Courts, Security and Trust

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Abstract

This article investigates the relationship between trust, security and the judiciary in Romania. Following the democratic transition and European Union (EU) membership, the Romanian legal system faced two crucial tasks: dealing with the past through means of transitional justice, such as lustration (vetting), and dealing with the future through anti-corruption measures that were to strengthen the rule of law and enable economic development. In dealing with both tasks, the Romanian judiciary was essential in making far-reaching decisions whose consequences went far beyond the legal system. In this article, the author examines some of the implications of the decisions in these two areas for the levels of trust within the judiciary and trust in the judiciary.

Keywords: trust, security, judiciary, transitional justice, Romania.

1 Introduction

In democratic societies, the courts and the intelligence agencies maintain a relationship marked by restraint. Intelligence agencies refrain from recruiting judges and court staff; judges and court staff are banned from collaborating with the intelligence agencies; the courts often defer to the executive in analysing the decisions of the security agencies and are reluctant to engage with them. The state often refuses to reveal its secrets to the courts, citing state secrets privilege and the ability of the state to invoke matters of national security in diverse cases ranging from citizenship to espionage and terrorism. Often, this limits the judges in exercising their otherwise unrestrained constitutional rights of adjudication.[1] Occasions in which the judiciary nurtures a close relationship with the intelligence sector that then evolves into decoupling are relatively rare.

The judiciary has different opportunities to exercise judicial review of the activities of the intelligence agencies. The courts have an ex ante role in approving surveillance measures of the intelligence agencies and an ex post role in the oversight over intelligence actions that may have violated human rights, and the courts decide if evidence gathered through surveillance may be admitted in ongoing trials.[2],[3] In addition, in transitional societies that have taken up truth and accountability measures, the courts' decisions regarding handling the intelligence service files may shape the transitional justice process.[4] All these roles are essential for the functioning of a democratic society as they establish the courts as independent arbiters against misuse of power through covert means. The courts build societal and institutional trust and reputation nationally and internationally by performing these roles successfully.[5] The literature on courts and security recognises that courts may refuse to review national security decisions, citing a lack of expertise or political accountability.[6] In the past few decades following the expansion of the security field, the courts have found themselves under more pressure to engage in national security matters or the field of work of intelligence agencies.[7]

The judiciary is not the only brake on the power of intelligence agencies. Parliamentary oversight of the work carried out by the parliamentary committees represents an opportunity for the people's democratically elected representatives to monitor their activities and limit their engagement and misuse of power.[8] Oversight bodies may rely on courts to order intelligence agencies to give them access to relevant information,[9] or they may carry out investigatorial activities on their own. In practice, however, the parliamentary oversight rarely achieves its goals.[10] The deficiencies of the judiciary and

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1 D. Bigo et al., 'National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges', *Center for European Policy Studies*, (2014)at 37-9.

2 European Union Agency for Fundamental Rights, 'Surveillance by Intelligence Services: Fundamental Rights Safeguards and Remedies in the EU Volume I: Member States', *Legal Frameworks* (2015) 31, 42.

3 In this article, the usage of surveillance in trials refers to the usage by the prosecutors and the analysis of the evidence by the judges and prosecutors. Historically, in the Romanian judiciary, just as in the Italian, the term *magistrate* is used to refer to both judges and prosecutors.

4 Generally, see J.D. Ohlin, 'On the Very Idea of Transitional Justice', 8 *Whitehead Journal of Diplomacy and International Relations* 51 (2007).

5 T. Wischmeyer, 'Generating Trust through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust"', 17(3) *German Law Journal* 339-82 (2016).

6 Generally, see S. Sinnar, 'Procedural Experimentation and National Security in the Courts', 106(4) *California Law Review* 991-1060 (2018).

7 L. Zedner, 'Criminal Justice in the Service of Security', in M. Bosworth, C. Hoyle & L. Zedner (eds.), *The Changing Contours of Criminal Justice* (2016) 152-65.

8 Generally, see P. Fluri and H. Born (eds.), *Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices* (2003); P. Gill, 'Evaluating Intelligence Oversight Committees: The UK Intelligence and Security Committee and the "War on Terror"', 22(1) *Intelligence and National Security* 14-37 (2007).

9 A. Will, *Understanding Intelligence Oversight, Geneva Centre for Democratic Control of Armed Forces* (2010), at 41.

10 P. Albrecht and F. Stepputat, 'The Rise and Fall of Security Sector Reform in Development', in P. Jackson (ed.) *Handbook of International Security and Development* (2015), at 150-64.

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parliamentary oversight of the intelligence agencies leave the public to hope that the leaders of the intelligence agencies exercise self-restraint and non-partisanship.[11] When overreach happens, the reactions usually come from the political class, particularly from the opposition that blames the ruling party or class for governing the country through secret services.[12] Deciding on the claims of such overreach, the courts may securitise or de-securitise a particular matter, area, or policy field.[13]

The impact of such decisions goes beyond the security sector. As this article demonstrates, they strongly impact the trust and confidence of citizens in courts and the trust between judicial officeholders at the different levels of hierarchy. This is especially true of countries with an authoritarian legacy where the judiciary served the interests of authoritarian leaders without establishing accountability for public officeholders. In post-communist countries that joined the European Union (EU), a strong focus on judicial independence and, later, anti-corruption was to help the societies deal with the past and address the rising inequality and corruption characteristic of transition.[14] In so doing, these processes were to rebuild institutional trust, which was considered lacking during the communist era.

This article examines the Romanian case of a complex relationship between the judiciary and the security sector within a post-communist setting and its impact on institutional trust, particularly the trust in the judiciary. Considered a peripheral European country, Romania's legal system's evolution and the battles it was fraught with over the past decades represent a unique and underexplored story. Many of its features, such as the building of judicial institutions, the fight against corruption, the populist counter-mobilisations and the subsequent backlash against judicial independence, have led commentators to call it a 'quasi-constitutional metadiscourse'.[15] The recent growing attention to this story focuses on the relationship between the primacy of European law[16] and the national Romanian law,[17] democratic backsliding,[18] judicial populism[19] and anti-corruption.[20] This article, instead, looks at the role that the relationship between the security sector and the courts had during and in the aftermath of the judicial anti-corruption campaign in Romania, a topic that has received less attention in the research.[21] In Section 2, the author provides an insight into the de-securitisation practices through a transitional justice angle – namely, the vetting (lustration of former intelligence agency officials). In Section 3, the author revisits the narrative of the drivers, the emergence and the main features of the anti-corruption campaign carried out by the judiciary, examining the relationship between courts and security established during the Romanian anti-corruption campaign. In that section, the author provides an insight into how the Constitutional Court of Romania (CCR) decided the cases concerning the legality of the involvement of the Romanian Intelligence Agency (SRI – Serviciul Roman de Informatii) in the judicial anti-corruption campaign. In the following section, Section 4, the author discusses the implications for the studies of trust in courts and trust within the judiciary. The author argues that a lack of specific targeted surveys prevents us from making definite conclusions but that the assumptions that to be inferred based on existing surveys are a testimony to the intricate relationship between the actions of the courts and the trust in the courts, trust between the courts and the judicial officeholders, and, to a lesser degree, institutional trust. Section 5 offers a conclusion and theoretical and practical implications of the Romanian case.

11 N.A. Sales, 'Self-restraint and National Security', 6 *Journal of National Security Law & Policy* 227 (2012).

12 C. Guitton. 'Beyond Appearances: Cooperation, Structure and Constraints of the Swiss Intelligence Service', 12(2) *Journal of Policing, Intelligence and Counter Terrorism* 177-9 (2017) (detailing the Swiss scandal of the early 1990s); D. Ganser, 'The Ghost of Machiavelli: An Approach to Operation Gladio and Terrorism in Cold War Italy', 45 *Crime, Law and Social Change* 117-20 (2006) (detailing the Italian 'stay behind army' that was to suppress Soviet invasion of Italy).

