Articles

Romania: Perils of a "Perfect Euro-Model" of Judicial Council

By Bianca Selejan-Guțan[*]

Abstract

The last three decades have brought important changes to the Romanian judicial system, especially concerning the struggle for independence and autonomy within the separation of powers equation. The internal and external context – i.e. the transition to democracy, after 1989, and the intention to join the European Union – determined an orientation towards the "Euro-Model" of judicial self-government. This has not come without difficulties and perils, both from the inside and from the outside. The article provides a comprehensive analysis of the Romanian system of judicial self-government in the context of these perils and emphasizes the link between the attempts to reinforce judicial independence and the anti-corruption fight, required by the supervision mechanism under which Romania has been placed at the moment of the EU accession. The increase in the number and intensity of such perils in the recent period has coincided with an increase in the number of high-level political corruption cases that have resulted in convictions. The article also discusses recent changes in the laws of the judiciary, which still are, partially, under parliamentary scrutiny, but which have raised serious concerns at the European level, as regards the progress made by Romania in achieving the objectives included in the Cooperation and Verification Mechanism.

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A. Introduction

In the last 29 years, the Romanian judiciary has been caught in a permanent struggle for independence. In the post-communist period, several reforms took place, at both the constitutional and legal levels. In this context, the main Romanian judicial self-government body – the Superior Council of Magistracy (hereinafter SCM) – has been has been subjected to the most important transformations of all constitutionally entrenched institutions since its establishment in 1991. Re-introduced in the Constitution after the fall of the communist dictatorship, the SCM became the main guarantor of the independence of the judiciary and has been seen as one of the main instruments of fighting against endemic corruption in Romanian society, under European supervision.

In this difficult external and internal context, the shift from a weak judicial council dominated by the executive power through the minister of justice to an autonomous body with enormous influence within the judicial system has been seen as a normal response to external pressures from the EU as well as a potential 'miraculous' solution to the main goals pursued by the unique placement of the country under European formal supervision through the Co-operation and Verification Mechanism: a stronger independence of justice and a fight against corruption. As the anti-corruption measures increased, including the creation and reinforcement of the powerful Anti-Corruption Directorate, going hand-in-hand with the increasing autonomy of the judiciary as a whole, through the SCM, external and internal perils started to become more and more evident: political statements against the judiciary, attempted changes of legislation, media scandals, but also internal issues such as corruption, conflicts between judges and prosecutors within the SCM, a small degree of transparency and unstable public confidence.

The constitutional law and socio-legal scholarship has emphasized some of the shortcomings of a too autonomous and corporatist judicial self-government system. Garoupa & Ginsburg[1] first argued that a strong judiciary should also be politically accountable, but this opinion is to be carefully limited as to the degree of purely "political" accountability in an emergent democracy with illiberal tendencies. The same authors also warned about the judicial council being "targets of institutional reform". As for the Romanian context, Tănăsescu & Popescu advocate for the reform of the Romanian SCM, invoking the lack of transparency and accountability, as well as for a "necessary moral and ethical purging of its members"[2], while Bogdan Iancu claims that "the translation of this institutional form may just as well produce different abnormalities" in the context of an

[1] Nuno Garoupa, Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence,* in 57 AMERICAN JOURNAL OF COMPARATIVE LAW 130–131 (2009).

[2] Elena-Simina Tănăsescu, Ramona Popescu, *Romanian High Judicial Council – Between Analogy of Law and Ethical Trifles,* in 36 TRANSYLVANIAN REVIEW OF ADMINISTRATIVE SCIENCES 173 (2012).

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"opaque corporatist structure".[3] Cristina Părău, on the other hand, acknowledges that "judicial reform in Romania has been driven by strategic motives informing the process of EU accession as well as by domestic power struggles".[4] While I mostly agree with all these opinions, I also think that they should be put in the unique perspective of the Romanian internal and external context. For example, the "eternal struggle for a balance between independence and accountability"[5] seen by Garoupa & Ginsburg as the main locus for institutional reform, has, in the Romanian case, interesting implications on the position of the Council towards the other state powers. The answer to the question "Is Romania a perfect model of JSG?" could only come from an integrated evaluation of all of the advantages, shortcomings and perils of the system, in the internal and external context of a continuous need for reform. In this article, without any claim to being exhaustive, I am offering an account of the features of the Romanian judicial self-government system from a constitutional law standpoint. Shortcomings and challenges will also be emphasized, with a view to establishing whether the current system should be considered to be adequate and, consequently, be strengthened, or, on the contrary, whether it should be changed to a less autonomous one.

I will try to point out that the actual perils to the Romanian judiciary as a whole are, in fact, a response to its "normal" functioning, especially in the anti-corruption field. The increase in the number and intensity of such perils in the recent period has coincided with an increase in the number of high-level political corruption cases that have been prosecuted and have resulted in convictions. Therefore, the pressures from the political sphere, especially the repeated attempts to change legislation in order to weaken judicial independence (i.e. of judges and prosecutors), were all the more intense. This situation raised the concerns of international actors, such as the European Commission and the Venice Commission[6] and proved that the system should increase its independence from political power. To the concerns regarding the risks of excessive corporatism, I would argue that the system can be self-regulatory and can remove the unwanted effects on its own, if the legislation assures the proper guarantees for a true judicial independence.

The article is organized into three main parts: the first part includes a presentation of the Romanian judicial system and of the reasons why the judicial council model was adopted

[3] Bogdan Iancu, *Perils of Sloganised Constitutional Concepts Notably that of 'Judicial Independence',* in 13 EUROPEAN CONSTITUTIONAL LAW REVIEW 599 (2017).

[4] Cristina Părău, *The Drive for Judicial Supremacy,* in JUDICIAL INDEPENDENCE IN TRANSITION (Anja Seibert-Fohr ed., 2015) 665.

[5] Garoupa&Ginsburg, *supra* note 1 at 105.

[6] Venice Commission, *Romania. Preliminary Opinion on Draft Amendments to Law no. 303/2004 on the Statute of Judges and Prosecutors, Law no. 304/2004 on Judicial Organization, and Law no. 317/2004 on the Superior Council for Magistracy*, CDLPI(2018)007 of 13 July 2018, §51, and esp. §§160–161.

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and subsequently consolidated; the second part assesses the external and internal perils that confront the judicial self-government, from a constitutional perspective, including the gap between the degrees of independence and accountability of the judiciary; the third part examines whether the judicial council model itself can be considered a threat to constitutional principles and values – particularly, to the separation of powers and democracy – due to the ever-increasing insulation from subordination to other branches of government. The necessity and shortcomings of the most recent legislative changes will also be addressed, as will the increasing awareness in civil society of the need for an independent judiciary.

Is excessive judicial self-government perilous to the rule-of-law? In my opinion, although the criticisms against the 'corporatization' of the system are partly justified, this 'excessive autonomy', established as a reaction to the high level of corruption that plagues the Romanian society, can be considered "the lesser evil" in the equation. The peculiar situation of Romania – placed under EU supervision ever since the accession because of the serious flaws of the judiciary and of the high degree of official corruption – is a strong argument in this direction. Should the SCM disappear or should its powers be diminished, in a troubled political context with clear tendencies towards illiberalism, these European goals would be under a major threat. That is why I try to demonstrate that the current system should be maintained, with some amendments regarding transparency and accountability (based on clear and predictable legal provisions). Therefore I conclude, in line with Garoupa & Ginsburg, that "judicial councils remain attractive institutions"[7] but that, in the end, there is no "perfect model" of judicial self-government.

B. The Romanian Judicial System and the Rationales of Judicial Self-Government

It must be stressed from the outset that the current position and influence of the SCM are the result of an evolution that was strongly influenced by the tensions generated in the context of the EU accession and of the internal fight with endemic corruption. To better understand the peculiarities and the rather unique situation of Romania in the European context, it is necessary to examine the Romanian judicial system and the background of its judicial self-government.

The Romanian judicial system is a classic 'Continental'-type one,[8] with a single order of jurisdiction,[9] which comprises courts of the first instance (*Judecătorii*), secondary courts (*Tribunale*), courts of appeal and the High Court of Cassation and Justice (hereinafter HCCJ) as the apex court. The Constitutional Court, established by the 1991 Constitution, is not

[7] Garoupa & Ginsburg, *supra* note 1 at 103.

[8] For details, see Bianca Selejan–Guțan, THE CONSTITUTION OF ROMANIA. A CONTEXTUAL ANALYSIS (2016) 181–182.

[9] There are no special administrative courts.

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part of the judiciary, but an institution independent from the other state powers. One peculiarity of the system is that, according to the Constitution, the "judicial authority" (Chapter 3 of the 3rd Title – *Public Authorities*) includes, besides the courts, the "Public Ministry" – i.e. the prosecutors, organized in prosecutors' offices (*Parchete*) and the Superior Council of Magistracy, which represents the whole "order" of magistrates. The prosecutors are considered magistrates within the meaning of the Law on the Status of Magistrates and have similar rights as judges, but there are also significant differences: prosecutors are not irremovable, they are placed "under the authority" of the Minister of Justice and are under hierarchical control.[10] These features led the European Court of Human Rights to rule, in 2003, that prosecutors are not to be considered 'magistrates' within the meaning of the Convention's Articles 5 and 6 and therefore their power to decide on pre-trial detention was considered a breach of the right to liberty and security.[11]

The constitutional principles of the judiciary are: independence and impartiality, the prohibition of extraordinary tribunals, the right to appeal, the official language (Romanian) – with the possibility of persons belonging to national minorities to use their mother tongue in special conditions.[12]

The judicial culture in Romania is not significantly different from other post-communist countries in the region. As pointed out in the scholarship, at the beginning of the transitional period, "despite their strong political commitment to European integration, CEE candidates, their national judiciaries, proved to be poorly methodologically equipped to face the burden of European integration."[13] Among the weaknesses emphasized by the author, were "textual positivism, (…), reluctance towards the binding legal precedent (…), mechanical jurisprudence, rudimentary descriptive approach (…), ignorance towards persuasive arguments and soft law, disregard of comparative law",[14] but also "formalist reading of the law and misunderstanding of precedent".[15] Although Romania, like all other CEE countries, has been subjected to a process of 'Europeanization' since the early stages of pre-accession, the actual changes in legislation and mentality occurred in slow motion

[10] Selejan-Guțan, *supra* note 8 at 186.

