Post-Accession Constitutionalism With a Human Face: Judicial Reform and Lustration in Romania

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'Every trade has its tools. In the *Securitate* work, what is ours? We too have our tools. Whereas the barber owns a razor, whereas the carpenter uses a lathe, I say our tools are our informers. We have to know what our tasks are and whom we are dealing with. And just as the worker takes care of his things, we have to take care of our informers. (...) These are the teachings of the Party!'

General Gheorge Pintilie, Minister of Internal Affairs,
Internal Memorandum to the General Directorate of the People's Securitate *(1950).*

'The Commission has no comment to make on a specific domestic Romanian issue, especially when the situation is still evolving.'

Answer given by Mr. Verheugen, on Behalf of the Commission, to Written Question E-0905/03,
Subject: Romania – access to the Securitate *archives (2004/C33E/085)*

Process of EU-driven constitutionalisation – Decision of Romanian Constitutional Court post-EU accession – Nullification of the Lustration Law to pre-accession judiciary reform processes – Lustration elsewhere considered a matter of collective guilt of confrontation with the past – Lustration in Romania related to legislative attempts to reform the judiciary

Introduction: Post-communist past, European present

In late January 2008, the Romanian Constitutional Court declared unconstitutional, by unanimous decision, the 1999 Law on Access to Personal Files and the Disclo-

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sure of the Communist Political Police.[1] This decision invalidated the statute in its entirety, holding that the unconstitutional provisions were inextricably enmeshed in the normative structure. Whereas the radicalism (unanimity, invalidation *in toto*) was somewhat unusual, this Romanian development is by no means extraordinary. Many other post-communist lustration legislative packages have been voided or crippled by the respective constitutional courts, usually on rule of law (non-retroactivity), non-discrimination, and personality rights grounds. The European Court of Human Rights has also expressed a measure of human rights scepticism with respect to lustration measures.[2]

In Romania, the immediate public reaction to the ruling could at best be described as moderate. In the University Square of Bucharest, where tens of thousands used to gather in the 90s to protest against 'communist restoration' and demand decommunisation and lustration, a demonstration summoned by the major civil society NGOs barely managed to rally a few hundred people. They shouted haphazard slogans, somewhat half-heartedly, for little over one hour. Threats of hunger strikes pending denial of transitional justice did not materialise, the announced follow-up demonstrations were not subsequently convened, and even the initial bout of press attention quickly subsided. This was also a familiar and predictable eastern European development. The occasional press leaks of informer files and many years of endless political haggling over institutional and procedural matters have undermined much of the credibility of the entire accountability for the past debate.[3] The mere remoteness in time from the collapse of communism has by now dulled collective memory and public emotions. The public is weary of this matter and correctly perceives what was apparent to a few commentators even in the early 90s: aside from the concerns of a handful of isolated former dissidents, most public discourse about lustration, inasmuch as it still exists, is 'basically an elite power game'.[4] And there is, in any case, constantly diminishing political debate about lustration: even though the current President was elected in 2004 on a militant anti-crypto-Communist platform, no press release was issued from the Presidency in the aftermath of the decision. Morally charged positions have little purchasing power nowadays and the entire issue seems to have disappeared, even as a 'shaming strategy', from the political agenda.

[1] Decision 51/2008 regarding the objection of unconstitutionality to the provisions of Law 187/1999 Regarding Access to Personal Files and Disclosure of the *Securitate* as Political Police (M. Of. Nr. 95/29.02.2008).

[2] *Turek* v. *Slovakia* (2007) 44 EHRR 43, *Matyjek* v. *Poland*, Judgment (Application No. 38184/03), *Sidabras and Džiautas* v. *Lithuania*, Final Judgment of 27/10/04 (Application Nos. 55480/00 and 59330/00).

[3] *See* András Sajó, 'Comment – Socialist Law Unaccounted', in Bogdan Iancu (ed.) *The Law/Politics Distinction in Contemporary Law Adjudication* (Eleven Publishing 2009), p. 133 at p. 135.

[4] Stephen Holmes, *The End of Decommunization*, 3 *E. Eur. Const. Rev.* (1994), p. 35.

The European Commission, recently the main local constitutional and legislative reforms 'entrepreneur', was not interested in this development, either; this lack of concern was also to be expected. Since the beginning of monitoring the 'political conditionality' *acquis,* lustration has been perceived as being of marginal or no interest to the fulfilment of the Copenhagen criteria. From the standpoint of the European Union, post-Communist 'confrontation with the past' was deemed to be, as Mr. Verheugen's above-quoted answer so crisply phrases it, 'a specific domestic Romanian issue', on which the Commission never had much to say during the accession process. Structural moral dilemmas are bureaucratically unquantifiable. This was a problem of guilt and shame, atonement and collective catharsis, one of those insoluble collective quandaries better left to the locals to sort out as they best deemed fit.

The Commission was and continues to be interested in the measurable constitutional problem areas of judicial reform and the fight against corruption. These objective matters, broken down into the four benchmarks of the Cooperation and Verification Mechanism (CVM), can be sub-itemized into a number of concrete, clear tasks.[5] Guidelines can be advanced, deadlines can be set, overall progress can be monitored, and results can be periodically assessed. In these more technical respects, however, things do not seem to be going too well. Albeit, since January 2007, the Commission has to be more cautious in its tone when addressing the seventh-largest member state of the Union, a note of alarm can be perceived in the stylistic inflections of its latest Report: 'Despite good progress on the investigative side, Romania can show few tangible results in its *fight against high-level corruption*.'[6] In fact, even in the logic of Eurospeak, this seems to be a gross understatement. None of the key indictments of ministerial corruption has reached a decision on the merits, as trials are interminably protracted, mired in procedural matters and objections of unconstitutionality. An expert reviewer of the Commission, Belgian prosecutor Willem de Pauw, declared, in a CVM report recently cited by *The Economist*, that 'the Romanian judiciary and/or legal system appear to be unable to function properly when it comes to applying the rule of law against high-level corruption' and that the situation would soon revert to the pre-accession level of 2003.[7] De Pauw's report also points out the apparent paradox that the

[5] *See* COM (2007) 378 Report from the Commission to the European Parliament and the Council – On Progress in Romania under the Co-operation and Verification Mechanism available at <http://ec.europa.eu/dgs/secretariat_general/cvm/docs/romania_report_20070627_en.pdf>.

[6] [Emphasis in original.] Report from the Commission to the European Parliament and the Council – On Progress in Romania under the Co-operation and verification Mechanism, COM (2008) 494 available at <http://ec.europa.eu/dgs/secretariat_general/cvm/docs/romania_report_20080723_en.pdf>.

[7] Available at <http://www.economist.com/media/pdf/romaniacorruption.pdf>. *See* comment in *The Economist*, 'In Denial – The European Union Conceals Romania's Backsliding on Corruption'

judges cannot be blamed for this situation, since it would be absurd to impute to the judiciary a lack of 'corruption awareness'. The fight against corruption is a broadly defined policy imperative with which the judicial function as such has nothing to do. Judges, by ideal-typical definition, apply law independently and impartially to individual cases. Hence, how the Romanian judicature interprets substantive and procedural norms and what practical results such interpretations yield can only be successfully approached and assessed from a legal perspective and within a judicial framework of reference. But a way out of the deadlock is not apparent to the bureaucracy in Brussels, probably since the conundrum is hard to classify, as it taxonomically straddles CVM Benchmarks 1 ('ensure a more transparent, and efficient, judicial process') and 3 ('continue to conduct professional, non-partisan investigations into allegations of high-level corruption').

The following argument is intended to show that the Communist past and its after-effects should not have been perceived as purely domestic moral problems and that judiciary reforms should not have been approached as mere technical, bureaucratic tasks. The apparently distinct constitutional issues of lustration and judicial reforms relate to each other, as both processes are 'fused at the hip' by the legal 'personnel' problem of post-Communism. It is true that the term 'post-Communism' is losing its explanatory grip on facts the more remote we are in time from the collapse of state socialism. As has rightly been observed, 'the states in the region … are post many other things as well.'[8] This, however, means only that the transitional after-effects of the Communist system, for which the term 'post-Communism' stood as a convenient shorthand, today need to be taken into account as one more (important but not fully determinant) generation of local contradictions and tensions. In this respect, the relevance of the lustration decision lies nowadays not in relation to its direct implications for the lustration process, which may have already been brought to an institutional standstill and political irrelevance. Rather, the reasoning of the constitutional judges and the consequences and implications of their decision are relevant insofar as they unravel ongoing transitional tensions affecting the operation of the Romanian legal system. The accession process has led to the aggravation of extant tensions, as the formalistic and directionless way in which the EU-driven constitutional and institutional reforms proceeded has perpetuated, entrenched, and legitimatised the local 'instrumentalisation' of the rule of law. Thus the personnel problem of post-Communism and the vision deficiencies of the pre-accession Europe-related

(3 July 2008), available at <http://www.economist.com/world/europe/displaystory.cfm?story_id=11670671>.

[8] Adam Czarnota & Martin Krygier, 'After Postcommunism: The Next Phase', 2 *Annu. Rev. Law Soc. Sci.* (2006), p. 299 at p. 301. *See also*, András Sajó, 'Pluralism in Post-Communist Law', 44 (1-2) *Acta Juridica Hungarica* 1 (2003).

reforms have together contributed to the constitutionalisation of systemic pathologies. As an unintended consequence of conjoined constitutionalist efforts, these pathologies are now almost impossible to dislodge and serve as formally legitimate and equal sources of 'the common constitutional traditions of the Member States'.

