National Institute of Magistracy was increased from two to four years, to comprise professional socialization stages of practice in law firms, the prison administration, courts, and prosecutorial offices. *See* Art. 16 (3), Law 303/2004. The infrastructure for this change does not exist and the procedure was not in fact applied. Instead, its application was suspended by Emergency Governmental Ordinance. This was from the beginning a compromise solution, from an initial MoJ proposal to increase, Czech-style, the minimum age for entry in the profession to thirty years, combined with a five-year experience requirement. Minimum seniority requirements were introduced for apex positions in the Public Ministry, fifteen years, and executive positions in elite prosecutorial bodies such as the DNA or the organized crime and counter-terrorism directorate DIICOT, ten years. *See* Law 304/2004, as amended by EGO 92/2018. These changes should be understood in the context where secondments to the DNA could have been, and regularly were, made in the past on the basis of an interview with the Chief Prosecutor, so that a trial court or tribunal prosecutor with very little experience could overnight investigate on a corruption charge high-level officials, including high-level judicial officials. The prior practice was in accord with the philosophy of the 2004–2006 judicial legislation, namely, as already mentioned, a leap of faith in the virtues of judicial rejuvenation.

[71]The Romanian provision differs from the December 2020 Slovakian limitation of immunities package, which bears on criminal, "bending the law," and disciplinary measures. *See, e.g.*, *The Consultative Council of European Judges Opinion*, CCJE-BU(2020)3, https://rm.coe.int/opinion-slovakia-2020-/1680a0a961. On the Slovakian context, see Peter Čuroš & Hans Petter Graver, *Dissimilar Similarities: Structural Reforms of the Courts in Norway and Slovakia,* VerfBlog (Nov. 26, 2020), https://verfassungsblog.de/dissimilar-similarities/. In the Romanian case, according to Article 96, Law 303/2004 (as amended), the state has primary liability for damages caused by judicial errors. The Ministry of Finance may seek to recover by suing the judge or prosecutor who has acted in bad faith or with gross negligence. The determination that bad faith or gross negligence had occurred would be made by the Judicial Inspection (the "disciplinary prosecutor," an institution functionally autonomous, endowed with legal personality, located within the CSM). In the initial logic of the amendment, judges and prosecutors would have purchased, according to CSM-established guidelines, professional liability insurance policies to cover the risk of such damages. These changes were not given any practical effect. Furthermore, the recent CJEU judgment impugns them as contravening the magistrates' rights of defence under Article 47 of the Charter. *See Asociația Forumul Judecătorilor Din România*, C-83/19, paras. 224–41 (May 18, 2021), https://curia.europa.eu/juris/document/document.jsf;jsessionid=59F24320D4CE60F534CC64FB02FC2313?text=&docid=241381&pageIndex=0&doclang=RO&mode=req&dir=&occ=first&part=1&cid=5586146.

[72]*See, e.g.*, Mauro Cappelletti, *Who Watches the Watchmen—A Comparative Study on Judicial Responsibility*, 31 Am. J. Comp. L. 1, 62 (1983). *See also* David Kosař, Perils of Judicial Self-Government in Transitional Societies chs. 2, 3 (2016).

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Ministry—whose professional status is assimilated to that of magistrates— administrative personnel such as court registrars (*grefier*), and even judiciary police officers seconded to the Public Ministry from collaborating in any way with the current intelligence services.

Strikingly, the new article on the vetting of judicial collaboration with the current intelligence community sits side by side in the text with the already existing provision on the vetting of collaborators with the Communist *Securitate*. The two provisions, Articles 6–7 of Law 303/2004, provide symmetrical procedures, based on affidavits of non-collaboration. Sworn declarations are vetted; in the case of the former *Securitate* collaborators by the CNSAS and, in the case of collaboration with the current intelligence services, by CSAȚ.