[11] Following the ECtHR judgment *Pantea v. Romania,* in 2003, the Romanian Constitution was amended so that only a judge can decide on preventive detention and the prosecutors lost this power.

[12] Articles 124–128 CR.

[13] Manuel Guțan, *Judicial Culture as Vector of Legal Europeanization,* in EUROPEANIZATION AND JUDICIAL CULTURE IN CONTEMPORARY DEMOCRACIES (Manuel Guțan, Bianca Selejan–Guțan ed., 2014).

[14] *Ibid*. *See* also Bianca Selejan–Guțan, *Transitional Constitutionalism and Transitional Justice in Postcommunist States – The Romanian Case* in 2 ROMANIAN JOURNAL OF COMPARATIVE LAW 289–90 (2010).

[15] Zdenek Kühn, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement* in 52 AMERICAN JOURNAL OF COMPARATIVE LAW 550 (2004).

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and following external pressures. It is also relevant that Romania did not undergo a process of lustration,[16] as regards either politicians or members of the judiciary. Thus, at least in the first decade after the fall of communism, the judiciary had virtually the same composition, with no or little background of liberal principles such as equality, rule of law, legal certainty, constitutionality, or human rights. In this context, another peculiarity of the Romanian early post-communist judicial culture was a low willingness to evolve towards the new democratic values. The most effective instruments to trigger progress were, on the one hand, the case-law of the European Court of Human Rights[17] and, on the other hand, the EU accession and especially the Co-operation and Verification Mechanism (hereinafter CVM), established "to improve the functioning of the legislative, administrative and judicial system and to address serious deficiencies in fighting corruption".[18]

One of the first steps in changing the judiciary after decades of undemocratic regime was the reintroduction of the Superior Council of Magistracy/ *Consiliul Superior al Magistraturii* (hereinafter SCM), by the 1991 Romanian Constitution (hereinafter CR), after 42 years of absence. The SCM was established as the main judicial self-government body in Romania and it used its French counterpart an institutional rather than normative or functional model. The actual operation of the post-communist Council started in 1992, when the Law on Judicial Organization was enacted. Following the constitutional amendment of 2003, the Council was redesigned by the constitutional text and in 2004 a special organic law entirely dedicated to the "new" SCM was enacted – Law no. 317/2004 (hereinafter LSCM).

Despite its strong formal entrenchment, the judiciary and its independence were among the main weak links emphasized in the context of Romania's EU accession. This was mostly due to the high level of corruption in the political and administrative systems and to the apparently low involvement of the judiciary in the fight against this corruption in the first post-communist decade. Therefore, the European Commission set, as imperative pre-accession requirements, the establishment of strong institutions endowed with these competences. As a result, within the General Prosecution Office of the HCCJ was created,

[16] The only prohibition to occupy leading positions or positions in the SCM is for judges and prosecutors who were part of intelligence services before 1990 or who collaborated with these services (the old political police – *Securitate*). The National Council for the Study of *Securitate*'s Archives (CNSAS) gives affidavits to certify this condition. *See* also Părău, *supra* note 4 at 641.

[17] Bianca Selejan-Guțan, *Human Rights – An Element of the European Judicial Culture,* in Guțan, Selejan-Guțan, *supra* note 12 at 214.

[18] As provided by Article 37 of the Act of Accession of Romania to the EU (2005) and by Commission Decision of 13 December 2006 (2006/928/EC), http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:354:0056 :0057 :EN:PDF. The first benchmark was to "ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy." See also COM(2007) 378 final, *Report from the Commission to the European Parliament and Council on Romania's progress on accompanying measures following accession* 2.

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in 2002, the "Anti-Corruption National Prosecution Office" – nowadays the "Anti-Corruption National Directorate" (hereinafter DNA). Since its creation, the DNA's case-load has gradually increased. The institution has been under the constant eye of the European Commission, especially Romania's accession in 2007,[19] through its progress reports in the framework of the CVM. In this context, the reinforcement (in the pre-accession period) and the activity of the SCM and of the DNA were seen by the European actors as the flagships of judicial reform, alongside legislative measures intended to increase the quality and independence of justice in Romania (including accountability and transparency). Thus, in the view of the European authorities, a reinforced judicial self-government body must go hand-in-hand with a more powerful anti-corruption body.

In this context, two main peculiarities of the Romanian system must be stressed:
a) The strong position of the prosecutorial part of the judiciary within the system, which comes partly from its communist heritage (the prosecutors' offices were very powerful during the communist regime and also politically controlled as a part of the communist party's system of political repression[20]); that is why, prosecutors are considered 'magistrates' by the law, on an equal footing with judges. A major part of the discussion around the independence of the judiciary in Romania revolves around prosecutorial activity.

b) A significant part of the major debate regarding the efficiency of the judiciary focuses on corruption, which is seen as one of, if not the, main weaknesses of the Romanian society and political system. This also reflects on the public perception of the judiciary.

I. The Superior Council of Magistracy: Creation, Composition and Powers

Although the literature usually acknowledges France to be the first country to introduce a high judicial council, in 1946, Romania had created such an institution in 1909. The first Romanian SCM was an advisory body regarding the careers of magistrates, the decision-making authority being the minister of justice. It also had the competence to rule on disciplinary motions against magistrates. In 1924, the Law on Judicial Organization redesigned the SCM by removing its powers as a disciplinary court and by placing it under the authority of the minister of justice. In 1938, there were important structural changes related to the political regime (a "royal dictatorship" with strong nationalistic undertones two judicial councils were created, one for the proposals to the supreme court and one for the proposals of judges and prosecutors to the other courts, both under the authority of the minister of justice and without any disciplinary powers. In 1952, under the communist rule, the institution ceased to exist.

[19] *See*, for details, Selejan-Guțan, *supra* note 8 at 190.

[20] *See* also DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES (2016) 23.

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This brief historic account reveals a certain tradition of the "judicial council model" in Romania, in a more "hybrid" form (a consultative judicial council combined with the strong decision-making role of the minister of justice).[21] Therefore, the reinstatement of the Superior Council of Magistracy in 1991, this time at the constitutional level, was seen as an important move on the path of breaking with the totalitarian past and of reconnecting to the 'democratic traditions' of the country. The constitutional entrenchment did not fully follow the previous model, leaving the task to define the actual role of the SCM to subsequent legislation. In some views, at the moment of the Constitution's drafting, "there was no particular vested interest in an independent judiciary and perhaps a general undefined political interest against it".[22] This opinion is validated by the fact that, in 1997, the decision-making powers of the SCM were removed in favour of the minister of justice.

Following external pressure from the European Commission (in the light of the projected accession of Romania to the European Union), the constitutional and legal design of the SCM were fundamentally changed in 2003, through a constitutional amendment which instated the judicial council model in its pure form, i.e. entrenching the total autonomy of the high judicial council from all state powers, in its decisions regarding the careers of magistrates and disciplinary motions against them.[23]

During the debates on the draft Constitution (1990-91), there were other proposals on the JSG. For example, one proposal was to create a high judicial council composed of magistrates who are, at the same time, members of Parliament, under the presidency of the Minister of Justice.[24] The final draft supported the version of a Superior Council of Magistracy composed of magistrates elected by the chambers of Parliament. Some further amendments were proposed: to remove the Council from the Constitution; to include deputies and senators in the Council, in addition to magistrates; to provide that the President of the Supreme Court is also the President of the SCM.[25] All these amendments were rejected, some under the motivation that "the solution from the draft is in accordance with the political decision of the Constituent Assembly".[26] There was no actual public debate on this issue at the moment of the adoption of the Constitution, but the

[21] Michal Bobek, David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe,* in 15 GERMAN LAW JOURNAL 1266 (2014).

[22] Bogdan Iancu, *Post-Accession Constitutionalism with a Human Face: Judicial Reform and Lustration in Romania* in 6 EUROPEAN CONSTITUTIONAL LAW REVIEW 38 (2010).

[23] *See* also SEBASTIAN SPINEI, ORGANIZAREA PROFESIILOR JURIDICE LIBERALE (2010) 23.

[24] Viorel Mihai Ciobanu, *Articolul 133,* in CONSTITUTIA ROMANIEI. COMENTARIU PE ARTICOLE (Ioan Muraru, Elena Simina Tănăsescu ed, 2008) 1261.

[25] GENEZA CONSTITUȚIEI ROMÂNIEI. LUCRĂRILE ADUNĂRII CONSTITUANTE (1998) 669.

[26] *Ibid*.

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2003 constitutional amendment process included the reform of the SCM as a major point of debate.

From the outset, the SCM was included in the third Title of the Constitution (Chapter 6 – *Judicial Authority,* Section 3 – *Superior Council of Magistracy*). In 1997, the organic law expressly recognized the Council as a 'component of the judicial authority', after amending the Law on Judicial Organization.[27] The 1991 SCM was composed of magistrates (i.e. judges *and* prosecutors) elected, for a period of 4 years, by the two chambers of the Parliament. The actual composition was detailed in the Law on Judicial Organization (Article 72): 15 members, out of which there were 4 judges of the Supreme Court of Justice, 3 prosecutors of the General Prosecution Office of the Supreme Court, 6 judges of the Courts of Appeal, and 2 prosecutors of the Prosecution Office of the Bucharest Court of Appeal. The candidates to these positions were proposed by each court, as provided by the law, through the general assemblies of magistrates.