In what follows, I will first argue that the 'personnel problem' of the post-Communist legal profession is usually obfuscated by wholesale references to the impact of 'totalitarianism' on law and lawyers. The second part of the article will show that the failure to take into account local context – especially the impact of the past – during the recent EU-led and monitored accession process has resulted in the formalisation of 'political conditionality' requirements. In the field of judicial reforms, this formalistic and 'motorised' process of legal Europeanisation has led to the entrenchment and legitimisation of post-Communist power factions within the judiciary. In the last part of this article, the constitutional intersection of failed attempts at reforming the judiciary and the failure of the lustration process (i.e., the 'Lustration Decision' of the Romanian Constitutional Court) is presented as emblematic for the way in which post-Communist elites have learned to 'instrumentalise' rule of law ideologies in order to legitimise and perpetuate the *status quo* and deflect attempts at change. This type of 'balkanised' post-Communist European constitutionalism, I will conclude, serves as a cautionary tale about the preconditions and limitations of constitutionalism in the EU and, perhaps, of exporting 'democracy and the rule of law' more generally.

The problem of (post-)communist law and lawyers

Although reference is sometimes reflexively made to the impact of totalitarian dictatorships on legal systems,[9] totalitarianism as such is not cut out of one legal cloth. Different systems of organised lawlessness – the relative degrees of moral reprehensibility of which do not concern this argument – have different implications with respect to their detrimental impact on law and lawyers.

The National-Socialist regime, for instance, systemically more dependent on law and the legal profession for its efficient functioning, raised primarily, after its collapse, a problem of professional accounting for moral guilt. A sizable percentage of the Weimar lawyers served the Third Reich and were afterwards rather smoothly integrated into the judicial and legal-academic system of the Federal Republic. The underlying reason for this continuity of personnel was explained

[9] *See,* e.g., Adam Podgorecki & Vittorio Olgiatti, *Totalitarian and Post-Totalitarian Law* (Ashgate Dartmouth 1996), where, aside from Fascist, National-Socialist, Communist, and Apartheid South African legal wickedness, even Byzantine law is treated under the general conceptual heading of totalitarian law and even presented as the historic root of modern juridical totalitarianism.

by Ernst Fraenkel through his well-known thesis of a *Doppelstaat* or 'dual state'. Since, with minor changes, such as the accentuation of cartelisation and intensification of trusts and monopolistic practices, the economic system remained 'in essence capitalistic', a measure of demand for legal predictability and thus for legal expertise in economically-related legal relations therefore continued relatively unchanged from the Weimar Republic into the National-Socialist 'Normative State'.[10] Conversely, where a given matter was characterised as 'political' in nature, the ensuing decision, no matter how arbitrary and brutal, could proceed unfettered, as in a legal void, within the purview of what Fraenkel called 'The Prerogative State'. Within the scope of prerogative, the role of law was to ensure a minimal bureaucratic coordination and to act as an unquestioning 'transmission belt' for political commands. In case of jurisdictional doubt, the boundaries of the 'Normative State' and the direction of justification would be provided by the prerogative domain.[11] As soon as the 'confrontation with the past' process started in the 70s, the law-related question was: to what extent, given this continuity of functions and personnel, could the legal profession be brought to book for its role in 'planning, organizing, and legitimatizing' state lawlessness?[12]

Collective professional responsibility for upholding systematic Communist state terror is not the major problem posed by post-Communist law and lawyers. Marxism – as a foundational rather than as a critical legal ideology – has a distinct law-averse bias.[13] In this respect, an original and intellectually stimulating exemplification is Evgeny Pashukanis's argument that 'Communist law' is somewhat of an oxymoron, since law is a construction specific to the 'mystified relations of a

[10] Ernst Fraenkel, *Der Doppelstaat: Recht und Justiz im 'Dritten Reich' [The Dual State: A Contribution to the Theory of Dictatorship]* (Fischer Taschenbuch 1984).

[11] For instance, the newly appointed Reich Commissioner for the Press fired in 1934 the chief editor of a journal, although the latter's contract was termed to expire in 1940. The damages and back pay claim of the editor was dismissed as unfounded by the Court of Appeals (*Oberlandesgericht*) Hamburg, with the following reasoning: 'the plaintiff overlooks the fact that the close relationship of trust … between the Führer and his Following has constituted the basis of an almost unbounded plenitude of power to be exercised by the state government within the domain of law-making.' Ibid., at p. 31.

[12] Bernd Rüthers, 'The Functions of Law and Lawyers in Political and Social Transformation Processes', in Bogdan Iancu (ed.), *The Law/Politics Distinction in Contemporary Law Adjudication* (Eleven Publishing 2009), p. 117 at p. 127. For an excellent introduction in English into the problematic and the literature, *see further* Michael Stolleis's, 'Prologue: Reluctance to Glance in the Mirror-The Changing Face of German Jurisprudence after 1933 and post-1945', in Christian Joerges & Navraj Singh Ghaleigh (eds.), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions* (Hart 2003).

[13] On the anti-legalistic aversion of utopian and revolutionary thinking, Michael Burrage, *Revolution and the Making of the Contemporary Legal Profession* (Oxford U.P. 2006).

commodity-producing society' of exchange.[14] The socialist state was to make cautious use of this structure and 'exhaust its content' until law could eventually be replaced by relations of pure technical and administrative coordination. Once the initial world-revolutionary impetuses became 'Trotskyite deviationism,' Marxist sophistication, as indeed juridical intellectualism of all sorts, turned into a liability. Pashukanis himself disappeared in the 1937 purges.[15] In 1948, Lon Fuller was surprised to note, in a review of Andrei Vyshinsky's legal theory tract expounding the new state dogma of 'socialist legality', the surprising intellectual impoverishment, indeed, the logical primitiveness of the latter's argument. It appeared to Fuller that Vyshinsky had in fact no original legal theory whatsoever, contenting himself with a rudimentary description of the Soviet Union legal system, favourably compared with those of Western democracies (Western law hypocritically promises free speech but freedom of speech is truly ensured only in the Soviet Union, etc.).[16]

This relative decrease in analytical sophistication was due to the related practical cause that, in fully consolidated, bureaucratised state socialism, other forms of domination (economic incentives, administrative restrictions, police repression and secret police surveillance, party hierarchy, etc.) were equally or more important than legal control. The legal system catered to a meager array of demands on legality and served the 'primitive bureaucratic coordination needs of the socialist state organisation.'[17]

The socialist 'Prerogative State' was for the longest part of its duration less brutal than the National-Socialist one but it was also writ larger, had an almost full scope of operation. The total scope of the prerogative domain resulted in a quantitatively limited need for law and an intellectually crude legal training. For instance, since the sphere of private legal relations had shrunk to almost non-existence, there was no need in Communist Romania to abolish or amend the 1864 Civil Code. Since it had almost no import in actual human relations, the 'bourgeois' Code could be safely neglected and left in force. This general legal irrelevance is also factually showcased by a statistical study of the German Federal Bar Association on rate per million differentials in the number of legal professionals between East and West Germany, at the time of the Reunification. There were in 1990 38 attorneys at law in the East compared to 902 in the Federal

[14] Cf. Sajó, *supra* n. 3. Evgeny Pashukanis, 'The General Theory of Law and Marxism', in Pashukanis, *Selected Writings on Marxism and Law*, Piers Beirne & Robert Sharlet (eds.) (Academic Press 1980), p. 37 at p. 98.

[15] *See* Michael Head, 'The Rise and Fall of a Soviet Jurist: Evgeny Pashukanis and Stalinism', 17 *Can. J. L. & Jurisprudence* (2004), p. 269.

[16] Lon L. Fuller, 'Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory', 47 *Mich. L. Rev.* (1948–1949), p. 1157.

[17] Sajó, *supra* n. 3.

Republic and a ratio of 94 judges per million inhabitants in the GDR compared to a figure of 294 Western counterparts.[18] Likewise indicative of relative pre- and post-Communist demands for law and lawyers, at the oldest law faculty in Romania, that of the 'Al. I. Cuza' University in Iaşi, around 400 students were matriculated in 1985-1989. The number increased after the regime change in 1989 to 1500 over the 90s, and grew after 2000 to around 2500-3000 students.[19] Meanwhile, the number of accredited private and public law faculties in the country has also increased tenfold.

The main problem of post-Communist legal systems has therefore been one of credibility, not guilt, i.e., of moral, professional, and intellectual fitness to serve a rule of law democracy. State socialism created, according to its ideological and practical needs, a legal profession characterised by a strongly instrumental view of law coupled with a rudimentary descriptive approach towards the study and application of legal norms. Sometimes this rudimentary descriptive-literalist bent, which has historical and systemic determinations, is characterised as a legal-positivistic theoretical inclination.[20] But positivism, both as a theory of legal validity and as a theory of interpretation, is a complete legal world-view, presupposing a sophisticated understanding of legal phenomena, with which one could agree or not, from the opposed perspectives of other juridical *Weltanschauungen*.[21] The paradigm post-Communist lawyer is not a Marxist either, other than at the superficial lexical level of contamination with various slogans of the past, which surface sporadically nowadays, triggered by the occasional analogy. For instance, in a 2007 decision imposing on the legislature a duty to recriminalise insult and defamation, the Romanian Constitutional Court has paraphrased a paragraph from a 1952 Plenum

[18] Erhard Blankenburg, 'The Purge of Lawyers after the Breakdown of the East German Communist Regime', 20 *Law & Soc. Inquiry* (1995), p. 223 at p. 238.

[19] The figures were provided by the Chancellor of the Faculty (electronic letter of 21.09.2008, on file with the author).

