



FIGHTING CORRUPTION WITH CON TRICKS: ROMANIA'S ASSAULT ON THE RULE OF LAW

David Clark



**FIGHTING CORRUPTION
WITH CON TRICKS:
ROMANIA'S ASSAULT ON
THE RULE OF LAW**

Executive Summary

Democracy in Europe is facing its greatest challenge since the fall of the Berlin Wall. The threat comes not only from the rise of political movements that openly reject liberal democratic values, including the governing parties of Hungary and Poland, but also from the risk of creeping authoritarianism caused by a gradual decline in standards of governance and the weakening of important democratic underpinnings, such as the rule of law.

Romania is a country of particular concern. Although it has earned international praise for its recent efforts to stamp out corruption, a detailed examination of Romania's anti-corruption activities shows that they often provide convenient cover for acts of political score settling and serious human rights violations. The methods used show a considerable degree of continuity with the practices and attitudes of the communist era.

The strong correlation between those targeted for prosecution and the interests of those in power is indicative of **politicised justice**. Cases have often been accompanied by campaigns of public vilification designed to maximise their political impact. Far from being above politics, Romania's National Anti-corruption Directorate (DNA) is an active participant in its partisan struggles.

Although the rule of law requires the justice system to work independently of government, there is clear evidence of **collusion between prosecutors and the executive** in Romania. It is apparent that politicians continue to exert considerable operational influence over the DNA using their control of key appointments and that high-profile investigations have been politically directed.

There is growing concern about the **covert role of the intelligence services** in directing anti-corruption prosecutions. The Romanian Intelligence Service (SRI) carries out 20,000 telephone intercepts on behalf of the DNA every year, initiates DNA investigations and, in its own words, regards the judicial system as a "tactical field" of operations. The government has refused to investigate allegations that the SRI has infiltrated the judiciary and prosecution services.

Both the SRI and the DNA have been criticised for **undermining judicial independence**. Judges who fail to do the DNA's bidding and rule in its favour have themselves become targets of investigation, while those deemed friendly to its interests have seen their loyalty repaid. A pliant judiciary willing to bend the rules helps the DNA to maintain extraordinary conviction rates of 92%.

Methods routinely employed by the DNA amount to serious **abuses of process** that would cause outrage in most democratic countries. These include parading those arrested in handcuffs for the benefit of the media, threatening the relatives of suspects with indictment as a form of leverage, offering suspects immunity in exchange for implicating someone more senior and newsworthy, remanding defendants in detention for long periods in order to punish and stigmatise them and systematically leaking evidence to the media to prevent a fair trial.

Important principles of justice enshrined in the European Convention on Human Rights and the EU's Charter of Fundamental Rights are being routinely violated as part of Romania's anti-corruption drive. These include the right to a fair trial, the right to a presumption of innocence and protection from inhuman and degrading treatment.

These infringements of human rights standards ought to be a matter of serious concern to Romania's international partners. Actions should include the following:

FIGHTING CORRUPTION WITH CON TRICKS

- The EU should maintain monitoring as part of the Co-operation and Verification Mechanism and supplement existing performance indicators with additional tools designed to assess the impact of anti-corruption policies on human rights and standards of justice.
- The European Commission should trigger its Rule of Law Mechanism designed to deal with emerging systemic threats to the rule of law within the EU.
- US State Department human rights reporting should reflect increased concern about the consequences of Romania's approach to fighting corruption.
- The UK should reform or replace the European Arrest Warrant (EAW) to include stronger human rights safeguards. Two recent cases have highlighted the ability of the Romanian authorities to use the EAW to pursue politically motivated legal actions through the UK courts.
- Pending a change in the current system, UK co-operation with Romania under the EAW should be suspended.

1. Introduction

The enlargement of the European Union (EU) to include ten former communist countries from Central and Eastern Europe in 2004-7 was conceived as a bold act of democratic consolidation. Integration into the institutions of a free Europe was supposed to make the region's political transition irreversible, just as it had done with the countries of Southern Europe a generation earlier. It hasn't worked out that way, at least not in the short term. Instead of a normalisation of democratic practices, there has been an unravelling of political reform among some of the new accession states since enlargement. If they were applying for EU membership today, at least two of them probably wouldn't qualify on political grounds.