In 2003, the constitutional 'Euro-amendments' significantly changed the composition and role of the SCM. Firstly, it became almost totally autonomous and the term of office was extended from 4 to 6 years. The Constitution expressly set the role of the SCM as "guarantor of the independence of justice". Secondly, the composition of the Council increased. Thus, according to Article 133 (2) "the Superior Council of Magistracy shall consist of 19 members, of whom: a) 14 are elected in the general meetings of the magistrates and validated by the Senate; they shall belong to two sections, one for judges and one for public prosecutors; b) 2 representatives of the civil society, specialists in law, who enjoy a good professional and moral reputation, elected by the Senate; these shall only participate in plenary proceedings; c) the minister of justice, the president of the High Court of Cassation and Justice and the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice". Although a member of the Council, the minister of justice has a significantly diminished actual role. The constitutional text sets forth more precise provisions on the Council's leadership: "the president of the SCM shall be elected for a one-year's term of office, which cannot be renewed, from among the magistrates listed under para. 2 (a)". The minister of justice is not the only member of the executive power that was given a role within the SCM. The amended constitutional text gave the President of Romania the right to take part in the proceedings of the Council and the role of presiding over the SCM meetings in which he or she participates, but with no right to vote.

[27] Law no. 142/1997.

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Table 1. Composition and leadership of the post-communist Romanian SCM, from the draft Constitution to the current version.

Act	Composition	Leadership
Draft Constitution (1990-91)	Various proposals. E.g. magistrates who are also MPs; magistrates elected by parliament.	Various proposals. E.g. minister of justice to be the president of the SCM.
Constitution of 1991 (original version, in force until 2003)	15 magistrates (judges and prosecutors), elected by Parliament, only from upper courts (Supreme Court, Courts of Appeal)	No SCM president elected. President of the Supreme Court of Justice and the Minister of Justice presided over some of the meetings.
Constitution of 1991, amended in 2003	19 members: 14 magistrates (judges and prosecutors), elected by their peers, from lower and upper courts; 2 representatives of the civil society (no right to participate and vote in the sections); President of the High Court of Cassation and Justice, Prosecutor General, Minister of Justice (no right to vote in certain cases).	SCM President elected for a one-year term, non-renewable, with the vote of all members of the plenum. The President of Romania chairs the meetings in which he or she participates.

As regards the composition of the Council, it is worth pointing out its "anti-hierarchical tilt",[28] due partly to the rules on election of its members, whereby most of the candidates come from lower courts, and to the rules of composition, according to which three out of five elected prosecutors and four out of nine elected judges represent the lowest courts/prosecutors' offices. It is interesting that, although the ratio of magistrates decreased from 100% to 84.2% in the new Council, the autonomy of the Council increased. In 2014, a proposal to increase the number of the representatives of the civil society from 2 to 4, included in the draft law amending the Constitution, was declared unconstitutional by the Constitutional Court, on grounds that "the change of the representation proportion, by increasing the number of persons from outside the judiciary, would produce negative effects on the activity of the judicial system".[29]

The powers of the Council were provided by the first version of the Constitution in a general manner and detailed in the Law of Judicial Organization. Thus, according to former Article 133 CR, the SCM "shall nominate judges and public prosecutors for appointment by the President of Romania, except for the trainees, in accordance with the law. In this case,

[28] Bogdan Iancu, *supra* note 3 at 594.

[29] RCC, Decision 80/2014. For comments and details, *see* Bogdan Iancu, *Standards of good governance and peripheral constitutionalism. The case of post-accession Romania,* in SOCIOLOGY OF CONSTITUTIONS: A PARADOXICAL PERSPECTIVE (STUDIES IN THE SOCIOLOGY OF LAW (Alberto Febbrajo, Giancarlo Corsi ed, 2016) 191 et seq.

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the proceedings shall be presided over by the minister of justice, who shall have no right to vote." Secondly, the SCM had the role of disciplinary court for judges and prosecutors, "in which case proceedings shall be presided over by the President of the Supreme Court of Justice". These powers were actually exercised independently by the Council for only 5 years, until the legislative changes of 1997. From 1997 to 2004, all the powers of the SCM were exercised either 'at the recommendation' or 'following the proposal' of the minister of justice, which meant that the executive had the decisive word as regards the magistrates' careers. Moreover, the Law on Judicial Organization also provided that 'the minister of justice has a right to control the activity of judges', including a 'right to introduce disciplinary actions', which meant a strong interference with the principle of separation of powers and the independence of justice.[30] Thus, although the formal constitutional powers regarding the magistrates' careers belonged to the SCM, the law restrained these powers and, implicitly, the Council's independence, by granting the minister of justice the informal role of supervising the whole activity of the SCM. Combining the power of the Parliament to appoint the Council's members with a strong political majority supporting the Government, it resulted that the political power had total control over the SCM and indirectly over the judges and prosecutors. The SCM was characterized as "an inoffensive institution, without a great impact on the judicial system".[31]

The amended constitution significantly enhanced the powers of the SCM, making it an autonomous institution, especially as regards decisions on the careers of magistrates. The power to propose to the President of Romania the appointment of judges and prosecutors was maintained. The second role of the Council, a disciplinary court for magistrates, was consolidated, while the powers of the minister of justice were removed: thus, the Constitution provides that the Council "shall perform the role of a court of law, by means of its sections, as regards the disciplinary liability of judges and prosecutors, based on the procedures set up by its organic law. In such cases, the minister of Justice, the president of the High Court of Cassation and Justice and the general prosecutor of the Public Prosecutor's Office attached to the HCCJ shall not be entitled to vote" (Article 134 (2)CR). The decisions adopted by the Council, when acting as a disciplinary court, may be challenged at the High Court of Cassation and Justice, as established by Article 134 (3) CR. According to Article 133 (7), all other decisions of the Council are final. Another guarantee for independence in decision-making is the new Article 134 (5), according to which all decisions of the Council are taken by secret vote.

During the transitional period until the enactment of the new LSCM, the Ministry of Justice together with the members of the SCM started to transfer the decision-making from the

[30] *See* also Ion Popa, CONSILIUL SUPERIOR AL MAGISTRATURII DIN ROMÂNIA – DE LA SUCCES INSTITUȚIONAL LA EȘEC FUNCȚIONAL (2011) 18–19. The author characterizes the period as a 'dictatorship' of the Ministry of Justice on the SCM.

[31] Bogdan Dima, Elena Simina Tănăsescu, REFORMA CONSTITUȚIONALĂ: ANALIZĂ ȘI PROIECȚII (2012) 139.

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minister of justice to the Council. The minister of justice gradually withdrew from the process of appointing magistrates.[32] Within 90 days from the enactment of the new law, a new Council was elected, which started to function in January 2005. Even in the new formula, the Ministry of Justice retained the decision-making power on budgetary and financial issues related to the judiciary.

The current constitutional text leaves open-ended the list of the Council's powers: the organic law may bring additional powers, if necessary for the Council's role of 'guarantor of the independence of justice' (Article 134 (4) CR). The SCM has the right to address the Constitutional Court with a request 'to solve legal conflicts of a constitutional nature between public authorities' (Article 146 (e)CR). Other important powers of the Council are to: decide on secondment and delegation of judges and prosecutors; appoint leadership positions of courts and prosecutors' offices; solve complaints regarding the annual evaluations of judges and prosecutors; solve complaints regarding the inadequate behaviour of judges and prosecutors; advise on the proposal of appointment of the general prosecutor of the Prosecutor's Office attached to the HCCJ, of the chief-prosecutor of the DNA, of the chief-prosecutor of the Directorate for Investigating Organized Crime and Terrorism and of their deputies; decide on the suspension from office of judges and prosecutors. As regards the management of courts and prosecutors' offices, the SCM approves the creation and closure of courts' sections and of prosecutors' offices' sections and decides on which cases or actions shall be decided only in Bucharest and only by certain courts, according to the law. The SCM sections (for judges and prosecutors respectively) also have the power to decide on measures restricting the personal freedom of judges accused of criminal offences, such as searches and preventive detention measures.

In relationship to the legislative power, the SCM Plenum[33] can give advisory opinions on draft laws regarding the activity of the judicial authority, upon request by the initiators. Although the object of these opinions seems limited to the draft laws on the organization of the judiciary and the status of magistrates, this power has been extended de facto to other laws, such as the criminal code or the code of criminal procedure. The Constitutional Court, in a case law started in 2009,[34] tried to restrict this competence of the Council by stating that the wording "draft laws regarding the activity of the judicial authority" only refers to the laws that apply directly to the organization and functioning of the judicial authority and that "any other interpretation given to this wording would determine an extension of the SCM's powers that would not be grounded on clear and predictable

[32] *Ibid*. at 23.

[33] Article 38 (4) LSCM.

[34] RCC, Decision 901/2009, Decision 3/2014.

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criteria and therefore be arbitrary".[35] Nevertheless, in the absence of clear legal dispositions, various ministries continued to request advisory opinions from the Council on other draft laws. One of the most famous cases is that of Emergency Ordinance no. 13/2017, which tried to restrict the application of the Criminal Code provisions on the offence of "abuse of office" (and thus generated ample street protests in February 2017)[36]. In this case, the Ministry of Justice initially sought the advisory opinion of the SCM, but afterwards, without waiting for the Council's answer, forced the adoption of the Ordinance in an unannounced Government meeting organized the same night. The president of the SCM and the President of Romania then addressed the Constitutional Court with a request to resolve a constitutional conflict between authorities, but the Court rejected the complaint and declared that there was no such conflict because the Government "had no legal obligation to seek the SCM's advisory opinion" on said Ordinance.[37]

II. Role of the SCM within the Judiciary

The SCM has extensive powers as regards the recruitment and disciplinary investigation of magistrates through two structures that it coordinates: National Institute of Magistracy and Judicial Inspection.

The National Institute of Magistracy (hereinafter NIM) is the sole structure for recruiting and training new magistrates (trainee judges and prosecutors). It was created in 1997 under the subordination of the Ministry of Justice and has been placed, since 2004,[38] under the coordination of the SCM. The NIM has the role of assuring "the initial training of judges and prosecutors, continuous training of acting magistrates as well as of training of trainers". Unlike the initial regulation, under which the NIM was "subordinated" to the Ministry of Justice, it is now "coordinated" by the SCM. The NIM is led by a Director and a Scientific Board that includes representatives of the HCCJ (Court and Prosecution Office), of the Bucharest Court of Appeal, academics from three universities, three representatives of the training staff of the NIM and one representative of the trainees.