[20] *See* Rafał Mańko, 'The Culture of Private Law in Central Europe After Enlargement: A Polish Perspective', 2 (5) *Eur. L. J.* (Sept. 2005), p. 527; Zdeněk Kühn, 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement', 52 *Am. J. Comp. L.* (2004), p. 531 and, *idem*, 'The Application of European Law in the New Member States-Several (Early) Predictions', 6 (3) *German Law Journal* (March 2005), p. 563.

[21] Cf. Dieter Grimm, 'Constitutions, Constitutional Courts and Constitutional Interpretation at the Interface of Law and Politics', in Bogdan Iancu (ed.) *The Law/Politics Distinction in Contemporary Law Adjudication* (Eleven Publishing 2009), p. 21, at p. 29: 'For a positivist in this sense, the legal norm consist of its text and nothing else, and the only instruments for discovering the meaning of the text are philology and logic, i.e., not the legislative history, not the motives or the intent of the legislature, not the values behind the norm, not the social reality that brought forth the problems the norm was meant to solve and in which it is to take effect, not the consequences the interpretation may entail. There can be but one correct understanding of a norm and this remains correct as long as the norm is in force, no matter how the context changes.'

Guideline Decision of the Supreme Tribunal of the People's Republic of Romania which instructed trial courts no longer to award plaintiffs pecuniary compensation for non-pecuniary damages, since awards of 'moral damages' were incompatible with socialist morality.[22] Yet, the mere fact that now, in 2007, the judges find their inspiration in Stalinist-era jurisprudence, does not make them crypto-Communist or Marxist, and, indeed, has little to do with any specific and consistent ideological orientation. It is simply a cliché of the past.

Since the predilection for old stereotypes and primitive literalism is indicative of deep-seated structural determinations rather than a shared legal-theoretical propensity, general reform problems are consequently more intricate. Ingrained juridical habits may begin to pose concrete actual problems, for instance with respect to the application of European law, whose implementation relies on the national judiciaries. European law institutions and concepts presuppose a certain level of methodological flexibility and interpretive sophistication that overtaxes the dogmatic conceptual toolkit of rudimentary textualism.[23] But finding a way out of this predicament may be a more complex process than simply pointing out the virtues of attention to precedent, general principles of the law, or the superior hermeneutic qualities of teleological over plain meaning interpretation.

Although law was not a primary mechanism of social control in Communism, lawyers, as a profession operating in the proximity of politics and political power, were more intensively regulated, monitored, and controlled than other categories.[24] Thus, the collective moral issue comes into question secondarily and tangentially, not in terms of special professional guilt or responsibility for past oppression but, rather, in terms of 'group trustworthiness'. This is especially the case nowadays, given the responsibilities assumed by law and lawyers virtually overnight and it constitutes the link or overlap between the moral credibility issue and the professional expertise problem. The legal system is still largely controlled by the generation on which greatest suspicion falls.

[22] Decizia 62 din 18 ianuarie 2007 (M. Of. Nr. 104/12.02.2007).

[23] Cf. sources cited *supra* n. 21. *See also* Frank Emmert, 'Administrative and Court Reform in Central and Eastern Europe', 9 (3) *Eur. L. J.* (2003), p. 288.

[24] 'Physicians psychiatrists and lawyers were among the throngs who collaborated by providing ostensibly confidential information about their clients and patients.' Vojtech Cepl, 'Ritual Sacrifices', 1 *E. Eur. Const. Rev.* (1992), p. 24 at p. 25. In Romania, after 1976, the number of places in law faculties was increased following requests of the Interior Ministry 'in order to ensure the increase in the number of legally-trained cadres necessary in certain departments of the *Militia* (i.e., police force) and *Securitate* apparatus.' Citing a 1976 memorandum to that effect of the Interior Minister, *Sojust* ('The Society for Justice', a Romanian NGO dedicated to the reform of the justice system) asked the Ministry to provide the names of the currently practising law professionals who had benefited from the programme up to 1990, available at <http://www.sojust.ro/dosarele-sojust/mi-juristi-absolventi-de-drept-la-propunerea-mi-in-76/90.html>.

This general personnel problem of post-Communist law and lawyers varies in terms of present-day levels of unassailability across the former socialist law jurisdictions. Non-conformant human and professional types managed to escape this systemic logic and survived within it by virtue of historical contingency, i.e., a function of the varying national levels of brutality or permissiveness of state socialism. This degree proportionally affects the professional (intellectual and moral) quality of the transitional human capital in the respective countries.

The transitional dangers of constitutionalising slogans – European reforms and judicial independence

Systemic dysfunctionalities are polycentric in nature, and attempts to remedy them can easily be frustrated by unintended effects and counter-reactions. This is especially the case when structural deficiencies are addressed by means of piecemeal institutional reforms. What appears to be 'solved' in one respect and at one point of the system, for instance by establishing an independent anti-corruption prosecutor's office to investigate and indict corruption-related offences, rebounds somewhere else, when indictments are systematically thrown out of court or ministerial responsibility legislation is repeatedly tinkered with by the Constitutional Court.

Thus, when the President of the Romanian Superior Council of Magistracy (CSM) opened the 2008 International Conference of Judicial Authorities in Bucharest, by praising, in elated terms, the supreme value of judicial independence, without which 'there is no democracy but only predisposition towards abuse … [and] no legal security, but only arbitrariness',[25] the European Commission may have differed, perhaps not in principle but certainly in point of local application. Its last report has criticised the CSM for lack of accountability, applying inconsequential disciplinary sanctions, and an equivocal position with respect to the fight against high-level corruption.[26] However, the general issue has become a matter of perspective nowadays. From the CSM standpoint, the pressures exerted by the Commission are political encroachments on judicial independence in a member state. Moreover, the Commission contributed in no small measure to the state of affairs it now deplores.

[25] *Opening speech of Madam Judge Lidia Bărbulescu,* President of the Superior Council of the Magistracy, occasioned by the International Conference of Judicial Authorities, document (in Romanian) available at <http://www.csm-just.ro/csm/linkuri/24_09_2008__17285_ro.PDF> (Bucharest, Court of Appeals, 28 Sept. 2008).

[26] *See* the July 2008 report, COM (2008) 494, *supra* n. 6.

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Constitutionalising slogans: Bureaucratic constitutionalism

The original version of the Romanian Constitution, adopted in 1991, provided for a Superior Council of the Magistracy composed of magistrates elected for 4 year terms, by both Houses of Parliament, in joint session.[27] Qualifications, ratio of judges to prosecutors, or even the possibility of renewal were not specified in the constitutional text. The attributions of the Council were cursorily sketched in two sections of Article 133: the CSM was to nominate judges and prosecutors to be appointed by the President and to act as a disciplinary council for judges. This relative lack of specificity resided primarily in the fact that, among the post-Communist power groups that participated in the drafting of the 1991 Constitution, there was no particular vested interest in an independent judiciary and perhaps a general undefined political interest against it. The 1991 drafting debates were monopolised by the field 'experts' (existing public law professors, who made then a clumsy but swift ideological about-face from rudiments of the Marxist-Leninist theory of state to the now more lucrative doctrines of the 'bourgeois' rule of law) and the interests of the party in power, an ideologically loose but politically well-consolidated aggregation of interest groups perpetuating pre-existing ruling elites.[28] Consequently, the provisions of the Constitution reflected both the relative inexperience of the drafters and various forms of institutionalised special interests. Only generational self-preferences were itemised with care for detail.[29] For instance, the provision in Article 141 requiring as a condition of appointment to the Constitutional Court 18 years of experience in academic law or legal practice, merged gate-keeping and *status quo* political interests of the moment with a professional-corporatist generational interest of the drafting committee experts.[30]

Unsurprisingly, the arrangement facilitated extensive political influence over the judiciary, including liberal use of executive appointments. For instance, successive Ministers appointed personnel in the Ministry of Justice to the Bench. The European Commission, therefore, strenuously insisted in its Country Reports,

[27] Romanian Constitution (1991), Art. 132.

[28] The drafting debates can be consulted in *Geneza Constituției României 1991: Lucrările Adunării Constituante* [The Genesis of the Romanian Constitution: The Proceedings of the Constituent Assembly] (1998). *See also* Antonie Iorgovan, Odiseea elaborării Constituţiei- fapte şi documente, oameni şi caractere; cronică şi explicaţii, dezvăluiri şi meditaţii [The Odyssey of Drafting the Constitution: Deeds and Documents, Individuals and Characters; Chronicle and Explanation, Unraveling and Meditation] (1998). On the context of post-revolutionary political continuity in Romania, *see,* e.g., Dennis Deletant, *Ceaușescu and the Securitate: Coercion and Dissent in Romania*, 1965-1989 (M.E. Sharpe 1996).

[29] For the notion of foundational 'generational preferences' in constitutionalism, András Sajó, 'Preferred Generations: A Paradox of Restoration Constitutions', in Michel Rosenfeld (ed.), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke UP, 1994).