13 The term *securitisation* comes from the international relations theory. It has been used by the Copenhagen School of Security Studies and initially referred to a discursive practice that transforms typically political issues into matters of national security. *See* R. Taureck, 'Securitization Theory and Securitization Studies', 9 *Journal of International Relations and Development* 53-61 (2006). For a more recent interpretation that bridges discursive practices with the expansion of the field of security and its impact on law, see B.J. Heath, 'Making Sense of Security', 116 *American Journal of International Law* (2022) 289-339. For the use of term *securitisation* in finance, see C. Farruggio and A. Uhde, 'Determinants of Loan Securitization in European Banking', 56 *Journal of Banking & Finance* 12-27 (2015).

14 Generally, see M.A. Vachudova, 'Corruption and Compliance in the EU's Post-Communist Members and Candidates', 47 *Journal of Common Market Studies* 43 (2008).

15 B. Iancu, 'The Evolution and Gestalt of the Romanian Constitution', in A. von Bogdandy, P.M. Huber & S. Ragone (eds.), *The Max Planck Handbooks in European Public Law: Volume II: Constitutional Foundations*, (2023) at 524-31.

16 D. Kosar and O. Kadlec, 'Romanian Version of the Rule of Law Crisis Comes to the ECJ: The AFJR Case Is Not Just about the Cooperation and Verification Mechanism', 59 *Common Market Law Review* 6 (2022).

17 E. Tănăsescu and B. Selejan Gutan, 'A Tale of Primacy: The ECJ Ruling on Judicial Independence in Romania', Verfassungsblog, 2021, https://verfassungsblog.de/a-tale-of-primacy/.

18 L. Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law', 14 *Hague Journal on the Rule of Law* 107-138 (2022).

19 A. Mercescu, 'Non-sequiturs in Constitutional Adjudication: Populism or Epistemic Deficit?' in M. Belov (ed.), *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (2021) 194-216.

20 A. Mungiu Pippidi, 'Explaining Eastern Europe: Romania's Italian-Style Anticorruption Populism', 29(3) *Journal of Democracy* 104-16 (2018).

21 With the exceptions that focused primarily on parliamentary oversight and the transitional justice. See V. Stoian, 'A Rawlsian Account of De-securitisation: Securitising and De-securitising Corruption in Romania', 1 *Critical Studies on Security* 15-27 (2020); T. Fuior, 'The Romanian Experience of Intelligence Oversight', in I. Leigh and N. Wegge (eds.), *Intelligence Oversight in the Twenty-First Century* (2019) 57-74.

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2 Transitional Justice and De-securitisation

2.1 Lustration

The cornerstone of the cruel totalitarian communist regime that ruled Romania between 1945 and 1990 was its security service, the Securitate. The lustration[22] of the former Securitate officers who continued to work for the SRI following the democratic transition was finished until 2005 and contributed to a change of image that the security services enjoyed, at least in the first 15 years of post-communist Romania.[23] These measures, adopted in order for the society to deal with the past injustices, are to promote accountability 'and to catalyze bureaucratic change by requiring or strongly encouraging the replacement of the old guard with individuals more willing and able to support the democratic transition'.[24]

The establishment of parliamentary oversight over the work of the intelligence sector was achieved already by 1993. Yet, deficient legislative expertise in these matters and an absence of tradition of meaningful oversight not just in Romania but also in other European countries meant that effective oversight was not achieved during this period. Stories of usage of certain Securitate files and records after 1989, for blackmail and participation in illegal activities, did not convince the public of the effectiveness of lustration or oversight.[25]

Additionally, just like most Eastern European countries, Romania has failed to follow up on the network of informers and those who profited from the security services' actions. Romania, together with Yugoslavia and Albania, was one of the socialist countries that pursued an independent security policy and its own specific path to socialism, which meant heavier reliance on the domestic security apparatus.[26] The successful political mobilisation of the Romanian communists and the pervasive presence of the party in every sphere of societal life meant that very few genuine dissidents existed within the elites.[27] That made a meaningful lustration that would go beyond the ranks of the intelligence agency leaders extremely difficult despite the vast numbers of informers.[28] Perhaps this explains why it started relatively late, more than ten years after the fall of communism, and why few court proceedings have been launched even against the perpetrators of the worst crimes.[29] Additionally, the security sector reform was not in the focus of the foreign technical assistance and conditionality. This is surprising as the Securitate and its secret agents were monitoring political undesirables on a massive scale, had no understanding of or respect for human rights and had little desire to see their privileges curtailed by reforms.[30] To expect that they would simply evolve into a civilian intelligence agency, especially after having played an essential role in the removal of Ceaușescu from power, was unrealistic.

An important piece of legislation that would signal a break with the totalitarian past was Law 187/1999 regarding Access to Personal Files and Disclosure of the Securitate as Political Police (herein: Law). Adopted in 1999 and amended in 2005 to make undisclosed collaboration perjury, the Law defined collaboration with political police that led or was likely to lead to infringement of rights on grounds on which the individual found responsible for such a breach could be stripped from office or denied office.[31] The Law created the National Council for the Study of Securitate Archives (Consiliul National pentru Studierea Arhivelor Securitatii – CNSAS) as the body in charge of vetting. The Law was stricter towards the judiciary members as it qualified any collaboration with the political police as grounds for termination of office.[32] In practice, the CNSAS processed the applications slowly and, in most cases, didn't go beyond checking those who were officially registered members of the intelligence agency.[33] Before its adoption and after it entered into force, very few people who withdrew from politics due to their ties with the former regime or its secret police did so on moral and not legal grounds.[34] This was because of the pardons made by Ceaușescu's regime in 1988 when it neared the end of its rule and the subsequent amnesty made by the Romani-

22 W. Sadurski, *Rights before Courts. A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe* (2005), at 245 (defining lustration as applying to the screening of persons seeking to occupy [or occupying] certain public positions for evidence of involvement with the communist regime [mainly with the secret security apparatus] and how the term is often lumped together with de-communisation]. For a definition to the contrary, see M. Nalepa, 'Lustration', in L. Stan and N. Nedelsky (eds.), *Encyclopedia of Transitional Justice*, Vol. 1 (2013), at 46 defining it as 'the broad set of parliamentary laws that restrict members and collaborators of former repressive regimes from holding a range of public offices, state management positions, or other jobs with strong public influence (such as in the media or academia) after the collapse of the authoritarian regime'.

23 L.L. Watts, *Control and Oversight of Security Intelligence in Romania* (2003). Democratic Center for the Control of Armed Forces.

24 C.M. Horne, 'Transitional Justice and Temporal Parameters: Built-In Expiration Dates?', 14(3) *International Journal of Transitional Justice* 544-65 (2020).

25 F.C. Matei, 'The Legal Framework for Intelligence in Post-Communist Romania', 22(4) *International Journal of Intelligence and CounterIntelligence* 667-98 (2009).

26 M. Caparini, 'Comparing the Democratization of Intelligence Governance in East Central Europe and the Balkans', 29(4) *Intelligence and National Security* 498, at 504-6 (2014).

27 A. Mungiu Pippidi, 'Europeanization without Decommunization: A Case of Elite Conversion', *Center on Democracy, Development, and the Rule of Law Working Paper*, at 64.

28 B. Iancu, 'Post-Accession Constitutionalism with a Human Face: Judicial Reform and Lustration in Romania', 6 *EuConst* 28 at 48-9 (2010) (providing a number of estimates ranging between 400,000 and 700,000 informers).

29 L.N. Stan, 'Civil Society and Post-communist Transitional Justice in Romania', in O. Simić and Z. Volčič (eds.), *Transitional Justice and Civil Society in the Balkans* (2013), at 23-4 (explaining that the proceedings were launched almost exclusively against the members of the army and the secret police who were involved in the suppression of the 1989 uprising but not against those involved in the Communist regime during its existence between 1945 and 1989).

30 L.N. Stan and M. Zulean, 'Intelligence Sector Reforms in Romania: A Scorecard', 16(3) *Surveillance & Society* 303 (2018).

31 B. Iancu, 'Hidden Continuities? The Avatars of "Judicial Lustration" in Post-Communist Romania', 22 *German Law Journal* (2021).1209-1230

32 *Id.*, at 1219.

33 L.N. Stan, *Romania, 2 Encyclopedia of Transitional Justice*, (2013) at 401.

34 *Id.*, at 402.

an government in 1991.[35] Thus, the Law would signal a special treatment for the judiciary; potential informers present within its ranks would have been punished more harshly than some of the perpetrators of crimes that were part of the regime.