The threat to democracy is most obvious in Hungary where the government of Viktor Orban has taken a pronounced authoritarian turn. Since winning a two-thirds majority in 2010, the ruling *Fidesz* party has packed the constitutional court with its own nominees, created a new media regulator with the power to fine critical news outlets and used police harassment to intimidate independent NGOs.¹ Poland has embarked on a similar trajectory since the victory of the hard right Law and Justice Party in presidential and parliamentary elections in 2015. Again, the ruling party is attempting to undermine the independence of the constitutional court and media regulation is being subordinated to political control.²

In seeking to remove checks and balances to their own power, the governments of Hungary and Poland are applying a template that is familiar to those who have studied 'managed' or 'illiberal' democracies elsewhere in the world. The challenge they pose is largely understood and European policy makers have attempted, however feebly, to push back against it. Other threats to standards of governance in Central and Eastern Europe have received far less attention because they are less visible. Indeed, some are so well disguised that they are barely recognised as such. Of these, the case of Romania is one that merits special scrutiny.

Romania's struggle to stamp out corruption and establish a properly functioning judicial system has been an issue of comment and concern for more than two decades. A special mechanism to monitor Romania's ongoing efforts to comply with European standards in these areas has been in place since it joined the EU in 2007.³ The official verdict is that progress is being made because more and more cases of high-level corruption are being successfully prosecuted in court.⁴ The reality, however, is more complicated. On closer inspection it becomes clear that Romania's apparent success in cracking down on corruption is being achieved at significant cost to human rights and the rule of law. Convictions are up, but corners are being cut in ways that violate some of the fundamental principles that are supposed to bind the democracies of Europe together. Even more troubling, cases cited below indicate that the justice system is being used to pursue political vendettas. In short, there are signs that Romania's anti-corruption drive has itself become a tool of corruption.

¹ 'Hungary - Freedom in the World 2016', *Freedom House*, 2016, available at: <https://freedomhouse.org/report/freedom-world/2016/hungary>, last visited: 4 December 2016.

² 'Poland - Freedom in the World 2016', *Freedom House*, 2016, available at: <https://freedomhouse.org/report/freedom-world/2016/poland>, last visited: 4 December 2016.

³ 'Assessing ongoing progress by Bulgaria and Romania', *European Commission*, available at: http://ec.europa.eu/cvm/index_en.htm, last visited: 4 December 2016

⁴ 'Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism', *European Commission* (2016), available at: http://ec.europa.eu/cvm/docs/com_2016_41_en.pdf, last visited: 4 December 2016, p. 10.

FIGHTING CORRUPTION WITH CON TRICKS

The purpose of this paper is to alert policy makers and other interested observers to this new and largely unacknowledged threat. The first section describes the emergence of corruption as a problem in post-communist Romania and the role it has played in relations with the EU. It shows that, in its desperation for signs that Romania is making the progress in the dealing with corruption, Brussels has ignored significant problems with the methods being used. The next section examines Romania's past and finds that many of its current judicial attitudes and practices owe more to the communist era than is commonly understood. This is followed by a description of the European values and commitments against which the integrity of Romania's anti-corruption efforts should be assessed. The remaining sections of this paper detail the specific ways in which Romania's judicial culture adversely affects its compliance with European standards. The paper concludes with some recommendations about how UK and EU policy makers should respond.

2. Corruption in Post-Communist Romania

A decade after it joined the EU, corruption remains a significant problem for Romania and a major source of concern for its international partners. The 2015 Corruption Perceptions Index, published by Transparency International, ranking 168 countries from least to most corrupt, put Romania in 58th place. Only two EU countries - Italy and Greece - were considered more corrupt. This represents, at best, a modest improvement on the 69th place it ranked in 2007 when it was granted EU membership. A 2016 Rand Europe study commissioned by the European Parliament put the cost to Romania of failing to reduce levels of corruption to the EU average at between \$16.2bn and \$33.4bn a year.⁵ A Eurobarometer poll conducted in 2013 showed that 25% of Romanian respondents had been asked for a bribe in the previous year, compared to 4% for the EU average.⁶

Corruption was identified as a problem at an early stage in the process of Romania's accession to the EU. The European Commission's opinion on its application for membership published in 1997 noted that "the appointment of political place-men to certain levels of the administration has in the past stimulated corruption" and concluded that "much still remains to be done in rooting out corruption".⁷ Unfortunately, pressure from the EU on Romania to increase the pace of economic liberalisation in order to complete its transition to a market economy had the unintended consequence of making the problem worse. As in Russia, the combination of weak public institutions and the opportunities created by privatisation allowed insiders to exploit their connections for personal gain. The most common forms of high-level corruption involved the sale of public property at below market value and favouritism in the awarding of public contracts, for which politicians received bribes in return.