[30] Now Art. 143, Romanian Constitution (2003).

from the onset of pre-accession monitoring, on the need to strengthen the role of the Council and guarantee judicial independence.[31]

But, whereas judicial independence (much like separation of powers, democracy, equality, etc.) is a fine value in any constitutional system, the principle as such is not susceptible of direct and wholesale application. At this level of generality and abstraction, it represents a mere slogan. For one thing, the political autonomy of the judiciary is not necessarily coextensive with (and may actually negatively affect) the independence of the individual judge.[32] Furthermore, political autonomy is not a coarse zero-sum institutional game but rather needs to be carefully defined and qualified in terms of countervailing considerations: professionalism, transparency, accountability, impartiality.[33] Especially in a transitional system, any institutional arrangement has to take into account the fact that the dangers at both ends of the spectrum, politicised justice and judicial corporatism, respectively, are particularly acute. For instance, fully-fledged corporate judicial autonomy poses – paradoxically – also the danger of indirect politicisation, since judicial self-government becomes a *sui generis* government in its own right, with a political core and the preconditions for developing uncontrollable internal pathologies.[34] Which institutional arrangement is in the end chosen depends on an entire constellation of factors and ought to be the object of a hard political choice, where the application of principles is informed by local context.

A context-sensitive choice was not proposed or influenced by the Commission and the decisional failure can be imputed to a number of causes, among which the more remote are larger European dynamics which determined a visionless and erratic plan for the eastern enlargement[35] or the more general lack of reliable criteria for evaluating the effectiveness of foreign technical legal assistance.[36] The

[31] *See,* e.g., 2002 Regular Report on Romania's Progress towards Accession, COM (2002) 700 final, available at <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2002/ro_en.pdf>.

[32] *See* J. Bell, *Judiciaries within Europe—A Comparative Review* (Cambridge UP, 2006), p. 26.

[33] Cf. M. Cappelletti, in the context of discussing judicial liability, '"Who Watches the Watchmen?" – A Comparative Study on Judicial Responsibility', *Am. J. Comp. L.* 1 (1983), p. 31. *See also* Carlo Guarnieri & Patrizia Pederzoli, *The Power of Judges-A Comparative Study of Courts and Democracy* (Oxford UP, 2002), p. 75.

[34] This seems to be the case in Italy, with the development of ideological factions (*correnti*) within the *Consiglio Superiore della Magistratura* (arguably the most autonomous High Judicial Council), *see* Guarnieri & Pederzoli, *supra* n. 39 at p. 176 and Carlo Guarnieri, 'Justice and Politics: The Italian Case in a Comparative Perspective', 4 *Ind. Int'l & Comp. L. Rev.* (1993-1994), p. 241, and *idem*, 'Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self-Government', 24 *Legal Stud.* (2004), p. 169.

[35] Cf. Stephen Holmes, 'A European *Doppelstaat*?', 17 *East European Politics and Societies* (2003), p. 107.

[36] Cf. Stephen Holmes, 'Judicial Independence as Ambiguous Reality and Insidious Illusion', in Ronald Dworkin (ed.), *From Liberal Values to Democratic Transition: Essays in Honor of János Kis* (Budapest, Central European University Press 2004), p. 3.

fundamental problem, however, was that a remote technocracy was trusted to determine and assess on short deadline complex, politics- and history-laden local value-questions.[37] The Commission cannot impose on a new accession state any ready-made mould of judicial independence orthodoxy, since the models of judicial organisation vary widely among mature Western democracies. In a general and abstract way, the constitutional systems of Spain, France, the United Kingdom, and Germany can all be said to illustrate the principle of judicial independence. But none of these systems is a recipe for reform in Romania or Bulgaria. Even if it were, the Commission could not make the selection, since this would constitute an essentially political choice of a kind which bureaucracies cannot, and do not want to, make.[38] For similar reasons, the Commission cannot make a decision based on local context either. This is partly due to the fact that it possesses fragmentary and selective information and partly because it is predetermined by its own institutional biases to reduce this contextual and conceptual complexity and 'neutralise it' into ostensibly unproblematic policy imperatives. The result is apparent to anyone who peruses the annual reports' political criteria sections and then looks at the actual present situation. The Commission appears in retrospect as a fearful and inadvertent constitutional coloniser. Seemingly distrustful of the colonised and apprehensive of the unfamiliar local scenery, it identified broad problems of almost metaphysical breadth ('corruption'; 'judicial independence'; 'integrity') and translated them into laundry-lists of rudimentary bureaucratic criteria ('benchmarks'; 'tasks'; 'state of play assessments'). To implement these criteria, it usually decreed the adoption of 'motorised legislation' and determined the creation of 'palisaded outposts' (independent agencies), as if on the fringes of a wilderness: an independent anti-corruption department, an independent integrity agency, and, indeed, an independent judicial government.[39] In hindsight, it is unsurprising that these new institutions were soon afterwards either absorbed ('went native') or reduced to operational inconsequence by the local system.

On the occasion of the 2003 'Euro-amendments' to the Constitution, the broad desideratum made by the Commission became reality, in the radical form in which it had been made. The entire judicial system, as such, was rendered fully autono-

[37] *See, generally*, comparative, Wojciech Sadurski, Adam Czarnota & Martin Krygier (eds.), *Spreading Democracy and the Rule of Law?: The Impact of EU Enlargement on the Rule of Law, Democracy, and Constitutionalism in Post-communist Legal Orders* (Springer, 2006).

[38] *See* Daniel Smilov, 'EU Enlargement and the Constitutional Principle of Judicial Independence', in Sadurski, Czarnota, and Krygier, *supra* n. 37, at p. 313.

[39] In this respect, irrespective of the personal merits of the former Minister of Justice, Mrs. Monica Macovei, it is worth posing the question whether so many expectations should have been placed by the Union on one person, a politically unaffiliated Minister, to reform an entire system in a couple of years.

mous from politics (it became 'independent') and its autonomy was entrenched in the Constitution. In all crucial institutional respects (ratio of magistrates to lay members; ratio of elected to non-elected members; number and scope of attributions), the Romanian Constitution provides now for one of the most politically autonomous judiciaries in Europe, surpassed perhaps only by its Italian counterpart. Out of the 19 members of the CSM, 14 are directly elected by the magistrates and validated by the Senate.[40] The others are representatives of civil society elected by the Senate (two)[41] and three *ex officio* members, the Prosecutor-General attached to the High Court of Cassation and Justice, the chief judge of the highest court (Cassation), and the Minister of Justice. The Council received additional attributions in terms of sanction decisions. Mandates were extended from four to six years. The President of the Council is now elected by the Council and selected from among the elected magistrates, for a non-renewable term of one year. It was explicitly stated in the text that the two sections (for prosecutors and judges, respectively) would become disciplinary jurisdictions, with a possibility of appeal to the High Court of Cassation; non-elected members have no voting rights in disciplinary decisions.[42]

Organic legislation on the status of the magistrates and the organisation of the CSM was passed in 2004 to concretise and implement the constitutional changes.[43] Nominations for appointment, promotions, including promotion to positions of leadership in the court system (Chief Judge, Prosecutor-General), disciplinary decisions, and decisions regarding transfers, secondments, delegation of functions, are all controlled now by the CSM. Promotions, except for a handful of politically-influenced appointments to key prosecutorial positions, are to be based on examinations organized by the CSM. The Minister of Justice retained only limited control over appointment with respect to a few key prosecutorial positions.[44]

[40] As a constitution-making task, the institutional matter can be approached in various ways, for instance by factoring a number of distinct political institutions and representatives of professional bodies into the equation (*see* for instance the South African Constitution, Art. 178 – Judicial Service Commission).

[41] Since the number is irrelevant and the attributions of these two members are restricted to Plenum decisions, these positions are decorative. The CSM functioned in 2008 and until very recently with only one of the requisite two 'civil society' members, <http://www.csm1909.ro/csm/index.php?cmd=920302>.

[42] Not over-specifying the attributions in the constitutional text (compare with the Spanish case, Art. 122 of the Constitution of Spain), provides a measure of infra-constitutional leeway and makes a degree of political readjustment possible.

[43] Legea Nr. 303 din 28 iunie 2004 privind statutul judecătorilor şi procurorilor (Republicată M. Of. Nr. 826 din 13.09.2005) and Legea Nr. 317 privind Consiliul Superior al Magistraturii (Republicată M. Of. Nr. 827 din 13.09.2005).

[44] After the 2005 amendments to the Law on the Status of Judges and Prosecutors 303/2004, a right of the Minister to propose demotions to the President was added and the Chief Prosecutor of

In the course of little over one year, the justice system was fully emancipated from political control and thus also from political change. Much like the Third Estate, it became overnight, from virtually nothing, almost everything.

The Romanian Constitution is particularly difficult to change. Amendment Bills are required to be adopted in identical forms by two-third majorities in both Houses of Parliament. In the case of a divergence between the Chamber of Deputies and the Senate and of a failure to agree in conference committee, an amendment has to be passed by a three-fourths majority vote in joint session. The revision Bill has to be subsequently adopted by referendum, organised within 30 days.[45] Participation in the 2003 constitutional referendum was reduced, and the deadline for the poll had to be extended by emergency ordinance. A *quorum* was in the end barely achieved, amid complaints regarding irregularities and undue governmental influence to summon people to the poll. However, out of those casting a ballot, 89.7% voted in favour of the amendments. The reason for this discrepancy between the apparent lack of interest in the amendments among the population and overwhelming approval rates has also to do with the nature of bureaucratic Europe-related constitutionalism. On the one hand, the amendments were presented to the public as necessary to secure North-Atlantic and European integration, desiderata which all wholeheartedly embraced. On the other, they had been drafted in the top-down and bureaucratic way which has been a mark of the *acquis* implementation. Nobody disagreed with the end-result and, obversely, everyone perceived that there was little if any local choice in the process. Once the constellation of circumstances which determined the adoption of 2003 constitutional amendments (comfortable majorities in Parliament for the government initiating the revision and the quasi-universal and unquestioning acceptance of the 'Europeanness' of the change) disappeared, a new set of constitutionalised vested interests was entrenched and these could already claim a sterling European certificate of 'democracy and the rule of law'. Such would be particularly the case after the accession. Processes of legal modernisation have always been in Eastern Europe processes of Westernisation by legal transplant. Since the democracy and rule of law *acquis* was ostensibly a development closely monitored by 'Europe', in the discourse of entrenched local interests, including legal professional interests, accession carried with it a constitutional legitimisation bonus.