The NIM recruits new judges and prosecutors from among law graduates, through a national exam organized in Bucharest. Once admitted to the NIM, the law graduates become "auditors of justice", i.e. trainee judges and prosecutors, for two years. After that, they can become judges or prosecutors at lower courts.

[35] RCC, Decision 3/2014.

[36] *See*, for details, Bianca Selejan-Guțan, *We Don't Need No Constitution'–On a Sad EU Membership Anniversary in Romania,* Verfassungsblog, 1 February 2017, http://verfassungsblog.de/wedontneednoconstitutiononasadeumembershipanniversaryinromania/.

[37] RCC, Decision 63/2017.

[38] Law no. 304/2004 on Judicial Organisation.

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The Judicial Inspection (hereinafter JI) is an internal structure of the Council, having its own legal personality. It is run by a chief-inspector appointed via competition organized by the SCM. According to LSCM,[39] the JI is guided by "operational independence" and composed of judicial inspectors, i.e. judges or prosecutors seconded as such. As its powers were consolidated in 2012,[40] the JI is now entitled to pursue disciplinary actions against magistrates. The JI can act *sua sponte* or based on a complaint filed by the minister of justice, by the president of the HCCJ or by the general prosecutor attached to the HCCJ, as well as by any person proving an interest and by the SCM itself, as regards disciplinary offences allegedly perpetrated by judges and prosecutors. Members of the SCM can also be investigated by the JI. The disciplinary actions investigated by the JI are decided by the respective sections of the SCM (judges or prosecutors).

Upon registration of judicial complaints, judicial inspectors can verify court compliance with procedural norms regarding random case assignments, delays, continuity of judicial panels, elaboration and communication of decisions, etc. The JI has extensive powers as regards the verification of the "managerial efficiency" of the leadership of courts and prosecutors' offices, as well as the complaints against the "inadequate behaviour" of judges and prosecutors or the breach of their professional duties. An interesting competency is the one of verifying the individual requests to "defend the good reputation" of judges and prosecutors, addressed to the SCM by the incumbent persons.

Besides recruitment and disciplinary actions, the SCM has an important voice in appointing all court presidents except for the President of the High Court of Cassation and Justice.[41] They are appointed following a competition organized by the SCM through the National Institute of Magistracy. Court presidents, elected for a three-year term of office, once renewable, have mainly court administration competencies. Their powers are curtailed by the existence of a Ruling Board, which has most decision-making powers.[42] Thus, court presidents are designed more as managers or administrators of the courts rather than

[39] Article 65(2).

[40] By the changes made by the Law no. 24/2012 to the Law no. 317/2004 on the SCM.

[41] The 2018 amendments of the law on the organisation of the judiciary (entered into force on 23 July 2018) gave the Council the sole power of appointing the President and Vice-presidents of the HCCJ, by removing the competence of the President of Romania of appointing the chief justices. In the former regulation, the president of the HCCJ, as well as the vicepresident and the section presidents, were appointed by the President of Romania, at the proposal of the SCM, from among the high court's judges with a minimum of 2 years seniority in office. The actual management of the HCCJ is done by a Ruling Board that includes the president, vicepresident and 9 judges, elected by the general assembly of judges for a period of 3 years.

[42] For example, the Ruling Board of the High Court of Cassation and Justice has the following powers: approves the Rules of Court and the staff roll of the Court; analyses the candidacies for the position of judge at the HCCJ and reports on them to the SCM; proposes the draft budget of the Court, etc.

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actual leaders. They supervise the system of random case assignment[43] and have limited competence in the professional assessment of judges: the evaluation process is actually led by a committee approved by the SCM, composed of the president of the court and of two other judges appointed by the Ruling Board. This might be the most important power the court presidents have over their peer judges, as the periodical evaluation can influence a judge's career and promotion.

From a more informal standpoint, it must be mentioned that there are several associations established as private organizations – the Romanian Association of Magistrates, the Forum of Judges and the National Union of Judges. They have no formal role in court administration or the judicial careers. These associations can bring complaints to the SCM regarding alleged abuses against the individual rights of magistrates or abuses against the independence of justice.

To conclude, since 2004, de jure and de facto, the SCM has been a classic illustration of the "external incentives (accession conditionality) theory"[44] on judicial councils, in the context of the pre-accession to the European Union, and has gradually gained the position of the most powerful actor regarding court administration and the careers of magistrates in Romania. This position is consolidated by the control that the Council itself has on all actions related to magistrate careers (appointment, promotion, dismissal, retirement) at all levels, as well as on all disciplinary actions initiated by the Judicial Inspection and on recruiting new magistrates through the National Institute of Magistracy. These extensive powers have increased the authority of the Council within the judiciary and the autonomy of the judiciary from the other public powers, but they have also generated problems and perils to the system. In the following sections, I will try to assess the existence and the potential consequences of these perils, as well as to discuss whether a too autonomous SCM could itself become a peril to the constitutional system.

C. Who Threatens the Judicial Self-Government?

The main external perils regarding the Romanian judiciary come from the political sphere: political pressures have been the most likely to affect judicial independence. The process of creating an autonomous system, through a powerful SCM has been seen as a potential progress and solution, but it has created other problems and internal perils in return.

[43] Established in 2005.

[44] *See* Kosař, *supra* note 19 at 11.

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I. External Perils – the Struggle for Independence

Judicial independence is one of the fundamental principles of the Romanian constitutional system. It is included in the wider concept of rule of law and is protected by strong constitutional guarantees. Although the Constitution does not define judicial independence, it is mentioned, as an objective value, in Article 152 (1) and as a subjective value – or the "independence of the judge" – in Article 124 (3): "judges are independent and subjected only to the law". This subjective independence of individual judges has its own constitutional safeguards, among which the most important is irremovability, guaranteed by Article 125 (1)CR. The most important formal constitutional protection of judicial independence as an objective value is its recognition as an 'eternity clause' by Article 152 (1) CR.[45] Other guarantees established by the Constitution and by the Law on the Status of Magistrates are the publicity of the proceedings, the obligation to reason the decisions, etc.

The de jure independence of the judiciary formally increased since the reform of 2003-04. This independence is also protected by, besides the general insulation of the system as regards access, selection, appointments, career and accountability, the possibility of the SCM, through the Judicial Inspection, to issue reports on the "defence of reputation, independence and impartiality" of the judiciary as a whole and of individual judges or prosecutors. Such reports have been made regarding various public statements by politicians or by media representatives, deemed harmful to the independence of the judiciary. For example, in December 2016, the SCM Plenum found against statements made by a former President of Romania on a TV show; he had launched "serious accusations about the independence and impartiality of prosecutors, claiming that they are run by external forces, that they protect the interests of these foreign forces in exchange for some decorations and appreciations, by acting against the Romanian values". The Plenum found that these accusations were prone to have "a negative impact on the credibility of the judicial system, having as a consequence the affectation of the independence and impartiality of magistrates".[46] Prior to the decision, the judicial inspectors involved in the case found that these statements by the former President of Romania, a public figure who enjoys notoriety, represented "a deformation of factual reality, capable of inducing the idea of an abnormal functioning of the judiciary as a whole".

Similar reports were made by the SCM Plenum on various statements of the acting President of the Senate in which he claimed that the DNA was aiming to eliminate

[45] Article 152 (1) reads as follows: "The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language shall not be subject to revision."

[46] http://old.csm1909.ro/csm/linkuri/16_12_2016__85230_ro.htm

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politicians from the electoral competition by accusing them of corruption.[47] These statements were included in a document – *Appeal to the parliamentarians/Apel către parlamentari* – that was published on the official website of the Senate, a situation that was considered by the SCM as "creating the impression of subordination between the state powers, infringing the constitutional principle of separation of powers, having as a consequence the undermining of the credibility and prestige of the judiciary and, indirectly, of the independence and reputation of magistrates". These actions of "defending judicial independence" influence de facto independence, i.e. may reinforce the resistance of judges against potential external pressures and attempts of intimidation.

The current normative framework regarding the guarantees of de jure independence of the judiciary is quite extensive and seems to have good support in practice. Threats to the de facto independence still exist, generated more by political or media pressures, but also by attempted legislative changes.

The degree of de facto independence is more difficult to assess because it is based more on perceptions and factual evidence that is not always available to the public, due to the low levels of transparency within the system. For example, there are no statistics regarding the number of actions against magistrates specifically for lack of independence. The public perception of the judiciary is a good marker, but not the only one. Even more difficult to assess are, on the one hand, the independence of the SCM itself from any type of influence (from the political sphere or the media) and, on the other hand, the independence of judges and/or prosecutors from internal influence (court presidents/chief-prosecutors, judicial inspectors, members of the SCM, etc.). Obviously there may be cases of external interference with formal independence, and there have been, in the last decade, some cases of corruption of judges (bribery, tampering with evidence, interference with the random distribution of cases, etc.) or of a lack of impartiality that affected the de facto independence.

Among the problems the European Commission considered that might have affected the de facto judicial independence in Romania was, at the outset of the CVM in 2007, the secondment of judges to other positions, usually within the executive (e.g. Ministry of Justice), with the right to retain the initial position. This phenomenon decreased due to the involvement of the SCM, as the Commission found in its first CVM report of 2007: "the SCM is becoming stricter in granting secondments to magistrates". The Commission also found that the possibility of other authorities to change the personnel scheme of the judiciary and thus affect the de facto independence is significantly reduced due to the SCM.