The CCR's Decision 51/2008 did not try to manage the tension between the need to legitimise the democratic order by excluding those who have served the totalitarian government and the demands of due process. Opining that limited access to judicial functions is a form of punishment, the CCR completely dismantled the vetting procedure set up by the Law for the bearers of the judicial functions.[36] Consequently, the court found that the CNSAS, the institution to which the decision was made in the first instance regarding those who were found to be former collaborators of the Securitate, is a quasi-judicial body whose work does not satisfy due-process guarantees.[37] Defending the principle of separation of powers, the CCR found that the Law runs against the principles of judicial independence by giving the CNSAS the authorities vested by the laws and Constitution to the Supreme Council of Magistracy, the Romanian judicial council.

It also established an unofficial distinction between the collaborators whose work led to human rights violations and those whose 'work' did not present such a violation, reasoning that the former should not be 'punished'. The CCR also claimed that this distinction did not lead to an individualisation of guilt based on a concrete act that violated rights but rather its collectivisation.[38] Yet, the court did not specify what exactly represented a violation of human rights that a member or affiliate of the intelligence agency would have carried out in their function that would breach fundamental rights and freedoms. Instead, it concluded that collaboration with intelligence services per se does not represent grounds for disqualification.[39] The striking-down of the Law did not mean a complete absence of the need to disclose information regarding work in communist Romania, as the judiciary members were required to submit statements under penalty of perjury that they were not involved with the intelligence agencies before 1990. Equally important, it also did not mean a lack of interest of the citizens in the topic; citizens would access their files even after more than 30 years have passed since the last of them were created.[40] However, as we will see in section 3, a more important consequence of the decision was that it would pave the way for delegitimisation of the judiciary as an extended arm of the intelligence agencies as well as a more lenient treatment of crimes against the population committed during the communist regime.

35 L.N. Stan, *Transitional Justice in Post-Communist Romania* (2014), at 43.
36 Iancu, above n. 28, at 55-7.
37 Decision of the CCR, 51/2008.
38 *Id.*
39 *Id.*
40 C.M. Horne, 'What Is Too Long and When Is Too Late for Transitional Justice? Observations from the Case of Romania', 2(1) *Journal of Romanian Studies* 109-38 (2020).

2.2 Ursu case

The *Ursu* case, one of the longest sagas of the contemporary Romanian judiciary, testifies to this fact. Gheorghe Ursu, a Romanian construction engineer, was arrested for possessing 17 US dollars – a crime under the then-Romanian criminal code and tortured to death by the secret police.[41] His cellmate, ordered to beat him, was arrested and, in 2000, sentenced to twenty years in prison. One of the torturers from the rank of the police was criminally prosecuted, also sentenced to twenty years.[42] However, the two highest officials alleged to have been directly in charge of the murder were not tried or sentenced. It is very likely that the procedure wouldn't have started at all, as much of the evidence seems to have been lost in the first decade of post-communist Romania. Nevertheless, the perseverance of Ursu's son and his hunger strikes together with the existence of a civil society organisation that gathered the victims of communist crimes pressured the prosecutors to take legal action.[43] Yet, the higher Securitate officers who were involved in his death were not prosecuted. In 2023, the High Court of Cassation and Justice (HCCJ) acquitted the Securitate officers alleged to have been involved in his death. Causing a significant public uproar, the judgment was accompanied by a press release in which the court boasted that the court acts based on the evidence presented at the trial and that the 'judicial truth' may differ from the actual evidence. Such a decision-making style, argued the HCCJ, demonstrates the difference between the totalitarian courts and the courts founded on respect for the rule of law.[44]

With such a decision, the court actually enraged the public by what one commentator called its inability to separate the two contexts: one, of contemporary Romania, and, the second, of a totalitarian state run by the secret police.[45] Instead, the court offered a nuanced reading of totalitarian communist Romania, going to great lengths to establish the difference between the communist regime of Romania between 1948 and 1964 and between 1964 and 1989. What makes the year 1964 unique is that in that year, the Romanian Workers Party proclaimed its independence by following its own path to achieving communism.[46] Of importance to this case,

41 M. Touma, 'Romanian Seeks Justice over Dissident Father's Death', *Balkan Insight*, 3 June 2017, https://balkaninsight.com/2017/03/06/romanian-seeks-justice-over-dissident-father-s-death-03-06-2017/.
42 A. Oprea, 'Torţionarul Tudor Stănică a ob□inut o nouă amânare la executarea pedepsei de 15 ani de închisoare', pe motiv că ar avea Alzheimer Citeşte întreaga ştire', *Libertatea*, 17 January 2020, https://www.libertatea.ro/stiri/tortionar-tudor-stanica-amanare-executare-15-ani-de-inchisoare-dementa-mixta-alzheimer-2858892.
43 'Son of Late Romanian Dissident Ends Hunger Strike', AP News, 7 November 2014, https://apnews.com/article/5afead8b96544702a9a7eef967dc90c0.
44 High Court of Cassation, Press Release, July 2023, https://www.iccj.ro/wp-content/uploads/2023/07/Comunicat-de-presa-cauza-Ursu.pdf.
45 A. Pora, 'Verdictul istoricilor pentru judecătorii din dosarul Ursu: „analfabetism istoric" sau tică lo□ie? Cinci probleme grave ale motivării', *Europa Liberă România* (RFE/RL), 2023, https://romania.europalibera.org/a/judec%C4%83tori-ursu-ignoranta-ticalosie-/32526354.html.
46 B.C. Iacob, 'Defining the Nation: History, Identity, and Communism in Romania (1964–1966)', 56 *Studia Universitatis 'Babeş Bolyai', Series Historia*

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that was the year from which it cannot be considered that the authorities 'tried to mentally and physically suppress a huge number of Romanians, particularly intellectuals from all fields of social life'.[47] For that reason – according to the court – it cannot be claimed that there was an intent to exterminate those deemed to be enemies of the regime systematically.[48] Analysing the allegations of torture and other inhuman and degrading treatment, the court found that allegations of torture may only be considered in a context of conflict and that it cannot be said that a conflict between the intelligence services and the Romanian people existed.[49] The existence of a conflict would trigger the norms from the Geneva Conventions of 1949, to which Romania was a party as international legal norms which were binding Romania at the time did not include general prohibition of torture that would be adopted. The court arrives at this conclusion through a complex analysis that includes statistics on the number of persons who were under surveillance by the Securitate after 1968 and lengthy quotations on the conditions in penitentiaries and labour colonies that existed in Romania before 1964. The court, most likely wishing to appear as sensitive to the sufferings during communist times, goes to great lengths to describe them and juxtapose the conditions post-1964 to those before.[50]

However, in a surprising move, instead of proceeding to individualise guilt, the court uses this lack of systemic exterminatory nature of the regime to exculpate the individuals belonging to its security service. For example, the court finds that the Securitate measures against the population are similar to contemporary investigative measures, finding no difference between them.[51] The court openly speculated about the nature of Ursu's relationship with the secret police, alleging that he was a privileged member of the Romanian society because he owned a passport and was allowed to travel outside of the country.[52] Thereby, the court speculates his death could have also been a possible lack of loyalty towards the secret police and not a crime against a citizen of Romania. The court questioned the dissident status that Gheorghe Ursu's son and the community of dissidents during the former Romanian regime ascribed to him, finding that he never expressed much of his criticisms in public but that his criticism was confined to his diary and anonymous contributions that he made to Radio Free Europe.[53] All of this allowed the court – as the prosecutors also determined on some other occasions[54] – not to treat his death as a result of torture or some other international crime that would enable the court to ignore the statute of limitations but rather as something that happened as a result of activities that were legal at the time.[55]

This conclusion would not have been reached without a rather narrow reading of the international legal standards. For example, the court analyses the existence of a state of conflict in order to test the applicability of the Geneva Conventions of 1949, ignoring the fact that these apply in the war and represent the corpus of the laws of war. An acquittal could have been possible on purely procedural grounds due to the lack of evidence, but a narrow reading, instead of strengthening the argument, appears to have been necessary solely for the purpose of rewriting the historical narrative or establishing a precedent.