The formal nature of the reforms required and monitored by the Commission (the 'constitutionalisation of slogans') has also provided European encouragement and legitimacy for a newer local strain of legal instrumentalism. A novel

the Counter-terrorism and Organized Crime Investigation Directorate was included in the list (Art. 54 (republished)).

[45] *See* Constitution of Romania (2003), Title VII-Revision of the Constitution (the amendment procedure was not altered in 2003).

arsenal of ready-made ideological arguments derived from the rule of law could now be used to deflect any future change and defend the new *status quo*. Post-Communist legal professional elites are used to rule of law instrumentalism. From their standpoint, distorting constitutional principles ('separation of powers', 'judicial independence', 'the rule of law', 'academic autonomy') into clichés and manipulating them as slogans for self-serving corporate purposes has simply represented adapting to a new environment. They substituted a new for an old set of stereotypes.

Self-protective constitutionalism: Institutionalising slogans

In 2004, a new, coalition Government came to power. This Government did not muster either the Parliamentary majorities of its predecessor in power, the Social-Democratic Party, or its party discipline, but was elected on a pronounced reform- and European integration-oriented platform. 'DA' Alliance, the electoral name of the winning coalition, is the Romanian word for 'YES', an acronym for 'Justice and Truth' (*'Dreptate și Adevăr'*). 'Justice' was meant to stand for anti-corruption reforms, 'Truth' for a confrontation with the totalitarian past. Monica Macovei, a respected lawyer and former human rights activist who became the congenial face of Romanian accession-related judiciary reforms, was appointed Minister of Justice and took her seat in the Cabinet as an independent.

By this time, the Commission had understood that it is not necessarily beneficial to exchange political corruptibility for corporatist corruption. It started criticising the CSM and wanted the situation changed. The new Government, particularly the Ministry of Justice, inherited therefore what may be called a European constitutional paradox. The Ministry had substantially to reform a self-regulated corporative structure, under the demands of the 'Justice and Home Affairs' accession chapter. However, this structure, in its essential elements had already been constitutionally entrenched by means of EU-led or -influenced constitutional and legislative reforms. In other words, the Commission now wanted the new Minister to change a situation it had previously contributed to rendering unalterable. Since yet another round of 'Euro-amendments' to the Constitution to restructure judicial organisation once again was by now politically impossible, what could be achieved at this point were only piecemeal legislative changes relating to judicial qualifications and incompatibilities.[46]

Two of the problems which the new Minister sought to remedy were those of the pensioner magistrates and of seconded CSM members. The former case con-

[46] I am referring here to structural reforms of the judiciary, which are crucial to the present argument. Progress was made in other respects, for instance random (electronic) case allocation to judicial panels.

cerned retired magistrates who continued to exercise their functions upon retirement, until the age of 68, with the approval of the President of the Court of Appeal within their jurisdiction or of the High Court of Cassation and Justice and the consent of the CSM. These judges depended on their superior's good graces between the general statutory age of retirement[47] and the maximum age until which they could exceptionally be allowed to serve as sitting magistrates. The situation, though legally an exception, was a practical norm in higher courts; restricting the practice would immediately have caused a majority of the seats on the High Court Bench to be vacated.[48]

The second matter concerned secondments to the Council. In accordance with the CSM Law, judicial elections to the Council proceed by two simple majority ballots, one local, in appeal courts' constituencies, on lists of self-nominated candidates, followed by a national ballot. Final results are validated by the Senate. Even though local candidates are nationally 'reshuffled' in the countrywide vote, many of the elections to the CSM reproduce, inevitably, relations of authority at the local level.[49] Furthermore, those elected preserve their leadership positions in the courts or the prosecutors' offices while on secondment to the Judicial Council. This had created, according to the Ministry of Justice, a state of incompatibility between active judicial duties and administrative leadership positions in the justice system, on the one hand, and the control and disciplinary attributions these magistrates exercised as CSM members, on the other. The Government advocated changes on grounds of incompatibility and efficiency, but the displacement of consolidated authority networks would have been an evident incidental benefit.

Legislation was passed in 2005, prohibiting judges from simultaneously drawing a salary and earning pensions benefits. The Law also suspended the exercise of judicial and prosecutorial functions by elected members of the Council and imposed an option timeline within which persons currently sitting on the CSM had either to decline the nomination or to resign their position.[50] The previous

[47] 57 years and 7 months for women, 62 years and 7 months for men.

[48] 'Interese personale şi politice mai presus decât legea' ['Personal and Political Interests Higher than the Law'], Interview with Madame Minister of Justice, Monica Macovei, Revista '22' (13 July 2005), available at <http://www.revista22.ro/interese-personale-si-politice-mai-presus-decat-legea-1881.html>.

[49] This may change in the future, since proportional elections to autonomous judicial councils inevitably tilt the power balance, in the long run, against the senior judges. This is at least the Italian case, *see supra* n. 39, Guarnieri & Perderzoli. Moreover, the 2005 amendments raised slightly the representation of judges and prosecutors from lower (trial courts and first appellate) levels of jurisdiction, which inevitably favours younger magistrates.

[50] Legea 247/2005 privind reforma în domeniile proprietăţii şi justiţiei precum şi unele măsuri adiacente (M. Of. Nr. 653/22.07.2005).

mandate of administrative leadership positions in the judicial system had been five years, whereas the 2004 Law on Judicial Organisation provided for three-year terms and competition for all high judicial and prosecutorial positions under the highest (Cassation) jurisdictional level. Therefore, the 2005 reform package made all extant positions of authority vacant and provided for immediate competition to fill the openings.

An abstract review complaint was sent to the Constitutional Court regarding, *inter alia*, the constitutionality of the provisions on judicial pension-salary incompatibility, the mandatory option upon election to the CSM, and the automatic abridgment of leadership positions terms pending competitive examinations. A majority of the Court agreed with all three objections of unconstitutionality and annulled the respective sections.[51] As the Court observed, the judicial tenure guarantee of Article 125 in the Constitution, protecting the holder of judicial office from removal without prior consent, protects also incumbents of leadership positions in the court system from general legislative alterations, since: '*The judge is the central character of the Rule of Law State* and legislative instability regarding his professional career can only constitute an impediment to the choice of this profession and judicial fidelity to law and professional deontology.'[52] This change, the court noted, also impinged on separation of powers principles, 'revealing itself as an *individual [punitive] measure* which exceeds the attributions of the legislative power and interferes impermissibly with the judicial authority.'[53]

The prohibition on simultaneously drawing a salary and earning pension benefits was declared unconstitutional as well. This interfered, the court held, with Article 155(5) in the 'Final and Transitory Provisions' of the Constitution (2003), which reads: 'Judges of the Supreme Court of Justice [now High Court of Cassation and Justice] continue to exercise their functions until the end of the term for which they have been appointed.'[54] It would have been possible simply to interpret the impugned provision restrictively. The court noted, however, that the respective section, albeit transitory, has 'the value of a [general] principle in defining the concept of judicial irremovability' and went further, to indicate that international documents supported this thesis. For example, the Universal Charter of the Judge also states, at Point 8, that 'Any change to the judicial obligatory retirement age must not have retroactive effect.'[55] One could point out that the magistrates

[51] Decizia Nr. 375 din 6 iulie 2005 referitoare la sesizările de neconstituţionalitate a legii privind reforms în domeniile proprietăţii şi justiţiei, precum şi unele măsuri adiacente (M. Of. Nr. 591/08.07.2005).

[52] *Idem* [emphasis in original]. (Note: Decisions are not paginated and paragraphs are not numbered.)

[53] *Idem* [emphasis supplied].

[54] Romanian Constitution (2003), Title VIII, 'Transitory and Final Provisions'.

[55] Available at <http://www.iaj-uim.org/old/ENG/frameset_ENG.html> (last visited 28 Jan. 2009).

concerned had already retired and that the question before the court was, therefore, altogether different. But such rebuttals would had been of no avail, since, as the judges concluded, the decisive constitutional criterion was the radiating effect of the general equality clause on the judicial independence guarantees.[56] Everyone has the right to work after retirement. Indeed, even former magistrates could work after retirement in other legal professions. The limitation was thus held to be 'an inadmissible discrimination, given that the juridical situation concerned – that of a re-employed pensioner – is the same for all [categories].'[57]

The provision mandating an option on secondment to the Council was also ruled unconstitutional. Judges could not be forced to make a choice or have their high administrative functions automatically terminated upon election to the CSM, insofar as, the constitutional judges indicated: 'according to Art. 133 (2) of the Romanian Constitution, … 9 of the Council members are judges and 5 are prosecutors, hence *magistrates exercising the activities specific to these functions*.'[58] Judges and prosecutors serving in the Council, the court noted, have to be aware, in their day-to-day activities, of the concerns and problems of their peers. Were they to be stripped of these attributions, including functions of authority in the system, '[the Council would] cease to be the exponent of judicial power and [would] become a mere administrative organ.'[59] The response could be that the CSM is not purely an administrative body, it also constitutes a first instance disciplinary jurisdiction. But the Constitutional Court refused to deal with the objection, deeming it probably obvious that, as a matter of both ordinary life and constitutional law, acquaintances and colleagues are always the best judges of character.