The nature of Romania's 1989 revolution, in which a section of the communist apparatus was able to wrest leadership of the protest movement from a nascent opposition and relaunch itself as the National Salvation Front, meant that most of the old networks remained in place even as governance was supposedly being reformed. Those networks were ideally placed to help themselves to the spoils of economic liberalisation. As one authoritative account of Romania's post-communist transition described it:

EU-driven deregulation enabled different wings of the predatory elite to carve out domains of private power. These private fiefdoms are emerging as more influential than public agencies supposed to regulate and audit economic decision-making involving both the state and private enterprise. But the EU had insisted on rapid privatisation without ensuring that the political conditions would allow proper regulation.⁸

The EU's concerns became more pressing as the process of accession unfolded and it became obvious that Romania, along with Bulgaria, was trailing the other candidate countries of Central and Eastern Europe in its reform efforts. It was not considered ready to join the first group of countries to open formal accession negotiations in 1998. When negotiations did start two years later, they proceeded too slowly for Romania to be among the ten countries that joined in 2004. Its accession

⁵ 'The Cost of Non-Europe in the area of Organised Crime and Corruption, Annex II', European Parliamentary Research Service (2016), available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579319/EPRS_STU\(2016\)579319_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579319/EPRS_STU(2016)579319_EN.pdf), last visited: 4 December 2016, p. 44.

⁶ 'Special Eurobarometer 397 - Corruption', survey co-ordinated by the European Commission, Directorate-General for Communication (2014), available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf, last visited: 4 December 2016, pp. 80-1.

⁷ 'Agenda 2000 - Commission Opinion on Romania's application for Membership of the European Union', European Commission (1997), available at: http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/romania/ro-op_en.pdf, last visited: 4 December 2016, sections 1.1 and 1.3.

⁸ Tom Gallagher, *Romania and the European Union: How the Weak Vanquished the Strong* (Manchester University Press, 2009), p. 8.

FIGHTING CORRUPTION WITH CON TRICKS

date was set for 2007. The European Commission's 2002 progress report cited a failure to tackle corruption as one of the principal reasons for the delay:

Surveys indicate that corruption remains a widespread and systemic problem in Romania that is largely unresolved. Despite a legal framework that is reasonably comprehensive, and which has been expanded over the last year, law enforcement remains weak. New institutional structures have been created but are not yet fully operational... Corruption remains a common aspect of commercial operations but is also widely reported in dealings with public bodies as well as at the political level. Such high levels of corruption undermine economic development and erode popular trust in state institutions. Independent observers have concluded that there has been no noticeable reduction of corruption during the reporting period.⁹

Perceptions of Romania's performance started to improve in 2004 when the election of Traian Basescu as President led to the country's first major anti-corruption drive. Basescu, leader of the centre-right Democratic Party and a staunch critic of the post-communist elite, appointed a new government with a mandate to clean up politics. The state's investigative machinery was upgraded and put to work under the energetic leadership of Monica Macovei, the Minister of Justice. A string of indictments followed against high-profile figures, including eight members of parliament, two cabinet ministers, and nine judges and prosecutors. Most significantly, those charged included Adrian Năstase, the outgoing Social Democrat Prime Minister, who was eventually jailed in 2012 for the misuse of public funds.

Macovei's methods were controversial. Those indicted during her term in office were predominantly from rival political parties; she bypassed parliament to push through emergency ordinances allowing the electronic surveillance of suspects without a warrant; and she was criticised by prosecutors for exceeding her authority by interfering in their work.¹⁰ Yet none of this was referred to in the EU's monitoring reports. Desperate for signs of progress that would help to keep enlargement on track, there was little appetite in Brussels to look closely at the methods being used. The lesson the Romanian authorities took from this lack of scrutiny was they would be given a free hand for any actions that could be plausibly presented as part of their anti-corruption drive.

Despite an apparent improvement in the government's willingness to act, the EU came close to delaying Romania's accession by a further year, largely because of concerns about corruption. The European Commission's 2005 Comprehensive Monitoring Report acknowledged that there was greater political will to tackle the problem, but complained that it had yet to produce any tangible results: "The impact to date of Romania's fight against corruption has been limited, there has been no significant reduction in perceived levels of corruption and the number of successful prosecutions remains low, particularly for high-level political corruption".¹¹ Following this report, it became common for European policy makers to judge the seriousness of Romania's anti-corruption activities by the number of senior political figures convicted in court. As we shall see later, a narrow

⁹ '2002 Regular Report on Romania's Progress Towards Accession', European Commission (2002), available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2002/ro_en.pdf, last visited: 4 December 2016, p. 26.

¹⁰ Carmen, E., 'A Controversial Minister: Monica Macovei', *EuroZIU/A*, 6 March 2007, available at: <http://www.ziua.ro/display.php?data=2007-03-06&id=217053>, last visited: 4 December 2016.