Current collaboration is however regulated more minutely. Yearly affidavits must be submitted by all the categories enumerated above and their veracity is verified *ex officio* by the CSAȚ upon the request of the concerned magistrate, either of the two sections of the CSM, on prosecutors and judges, respectively, or of the Minister of Justice. Judicial redress in administrative court against the national defense council decisions on the matter is provided and can be exercised by any person who may prove public interest standing—a "legitimate interest," according to the Law 554/2004 on judicial review of administrative action. Furthermore, seeking to recruit a member of the judiciary as operative, collaborator or confidential informant was made in 2018 a "crime against the independence of justice," punishable by imprisonment from five to ten years. When the crime is committed by a higher-ranking officer or at his or her instigation, penalty limits are increased by half; the attempt is also criminalized. Furthermore, in a somewhat overwrought formulation, Section 9 of Article 7, Law 303/2004—the new "lustration" provision—refers not only to the declassification of all information concerning the inner institutional functioning of the judiciary and its interactions with other public authorities, but also to the declassification of "extrajudicial administrative acts issued or concluded by any public authority or among public authorities, concerning or affecting judicial proceedings."[73] These latter documents are declared public information by derogation from the classified documents clause of the Romanian freedom of information law (L. 544/2001).

Both the framing of public debates bearing on the relationship of prosecutors and judges, with the *post-communist* intelligence services and reactive legislative measures adopted in 2018, evince striking similarities with early *post-communist lustration*.

D. The Protocols Affair

Apparently on the basis of classified CSAȚ decision 17/2005, protocols were concluded between the SRI and the General Prosecutor's Office. Two of these—concluded in 2009 and 2016, respectively—were recently declassified. They provide, among other things, for mutual support procedures, including the creation of "common operative teams [of anti-corruption prosecutors and intelligence officers]" that would draw up and fulfil "common plans of action."[74] The declassification of these documents was the end result of sustained requests made by several professional associations, themselves acting in the trail of a snowball effect generated by an interview given to a

[73]Art. 7, Law 303/2004 on the status of judges and prosecutors provides that (section 1) "(1) Judges, prosecutors, assistant-magistrates, experts assimilated to magistrates, auxiliary court personnel are under the obligation to file an affidavit cannot be operative agents, including undercover, confidential informers or collaborators of any intelligence agency." According to section 9 of the article "All informations concerning the status of judges and prosecutors, judicial organization, the organization and functioning of the CSM, the institutional cooperation between courts and prosecutor's offices, on the one hand, and any other public authority, on the other, as well as any extrajudicial administrative act issued or concluded by or between public authorities, concerning or affecting judicial procedures, by derogation from the procedures of Art. 12 Law 544/2001 concerning freedom of information, as amended, constitute public information, to which the right of free access is guaranteed."

[74]The protocols are available on the websites of both the SRI and the Public Ministry, e.g., at (Rom.). https://www.mpublic.ro/sites/default/files/PDF/PROTOCOALE/protocol_cu_sri_si_iccj_privind_securitatea_nationala_-_2009.pdf, https://www.mpublic.ro/sites/default/files/PDF/PROTOCOALE/protocol_piccj_sri2016.pdf.

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professional legal information website by General Dumbravă, then head of the SRI legal services department. Dumbravă implicitly described the criminal justice system, with a phrase that has in the meanwhile come to haunt the intelligence service, as "a tactical field," from which the service would not withdraw until a final decision on a corruption indictment was rendered on appeal.[75] The 2009 document and several provisions in the 2016 document were declared unconstitutional by a Constitutional Court decision rendered in 2019.[76] Furthermore, the Parliament, itself, was found derelict of its constitutional obligation to exercise substantive, effective oversight.

This was not the first collision between the SRI and the CCR. To give but a few examples, a 2014 decision declared registration requirements for the purchased of prepaid phone card unconstitutional.[77] A unanimous 2015 decision declared the Cyber Security Law unconstitutional. In effect, the Cybersecurity Law would have given complete oversight over internet security policy and full access to data to a militarized service, with no judicial control, under the pretext of transposing the NIS directive, which was then still in first reading.[78] The law flew in the face of all requirements of both Romanian and EU law and was voided in its entirety. A justice of the Constitutional Court was detained the day after the decision was rendered, on a corruption crime investigated by the DNA.[79] This coincidence did little to alleviate suspicions of improper motive—for example, targeted prosecution—especially as he was eventually acquitted later on. A third 2016 decision, held unconstitutional a phrase in the Criminal Procedure Code, according to which criminal prosecution acts could be executed not only by prosecutors and the judiciary police—under prosecutorial supervision—but also by "other criminal justice organs."[80] This holding immediately effected the collaboration between prosecutors and the Service; until that time, technical surveillance warrants of all types were implemented by the SRI.