In a symbolic way, the judgments that abolished the alleged torturers of Gheorghe Ursu represented the end of the transitional justice process. With its focus on the lack of systemic extermination of opponents, it does not only abolish the three men accused of Ursu's death but the entire intelligence agency of controlling the population of Romania through coercive means. It questions the historical narrative on which post-communist Romania was founded; while it refers to the events of 1989 as a revolution, it claims that the context of 1985 was such that there was little need for revolution. Effectively, it reinforces the narrative of those who have defended Securitate as a patriotic intelligence agency that has defended the national interests and not the agency that surveilled and intruded into the domestic life of ordinary Romanians.[56] It is no wonder that strong reactions came also from the CNSAS that provided evidence on how the dissidents were treated and how they were often convicted of petty crimes that would cover up a real need for their prosecution.

3 Romanian Judicial Anti-Corruption Campaign

3.1 The Judicial Fight against Corruption and Its Relevance

The idea that institutions whose primary duty is to prevent the abuse of power constitute a separate branch of government originated in the American public law and policy theory[57] from where it spread across the world. The wave of good governance reforms promoted the best practices that would make judicial councils, audit and comptroller offices, and expert regulatory bodies

1-11 (2011).

47 Judgment of the High Court of Cassation and Justice, 238/A/27.07.2023, at 14.

48 *Id*., at 15.

49 *Id*.

50 *Id*., at 13-5.

51 *Id*., at 6-7.

52 *Id*., 19.

53 *Id*., at 23.

54 Stan and Zulean, above n. 30, at 55-6.

55 Charges for murder were not brought because of the expiry of the statute of limitations that occurred as a result of long periods of inactivity of the prosecutors.

56 *Cum l-am îngropat definitiv pe Gheorghe Ursu, omul care avertizase în 1979 asupra riscului de cutremur în clădirile neconsolidate ale Bucure□tiului*. (n.d.). PressOne, https://pressone.ro/cum-l-am-ingropat-definitiv-pe-gheorghe-ursu-omul-care-avertizase-in-1979-asupra-riscului-de-cutremur-in-cladirile-neconsolidate-ale-bucurestiului/.

57 E.g., see W.M.C. Gummow, 'A Fourth Branch of Government?', AIAL Forum. No. 70, 2012.

less dependent on the executive and, thus, independent from political influence. The expert consensus held the belief that a direct role of the parliament in the appointment of the key personnel of these bodies, the direct responsibility to the parliament, and the role of monitoring institutions – usually from the civil society – were crucial for the performance of the key societal roles.

Given the popularity of the policy of creating specialised judicial anti-corruption bodies at the turn of the century, it is unsurprising that such bodies were considered fourth-branch institutions.[58] Romania's Anti-Corruption Directorate, better known under its Romanian acronym DNA (Direcția Națională Anticorupție), was one such institution, and the Supreme Council of Magistracy (SCM), another.[59] These two institutions were to play a crucial role in responding to the demands of the European institutions for a reformed judiciary free from political influence and willing to go after the highest-placed officeholders; the DNA would prosecute those charged with corruption, especially those politically connected, while the SCM would be a judicial and prosecutorial council modelled after the successful Italian model.[60]

Following its inception in 2006, DNA operated freely and bravely but with little accountability. The SCM did not pick its leading members; the reformist cadres of the Ministry of Justice handpicked them just before the country was to join the EU.[61] These handpicked cadres recruited much of the younger staff trained at the newly founded Judicial Academy. This specific cadre policy led to the emergence of a particular *esprit de corps*.[62] On par with the *esprit de corps* exhibited by the Italian and Brazilian prosecutors in the Lava Jato and Mani pulite operations, one of the main features of this spirit was the perception that public officials may not enjoy immunity for crimes committed in office. More importantly, it was a chance to break the path of dependency instilled in the judiciary by the unvetted post-communist judicial factions.[63]

The DNA's creation was a policy response to Romania's accession to the EU and the widespread belief that the country lacks the adequate political and institutional culture to protect the EU's financial interests and the structural and cohesion funds that would begin to flow into the country from 2007.[64] The EU set up a Cooperation and Verification Mechanism (CVM) to track the country's progress in its anti-corruption interventions.[65] Initially envisaged to last for three years, the CVM, which was not an institution but rather an institutionalised monitoring of particular benchmarks, lasted until 2023, for sixteen years. One of the benchmarks of this mechanism, and the country reports that the EU prepared after the accession of Romania to the EU, was the number of investigations that were started.[66] Therefore, the EU and its demands were a strong external incentive for prosecuting political corruption and establishing institutions to monitor and sanction corruption.

External influence, institutional independence acquired through the fourth-branch-style design of the prosecutorial system, and stubborn and persistent individuals were all important elements for the mix that would lead to the mass prosecution of political corruption in Romania between 2010 and 2017. However, that same combination used in Bulgaria failed to produce a decrease in corruption or prosecutions that could be comparable to those in Romania.[67] The main difference between the two lies in the domain of gathering evidence for criminal trials. The entrenchment of corruption, a problem in Romania during communist times further exacerbated by the transition from communism to capitalism, meant the creation of powerful patronage machines that served political parties.[68] Expecting to be rewarded either by the party of which they were a member or by another to which they could defect, the members of the Romanian political class were not likely to report wrongdoings. Plea bargaining, witness protection and the role of whistle-blowers either were not adequately institutionalised or were mechanisms that both the prosecutors and the witnesses were unfamiliar with. Rather than a threat to its existence, much of the police force represented a part of the corrupt environment. In such a situation, including corruption on the list of national security threats that the intelligence agency SRI could investigate seemed a pragmatic move.[69] Recommended by the foreign advisers, the inclusion was to secure the country's national interests: a strategic movement towards joining the EU, the efficient use of its structural and cohesion funds, and economic development. The problem was, however, that the authorisation was also based on Decision 17/2005 of the Romanian National Defence Council, which was never made public.[70]

58 Generally, see M. Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (2021).

59 R. Coman, 'The Normative Power of the EU and Contentious Europeanization: The Case of Judicial Politics', 36(6) *Journal of European Integration* 533, at 541 (2014).

60 Generally, see D. Kosař, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe', 19(7) *German Law Journal* 1567-1612 (2018).

61 M. Mendelski, '15 Years of Anticorruption', 1 *East European Politics* 237-258 (2021).

62 This *esprit du corps* was comparable to the Italian and Brazilian prosecutors. Compare Sergio Fernando Moro, 'Considerações sobre a operação mani pulite', 26(8) *Revista CEJ* 56-62 (2004).

63 Iancu, above n. 28, at 36-7 (arguing that the judiciary in 2010 was still primarily controlled by the 'generation on which the largest suspicion falls").

64 G. Noutcheva and D. Bechev, 'The Successful Laggards: Bulgaria and Romania's Accession to the EU', 22(1) *East European Politics and Societies* 114-44 (2008).

65 L. Toneva-Metodieva, 'Beyond the Carrots and Sticks Paradigm: Rethinking the Cooperation and Verification Mechanism Experience of Bulgaria and Romania', 15(4) *Perspectives on European Politics and Society* 534-51 (2014).

66 Mendelski, above n. 61, at 12.

67 M. Popova, 'Why Doesn't the Bulgarian Judiciary Prosecute Corruption?' 59(5) *Problems of Post-Communism* 35-49 (2012).

68 C. Nicolescu-Waggonner, *No Rule of Law, No Democracy: Conflicts of Interest, Corruption, and Elections as Democratic Deficits* (2016).

69 The Law No. 51/July 29, 1991 – Law on the National Security of Romania. Cf. The National Security Strategy of Romania (2007), at 51.

70 The President and the Supreme Council of Romania members rejected the calls for declassification of the proposal, and the legislative proposal for its declassification never succeeded in the parliamentary procedure.