The figure of the Romanian magistrate appears thus, in this exciting hermeneutical cloak-and-dagger drama, against the background of a rich tapestry of rapidly changing roles and situations: here a concerned colleague and superior, judging with practical wisdom the daily affairs of the job, the national affairs of the judiciary, and the disciplinary affairs of his colleagues, there a humble elderly pensioner ruthlessly discriminated against while struggling to make ends meet or – farther on – the imposing representative of a mighty power, indeed, 'the central figure of the State'. Sometimes what is protected by the fundamental law is judicial tenure as such and sometimes the constitutional protection of judicial tenures seeps into that of high executive positions in the court system. The reverse can also be true, as general legislative abridgment of high administrative office terms

[56] Art. 16(1): 'Citizens are equal before the law and public authorities, without privilege and without discriminations.'

[57] Dec. 375/2005, *see supra* n. 51.

[58] *Idem* [emphasis in original].

[59] *Idem*.

is described as a 'Bill of Attainder', with repercussions on individual judicial tenures. In terms of its more mundane practical effects, the decision neutralised the main pre-accession attempt at structural reform.

Not all amending provisions, however, were constitutionally challenged. For instance, the 2005 legislative reform package had created a new disqualification ground for membership of the Superior Council of the Magistracy, providing that: 'Judges and prosecutors who were members of the intelligence services before 1990 or have collaborated with these services (…) cannot be elected to the Council.'[60] To this effect, candidates were now under an obligation to submit an affidavit under penalty of perjury. The affidavit obligation was specified as well in the amendments to the Law on the Status of Judges and Prosecutors and made applicable to all magistrates and 'assimilated or auxiliary judicial personnel' (court reporters and clerks). In the case of CSM members, the general statutory specification 'collaboration with the intelligence services, *as political police*', was not made.[61] At this precise juncture, the 'European' narrative of failed pre-accession judicial reforms intersects constitutionally with the 'domestic' post-communist narrative of the confrontation with the past.

Lustration as 'unconstitutional venom'

Post-communist rule of law and lustration

All post-Communist countries have for the most part resisted drawing a 'thick line' or following a 'Spanish transition' model[62] and adopted various forms of 'decommunisation' or lustration measures, as parts of larger legislative strategies for 'dealing with the communist past'.[63] These measures can be compared across national jurisdictions, according to Wojciech Sadurski's taxonomy, across three dimensions: i. the range of positions in or kind of involvement with the former regime which are targeted; ii. the range of positions in the current regime subject to lustration or decommunisation; and iii. the consequences entailed (by the fact that someone now in position ii. was then in posture i.).[64]

There are many national variations in all these respects. All lustration measures cover agents of and collaborators with the former secret police. Since employ-

[60] Law 247/2005, Title XV, Section 7.

[61] *Idem*, Title XVII, Section 9 [emphasis supplied].

[62] Cf. Michel Rosenfeld, 'Constitution-Making, Identity-Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example', *Cardozo L. Rev.* 1891 (1997-1998), p. 19.

[63] *See generally* Part II – 'Dealing with the Past', in Adam Czarnota, Martin Krygier, and Wojciech Sadurski (eds.), *Rethinking the Rule of Law after Communism* (CEU Press, 2005), p. 123.

[64] Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2005), p. 234.

ment records are not difficult to find, and since the number of collaborators dwarfs the number of the former secret services' employees, the real legal dilemmas are posed by the screening of collaborators.[65] As a result, the definition of collaboration and the procedural safeguards applicable to a collaboration determination vary widely across jurisdictions. To wit, Czechoslovak legislation initially allowed for a determination of 'C category' collaboration in the case of 'candidates for collaboration', who may have never even known that they were even considered for recruitment.[66] At the other end of the spectrum, the 2007 Polish lustration law ties a determination to the existence of a signed collaboration agreement.

National legal classifications have to take into account past secret police practices. The Romanian *Securitate,* for instance, used four categories of informers: 'hosts' (whose houses were used with their consent by their recruiting officers for conspiratorial meetings with other collaborators); 'residents' (who could build and coordinate their own network of collaborators and informers); 'collaborators' proper (those who had signed a formal agreement to provide information regularly); and 'informers'.[67] After an initial stage in the1950s, when many were coerced into collaboration, from the 1960's onwards and until the last stage of the regime subtler and more mutual co-optation methods were used, including remuneration, various perks and favours, and protection. Psychological duress was not excluded but once one agreed to collaborate, a measure of *quid pro quo* could be relied on. Recent archival research shows that, after 1965, no one who refused collaboration suffered more than occasional psychological pressure and chicaneries. Indeed, the refusal to inform would often be ascribed by superiors to the recruiting officer only, for failing to 'study the subject better' prior to initiating contact.[68] Regarding the total number of collaborators, a bewildering number of contradictory figures have been advanced. Silviu Brucan, a former high member of the Romanian *nomenklatura* and one of the few dissidents against Ceauşescu, estimated 700.000 informers.[69] Archival evidence of the local *Securitate* unit in the

[65] Throughout the argument, 'collaborator' and 'informer' will be used interchangeably, as generic terms.

[66] *See* Jirina Siklova, 'Lustration or the Czech Way of Screening', 5 *E. Eur. Const. Rev.* (1996), p. 57.

[67] Deletant, *supra* n. 32, at p. 395. *See also* Marius Oprea, *Moştenitorii Securităţii [The Heirs of the Securitate]* (Humanitas 2004). I am indebted to Dr. Marius Oprea, the current Director of the Romanian Institute for the Investigation of Communist Crimes and to Professor Gabriel Andreescu of the National School of Political Studies and Public Administration, for data and comments (manuscripts and electronic letters on file with the author).

[68] *See* Gabriel Andreescu, 'Deconspirarea poliţiei politice. Evoluţii [The Disclosure of the Political Police-Developments]', 3 *Noua Revistă de Drepturile Omului* 34 (2006) and Mihai Albu, Informatorul. Studiu asupra colaborării cu Securitatea [The Informer – A Study on Collaboration with the Securitate] (Polirom 2008).

[69] Silviu Brucan, Generaţia irosită. Memorii [The Wasted Generation. Memoirs] (TESU 2008).

county of Sibiu yields a rate of roughly one informer to every thirty Romanians (10.500 informers in a county population of 325,000).[70] In his 1990 report to Parliament, Virgil Măgureanu, the first director of the Romanian Intelligence Services (SRI), provided the figure of 400,000 informers for the year of 1989. A 1994 address by the SRI to the Senate reported 486,000. The head of the SRI archive advanced the number of 137,000, in a 1997 interview with the Romanian historian Marius Oprea (*see* page 48, note 67).

The truth is that we do not know or, rather, that what we will know now is essentially a function of legalised truth. Namely, depending on what legal definition and administrative procedure are used for determining collaboration status, numbers can be manufactured, reinterpreted, and recounted. This is especially the case if the statutory purpose is to legally individualise relative moral guilt, given that investigating an archive could take a long time and new informer notes could always surface, in various individual files. Romanian legislation provided for a possibility of re-opening the vetting procedure *ex post*, even in cases where a final determination of *non*-collaboration had been made.

The number of current positions vetted varies as well, from a rather limited array of important public offices (the Hungarian lustration law) to very extensive screening of elective and appointed, public and private positions. The 1998 Lithuanian 'KGB Act' includes employees of 'banks and other credit institutions' and 'strategic economic projects', teachers, educators, as well as 'any job requiring the carrying of a weapon'.[71]

Finally, the consequence of lustration could vary between mere disclosure (in the Hungarian and Romanian laws) and sometimes very severe disqualifications (ten years ban on standing for public office or working in any of the enumerated fields, in the Lithuanian case). Where affidavits are required from individuals appointed to certain positions or standing for elective office, criminal consequences could be triggered by a 'lustration lie'. Administrative consequences which are more detrimental to the individual and thus more punitive in nature, i.e., more akin to a criminal sanction, will require a legislative scheme providing for a more individualised determination of guilt.

All legislative choices represent legislative and institutional trade-offs among these three dimensions, which in turn reflect trade-offs between the moral and political intricacies of lustration and the measure of complexity that the present systems can institutionally and legally accommodate. These two dimensions are inversely related. Individualising the degree of moral guilt presupposes a need for judicialised ('quasi-judicial') administrative determinations, to sift the 'good' from the 'bad' collaborator, based on how much damage the 'bad' collaborator had

[70] *Idem*, at p. 394.
[71] *See Sidabras and Džiautas*, *supra* n. 2.

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inflicted on others (colleagues, neighbours, patients, students or teachers, etc.). Individualising relative culpabilities raises the need for onerous administrative procedural guarantees and judicial review standards. The legally, and institutionally less problematic, solution of determining collaborator status based on a more technical-administrative enforcement model, according to an objective legislative standard (a finding of fact, such as a signed collaboration agreement) can be politically more onerous. Absolute numbers could be quite taxing and a prophylactic ban on standing for election or being appointed to public office, perhaps also on exercising certain professions, could under the logic of mere numbers be politically impossible or unfeasible to adopt. It could also be argued, perhaps, that it is morally questionable: many people signed but gave the secret police what they deemed irrelevant or innocuous information.[72] In both legal and moral terms, how problematic a prophylactic ban is depends on the consequences, i.e., on how punitive are the measures resulting from a positive determination of collaborator status.