[47] http://old.csm1909.ro/csm/linkuri/15_11_2016__84154_ro.htm

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Output independence is the most difficult to assess due to a lack of consensus stemming from the subjective perceptions of the parties involved. During the transition period (1992-2000), the output independence of the judiciary as a whole and of individual judges was seriously affected by the political factor. The judiciary of the time was inherited from the communist regime. Therefore, at the beginning of the transition period, especially superior courts had a certain tendency to follow political directives given from "above". The case of the nationalized buildings, claimed by the former owners in the period 1990-1995, is famous. After a ground-breaking jurisprudence based on the Civil Code, in favour of the former owners (1992-1993), the Supreme Court suddenly changed its mind in 1995 and stated that property "could only be acquired by way of legislation, (…) that the State had taken the house on the very day on which the nationalization Decree had come into force and that the manner in which that decree had been applied was not to be reviewed by the courts."[48] This jurisprudential U-turn was the result of a speech indirectly addressed to courts by the former President of Romania, Ion Iliescu, in 1994: "all judgments adopted by courts do not have a legal basis to decide the restitution of property, as long as a law does not say in what context and how such a restitution can be done to a nationalized owner."[49] This was one of the earliest cases in the post-communist history of Romania when the political factor decisively influenced the outcome of hundreds of judicial decisions: all previous decisions of lower courts in favour of former owners were quashed by the Supreme Court via an extraordinary appeal – *recurs in anulare* – that could only be introduced by the General Prosecutor without any time-restriction and with retroactive effect on final judgments.[50] This appeal was removed from the legislation in 2006 following a massive number of ECtHR judgments that found violations of Article 6 of the ECHR.[51]

More recently, the political factor lost momentum in influencing the judiciary, but this became a problem for the independence of individual judges. The loss of direct influence generated other kinds of pressures from the political side, with anti-corruption policies playing a significant part. Thus, direct or indirect pressures on individual judges manifested especially in major corruption cases or in cases with an important financial stake and these pressures took the form of media exposure regarding judges' personal lives, media assertions regarding prosecutors or judges and their alleged lack of independence, threats of filing complaints with the Judicial Inspection, etc. These were doubled by statements affecting judicial independence as a whole (see above) made by politicians, media influencers, media patrons, etc. (usually convicted or investigated for corruption crimes) and even by attempts to change the legislation so as to remove certain corruption offences

[48] Selejan-Guțan, *supra* note 13 at 293.

[49] *Ibid*. at 294.

[50] *See* also Părău, *supra* note 4 at 657–58.

[51] Brumărescu v. Romania, App. No. 28342/95 (28 October 1999) and the subsequent case law.

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or diminish their scope.[52] The European Commission noted in its CVM report of 2013 that "unfortunately (…) politically motivated attacks on the judiciary have not ended. A critical point is the acceptance of judicial decisions: this requires the whole of the political class to form a consensus to refrain from discrediting judicial decisions, undermining the credibility of magistrates or putting pressure on them".[53] As the situation escalated, the European Commission took a stance by saying that certain media pressures may become a "threat to the independence of the judiciary; same goes for the relative incapacity of the National Audio-visual Council to sanction those situations."[54]

The 2013 CVM report emphasized the progress in the anti-corruption track-record, especially related to the de facto judicial independence: "the commitment of the executive and legislative to the quality of appointments to key posts in judicial institutions",[55] i.e. ensuring the appointment of a leadership – especially of the DNA - that can prove integrity, independence and professionalism. Along this line, in 2014, the Commission asked for more transparency in the appointment procedure of senior prosecutors. The independence of the judiciary has thus been seen by the Commission as not only regarding the independence of judges, but also of prosecutorial activity, especially anti-corruption activities.

Another threat to judicial independence from the political side is the hindering of criminal investigations, especially for corruption offences, regarding parliamentarians or members of Government. The Chambers of Parliament rejected numerous requests from the DNA and from the General Prosecutor's Office to investigate members or former members of Government (who are also parliamentarians). As the Constitution requires parliamentary approval in such cases, the European Commission criticized this practice in its CVM reports. Despite the EU's insistence, the practice of rejecting investigation requests still occurs.

In 2012, a new disciplinary offence was introduced in the Law on the Status of Magistrates: the non-observance of the decisions of the Constitutional Court or of the decisions of the HCCJ pronounced in an appeal on points of law. Although it has never been applied,[56] this sanction can be problematic, as the Constitutional Court is a political-legal institution and its decisions can have a politically influenced background. Thus, the possibility of a disciplinary motion against a judge who expresses an opinion contrary to a political stance of the Constitutional Court may be an indirect form of political pressure on individual judges.

[52] For a detailed account on "Black Tuesday" (2013), see Selejan-Guțan, *supra* note 7 at 86.

[53] COM(2013) final at 4.

[54] *Ibid*.

[55] COM (2013)47 final at 4. See, for details, the 2017 Technical report SWD(2017) 25 final at 1314.

[56] Two disciplinary cases based on this text were referred to the SCM in 2017 and are still pending.

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An important external peril, especially present in the last few years, is the pressure exercised by political powers through changes to the judiciary legislation. After the major reform of 2003-2004 and a period of relative legislative stability, in 2017, under the PSD government installed after the December 2016 elections, new major changes of judiciary legislation were envisaged. The first proposals were presented by the minister of justice in August 2017 and were debated and amended in Parliament, in a controversial emergency procedure, in December 2017. The changes were directed towards all three "judiciary laws": the Law on Judicial Organization, the Law on the Status of Magistrates and the LSCM, and they refer to magistrates' careers. The changes introduce new disciplinary offences and include harsher positions on magistrates' accountability.[57]

The changes and their hasty adoption generated a strong reaction from the civil society, political parties and associations of magistrates,[58] alongside other actors, both internal and external. The President of Romania, the European Commission and embassies of the US and of several EU member states expressed their concern about the way in which the proposals may affect the independence of justice and the rule of law in Romania.[59] The SCM itself gave negative advisory opinions on both versions (initiative and draft law). The main criticisms and concerns regard the creation of a new prosecutorial section specialized in investigating magistrates,[60] seen as a form of discrimination against judges and prosecutors, as representatives of other state powers are investigated by ordinary prosecutorial offices or the DNA, depending on the accusations. There were other, indirect forms of pressure against judicial independence as well, such as the introduction of an obligation for judges and prosecutors to "abstain from any defamatory expression against the other state powers – legislative and executive". This requirement was seen as a potential tool that would force judges to adopt certain views in particular cases.

It is also striking that, while diminishing the powers of the President of Romania – by removing the right to appoint the president of the HCCJ and by limiting the right to refuse

[57] The amendments of the law on the status of magistrates were challenged several times at the Constitutional Court before promulgation. The Court gave its first decisions in January 2018. As a result, all drafts were declared partially unconstitutional and reexamined by Parliament. Currently (July 2018), the readopted versions are in the process of promulgation and were referred again to the Constitutional Court.

[58] One of the judges' associations registered an *amicus curiae* statement at the Constitutional Court, where numerous breaches of the Constitution are emphasized. See Forumul Judecatorilor, *Memoriu amicus curiae pentru Curtea Constitutionala a Romaniei,* http://www.forumuljudecatorilor.ro/wpcontent/uploads/AmicuscuriaeCCRlegilejustitiei.pdf

[59] *See*, for details, Bianca Selejan–Guțan, *Failing to Struggle or Struggling to Fail? On the New Judiciary Legislation Changes in Romania,* Verfassungsblog, 31 January 2018, https://verfassungsblog.de/failingtostruggleorstrugglingtofailonthe newjudiciarylegislationchangesinromania/

[60] SCM, Decision no. 1148/9 November 2017.

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the appointment of the senior prosecutors – the amendments increased the powers of the SCM, which would be the sole actor deciding on the appointment of the HCCJ chiefs and the final advisor on the appointment of senior prosecutors.

An interesting dimension of external perils concerns the "social" legitimacy of the SCM (i.e. the legitimacy of the SCM vis-à-vis the people and the representative political authorities). The social dimension of legitimacy is closely related to public confidence in the judiciary, but they do not overlap. Social legitimacy includes acceptance by other authorities, acceptance by politicians individually and acceptance by the public. The public authorities rarely called into question or blatantly disregarded the judiciary as a whole or particular judicial decisions. The few existing conflicts had a special importance in the context of the principle of "loyal cooperation"[61]: they were "legal conflicts of a constitutional nature" between authorities, as defined by the Constitutional Court. One of the most famous conflicts took place in 2012 between the judiciary (the HCCJ) and the Senate, which refused to apply a final decision of the former regarding the incompatibility of a senator. The Constitutional Court was addressed by the SCM with a request to solve a constitutional conflict and ruled, *inter alia,* that:

"The negative vote [of the Senate] as regards the incompatibility that was established irrevocably by a judicial decision, the Senate acted *ultra vires*, arrogating competences that belong to the judicial power. Consequently, the Court notes the existence of a legal conflict of a constitutional nature between the judiciary and the legislative authority, represented by the Romanian Senate, which could obstruct the judiciary in its constitutional powers vested in it. Therefore (...) the Senate has the obligation to take into account the incompatibility as stated by the [judicial decisions at stake] and to decide the *de iure* cessation of the senatorial mandate of Mr. M.D., according to the Law on the statute of deputies and senators"[62]

Another way of disregarding the SCM's legitimacy was the failure of the Government or ministries to request the Council's opinion on laws regarding the judiciary. This has been the object of several constitutional conflict complaints addressed to the Constitutional Court. For example, a request from 2009 stated that, "in the period 2005-2009, the Government initiated and approved 77 normative acts regarding the activity of the judiciary, without asking the opinion of the SCM", although there are legislative dispositions that set this obligation. The Constitutional Court rejected the claim[63] on the grounds that these aspects do not qualify as a "legal conflict of a constitutional nature" between authorities.

[61] A loose interpretation of the Romanian Constitutional Court, i.e. a principle that could cover and define separation of powers more broadly.

[62] RCC, Decision no. 972/2012.

[63] RCC, Decision 901/2009.

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Individual politicians may also not easily accept the limited possibility to interfere with justice, but this might also be a strong factor of increasing public confidence in the judiciary. There were many cases of political leaders or former ministers, convicted by final judgments for corruption offences, who kept criticizing the judicial decisions given against them (especially as regards the objectivity and impartiality of the courts) or against other politicians. Some of these statements, made in the public space (TV, social media) were examined by the Judicial Inspection and the SCM and amounted to "interferences with the independence of the judiciary" or statements that affect the judicial independence and image. The attempts of politicians to undermine the authority of the judiciary can be considered among the main factors with the highest *negative* influence on judicial legitimacy.