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Between 2010 and 2017, DNA investigated several thousand people – many of whom were high-positioned individuals – for corruption-related crimes, achieving the much-lauded and much-criticised 92% conviction rate.[71] The prosecutions made the institution popular among the Romanian population and the European public,[72] and both saw it as preventing immunity for public officials. The Romanian political class did not share this enthusiasm as strong independence, and the bias towards certain political parties made it unpopular with them. Following the 2016 general elections, the government led by the Social Democratic Party (*Partidul Social Democrat – PSD*) began dismantling the system that allowed the judicial anti-corruption campaign to emerge. It changed the laws defining corrupt acts and judicial independence. It removed Laura Codruta Kövesi as head prosecutor; however, without the decisions that ruled as unconstitutional some aspects of the anti-corruption policies considered well-established, it is doubtful whether the anti-corruption campaign would end.[73]

The impact of the prosecutions of political corruption is difficult to ascertain. The perceptions of corruption lowered while remaining higher than in most other European states[74] and higher than in post-socialist countries that did not use repressive mechanisms on such a scale as Romania did.[75] Economic life in the country became less dependent on patronage.[76] Judicial organising that was relatively underdeveloped following the introduction of the SCM blossomed as judges fought to preserve their independence[77] and, as we will see later, mainly because of the differences and polarisation between them that depended on different perceptions of trust. Anti-corruption became a part of the populist agenda of the centre-right Romanian political parties[78] remaining, despite the high salience of the topic for the Romanian voters, a widespread practice of clientelism for some political parties.[79] However, the campaign also changed the relationship between the courts and intelligence services in Romania which was already strained due to an unsatisfying lustration process that had, for the judiciary at least, ended before it began.

3.2 Securitisation and De-securitisation

3.2.1 Protocols with the Judiciary

Close cooperation between the SRI and the judiciary in cases concerning corruption became institutionalised by the signing of the cooperation protocols. These protocols, agreed upon and signed between the SCM – the highest body of judicial independence and self-governance – and the SRI and the DNA, allowed for the intelligence agency staff to be used in corruption investigations.[80] The broad language of the protocols referred to cooperation in the field of corruption investigations and the entire field of work covered by the SRI.[81] The cooperation objectives were also set wide but with more precision, for example, using staff and equipment for surveillance and interceptions and forming mixed investigatory teams.[82] The protocols were signed in 2009 and kept secret until 2016 when they were declassified at the request of the members of the parliamentary oversight committee. The specification that, in reality, they referred mainly to the wiretapping of national security threats (on the basis of court orders) of which corruption was a part was absent from the text.

By themselves, the protocols for collaboration between law enforcement agencies are common, standard operations practice.[83] The text, most likely prepared by the SRI based on earlier cooperation protocols or memorandums of understanding with other law enforcement bodies, also references the elements of collaboration that were less likely to happen, such as the preparation of joint action plans.[84] Their classification was perhaps more of an unnecessary cautionary measure rather than a part of some elaborate plan for controlling the judiciary. Yet, the vague language used, particularly the formulation concerning the mixed investigatory teams, invokes suspicion that the SRI-DNA collaboration obscured the boundary between police and intelligence work.[85] This boundary exists for practical and historical reasons. From a historical standpoint, it is essential as it prevents the repetition of previous instances of the emergence of a police state that was enshrined precisely in the indeterminate and broad reach of the intelligence agency. For practical reasons, the delimitation of the fields of engagement prevents overreach and conflict of

71 D. Clark, *Fighting Corruption with Con Tricks: Romania's Assault on the Rule of Law* (2017).

72 E.g., see 'In a Soft-Spoken Romanian Prosecutor, Some See an "Earthquake"', *The New York Times*, 14 November 2014, https://www.nytimes.com/2014/11/15/world/europe/romania-prosecutor-laura-codruta-kovesi.html.

73 N. Hogic, 'Judicial Anticorruption Campaigns as Quests for Judicial Reputation', 32 *Journal of Transnational Law and Policy* 115 (2022-2023).

74 Compare European Commission, Special Eurobarometer 374 (2012) and European Commission, Eurobarometer Special 523 (2022).

75 M. Popova and V. Post, 'Prosecuting High-Level Corruption in Eastern Europe', 51(3) *Communist and Post-Communist Studies* 231-44(2018).

76 Mungiu Pippidi, above n. 20.

77 D. Călin, 'The Role of Associations of Judges in Defending the Rule of Law: Legitimacy of Unconditional Locus Standi in Situations Where They Seek to Obtain Effective Jurisdictional Protection in Areas Regulated by European Union Law', 16 *UNIO EU Law Journal* (2023) at https://officialblogofunio.com/2023/01/16/the-role-of-associations-of-judges-in-defending-the-rule-of-law-legitimacy-of-unconditional-locus-standi-in-situations-where-they-seek-to-obtain-effective-jurisdictional-protection-in-areas-regulated/.

78 T. Kiss and I.G. Székely, 'Populism on the Semi-Periphery: Some Considerations for Understanding the Anti-Corruption Discourse in Romania', 69(6) *Problems of Post-Communism* 514-27 (2022).

79 S. Gherghina and C. Marian, 'Win Big, Buy More: Political Parties, Competition and Electoral Clientelism', 40(1) *East European Politics* 86-103 (2023).

80 Protocol of Co-operation between the Office of the Prosecutor Attached to the High Court of Cassation and the Romanian Intelligence Agency regarding Matters of National Security, 2009, https://media.hotnews.ro/media_server1/document-2018-03-30-22371514-0-protocol-cooperare-parchetul-general-sri.pdf.

81 *Id.*, Art. 1 and Art. 2 stating that 'the parties co-operate in combatting crimes against national security and crimes that have a counterpart in the field of national security.'

82 *Id.*, Art. 3.

83 A. Defty, 'Coming in from the Cold: Bringing the Intelligence and Security Committee into Parliament', 34(1) *Intelligence and National Security* 22, at 27-9 (2018).

84 Protocol, above n. 80, Art. 3.

85 Iancu, above n. 31, at 1227-1229.

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competencies between the intelligence agency and other actors.

In its decision from March 2019, the CCR reasoned that the conclusion of the protocols between the SRI and the other bodies leads to an expansion of the legislative scope of the criminal procedure law that allows the prosecutors to act *ultra vires*. By its decision, the court struck down the two protocols for collaboration deeming them unconstitutional and in violation of the principle of legality and the separation of powers. The court found the two protocols to be of a 'heterogeneous nature', thus allowing the prosecutor's offices to transfer some of its competencies to the SRI.[86] According to the CCR, this led the courts towards a situation in which, unaware of the protocols, they could not effectively administer justice.[87] The CCR noted the passivity of the parliament and its oversight, finding that it could have easily requested the SRI to declassify and allow the members of the parliament an opportunity to review the protocols.[88] Finally, the CCR ordered that in all of the pending trials based on this cooperation, the courts will verify that all of the norms of the criminal procedure have been observed.[89]

What exactly did the collaboration between the courts, the prosecutors and the SRI add to the criminal procedures against individuals charged with corruption remains difficult to assess. There is an absence of concrete evidence of the influence of SRI in the outcome of the investigations and the trials and the possible misuse of power by the SRI.[90] From the data on surveillance gathered by the SRI, we infer that the decisions of the CCR made a significant impact, with the total number of surveillances reduced by 80% following the publication of the decision.[91]

3.3 Collection and Handling of Evidence

We know that the SRI ignored the boundary between police and intelligence work because of the admission made by its leading personnel. In an interview in 2015, Head of SRI Legal Department, Dumitru Dumbravă, stated that the reference of the perpetrators of corrupt criminal acts as an established practice conducted by the SRI was no longer the only option that the agency pursued – instead, it also included the monitoring of the trials from the beginning to the end.[92] This admission, coupled with a practice of mass surveillance of Romania's citizens, the judiciary's leading members, CCR judges and SCM members, led to suspicions, fuelled by part of the media and the legal community, that the SRI is behind the prosecutions.[93] The mass collection of surveillance material created doubt that the selection of what gets included in the proceedings that were a part of the judicial anti-corruption campaign was, effectively, dictated by the SRI, and not the prosecutors, representing, consequentially, a case of selective justice. Likewise, the number of approved surveillance warrants testifies to little effective judicial oversight over surveillance.[94] The SCM also failed to comment on the designation of the courts as a tactical field for the SRI, debating the issue based on the materials provided by SRI, which remained classified to the public.[95]

As previously stated, the collection of evidence relied on the protocols that allowed SRI's involvement, and these protocols were based on the number of laws and bylaws, the most controversial of which was Decision 17/2005 on the fight against corruption, fraud and money laundering.[96] Reviewing the protocols, the CCR did not seek to declassify this decision, finding simply, as stated above, that the protocols infringed on the prosecutors' independence and represented a legal conflict between different branches of government.