The difference between the previous rulings and the 2019 decision lies in the fact that the protocols, on their face, are relatively dry documents that raise more questions than they answer. Furthermore, these are "soft law," inter-institutional acts without binding legal force. Certain formulations are, however, problematic. For instance, the 2009 document refers to "serious crimes" as the predicate for inter-institutional coordination and mentions "common operative teams," such as prosecutors and intelligence offices that would cooperate on the basis of commonly drafted "common plans of action."[81] These wordings raise justified suspicions, inasmuch as the term "serious crime" may, in an extensive interpretation, include half the Criminal Code, exceeding the technically circumscribed sphere of crimes against national security. In this latter case, cooperation would be lawful under Law 14/1992, and perhaps also inevitable in practical terms. The phrases "common teams" and "common plans of action" sound equally ominous, especially when read in the dark light of conspiratorial fears and figments of undigested public information.

The CCR extrapolated from bits and pieces general conclusions about the reversal of the institutional roles. Namely, the Court inferred, primarily from the 2009 document, that these documents created preconditions for a situation where the tail—intelligence officers with no general authority over criminal procedure—wagged the proverbial dog—the Public Ministry and its

[75]Alina Matei, *Dumitru Dumbravă: SRI este unul dintre anticorpii bine dezvoltați și echipați pentru însănătoșirea societății și eliminarea corupției*, JURIDICE (Apr. 30, 2015), https://www.juridice.ro/373666/dumitru-dumbrava-sri-este-unul-dintre-anticorpii-bine-dezvoltati-si-echipati-pentru-insanatosirea-societatii-si-eliminarea-coruptiei-v1.html.

[76]DCC 26/2019 (Rom).

[77]DCC 461/2014 (Rom).

[78]DCC 17/2015 (Rom).

[79]Anca Simina, Cristian Delcea, Mihai Voinea & Daniel Morar, INTERVIU *judecător CCR: „Amenințările SRI la adresa Curții Constituționale au depășit cadrul legal. Așa ceva nu se întâmplă într-o țară civilizată"*, SOCIETATE (June 4, 2015), https://adevarul.ro/news/societate/interviu-daniel-morar-judecator-ccr-amenintarile-sri-adresa-curtii-constitutionale-depasit-cadrul-legal-asa-e-neacceptat-intr-o-tara-civilizata-1_556f20d3cfbe376e35e4060f/index.html.

[80]DCC 51/2016 (Rom).

[81]The reference to "common operative teams" can be found in Section 3 (The Objectives of Cooperation), Art. 3, let. g of the 2009 protocol of cooperation, https://www.sri.ro/assets/img/news/protocol-de-cooperare/Protocol_declasificat.pdf.

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prosecutors, as formal 'masters of the indictment/prosecution.' [82] There is, however, relatively little in the memoranda that would warrant such extrapolations. Contrariwise, there is ample room for deniability of foul play. Until the 2016 decision mentioned above eliminated the formal legal basis for direct technical implementation of the surveillance warrants, wiretaps, and technical surveillance warrants of all kinds were lawfully executed by the Service. Indeed, the Court itself impugned the Public Ministry for concluding the 2009 protocol and for having taken over a few of its provisions in that of 2016 but did not deny the need for inter-institutional cooperation. Most perplexingly, in view of the seriousness of the implications and unstated inferences that a parallel, occult system of justice had been created, the ninety-two-page majority opinion states in its conclusion that "the current decision brings no element of novelty to the existing normative framework."[83] Namely, that illegally obtained evidence could have been voided and set aside by courts even without this decision.

Nonetheless, with all imperfections and caveats, the protocols decision addresses the problem —or at least the visible part of it—in a more fine-tuned way than the lustration provision. In the meantime, a preliminary reference (DNA-Serviciul Territorial Oradea) reached the European Court of Justice with a plea to the CJEU to declare that ordinary courts could—applying the principle of primacy of EU law—set aside the protocols and the special criminal investigation bodies decisions of the Romanian Constitutional Court as impinging on the CVM-mandate imperative to fight corruption. The arguments of the referring court are, explicitly or implicitly, those that dominated mainstream anti-corruption discourses and parts of the judiciary for over fifteen years: That the fight against corruption must be carried out with no holds barred and that politics may be safely presented, when need be, as a dirty business. In this latter sense, one line of argument in the reference is that proper judicial authorities should not yield to the decisions of a "politico-judicial body," meaning a constitutional court. To his credit, A.G. Bobek takes significant pains to explain to the Romanian judges and prosecutors that constitutional courts are, in principle, necessary institutions in constitutional democracies and that the achievement of the CVM decision benchmarks should not be understood in the sense that the securing of criminal convictions can be pursued at all costs. In his interpretation, the CCR, gives effect to the higher spirit of the 2006 CVM decision as an instrument of EU law by severing ties between the judiciary and the SRI.[84] However, A.G. Bobek's reading, correct and salutary though it certainly is, sits somewhat at cross-purposes with the understanding impliedly conveyed, over more than a decade, by the Commission via its CVM progress reports.[85]