¹¹ 'Romania: 2005 Comprehensive Monitoring Report', European Commission (2005), available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/sec1354_cmr_master_ro_college_en.pdf, last visited: 4 December 2016, p13.

reliance on this crude benchmark has impeded the EU's ability to assess the country's performance in meeting other important European commitments.

The compromise that cleared the way for Romania to join on its 2007 target date was that it would continue to be subject to post-accession monitoring through a new arrangement known as the Co-operation and Verification Mechanism (CVM). Regular reports from the European Commission would evaluate Romania's efforts to reform its judicial system and stamp out corruption against a set of broad targets, with compliance becoming a condition of its admission to the Schengen Area within which internal border controls have been abolished. These reports were generally positive about the progress being made, even though Macovei was removed from her post a few months after Romania joined the EU. The National Anti-corruption Directorate (DNA), in particular, was regularly singled out for praise in its apparent willingness to investigate and indict major public personalities.¹²

A serious crisis occurred in 2012 when the Social Democrats returned to power and called a referendum to impeach President Basescu. The CVM report issued at that time censured Victor Ponta, the Social Democrat Prime Minister, for attempting to undermine the authority and independence of the Constitutional Court. Emergency ordinances had been issued limiting the Court's ability to declare parliamentary acts unconstitutional, allowing the new government to lower the electoral threshold needed to win an impeachment vote. Ponta quickly backed down and the crisis passed when the referendum to impeach Basescu failed to meet the required quorum.

The European Commission's assessments since then have become increasingly positive in tone. In 2013, the appointment of Laura Kovesi as Chief Prosecutor of the DNA led to a new anti-corruption drive and a surge in the prosecution of high-level targets. As the 2016 CVM report approvingly noted: "DNA indicted over 1,250 defendants in the course of 2015, and this included the Prime Minister, former Ministers, Members of Parliament, mayors, presidents of county councils, judges, prosecutors and a wide variety of senior officials".¹³ Victor Ponta became the first sitting Prime Minister to be indicted on corruption charges before being forced to resign in November 2015. The assessment of the US government has been equally positive, with officials regularly praising Kovesi's work and using their influence to bolster the DNA.¹⁴ The American Ambassador in Bucharest has called on Romania's political parties to drop candidates charged with corruption.¹⁵

Just as the anti-corruption campaign of Monica Macovei convinced the EU to let Romania join on schedule in 2007, the campaign initiated by Laura Kovesi since 2013 seems to have opened the way for its accession to the Schengen Area. In 2016, the European Commission declared Romania ready to join and a political decision is now pending. Commission President Jean-Claude Juncker has also said that the monitoring of Romania under the CVM would come to an end by 2019 at the latest.¹⁶ Yet the assumption on which this is based – that the Romanian justice system now functions in line with European norms – remains open to challenge.

¹² 'Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism', European Commission (2008), available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0494&from=EN>, last visited: 4 December 2016, p. 3.

¹³ 'Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism', European Commission (2016), p. 10.

¹⁴ 'US Ambassador: I support DNA head's work', *The Romania Journal*, 20 October 2015, available at: <http://www.romaniajournal.ro/us-ambassador-i-support-dna-heads-work/>, last visited: 4 December 2016.

¹⁵ Paun, C., 'Romanians shouldn't vote for corrupt candidates: US envoy', *Politico*, 1 June 2016, available at: <http://www.politico.eu/article/romanians-shouldnt-vote-for-corrupt-candidates-us-envoy-hans-klemm/>, last visited: 4 December 2016.

¹⁶ Paun, C., 'Romania ready to exit EU corruption monitoring', *Politico*, 15 February 2016, available at: <http://www.politico.eu/article/romania-ready-to-exit-eu-corruption-monitoring-cooperation-verification-mechanism-timmermans/>, last visited: 4 December 2016.

FIGHTING CORRUPTION WITH CON TRICKS

Behind the headlines of fearless prosecutors making high-profile arrests, there are good reasons to be concerned about standards of justice in Romania for those who choose to look carefully. Far from proving it has addressed its governance problems, Romania's anti-corruption campaigns have often provided cover for political score settling and serious human rights violations that show a troubling disregard for the rule of law. Indeed, the methods used often show a considerable degree of continuity with the country's pre-democratic past. To understand how Romanian justice works today, it is necessary to look back at the communist era.