The practice of cooperation between the intelligence agency and the judiciary would change dramatically following the CCR decisions on the illegality of the protocols. Every instance of cooperation would become much more transparent, requiring the 'declassification of extrajudicial administrative acts issued or concluded by any public authority or among public authorities, concerning or affecting judicial proceedings'.[97] In addition, a prohibition of involvement of any members of the judicial personnel with the intelligence agency was included in the law. Paradoxically, as Iancu observes, the requirements for disclosing this information were stricter than those concerning the earlier lustration laws.[98]

86 Judgment of the Constitutional Court of Romania, 26/2019, para. 173, https://www.ccr.ro/wp-content/uploads/2020/07/Decizie_26_2019.pdf.

87 *Id*., para. 189.

88 *Id*., para. 185.

89 *Id*., para. 214.3.

90 To the best of my knowledge, the literature offers no conclusive evidence of the specific outcome of the cases in which such collaboration occurred. The criticism that is offered, for example, by the Romanian Bar Association limits itself to the composition of the panels of the High Court of Cassation and Justice (that would later also be deemed unconstitutional practice by the CCR Decision 685/2018) but not to the outcome of the cases based on selective justice or tampered evidence. Prosecutorial outreach referred to with regards to the prosecutors in Oradea charged with extortion does not point out exploitation of evidence gathered by the SRI; e.g., see L.K. Gal, Final de poveste: Procurorii DNA Oradea acuzați că au băgat spaima în judecători au fost declarați nevinovați, Bihoreanul, 17 July 2023, https://www.ebihoreanul.ro/stiri/final-de-poveste-procurorii-dna-oradea-acuzati-ca-au-bagat-spaima-in-judecatori-au-fost-declarati-nevinovati-180100.html.

91 Mendelski, above n. 61.

92 Dumitru Dumbravă: SRI este unul dintre anticorpii bine dezvoltați și echipați pentru însănătoșirea societății și eliminarea corupției, Juridice.ro, 30 April 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.

93 D. Călin, 'The Evolution of the Superior Council of Magistracy, between Efficiency and Indifference', in D. Tăpălagă, D. Călin & C. Coadă (eds.), *900 Days of Uninterrupted Siege upon the Romanian Magistracy: A Survival Guide* (2019) 153-6.

94 Mendelski, above n. 61.

95 UNJR: CSM evita sa clarifice problema relatiei justitiei cu serviciile secrete, https://www.legal-land.ro/unjr-csm-evita-sa-clarifice-problema-relatiei-justitiei-cu-serviciile-secrete/.

96 See preamble to the Protocol, above n. 80, at 2.

97 Iancu, above n. 31, at 1229.

98 *Id*.

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Parliamentary oversight increased,[99] and a dramatic fall in the number of interceptions occurred.[100]
The CCR further limited the use of surveillance in anti-corruption investigations by limiting the SRI's participation in the anti-corruption investigations. In 2018, the CCR struck down Article 3f of the Law on National Security of Romania as unconstitutional.[101] Article 3f gave the SRI the authority to operate to prevent threats of national security, defined as

> undermining, sabotage or any other actions that have as purpose to remove by force the democratic institutions of the state or that gravely harm the fundamental rights and freedoms of Romanian citizens, or may damage the defense capacity or other similar interests of the country, as well as the acts of destruction, degradation, or bringing in an unusable state the structures necessary for the good development of social and economic life.

In its interpretation of the Article 3f, the CCR focused on the meaning of the phrase 'that gravely harm the fundamental rights and freedoms of Romanian citizens' to discern whether it can be attributed to mean that the SRI has the authority to combat corruption. The CCR held that the provision was unconstitutional, finding that

> the commission of specific crimes, such as corruption, cannot be classified as a threat to national security, even if the facts seriously affect certain fundamental rights and freedoms of Romanian citizens. This is because, although some offenses are likely to seriously prejudice certain fundamental rights and freedoms by penalizing those acts in the general interest, they do not have the magnitude necessary to classify them as threats to national security.[102]

According to the CCR, such a classification risks a lack of distinction between individual criminal acts and those threatening national security. As a result, many of the actions taken may not be defined within a 'clear, precise and predictable regulatory framework', thus risking the protection of the principles of legality and privacy as well as the conditions under which the limitations for human rights may be exhibited. In so doing, the CCR has, as the Dissenting Opinion noted, stretched the concept of predictability concerning the deployment of electronic surveillance measures. The CCR ignored the fact that many European jurisdictions have similar legislation that opens the possibility for national intelligence agencies to participate in activities concerning serious offences and fraud while at the same time staying away from criminal proceedings or the indiscriminate gathering of evidence. It also overlooked the fact that the strategic anti-corruption documents of Romania have treated and continue to treat corruption as a matter of national security.[103]

4 Trust and the Judiciary

There is a general consensus that legal rules influence the level of trust, especially so-called systemic trust in a society.[104] The problem with trust measurements in the legal field is that they are often imprecise and, moreover, that they often conflate two ideas: trust in courts and confidence in courts. The distinction lies in the relationship between the observant and the phenomenon, event or other actors. Confidence means a more passive approach based on cognitive expectations, while trust involves more risk as it may be unilaterally withdrawn. Trust develops based on shared legal practice and common values.[105] The often problematic delineation between legitimacy, trust and confidence that the literature points to[106] remains difficult to ascertain. One of the main problems is insufficient research on the relationship between judicial and prosecutorial officeholders and trust. This problem is not specific only to Romania[107] but because both lustration and prosecutions of corruption were (and remain) salient political issues, political stances of the population may help us bridge the gap in knowledge or, at least, make more informed assumptions about the trust in judicial officeholders and the judiciary as a whole.

4.1 Trust of Citizens in Courts

At the beginning of the 21st century, trust in Romanian courts was lower than in other Central and Eastern European countries.[108] Only 19% of citizens trusted the courts, compared to a mean of 25% for the other countries combined. This rate would strongly oscillate between the years; at the height of the judicial anti-corruption campaign in 2015, the trust in the judiciary, particularly the prosecutors, was record high.[109] In 2022, 51% of the Romanians say they cannot entirely rely on

99 V. Stoian, 'Parliamentary Intelligence Oversight in Romania: Between Consolidation and Controversy', 37(1) *International Journal of Intelligence & CounterIntelligence* 276-8 (2024).
100 Raportul partial reprezentand activitatea comisiei in perioada septembrie 2017-prezent, referitor la mandatele de supraveghere tehnica si la ordonantele procurorilor pe 48 de ore, at 11, https://www.cdep.ro/comisii/controlul_sri/pdf/2018/rd_1003.pdf.
101 Constitutional Court of Romania, Judgment 91/18 of 20 April 2018.
102 *Id.*
103 OECD, *Evaluation of the Romanian National Anti-Corruption Strategy 2016-2020* (2022).
104 Wischmeyer, above n. 5.
105 *Id.*, at 347.
106 P. Popelier, M. Glavina, F. Baldan & E. van Zimmeren, 'A Research Agenda for Trust and Distrust in a Multilevel Judicial System', 29(3) *Maastricht Journal of European & Comparative Law* 351-74 (2022).
107 See J. Frateur, P. Bursens, S. Duarte Coroado & P. Popelier, '23/03/2023: Literature Review, Legitimate Crisis Governance in Multilevel Systems', at 14-15 (arguing that a small number of papers differentiate between trust in government and trust in the legal system despite the latter being more resilient), https://legitimult.eu/wp-content/uploads/2023/06/Del-5.1-Working-paper-Literature-review-and-methodology.pdf.
108 See K. Scott, 'Decollectivization and Democracy: Current Law Practice in Romania', 36 *George Washington International Law Review* 817 (2004).
109 B. Selejan Gutan, 'Romania: Perils of a "Perfect Euro-Model" of Judicial Council', 19 *German Law Journal* 1707 (2018).