In this latter respect, many lustration critics underline – sometimes disproportionately – the moral intricacies and dilemmas of lustration measures.[73] Namely, as argued by Eric Posner and Adrian Vermeule, critics all too often seek 'retreat to the safe ground of moral theory', overlooking the fact that many of the features lustration opponents condemn (retroactivity, difficulties of measuring relative guilt and selective prosecutions, etc.) can be encountered, albeit in different degrees, within 'intra-systemic transitions', that is to say in the normal operation of any legal system. The two authors also observe that lustration critics have a distorted and one-sided understanding of transitional justice. Viewing such measures as 'backward looking' (e.g., vindictive) obfuscates the 'forward-looking' considerations and benefits (e.g., stabilising society, neutralising and eliminating illiberal elements from the public sphere).[74] Nonetheless, the policy virtues of pragmatism should not be overrated either, since the legality and constitutionality of lustration measures will in the end be reviewed by the courts. The judiciary will inevitably factor

[72] From the standpoint of the secret police, nonetheless, *any* piece of information could be rendered lucrative.

[73] Sometimes this is done out of implicit disagreement with the policy aims. *See*, e.g., Cynthia M. Horne & Margareth Levi, 'Does Lustration Promote Trustworthy Governance? An Exploration of Central and Eastern Europe', in János Kornai & Susan Rose-Ackerman (eds.), *Building a Trustworthy State in Post-Socialist Transition* (Palgrave Macmillan 2004), p. 52, setting out to prove that lustration does not promote trustworthy governance in Eastern Europe and admitting, in conclusion, that the available data is now insufficient to substantiate their thesis but trusting it will come out in the future.

[74] Eric A. Posner and Adrian Vermeule, 'Transitional Justice as Ordinary Justice', 117 *Harv. L. Rev.* (2003-2004), p. 762.

in the relative implications of the intensiveness and extensiveness of a restriction within a normative, rule of law framework.

In normative terms, no simple and general answer can be provided; it all depends on what right or legitimate interest is affected and on the degree of intrusiveness. The more the rights affected by lustration proceedings and the degree of intrusiveness are (or can be characterised as) punitive in nature and the more what is assessed is, therefore, relative guilt, the more the procedure has to approach a standard of protection nearing that provided by a court of law (quasi-judicial enforcement model). Conversely, the more the encroachment is or can be characterised as limited, across the board, and prophylactic, the more one can follow a procedure more 'ministerial', technical-administrative in nature, with standardised factual determinations of collaborator status (purely administrative enforcement model).

One has to reckon also with the paradoxical questions of justification and time. European human rights orthodoxy commonly accepts such measures as implements of democratic protection and self-defence.[75] In many East European countries it was, due to the continuation in power of pre-existing Communist elites, close to impossible to pass lustration measures after the collapse of Communism. Once it became politically possible, sometimes a decade or more after the fall of the totalitarian regime, it could be argued that too much time had already passed and democracy was fully consolidated and no longer in danger.[76]

Lustration and judicial reform – Legislative intersections

Romania adopted Law 187 on Access to Personal Files and the Disclosure of the Communist Political Police a decade after the 1989 demise of the Communist regime.[77]

While the number of positions affected by secret police collaboration vetting is fairly extensive (the list includes, for instance, the clergy of the official denominations down to the level of ordinary parish priests, higher academic administrators, members of the boards of directors in major public corporations, directors and founders of all foundations and NGOs established in Romania, holders of

[75] *See* Resolution 1096 (1996) of the Parliamentary Assembly of the Council of Europe on measures to dismantle the heritage of former totalitarian Communist systems, available at <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta96/ERES1096.htm>. It is emblematic in this regard that the rapporteur of this resolution was the Romanian Adrian Severin, representing, at that time, a governing party which perpetuated Communist elites and was in no way inclined to adopt any lustration measure.

[76] *See* David Kosař, 'Lustration and 'Lapse of Time': (How Long) Can the Czech Lustration Acts Survive Judicial Review?', 4 *EuConst* (2008), p. 460.

[77] Law on Access to the Personal File and the Disclosure of the *Securitate* as Political Police, No. 187/1999 (M. Of. Nr. 603/09.12.1999).

the title of 'revolutionary' or 'fighter with special merits in the 1989 December Revolution', etc.), the direct consequence of a positive collaboration verdict was initially only disclosure. Lustration screening of the incumbents could be demanded by any concerned citizen. Those seeking election or appointment in future to one of the positions covered were under an obligation to submit affidavits made under oath. A lustration lie constituted perjury, even though, should a person subject to vetting decide to step down and give up candidacy or appointment within 15 days after the beginning of the lustration procedure, all investigations would automatically be halted.

The law created an autonomous administrative agency, the National Council for Studying the Former *Securitate* Archives (CNSAS), subordinated to the Parliament, composed of civil servants and led by a politically-selected College of 11 members, appointed for a 6-year term, renewable once. In the initial (1999) form of the law, nominations to the College were allocated to the party factions, according to the Parliamentary political spectrum. In 2006, the Law was amended to reserve one nomination to the Prime Minister and one to the President. Upon a verification following a screening request, or in the course of the mandatory vetting procedure, the Council would issue resolutions, which could be challenged via internal administrative appeal to the College of the Council. The final administrative decision of the College could be appealed against by an application for judicial review to the Court of Appeals (Civil Division).

Defining collaboration is the tenuous part of the Act. As an interesting gloss on the virtues of legalising historical truth, only 'collaboration with the *Securitate as political police*' was targeted. The first three criteria based on which a collaboration verdict is to be grounded rest on objective, factual determinations ('resident'; 'holder of a conferred flat or of a conspiratorial flat'; 'someone remunerated or otherwise compensated for his activity'). However, the fourth criterion, relating to most actual situations of collaboration, defines 'political police collaboration' as the provision of information that either led or was 'likely to lead to the infringement (…) of fundamental human rights and liberties.'[78] Such formulae, enforced in the given institutional setting, can mean anything and nothing. As a result, once determinations of collaboration started to be issued by the Council, the public witnessed with amazement a daily administrative charade of administrative decisions issued, challenged, revoked, reissued, and then challenged anew.

After promulgation, nothing happened for five years. This was in part due to structural legislative flaws. For instance, for the screening of most positions covered by lustration vetting there were no timelines or guidelines indicating which office was responsible for collecting the affidavits. No term within which a final Council decision had to be taken was provided. But the main reason for inaction

[78] Art. 5(3)(d) and 5(4).

was practical. The files were jealously guarded by the SRI, institutional heir of the *Securitate* archives and partially also of its former personnel. For most of its institutional life, the Council had exclusive custody over a paltry 6,000 files.

Following the election of the new Government in December 2004, a 2005 decision of the National Defence Council resolved the transfer of twelve kilometres of archive documents, 1,300,000 files, 1,500,000 volumes altogether, from the custody of the Romanian Intelligence Service to that of CNSAS. After some procrastination and haggling by the intelligence services (for instance, the files were initially transferred without microfiche documents and the centralised card index), the documents slowly entered the CNSAS archive.

In 2005, the 1999 Lustration Law, the initial form of which included a six-year 'sunset' clause, was due to lapse. At about roughly the same time, as we have seen, Minister of Justice Monica Macovei was attempting unsuccessfully to reform the judicial system. In 2005, the application of the law was extended by emergency Ordinance. In 2006, another emergency Ordinance initiated by the Ministry of Justice amended the Lustration Law and extended its application. These measures tracked a renewed wave of pre-EU accession public support for the idea of 'entering Europe cleanly'.

Most amendments are technical provisions, marginally extending the number of posts subject to screening, streamlining the vetting procedure and setting clear administrative timelines.[79] There were also two substantive changes. The first made a final perjury conviction for a lustration lie a cause of disqualification for all public appointed or elective dignities and offices covered by the law. According to the 2006 amendments, once a determination of collaboration was final and published in the *Official Journal*, the Council was under an obligation to inform the Prosecutor's Office attached to the High Court of Cassation and Justice, so that an indictment for perjury could be filed immediately. The second alteration concerned the definition of collaboration for judges and prosecutors currently appointed or seeking appointment to positions of administrative leadership in the court system or the prosecutor's offices or elected to the Superior Council of the Magistracy. In these cases, collaboration had already been made a cause for disqualification by virtue of the judicial reform legislation amendments of 2005.

The Ordinance also changed the enforcement criterion, insofar as it applied to judges and prosecutors, using a purely non-discretionary, factual determination. 'Likelihood of endangering the fundamental human rights and liberties' was omitted in these hypotheses. The amending Ordinance redefined collaboration in these hypotheses as: 'providing, passing on or facilitating the provision of information to the intelligence services.' This practically meant that, upon finding a signature

[79] Ordonanţă de urgenţă Nr. 16/22.02.2006 pentru modificarea şi completarea Legii Nr. 187/1999 privind accesul la propriul dosar şi deconspirarea Securităţii ca poliţie politică (M. Of. Nr. 182/27.02.2006).

on a note or declaration, someone could be summarily stripped of his or her high judicial office, without going through the regular, arbitrary, and long-drawn-out administrative lottery of 'political police collaboration' determinations based on assessing '(the likelihood of) fundamental human rights and liberties infringements.' The administrative determination was by necessity fast-tracked. Moreover, a court appeal would be necessarily limited to the technical issue of challenging the authenticity of the signature or handwriting by graphological expertise.

It is impossible to prove this, but one can suppose that Macovei's primary intention was to attempt an oblique change of the judicial system, after the constitutional defeat of her 2005 legislative reform package. It is common knowledge (and evidence exists to this effect) that lawyers were a professional category more intensely controlled by the secret police. The current legal system is controlled by a generation on which suspicion of past involvement with the repressive structures reasonably falls. It is therefore not unreasonable to believe that, by disqualifying all former collaborators from positions of authority in the current justice system, the present power structures and networks of influence can be radically dislodged and replaced.