The SCM reacted against various external pressures and attempts at undermining judicial independence through different means: in 2016, it took 40 decisions "defending" the independence of the judiciary and the independence and professional reputation of individual judges. In the same year, the SCM signed a protocol with the National Union of Romanian Bar Associations by which magistrates were given the right to free legal assistance in cases brought to court to seek redress for actions against their professional reputation. The indirect pressures continued, however. In its 2017 CVM Technical Report, the European Commission noted that, besides the SCM, "it is notably rare that any State authority, politician or media publicly condemns such criticism of the judicial system, or individual magistrates on grounds that it harms the independence of judiciary, even once established that the claim is untrue".[64]

As for the external pressures from the EU authorities, they proved to be a positive factor, either through the CVM reports or through other formal and informal means. Although this has been recently challenged by some authors,[65] in my view, without the external supervision, the high level of political corruption in Romania would have been a major obstacle to judicial de facto independence and reinforcement of judicial legitimacy.

II. Internal Perils – the Quest for Accountability and Legitimacy

Perils coming from within the judiciary affect especially its accountability and legitimacy. Such perils may be, on the one hand, the gap between strong independence and weak accountability and, on the other hand, internal conflicts that challenge the system's legitimacy. Nevertheless, in the absence of clarity and predictability of its rules, accountability can become a threat to judicial independence.

[64] SWD(2017) 25 final at 12.

[65] *See*, for details, Iancu, *supra* note 3 at 584585.

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Judicial accountability is one of the most sensitive issues in all judicial systems, but especially in the post-communist countries, where the communist regime took its toll and the judiciary was, for a long time, accountable only to the political power. The need for changes in legislation and mentality, advocated after 1990 in the constitutional and legal orders of these countries, was long rejected, silently but resolutely, by the old-school judiciaries. As I pointed out elsewhere,

"If the legislature and the executive were forced to change in a drastic and spectacular way by the process of popular elections and by media scrutiny, the judiciary maintained the rules and privileges of the 'judicial cast' until almost present days. Early changes in the laws of judicial organization were little and timid. Even the successive re-modellings made in order to comply with EU requirements were not able to solve the structural problem of the Romanian judiciary: incapacity to adapt to the new realities."[66]

This is especially true as regards judges, because the means of engaging their accountability were few and weak. Nevertheless, the willingness to join the European organizations influenced the acknowledgement of judicial accountability as an element of the rule of law, which was a constant requirement of these organizations for the new members. After 2004 and especially after the establishment of the CVM in 2007, the SCM was forced to take steps to increase the degree of accountability, especially of disciplinary accountability.

The disciplinary offences for which magistrates can be held accountable are currently listed by the Law on the Status of Magistrates.[67] There are over 20 kinds of offences, from actions that affect the honour and professional reputation or the prestige of the judiciary, to political activities or public manifestations of political convictions, from the unjustified refusal to perform a duty, to the interference with the activity of other judges and/or prosecutors or to the exercise in bad faith or serious negligence of duties. The law also lists the disciplinary sanctions that can be applied by the SCM. In practice, there is quite an extensive case law of the SCM sections regarding disciplinary action. Among the sanctions applied in the last four years were: warning, suspension from office for 3 to 6 months, salary reduction, disciplinary transfer, and exclusion from magistracy.

[66] Selejan-Guțan, *supra* note 13 at 289.

[67] Law no. 303/2004.

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Figure 2. Disciplinary actions against judges

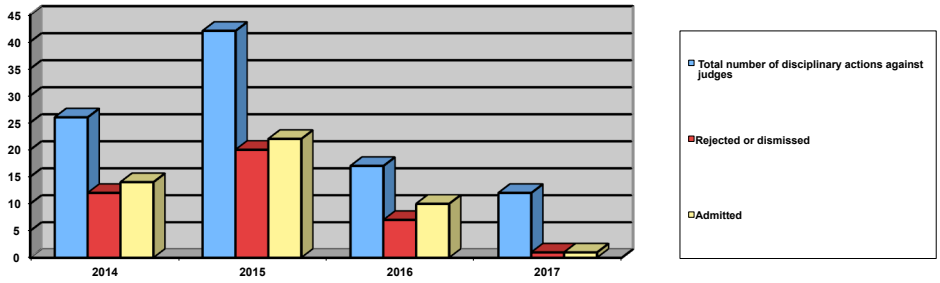
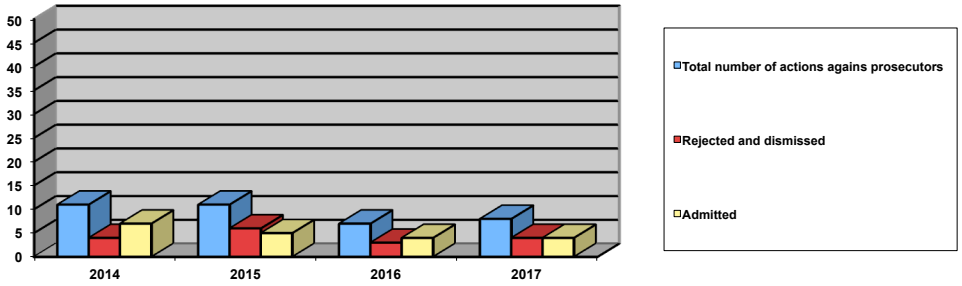


Figure 3. Disciplinary actions against prosecutors[68]



Disciplinary accountability is not the only form of accountability for magistrates: civil and criminal accountability can also apply. For example, the Law on the Status of Magistrates and the Code of Criminal Procedure provide the right of the State to file civil actions against the magistrates responsible for judicial errors and unfair convictions. Article 96 of the Law on the Status of Magistrates provides that "(1) the State is materially accountable for any damages caused by judicial errors. (2) The State's responsibility does not exclude the responsibility of judges and prosecutors who exercised their functions with bad faith or gross negligence". After the first version was declared unconstitutional, the draft amendments adopted in 2018 define more precisely the notions of "judicial error" and "gross negligence". So far, there are no available statistics regarding the number of cases in

[68] Source: SCM Reports on 2014 and 2015, http://old.csm1909.ro/csm/index.php?cmd=24; Reports of the Judicial Inspection on 2016 and 2017, http://old.csm1909.ro/csm/linkuri/09_03_2017__86944_ro.pdf and http://old.csm1909.ro/csm/linkuri/07_03_2018__90791_ro.pdf.

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which the State has filed complaints against judges or prosecutors for damages paid as a result of such judicial errors.

Judges and prosecutors may also be subject to criminal investigations, but they can only be searched or arrested with the consent of the corresponding sections of the SCM. In case of flagrant offence, the magistrates can be retained and searched, but the SCM must be immediately informed of the situation. In recent years, there were several cases of criminal investigation and conviction of magistrates in criminal cases, mostly regarding corruption offences such as bribery or influence trafficking. In 2014, a law came into force that limited the special pensions for magistrates convicted of corruption.

The gap between independence and the de facto accountability of magistrates has been a recurrent issue in the Romanian judicial system and public debate. Although the law is generous in strongly guaranteeing independence and in regulating various forms of legal accountability, the cases in which these rules apply are relatively few. In its 2011 CVM Report, the European Commission noted:

"Improving the accountability *of the judiciary* remains an important challenge. Since the Commission's last annual assessment, new recruitment rules for judicial inspectors were adopted and some steps were taken to improve the efficiency and transparency of the Judicial Inspection and to unify its practice. The capacity and track record of the Inspection has not significantly improved. The analysis of a sample of high-level corruption cases which remain delayed in court by the Inspection has not led to any significant findings or recommendations regarding judicial practice. Romania has not yet engaged in a thorough reform of the disciplinary system."[69]

The situation has not improved much since 2012, when the annual report noted that, despite the strengthening of the legislation on the disciplinary responsibility of the judiciary, little has changed at the de facto level.[70]

In 2016, the Commission renewed the recommendation to the new SCM to "take clear measures for increased transparency and accountability";[71] it was a sign that the situation was still far from being resolved, although the Commission noted that "increased steps" had been made in this direction. The 2017 Technical report,[72] released 10 years after the

[69] COM(2011)460 final at 5.

[70] COM (2012)56 final at 3.

[71] CVM Progress Report, January 2016: https://ec.europa.eu/transparency/regdoc/?fuseaction=list&n=10&adv=0&coteId=1&year=2016&number=41&version=F&dateFrom=&dateTo=&serviceId=&documentType=&title=&titleLanguage=&titleSearch=EXACT&sortBy=NUMBER&sortOrder=DESC.

[72] SWD(2017)25 final at 910.

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accession, pointed out an increase of corruption investigations against magistrates. This was "attributed to an increase in whistle-blowing" and not to a structural improvement of the formal integrity system. The report also praised the fact that the SCM had authorized all requests for the search and arrest of magistrates since 2007, and that it had regularly decided on the suspension of magistrates under criminal investigation. Although the 2017 report stresses that the progress in increasing the actual cases of accountability was slow, it also highlighted that, when the SCM decisions in disciplinary cases were appealed before the HCCJ, there were little variations in the recent years between the SCM and HCCJ decisions.