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the judiciary, while 23.5% saw it as corrupt.[110] Compared to other public institutions, the judiciary appears to be in the middle of the list of most corrupt or distrusted institutions. The courts are perceived as independent by 48% and as captured by external influence by 36% of the population, roughly at the level of the EU average.[111] Contextualising these results within a larger frame of trust research in Eastern Europe also reveals that Romania and Slovakia had the lowest scores in terms of interpersonal trust. That indicates the existence of a much more difficult terrain in which trust in public institutions and the rule of law is to be built.[112]

The transitional justice efforts in Romania and the judicial anti-corruption campaign were political events of the first order for Romanian society. One of the reasons is that both events have dealt with surveillance, a topic citizens care for and relate to trust.[113] In the case of transitional justice, the surveillance refers to the former informers who collected data for the intelligence agency; in the case of the judicial anti-corruption campaign, the intelligence agency surveilled the general population for the prosecutorial decisions on indictment and subsequent court procedures. From the data on the support to the special prosecutor's office and the DNA, we infer that the citizens supported the judicial anti-corruption campaign. However, from the results of the 2016, and subsequent elections, we also infer that the citizens were much more sceptical towards the securitisation that allowed the campaign to happen in the first place. Likewise, the citizens did not support the decision that the informants remain unvetted; in fact, data suggest that an informal lustration following the accessibility to publicly disclosed files happened.[114] A missed opportunity to increase societal trust by a stronger lustration process in which the judges would be vetted opened the door to delegitimising the judicial anti-corruption campaign conducted by the populist politicians. Double standards concerning securitisation played a key role in that.

The delegitimisation was directly inspired by the conflation of the past injustices of the totalitarian communist regime with the then-ongoing judicial anti-corruption campaign. For the voters supporting liberal values, the judicial anti-corruption campaign remained a rallying flag, a call for a more just society.[115] However, many voters were swayed by the successful delegitimisation of the campaign carried out by Romania's biggest political party, the PSD, and its media allies. While PSD is not the main culprit for the salience of corruption in the political discourse of Romania,[116] it shaped the negative discourse against the judiciary regarding anti-corruption measures. Presenting themselves as victims of an anti-corruption witch hunt orchestrated by the remnants of the former secret police in breach of the rule of law standards, PSD successfully won the 2016 elections held at the height of the anti-corruption campaign.[117]

One of the reasons why PSD was able to defeat its opponents was its handling of the strong anti-corruption narrative present within society. To it, the PSD responded with an equally strongly argued narrative on inequality. By successfully presenting itself as a political project committed to equality and not anti-corruption,[118] the PSD defended its own legitimacy, sowing, at the same time, distrust towards the judiciary. In many Eastern European post-communist societies, including Romania, the levels of trust correlated with levels of inequality,[119], and such a focus could have played a role in exploiting the distrust towards the judiciary in obtaining a better electoral result. What helped the PSD's cause was a gradual loss of trust of Romanian citizens in the EU and its institutions. In the first decade of Romania's EU membership, the trust in the EU institutions was significantly higher than the trust in national institutions.[120] Gradual dissatisfaction with the EU, a staunch supporter of the judicial anti-corruption campaign, and sharp divisions among the Romanian judiciary itself,[121] could explain why the trust in the judiciary didn't rise.

Still, the trust, confidence and legitimacy of the judiciary are significantly stronger among the citizens than they were twenty years ago.[122] Unlike Italy and Portugal, where a lack of success in anti-corruption trials has shaken confidence in public institutions, particularly the courts, in Romania, this was not the case.[123] Even five years after being removed from her position as the lead prosecutor in the DNA, Laura Codruta Kövesi, remains the second most trusted public person in Romania.[124] While it is unclear what trust measurements

110 European Commission Special Eurobarometer 534 (2022).

111 European Commission, *Flash Eurobarometer 519 Perceived Independence of the National Justice Systems in the EU among the General Public* (2022).

112 C.M. Horne, *Building Trust and Democracy: Transitional Justice in Post-Communist Countries* (2017), at 258-60.

113 V. Mitsilegas, 'Trust', 21 *German Law Journal* 69 (2020).

114 C. Horne, '"Silent Lustration": Public Disclosures as Informal Lustration Mechanisms in Bulgaria and Romania', 62(3) *Problems of Post-Communism* 131-44 (2015).

115 Kiss and Székely, above n. 78.

116 D. Dragoman, '"Save Romania" Union and the Persistent Populism in Romania', 68(4) *Problems of Post-Communism* 303-14 (2021).

117 See I. Chiruta, 'Challenging the Rule of Law in Romania: The Metamorphosis of Political Discourse towards Populism', 70(1) *Problems of Post-Communism* 76-93 (2023). It should be noted that this was not the only element in the electoral campaign that defined the outcome and, therefore, that its overall relevance should not be understated.

118 With a subtext that, in any event, all parties are corrupt.

119 E.M. Uslaner, 'Political Trust, Corruption, and Inequality', in S. Zmerli and T.W.G. van der Meer (eds.), *Handbook on Political Trust* (2017) 305-7.

120 A. Mungiu Pippidi, 'Splintering of Postcommunist Europe', 26(1) *Journal of Democracy* 94-5 (2015).

121 L. Puleo and R. Coman, 'Explaining Judges' Opposition When Judicial Independence Is Undermined: Insights from Poland, Romania, and Hungary', 31(1) *Democratization* 51-3 (2024).

122 We see this also from the fact that the number of the users of the court is not declining but remains high. See Romania Judicial Functional Review (2013), at 4-5, https://www.just.ro/wp-content/uploads/2021/08/Romania-Judicial-Functional-EN.pdf; M. Mendelski and A. Libman, 'Demand for Litigation in the Absence of Traditions of Rule of Law: An Example of Ottoman and Habsburg Legacies in Romania', 25 *Constitutional Political Economy* 177-206 (2014).

123 P.C. Magalhães, 'When Corruption Investigations Come to Nothing: A Natural Experiment on Trust in Courts', 37(1) *Governance* 99-117 (2024).

124 Sondaj INSCOP, 'Geoană, Kovesi şi Boc, pe primele locuri în topul încrederii. Iohannis, la coada clasamentului', HotNews.ro, 5 December 2023,

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mean to judicial and prosecutorial officeholders, we can hypothesise that some of their concrete actions resonated well with public opinion. Such was, for example, the situation with strikes in which judicial associations actively mobilised the public to join them.[125] By successfully tying the topics of judicial independence and anti-corruption, the judiciary legitimised its struggle against government control.[126] In the absence of specific surveys, we may assume that many prosecuted and investigated cases coupled with a balanced penal policy may have strengthened citizens' perception of an independent judiciary.

4.2 Trust between Courts and between Judicial Officeholders

When it comes to trust between courts, more data are available. The judicial associations' proactive role in the legal mobilisation of Romanian judges against the rule of law violations and attacks on judicial independence testifies to the high level of social capital within the judiciary.[127] However, this capital is distributed unevenly; younger judges and prosecutors in the courts of first and, to a certain extent, second instance tend to have a more favourable view of the judicial anti-corruption campaign. They view the failed lustration (vetting) as a missed opportunity that could have sped up the decoupling from the communist-era judiciary. Many of them protested the changes in the laws governing corruption and the judicial responsibility.[128] The younger judges group around the Association Forum of Romanian Judges (AFRJ) actively criticised the decisions of the CCR and the ensuing reform created by the Romanian government. They actively networked with other judicial organisations, mobilising them to participate in the protests and support their applications to the CJEU, in which they challenged the legislation adopted by the Romanian government.[129] By its decision in May 2021, the CJEU found that the Romanian government's measures to establish the Section for Investigation of Offences within the Judiciary (SIOJ) is in violation of the CVM and the safeguards of judicial independence.[130] Still, in 2023, the Association of Prosecutors Initiative for Justice (Inițiativa pentru Justiție) – with some prominent European legal experts' support – sued the European Commission for terminating the CVM.[131] While the reestablishment of the CVM for Romania seems unlikely and, to a certain extent, anachronistic, as the instrument has served its purpose, the effort primarily serves as a tool for conducting legal mobilisation in an attempt to gather the prosecutors around the idea of independence and expand the membership of the association.[132]