Lustration as unconstitutional venom

An objection of unconstitutionality raised before the Bucharest Court of Appeal in the course of an appeal against a final CNSAS 'political police' determination reached the Constitutional Court in 2008. The Romanian Ombudsman, a former Constitutional Court judge, joined with an enthusiastic *amicus curiae* opinion, pleading with the Court to 'extract the unconstitutional venom through a wise and just decision.'

After a number of previous exceptions of unconstitutionality regarding the Lustration Law had been rejected, the Court now reversed itself. Without accounting for the necessity of this departure from precedent, it declared the Law and the amending Ordinance unconstitutional in full. Another surprising departure from precedent was the extension of the scope of review. The referred challenge was unrelated to the provisions regarding vetting of high judicial offices and disqualifications. Concrete review is legally limited to the scope of the exception raised by a litigant in the course of a trial, as referred by the trial judge. Indeed, the Constitutional Court Law authorises the referring judge to reject as unfounded exceptions that are not directly related to a case. Such had also been the consistent interpretation of the Constitutional Court.[80]

[80] Art. 29, Legea 47/1992 privind organizarea şi funcţionarea Curţii Constituţionale (Republicată, M. Of. Nr. 502/03.06.2004). Cf. also Corneliu-Liviu Popescu, 'Uzurparea de putere comisă de Curtea Constituţională în cazul cenzurii dispoziţiilor legale privind deconspirarea poliţiei politice comuniste'

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The invalidation of the Lustration Law, as amended, has a dichotomous logical structure. The major operative provisions of the Law are declared unconstitutional on a primarily textual-technical rationale. The judges observed that, whereas the Council could only be characterised as a special administrative jurisdiction, recourse to special administrative jurisdictions is, according to the Constitution, optional. Lustration procedures were, however, mandatory. Moreover, they pointed out, the acts of the Council could not be defined as administrative acts. If such were the case, the appeal should have been lodged with the Administrative Review Division of the Court of Appeal, rather than with the Civil Division, as the law provided. This could only mean, in the opinion of the Constitutional Court majority, that the Council was an extraordinary jurisdiction, expressly forbidden by Article 126(5) of the Constitution: 'Extraordinary courts of law are prohibited'. The Court also observed in passing that the Council exercised quasi-judicial attributes without the full gamut of judicial process guarantees. Prosecutorial and adjudication functions were not separated within the CNSAS and the person subject to lustration could not be represented by legal counsel in the course of the administrative procedures. Last but not least, in flagrant breach of legal certainty principles, the Law allowed lustration procedures to be re-opened in the light of new incriminating evidence, even after a definitive decision regarding a lustrated individual.

Portraying clumsy legislative drafting and a number of genuine institutional deficiencies as amounting to the establishment of a local Star Chamber carries rhetorical appeal. Yet most, if not all, of the contradictions and irregularities observed by the Constitutional Court could easily have been remedied by requiring the adoption of punctual adjustments, for instance in order to provide for the lodging of an appeal with the Administrative rather than the Civil Division of the Court of Appeal. Moreover, insofar as access for review to the ordinary courts and thus judicial redress is provided for in the Law, one cannot cavalierly characterise an administrative jurisdiction as an extraordinary court. Otherwise, the modern administrative state as such, with its myriad regulatory commissions and administrative tribunals, would be under blanket indictment.

The major substantive deficiency, however, passed completely unobserved in the decision. Namely, a basic rule of criminal constitutional law, found in all liberal constitutional systems, requires that 'no conduct shall be held criminal unless it is clearly specified in the behaviour-circumstance element of a penal statute.'[81] One cannot be prosecuted for perjury if the affidavit made under oath refers to a qual-

['On the Power Usurpation by the Constitutional Court in the Case of Reviewing the Legislative Provisions Regarding the Disclosure of the *Securitate* as Political Police'], 1 *Noua Revistă de Drepturile Omului* (2008), p. 3 at p. 8.

[81] Jerome Hall, '*Nulla Poena Sine Lege*', 47(2) *Yale L. J.* (1937-1938), p. 166.

ity one could not possibly foresee, rather than to a state of fact which is within the knowledge of the individual and the existence of which can be proved by evidence. I could tell a lie and perjure myself about having been remunerated by the *Securitate* in 1974 or about having signed an agreement to collaborate in 1985. But I cannot be criminally brought to book for telling untruths about having committed actions 'likely to affect fundamental human rights', especially if this likelihood would be assessed *ex post* by a politically-appointed commission using opaque procedures.

Whereas the first prong of the decision is elaborate and abounds in textual-technical minutiae, the second, used to invalidate the provisions applicable to the lustration of judges and prosecutors, is cryptic and charged with broad, unstated, substantive assumptions. The crucial passage is worth citing at some length:

> 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.[82]

While vagueness in the definition of a crime (perjury) had been passed over in silence, denial of access to the highest executive positions in the court system is portrayed here as akin to a criminal sanction. The highest threshold of scrutiny is consequently applied in the case of a limited administrative restriction, on the grounds of an extension of the constitutional criminal law principle of presumption of innocence, derived in turn by the Court from a mysterious umbrella concept of 'presumption of honesty'. The assertion thus conceals, under the stylistic extravagance of italicising a whole declaratory paragraph, a run of the mill *petitio principii*. 'Mere association' with the repressive structures of an oppressive regime can safely be said to be a 'reprehensible deed' and may represent a legitimate cause for limited disqualifications. Moreover, it strains both logic and common sense to argue that, based on such forms of past 'association', depriving someone of ac-

[82] Decizia Nr. 51/31.01.2008 referitoare la excepţia de neconstituţionalitate a dispoziţiilor Legii nr. 187/1999 privind accesul la propriul dosar şi deconspirarea Securităţii ca poliţie politică (M. Of. Nr. 95/06.02.2008) [emphasis in original].

cess to top positions in the present State hierarchy would constitute a form of punishment.

The practical implications of post-Communist Constitutional Court decisions are often more interesting than the reasoning. As a reminder, the invalidation of the quasi-judicial model of determining collaboration was argued on the basis of disparate, technical minutiae, whereas annulling the administrative system of enforcing general disqualifications based on past collaboration rested on an argument of absolute principle (it 'presumes collective responsibility' in the absence of 'individualised guilt'). This apparently strange argumentative dichotomy has a practical strategic result. The decision made it possible for a version of the quasi-judicial model to be re-enacted. Moreover, there are enough loopholes in the Law and innuendoes in the reasoning to make it possible to declare even the new legislation unconstitutional. But any possibility of across-the board, systemic vetting, however limited the disqualification, was fully barred. This decision ensured, therefore, that, in the future, lustration would continue to be carried out by means of an endless, erratic, almost Kafka-esque procedure. All 'good collaborators (i.e., those whose collaboration presented no 'likelihood of endangering fundamental human rights and liberties') can, however, rest assured that they will not be 'punished' by collective deprivation of access to high positions of power in the current, perfectly European constitutional system.

Conclusion – Network constitutionalism at the margins

The fate of the judicial reform process is equally uncertain. In this respect, it is impossible to tell how many of those now controlling the judicial system have in fact collaborated with the secret services. The little that we do know from press leaks and contradictory CNSAS decisions gives reason for apprehension. What is known is a very partial truth, resulting from arbitrary determinations, based on an open-ended administrative standard and proceeding from the screening of a limited number of people, given very limited time. The most objective proof of the connection between past and present, lustration and judicial reform, is in fact the Constitutional Court decision itself. The intersecting paths of judicial reform and lustration legislation, and the cynical instrumentalisation of the rule of law demonstrated by the recent constitutional jurisprudence, reveal how the resilient personnel problem of post-Communist law is fused at the hip with manipulative corporatist behaviour. This gives little cause for optimism about further changes.

It should be noted that the Romanian Constitutional Court has dealt lustration a final blow with impeccable sense of political timing. It is not by accident that the judges found a zest for judicial activism after January 2007. In 2003, observing the slapdash way in which the previous wave of EU extension to Eastern Europe was

proceeding, Stephen Holmes quipped that if Europeans 'get only what they pay for, they will almost certainly get less than they need.'[83] Romanians got less than they needed also, certainly less than they expected. Aside from the unanimous desire to join in the general welfare of a standardised organisation of producers and consumers, Romanians (as arguably many eastern Europeans) wanted to join 'Europe', that idealised cultural construct to which peripheries relate in their search for models and values. To a certain extent, such expectations are bound to be disappointed by reality. But this state of facts represented a capital of legitimacy to which the European Union laid waste and a window of opportunity for substantive change which was fully neglected, most probably at common future risk. This failure represents, in equal degree, a European and Romanian constitutional quagmire. Insofar as the failure described here is the result of structural determinations, it casts a shadow over the prospects of future enlargement-related Europe-driven 'constitutionalisation' processes, at least if they are to be carried out within the same setting.

The 'balkanised' constitutional landscape left in Romania at the confluence of European and post-Communist constitutionalism will undoubtedly continue to produce attempts to use and change the fundamental law at the behest, and for the benefit, of the various entrenched interest groups. In this new type of constitutionalised feudalism, institutionally consolidated corporatist factions will continue to fight against each other to grab power, to extract 'rents', and to replicate themselves. This hybrid kind of graft-politics will be carried out by means of rule of law ideologies and instrumental appeals to fundamental law. Generational change will naturally occur, even though, under these conditions, biological change as such is of mixed benefit. When and how another opportunity for 'democracy and the rule of law' will arise seems impossible to predict.

[83] Holmes, *supra* n. 35, at p. 118.

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