There is little public information regarding informal accountability, which may manifest itself in alternative types of "penalties" such as retirement requests, requests to leave magistracy, voluntary transfers to other courts, etc. An interesting case of "informal accountability" that ended up with a formal accountability decision was the one of a judge excluded from magistracy for lack of impartiality. The judge in question had participated, as a trainer, in training sessions organized by a Ministry of Agriculture Agency, for which she was remunerated. The National Agency for Integrity, at the request of the judge, had said that there was no formal incompatibility between the position of trainer and that of a judge. However, according to a previous decision of the SCM, judges can act as experts or trainers only in judicial training programs, whereas the training in question targeted experts in agriculture. Later on, the incumbent judge was a part of the panel that ruled in favour of the Ministry of Agriculture in a case. The SCM found that "as a consequence of the defendant's acts, the image of the judiciary was seriously affected as the regulation of the conflict of interests has a double purpose – the defence of the prestige of the judiciary and the prevention of situations that could cast a doubt on the public perception of the magistrate's impartiality".[73] Therefore, the seriousness of the offence determined the application of the most serious penalty – removal from magistracy. The judge filed an appeal at the HCCJ, which, in December 2017, removed the sanction and replaced it with a disciplinary reassignment to a judgeship at a Court of Appeal.[74]

There have been several proposals to introduce a special law on the accountability of magistrates, but this has never been formally initiated. Because the idea for such a legislative initiative has been used as a form of pressure on the judiciary by various political actors (the latest one being the PSD minister of justice in January 2017), the SCM as well as the representatives of magistrates in other organizations (such as the Union of Romanian Judges) advised against such a project.[75]

[73] SCM, Decision 1/J of February 2017. In April 2018, the same judge was excluded once again from magistracy, for a different offence.

[74] http://www.scj.ro/1094/Detaliidosar?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=100000000309773.

[75] http://www.digi24.ro/stiri/actualitate/csmlegearaspunderiimagistratilornuesteoportuna648378.

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The 2017-18 amendments of the Law on Judicial Organization[76] include some highly contested provisions regarding the accountability of magistrates, including the creation of a special section within the General Prosecutor's Office, specialized in investigating "criminal offences within the judiciary". Although this was strongly opposed by the associations of judges and seen by the SCM[77] as unnecessary and an indirect threat to judicial independence, the Constitutional Court, in its decision on the amended law before promulgation, stated that the creation of the new section is within the constitutional competence of the Parliament to legislate and therefore is not unconstitutional.[78]

In the context of accountability and legitimacy, a special reference must be made to the accountability of the SCM itself, which has been called "a chimera" by some authors.[79] The increase in SCM autonomy and powers in 2003-2004 meant that its own accountability to external authorities decreased exponentially. The only political authority still involved in the formation of the Council is the Senate, who appoints the two representatives of the civil society. The Senate also validates the election procedure of the SCM, but this is more of a formal power of the second chamber of Parliament, as any censorship can be imposed only regarding matters of legality. A higher degree of accountability usually increases the legitimacy of any public power. Therefore, the SCM's almost entire lack of accountability can call into question its legitimacy: "The fact that the overwhelming majority of the SCM members are elected by and from their peers and further officially validated (…) by the Senate causes that any connection between them and the citizens is broken".[80]

The legal dimension of legitimacy (i.e. the legitimacy of the SCM within the judiciary) is straightforward, as the Constitution and LSCM provide strict rules for the composition and election of the SCM. Respect for the rules of election has not been called into question thus far, but the election of the SCM members by their peers is not followed by any possibility of recalling them. The revocation from within of the de jure members of the SCM is virtually impossible, as their membership is due to their offices (president of the HCCJ, minister of justice, etc.).

[76] The Law was challenged at the Constitutional Court before promulgation, declared partly unconstitutional, was reexamined by the Parliament in March 2018 and is now pending promulgation.

[77] SCM, *supra* note 56 at 12. In March 2018, the Council of Europe's Group of States against Corruption adopted a Report which recommended the removal of this special section from the draft legislation. See GrecoAdHocRep(2018)2 at 17.

[78] RCC, Decision 33/2018. The new provisions are likely to enter into force later in 2018.

[79] Tănăsescu & Popescu, *supra* note 2 at 171.

[80] *Ibid*. at 172.

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In this context, the latent internal battle between judges and prosecutors or other internal conflicts may become challenges in themselves to judicial legitimacy. A famous conflict arose in 2013 after the election of a prosecutor as the SCM president. The judges protested and claimed that a prosecutor should never occupy this position.[81] As a result, a "turf war" started and two judges, members of the SCM – one of whom had been elected vice-president – were removed from the Council by the Plenum. This was possible only following the vote of the general assemblies of judges all over the country.[82] One month later, the Constitutional Court[83] declared that the legal texts setting the rules of removal were unconstitutional because they were unclear and infringed on the right to defence. As a result, the two members were reinstated.[84]

As for the latest elections of 2016, it must be noted that, although the elections of the magistrate-members were finalized in 2016, the Senate elected the representatives of the civil society only in September 2017. This was due to political battles within the parliamentary committee that had to advise the appointments. Therefore, instead of being actual representatives of the civil society, these members are appointed according to various political interests, which is a distortion of their actual role within the Council of being impartial members from outside of the judiciary.

To conclude, the SCM generally enhanced the idea of accountability and legitimacy within the system. Internal conflicts and a certain resistance to stronger rules on accountability remained, however, as perils to a more balanced relationship between independence and accountability.

D. Who's Afraid of Judicial Self-Government?

In spite of, or perhaps due to, its increased autonomy, judicial self-government may be perceived as a threat by a part of the civil society, as well as by other state powers, in the context of the variable public confidence in the judiciary and of the position of the judiciary within the separation of powers equation.

[81] http://stiri.tvr.ro/disputeledincsmconflictintrejudecatorisiprocurorialegerinetransparente_25751.html. *See* also Selejan-Guțan, *supra* note 7 at 195-96.

[82] http://www.hotnews.ro/stiriesential14305057decisivacsmalegereavicepresedinteluirevocareajudecatorilorcristidaniletalinaghicaordineaplenului.html

[83] RCC, Decision 196/2013.

[84] *See* also Iancu, *supra* note 28 at 192.

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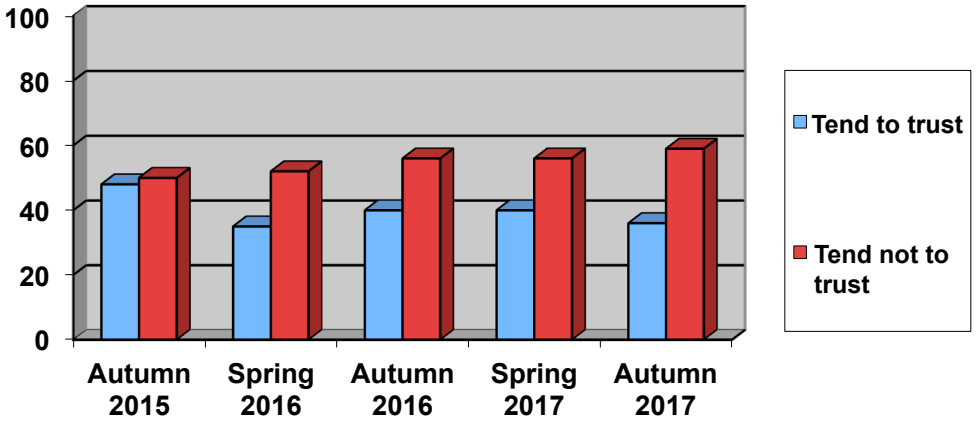
I. In Judges We Trust: Transparency and Public Confidence

Transparency and public confidence are strongly related: the degree of transparency is among the factors that affect the degree of public confidence in the judiciary. In the last decade, transparency in the judicial system has increased mainly at the level of outcomes (judicial decisions). There is also more public information on judges and prosecutors, especially as regards wealth statements and interest statements, which are now published on the SCM's website. This also improved the findability of information, as the new platform is easy to use. There is no detailed information about the magistrates' CVs or careers, only the list of all judges from each Court of Appeal's territorial jurisdiction. The transparency within the SCM was improved by the publication of the Council's decisions, but the hearings and deliberations are still closed to the public, so there is little transparency about how the Council comes to its decisions. As a notable recent exception, due to the high public and media interest in the matter, the SCM decided to provide a live broadcast of the hearing, by the Section for prosecutors, of the chief-prosecutor of the DNA in the case of her proposed dismissal by the Minister of Justice, on 27 February 2018.

In the communist period, one of the factors that negatively influenced the level of public confidence in the judiciary was the political influence of the ruling party, especially as regards the prosecuting offices (*procuratura*). In the post-communist period, especially during the transition years, the constitutional entrenchment of the independence of the judiciary was not sufficient by itself to establish a higher level of public confidence. Romania did not enact lustration legislation, therefore all judges from the communist regime maintained their positions, regardless of their background. That is why the level of public confidence in the judiciary was not particularly high in the first decade of the transition.

The situation changed with the reform of the SCM, which at first served as a strong incentive to increase public confidence in the judiciary, especially because it was perceived as distancing the SCM from political influence. Over the years, however, public confidence suffered variations. For example, in the last 2 years, public confidence in the judiciary decreased by 11% (from 48% in 2015 to 37% in 2017). It is however interesting that 55% of those who expressed a tendency to distrust the judiciary have formed this opinion as a result of debates and information from the media and only 25% based their views on actual facts (e.g. criminal convictions of judges, civil or criminal litigations in which they were involved, etc.). It is to be stressed in this context that the opinions within the civil society regarding the judiciary and judicial self-government are highly divided: a part of the society feels threatened by a too insulated judiciary, whereas another part strongly supports an increased degree of autonomy, seen as a shield against corruption.

Figure 4. Public trust in judiciary. Source: Eurobarometer[85]



In a national poll conducted in 2015, when the subjects were asked their opinion about the fact that numerous politicians are accused, judged and convicted of corruption, 47% of the responses were very favourable and 30% favourable, which means that 77% of all respondents strongly supported anti-corruption measures.[86] These results endorse my theory that the image of the judiciary in Romania is strongly linked to the fight against corruption.

The creation and the reform of the SCM influenced judicial performance values (efficiency, access, effectiveness, competence, fairness, etc.), but the only measurable data can be found in the Council's own reports on the "state of the judiciary".[87]

The quality of the process of selecting magistrates also affects public confidence. The National Institute of Magistracy ensures the selection and training of junior judges and prosecutors. Admission to the NIM is subject to a highly difficult national competition, organized in a transparent way, which ensures the quality of the trainees. The training itself at the NIM is very complex, covering theoretical and practical issues, including matters of European law and Human Rights law and it ends with a final exam that grants

[85] http://www.mediafax.ro/social/increderearomanilorinjustitiesisistemuljudiciarinscadereaccentuataeurobarometru15574460. For the 2017 data, http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/STANDARD/surveyKy/2143.