Contrary to that, many of their senior colleagues residing within the CCR and the HCCJ and some appellate courts as well, hold less favourable views of the campaign and the lustration. For example, the judges and prosecutors grouped in the UNRJ association have, in many instances, publicly condemned the very existence of the judicial anti-corruption campaign, calling it a Soviet-style method of fighting corruption and successfully lobbying the MEDEL association of European judges to support them in taking this stance.[133] They have called upon their colleagues and participants in political life to stop the attacks on the CCR and to accept its decisions. For its part, the majority of the CCR judges did not publicly side with either association. It has been suggested that a failed DNA's case against one of the justices of the CCR was considered intimidation and a misuse of prosecutorial power that turned the justices against the DNA. Such a characterisation could have played a role in the CCR's later decision to support the Romanian Ministry of Justice's initiative to remove Kövesi[134] and a string of other cases in which the CCR stood with the government in its curbing of judicial independence. Going against the spirit and substance of European standards of judicial independence, the CCR would go to support governmental actions by invoking the country's constitutional identity.[135]

Certainly, the fault lines between European standards of judicial independence and anti-corruption on the one hand and the constitutional identity and legal certainty on the other should not be understood as absolute, and it is beyond the scope of this article to qualify all legal actions taken by different associations or the CCR or the CJEU counteractions as evidence of the validity, or the invalidity, of different stances.[136] However, a fault line

https://www.hotnews.ro/stiri-politic-26731759-sondaj-inscop-geoana-kovesi-boc-primele-locuri-topul-increderii-iohannis-coada-clasamentului.htm.

125 S. Doroga and R. Bercea, 'The Role of Judicial Associations in Preventing Rule of Law Decay in Romania: Informal Communication and Strategic Use of Preliminary References', 24 *German Law Journal* 1393-1396 (2023).

126 See surveys on judicial independence and trust in the judiciary from the 2017 to 2018 period.

127 Generally, see Tăpălagă, Călin & Coadă, above n. 93.

128 D. Călin, I. Militaru & C. Dragusin, 'Current Vulnerabilities in the Functioning of the Romanian Judiciary System', 20 *Revista Forumul Judecatorilor* 28 (2017).

129 B. Selejan Gutan, 'Romania. How Judges and Prosecutors Fight for European Values', *Working Paper Institute for European Politics*, 2020, https://www.iee-ulb.eu/content/uploads/2020/04/Romania.-How-Judges-and-Prosecutors-Fight-for-European-Values.pdf.

130 M. Moraru and R. Bercea, 'The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociaţia 'Forumul Judecătorilor Din România, and Their Follow-up at the National Level', 18(1) *European Constitutional Law Review* 82-113 (2022).

131 'The Good Lobby Profs Rally behind Legal Challenge to EU Commission's Decision on Romania's Rule of Law', The Good Lobby, 2023, https://www.thegoodlobby.eu/the-good-lobby-profs-rally-behind-legal-challenge-to-eu-commissions-decision-on-romanias-rule-of-law/.

132 Still, the success of this endeavour could be endangered should the CJEU reject the give the association *locus standi* by applying the famous Plaumann doctrine.

133 S. Spinei, 'Aged Clichés, Different Suburb: Justice in Romania: Crisis vs. Independence', in S. Shetreet, H. Chodosh & E. Helland (eds.), *Challenged Justice: In Pursuit of Judicial Independence* (2021) 258-69.

134 D. Morar, *Putea Sa Fie Altcumva* (2022), at 634-50.

135 C. Carmen Curt, 'Romanian Commitment to Independence of Justice and Anticorruption Reforms under CVM and Rule of Law Incentives. Some Considerations on Case-Law of the Constitutional Court', 65 *Transylvanian Review of Administrative Law* 54-5 (2022).

136 For example, invocations of constitutional identity are by itself not anti-European representing a value enshrined in the Art. 4(2) of the Treaty on the European Union. See K. Benke, 'The Saga May Continue: On the Intricate Dialogue between the Constitutional Court of Romania and the

seems to emerge that demonstrates a generational gap between younger judges and older judges. Manifesting itself as a difference in the views of judicial reputation and priorities, it explains the divisions in question. Younger judges, understanding the judicial reputation less as a collective characteristic of the judiciary but more as a project built through individual efforts, held a more favourable view of the judicial anti-corruption campaign and the interagency collaboration with the SRI.[137] These differing views on the nature of judicial reputation as one of the critical qualities of the judiciary were initiated by decoupling the judiciary from the two other branches of government due to the introduction of judicial self-governance in the form of a judicial council.[138] The entrenchment of the council helped judicial independence leading, however, to a question of limitations to the judicial and prosecutorial power.

5 Conclusion

Outside the United States and, perhaps, Great Britain, the courts are still not considered essential security actors. The security field continues to expand, and, consequently, much of what was traditionally outside of the domain of the work of the courts could now become a part of their agenda. Surveillance and its outcomes, including evidence to be used in judicial proceedings, have become increasingly important and a part of court oversight and judicial proceedings. These reasons make the work that would better conceptualise their role essential.

The Romanian experience tells us that this role in shaping the functionality of democracy comes with significant risks. Courts and prosecutors may be perceived as just another law enforcement agency. Such perception degrades their status and independence as it portrays them as subservient to the demands of the intelligence community. Omission to exclude individuals involved in mass violation of human rights via previous work in the intelligence sector and a lenient stance towards mass surveillance – even when such surveillance is necessary to carry out a much-needed crusade against corruption – testify of a significant degree of political awareness that the judiciary exercise in their relationship towards the security issues. In these situations, the courts fail to de-securitise a matter, upholding instead the secrecy and the past or present national security interests. When they de-securitise, as in the case of protocols for collaboration between the intelligence agency and the judiciary or the declaration that prosecutions against corruption may not be understood as a matter of national security, the consequences are felt much more broadly and transparently.

Transitional justice is a critical perspective that helps us understand how the courts approach security-related work. In Romania, decisions made by the Romanian courts have led to further securitisation and increased concerns about it. These decisions have allowed individuals involved in mass human rights violations to avoid scrutiny, which has contributed to a lack of faith in the judiciary and state institutions. This, in turn, laid the groundwork for later discrediting of the judicial anti-corruption campaign and its surveillance-based investigations.

Insufficient data prevent us from making a more definite conclusion concerning the impact of the court practice on citizens' trust in courts. The support of citizens in the fight against corruption seems to legitimise mass surveillance practices when they lead to uncovering corrupt crimes. However, citizens support the declassification and punishment of those involved in surveillance activities, testifying their distrust of the intelligence agencies. The potential for the courts' actions to act as a catalyst for increasing public trust needs to be clarified by better-targeted research. In many consolidated democracies, the fight against corruption evolved gradually through the work of the courts and through a holistic process of curbing the misuse of public functions.[139] This is especially true in light of a sharp turn towards answerability and accountability that took place in Romania over the course of less than a decade. Such a turn led to strongly different views within the judiciary. So far, their direct effects on trust are not observable, but we may predict such a divergence in communication regarding important legal topics.

Additionally, further empirical research is needed to clarify trust between courts and within the judiciary. It is, for example, difficult to imagine that no resistance to the mass issuing of surveillance warrants occurred within the judiciary or within the DNA. Recent publications, such as that by the former Justice Daniel Morar on revealing intentions of the court concerning the de-securitisation of the judicial anti-corruption campaign to the then President of Romania, testify of the doubts that the CCR had in realising that its decisions tip the balance of the consideration.[140] These reasons make the Romanian case a canary in the coalmine, a valuable precedent of interest to the modern relationship between the courts and the security and intelligence actors in the context of anti-corruption interventions and, more broadly, as democratic actors. This role is crucial because it influences trust in courts, which is essential in maintaining the democratic character of the political system.

Court of Justice of the European Union', IV *Central European Journal of Comparative Law* 30-31 (2023). Likewise, a support of a European lobbyist organisation is not a guarantee that a certain legal action is valid under European law.

137 Interview with the Romanian judicial association professionals.

138 Selejan Gutan, above n. 129.

139 M.F. Cuèllar and M.-C. Stephenson, 'Taming Systemic Corruption: The American Experience and Its Implications for Contemporary Debates', 155 *World Development* (2022) 105755.

140 Morar, above n. 134.

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