[82]DCC 26/2019 (Rom). A synopsis in English of the majority reasoning and holding can be found on the Court's website, https://www.ccr.ro/wp-content/uploads/2021/03/Decision-No-26_2019.pdf .

[83]Id., para. 212.

[84]Opinion of Advocate General Bobek at paras. 73–74, DNA-Serviciul Teritorial Oradea v. KI and Others, C-379/19 (Mar. 4, 2021), https://curia.europa.eu/juris/document/document.jsf?text=&docid=238468&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4036891. In summary, the MCV Decision indeed seeks to foster judicial efficiency and the fight against corruption, but those objectives must be achieved within, or above all within, a functional system that respects its own legal framework and the fundamental rights of the individuals concerned. It is incorrect and very dangerous to think that the purpose of the MCV Decision is simply to maximize one value—effectiveness measured in the number of final convictions—to the detriment of other, equally important, values. Against such a background, if anything could be said about the constitutional decisions at issue, it would be rather that they are in fact implementing the objectives and benchmarks laid out in the Annex to the MCV Decision, but certainly not that they are in infringement thereof. Put simply, I find nothing problematic with a national constitutional decision declaring that, as a matter of national constitutional law and safeguards, domestic intelligence services are not to participate in criminal investigations.

[85]*See Report from the Commission to the European Parliament and the Council: On Progress in Romania Under the Cooperation and Verification Mechanism*, COM (2019) 499 final, n. 13 (Oct. 22, 2019), https://ec.europa.eu/info/sites/default/files/progress-report-romania-2019-com-2019-499_en.pdf (stating that the operation of intelligence services is not a matter for the EU and falls outside the CVM benchmarks).

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E. Conclusion: Hidden Continuities, Path Dependencies

All legal systems produce a very imperfect form of truth: Namely, formalized, legalized truth. Yet some are incapable of delivering even this relatively modest public good. The avatars of "judicial lustration" in Romania prove primarily that the local post-communist political and constitutional system has been systematically incapable of administering in principled ways the darker sides of the complicated inter-relationships between the justice system and the intelligence structures, old and new alike.

Continuities of justified suspicion do exist, and such suspicions are partly, albeit imperfectly, validated by quite a few worrying figures and facts. But these inchoate suspicions have been regularly channeled in syncopated and instrumental reactions to unsubstantiated perceptions. Such reactions span the thirty-one years since the communist regime collapsed: The 2006 "expedited lustration" tailor-made for the judicial system, crudely designed in order to make room in the system for fresh high-level appointments; the decades-long irresolution of the SIPA affair, amid dozens of aborted plans, cloak and dagger innuendoes, and inconsequential commissions; all the way to the "judicial lustration" of 2018, a knee-jerk, defensive reaction, both under- and over-inclusive, to justified but largely unaddressed concerns about the current role of the SRI and its real, precise reach within the justice system.

These three episodes are thus part and parcel of an ongoing saga of failure, further fomenting, in constantly reinforced vicious circles, fears about path-dependencies. The fears as such are intuitively justified. Nonetheless, structural instrumentalism in dealing with the past has either deflected these apprehensions or rendered them moot or unsubstantiated. Instrumental sloganization of the past and the strategic use of lustration or anti-communist heuristics for unrelated policy and discursive purposes are proclivities that cut across the political-institutional spectrum and straddle the three full decades past since the official demise of state socialism in 1989. Recent lustration episodes intersect EU-driven conditionalities which are systemically misconstrued to equate sheer effectiveness in the repressive fight against corruption with the liberal-constitutional value of the rule of law. Perennial local traditions of instrumentalism and mystification of the past, now cross-hybridized with peculiar understandings of "the rule of law," have acquired European connotations and implications.

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