[86] Alin Gavreliuc, *"Dreptatea" și „apărătorii dreptății" în imaginarul social românesc. Studiu de caz corupția,* in DESPRE JURIȘTI (Raluca Bercea, Alexandra Mercescu ed, 2017) 336–337.

[87] The 2016 SCM Report, https://www.csm1909.ro/PageDetails.aspx?PageId=267&FolderId=3570.

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the trainees the right to become junior judges. Due to the better initial and continuous training of judges, but also to the publication of the case law, the quality of the decisions has improved over the years, especially as regards taking into account ECtHR and ECJ jurisprudence.

Other factors that affected public confidence were the appointments of senior prosecutors – the General Prosecutor of the HCCJ Prosecuting Office and the General Prosecutor of the DNA – but this was mainly due to political involvement in the nomination and appointment of the candidates than to the candidates themselves. Paradoxically, however, public trust in the DNA is still higher than public trust in the courts. This is due to the greater visibility of the institution regarding high level political corruption, despite the fact that some famous cases ended with acquittals or dismissals. The DNA is currently seen as the main vector of "purging" the society from the "corruption plague", especially in the wake of the repeated attempts by politicians to change the legislation and diminish the level of anti-corruption policies.

Scandals concerning judges and prosecutors accused of corruption or of being politically influenced (for example by "fabricating" files at political command in order to bring down the political opponents of powerful figures) could also influence public confidence in the judiciary. The media played a major role by inciting the view that a good part of the judiciary might be corrupt. It must be mentioned, though, that many of these media scandals were initiated by media trusts belonging to political magnates accused, in turn, of corruption or other criminal offences (money laundering, tax evasion, blackmail, etc.).[88]

The key public confidence issues on the judiciary in Romania are complex and multifarious. These concerns revolve around the activity of the judiciary, its effects on the public and the internal aspects of judicial organization. Among the salient factors that raised concerns on public confidence in judiciary are: independence and impartiality of individual judges and of the judiciary as a whole, length of proceedings, execution of judgments, and political pressures via media channels. Other internal challenges for the public image of the different parts of the judiciary, but which manifest periodically, are the appointment of top prosecutors and the elections for the SCM.

[88] For example, the campaigns against the former president of the High Court of Cassation and Justice, in which she was accused of manipulating evidence in a case against a person who accused her of not paying some private debts; the campaign against the general anticorruption prosecutor in which she was accused of plagiarizing her doctoral thesis. Some of the corruption scandals mentioned in the sections above were also important for the decrease in public confidence in the judiciary.

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II. Thy Shall Have No Other Master before Me: Judicial Self-Government, Separation of Powers and Democracy

After the demise of the communist dictatorship, the principle of separation of powers was placed at the foundation of the post-communist Romanian constitutional system. Although neither the draft Constitution, nor the first version of the 1991 Constitution expressly enshrined this principle, the division of the state functions was present in the "letter and spirit" of the text. In 2003, by constitutional amendment, the separation of powers was expressly entrenched in Article 1(4) CR: the separation and balance of powers are a founding principle of the state organization, "within the constitutional democracy". In the absence of a constitutional definition, the most important developments of the separation of powers are provided by the Constitutional Court[89] or come from institutional practices. In a teleological and extensive interpretation of the principle – not only as mutual control of competencies, but also as a guarantee of good functioning – the Court emphasized the "importance, for the good operation of the rule of law, of the collaboration of powers, which must manifest in the spirit of the rules of constitutional loyalty, loyal behaviour being a guarantee of the principle of separation and balance of powers".[90]

In this equation, the introduction of judicial self-government in 1991 was not in itself a critical change, because the first SCM and the judiciary as a whole were still the "weaker link" of the separation of powers scheme. The 2003 Constitutional amendment turned out to be a dramatic shift to another "extreme": from an almost complete dependence on the executive, to an almost complete autonomy. Although, through its appointment and election procedure, as well as through its composition, all state powers seem to be involved in the SCM, in practice the autonomy of the Council and, with it, of the judiciary, is very high. To wit, in the separation of powers scheme, the judiciary has gained a stronger voice, including the possibility to address the Constitutional Court when it considers that other powers transgress its competence. As the Constitutional Court has stated, the dialogue between powers and the principle of loyal cooperation could be the key to a harmonious application of the separation and balance of powers.[91]

The current structure of the SCM and the judiciary's position in the state powers architecture have also shifted the understanding of the democratic principle in the sense that there is virtually no control of elected institutions over "the least dangerous branch" – transformed into "the least accountable branch".[92] Nevertheless, the public reaction to

[89] RCC, Decision no. 63/2017.

[90] RCC, Decision no. 972/2012.

[91] *See* also Bogdan Dima, *The Authority of the Judicial Power,* in THE DIALOGUE BETWEEN THE JUDICIARY FROM ROMANIA AND THE OTHER AUTHORITIES OF STATE IN THE CONSOLIDATION OF THE RULE OF LAW (Rodica Aida Popa ed, 2016) 248.

[92] Kosař, *supra,* note 19 at 1.

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illegitimate interferences of political authorities and especially of politicians (MPs, presidents of the Chambers, ministers) with the competence of the judicial power has become stronger in the last five years, proving a better understanding of what liberal democracy means: a legitimate mutual control of powers through constitutional means and not the subordination of the judiciary to the elected institutions in the name of "democratic legitimacy".

From the point of view of the judiciary itself, the understanding of democracy has dramatically changed, especially after 2000. This did not happen necessarily due to the existence and actions of the SCM, but more under external pressure (ECtHR, EU) and internal influence (the Constitutional Court's case law). This is especially true for the understanding of human rights, legal certainty and other fair trial guarantees indispensable for a truly democratic society: "The judge is legitimate in a democratic system not only because it obeys the Constitution or the laws but also because it promotes the democratic values".[93] The understanding of democracy in a country (still) in democratic transition should include, besides the fact that the judiciary can and must "control" political authorities, a higher degree of accountability, through constitutional means that do not affect its independence, to citizens or their representatives. One of these means could be a judicial self-governing body capable of protecting the system from external and internal dangers.

E. Conclusions – Judicial Self-Government and Rule-of-Law in Romania

The apparently perfect Romanian "Euro-model" of judicial self-government is, therefore, subjected to important perils, both from the outside and from the inside of the judiciary. The passage, in 2004, of the SCM "from an extreme to another, from total dependence to total independence"[94] resulted in an increased autonomy of the judiciary, and in a greater authority of the SCM within the judicial system, but it had little effect on transparency and accountability. Moreover, even in such an autonomous form, the Romanian JSG system was not sufficient for protecting the true independence of the judiciary against repeated assaults from the political sphere.

The literature has criticized the fact that "the absolute independence of the judicial system from the whole rest of the Romanian state architecture, including from citizens – whom it is supposed to serve – raises serious questions and contributes to the all the more accentuated fragmentation of social cohesion in Romania".[95] In my view, although these criticisms are partly justified, the autonomy of the judiciary was established as a reaction

[93] Dima, *supra* note 90 at 249.

[94] Dima & Tănăsescu, *supra* note 30 at 142.

[95] *Ibid* at 139.

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to the tendency of the judiciary towards political obedience as well as to the high level of corruption that plagued the Romanian society. Therefore, this autonomy can still be deemed as the "lesser evil" in the big picture. If it were diminished at the present time, a certain backsliding would take place in this respect,[96] by encouraging the interference of political powers into judicial investigations and proceedings. This is proven by the repeated and aggressive attempts of the political power to diminish the anti-corruption tools, precisely on the grounds that the judiciary has gained too much power and autonomy.

Following unprecedented criticisms from the civil society, from the SCM and from a high number of magistrates, the Parliament has given up some of the dangerous changes that were initially proposed by the minister of justice in 2017, such as the placement of the Judicial Inspection under the authority of the Ministry of Justice. Nevertheless, many other new or amended provisions that menace judicial independence, especially as regards the anti-corruption fight, have remained in the adopted laws.[97] In May and June 2018, the Constitutional Court decided on two sets of unconstitutionality complaints against these laws. The new Law on Judicial Organization entered into force in July 2018, even with problematic changes that were however not dismissed by the Constitutional Court. Towards the end of the year, most of the other changes are expected to enter into force, despite further challenges at the Constitutional Court and despite the serious concerns raised by the European Commission in its latest CVM report.[98] The Romanian JSG model also has to fight against perils from the inside of the system: inner conflicts between the two branches of magistracy or within various institutions (e.g. DNA, SCM), lack of transparency, and the low accountability of judges, especially at higher courts and of the SCM itself. These threats may either turn the Romanian system from a "perfect" model on paper into a failed European experiment in practice, incapable of imposing the rule of law or, on the contrary, if resisted, may reinforce its position as a guardian of judicial independence and, indirectly, of the fight against corruption. The system is currently under constant and powerful pressure, but only the future will show its capacity to self-regulate and fulfil, despite the imperfections, its original task.

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[96] Venice Commission, *supra* note 7, §137.

[97] In its preliminary opinion, the Venice Commission also stated that: "Although welcome improvements have been brought to the drafts following criticism and a number of decisions of the Constitutional Court, it would be difficult not to see the danger that, together, these instruments could result in pressure on judges and prosecutors, and ultimately, undermine the independence of the judiciary and of its members and, coupled with the early retirement arrangements, its efficiency and its quality, with negative consequences for the fight against corruption", *supra* note 7, §162.

[98] *See* European Commission, COM(2018) 851 final, *Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism,* Strasbourg, 13 November 2018 at 17: "The entry into force of the amended Justice laws, the pressure on judicial independence in general and on the National Anti-Corruption Directorate in particular, (...) have reversed or called into question the irreversibility of progress."