3. Romania's Communist Legacy and the Rule of Law

From 1947 to the fall of the Ceausescu regime in 1989, Romania stood out as one of the most brutal and repressive of the 'People's Democracies' established in Eastern Europe under Soviet auspices after the Second World War. The Romanian Communist Party managed to seize power through rigged elections, widespread intimidation and the murder of political rivals. It maintained its grip for four decades by establishing an extraordinarily pervasive apparatus of state repression. At the height of its operations, the Romanian secret police, the Securitate, had as many as half a million informants among a population of 22 million.¹⁷ Those deemed a threat to the regime were imprisoned and sometimes killed.

The law played an important role in establishing and legitimising one-party rule in Romania. In this it followed the precepts of 'socialist legality' developed in the Soviet Union. These were defined by Andrei Vyshinsky - the man who orchestrated the Moscow show trials as Joseph Stalin's chief prosecutor in the 1930s - as follows: "The dictatorship of the proletariat is authority unlimited by any statutes whatever. But the dictatorship of the proletariat, creating its own laws, makes use of them, demands they be observed, and punishes breach of them".¹⁸ The law was thus an instrument of political power in the hands of the state, not a means of holding the state to account, let alone safeguarding the rights of the citizen.

It was Vyshinsky who was sent by Stalin to co-ordinate the communist seizure of power in Romania after the war. One of his first steps was to use the Soviet Union's status as the occupying power to demand the formation of a coalition government in which the Ministry of Justice and the Ministry of the Interior were controlled by the Communist Party. Within months, the judiciary had been purged and subordinated to political control.¹⁹ With the police and the courts at their disposal, the communists were able to remove all remaining obstacles to their rule. Hundreds of opposition leaders and activists were arrested on trumped up charges and subjected to show trials on the Soviet model. The communists completed their takeover with proclamation of a 'People's Republic' in 1947 and the adoption of a Soviet-style constitution a year later.

It has been more than a quarter of a century since the communist system was overthrown and countless reforms have been enacted to bring the judicial system into line with European norms and Romania's international commitments. While these have succeeded in creating an institutional framework that outwardly conforms to the standards expected of an EU member state, the ability of the system to function in a way that respects European values in practice has frequently been undermined by attitudes and working methods that owe more to the communist era. Very little of this is acknowledged or understood, even by many organisations, politicians and policy analysts responsible for monitoring Romania's performance.

The first problem concerns the fundamental question of what the law is for. In the Western liberal tradition, the judicial system is a neutral and disinterested mechanism for upholding universal rights. The law constrains rulers and ruled alike, providing individuals with a right of redress against arbitrary government as well as a means for government to maintain public order. As we have already seen, communist regimes used the law as a political weapon, turning it into a tool of arbitrary

¹⁷ Stan, L., 'Inside the Securitate Archives', *Woodrow Wilson International Center for Scholars*, 4 March 2005, available at: <https://www.wilsoncenter.org/article/inside-the-securitate-archives>, last visited: 4 December 2016.

¹⁸ Vyshinsky, A.Y., *The Law of the Soviet State* (MacMillan, 1948), p. 48.

¹⁹ Lowe, K., *Savage Continent: Europe in the Aftermath of World War II* (Penguin, 2012), pp. 321-3.

government rather than a means of preventing it. As we shall come to see, there is considerable evidence that some of this mentality persists in modern Romania and that the law continues to function as a servant of the state.

The continued use of the judicial system as a political weapon is apparent in the tit-for-tat pattern of anti-corruption investigations involving senior public figures. Investigations often target the political opponents of whoever is in power, including senior members of opposition parties and internal party rivals. Waves of arrests are usually accompanied by campaigns of rhetorical denunciation aimed at maximising their political effect and establishing their guilt in the court of public opinion. Government figures display their power by using carefully staged public appearances to hint at imminent arrests and prosecutions. Evidence that the Romanian legal system does not operate as a neutral instrument of justice can also be found in conviction rates more typical of authoritarian regimes like China and Russia than a normal European democracy. With more than 90% of defendants found guilty, it is clear that courts work on the basis of a strong presumption in favour of the prosecution.²⁰ This lowers the threshold of proof, allowing convictions to be secured with evidence that would be considered unreliable or inadmissible in other parts of Europe. Judicial rulings sometimes explicitly confirm this pressure by stating that decisions favourable to defendants would be incompatible with public expectations.

A related set of concerns involves the failure of the Romanian justice system to maintain a proper separation of powers between the different branches of the state involved in its administration – the executive, the judiciary and the prosecution service. This a bedrock principle of liberal justice guaranteeing fair and impartial treatment for those brought to trial. Although Romania is meant to have incorporated it in its pre-accession reforms, the formal separation of powers is often subverted by the involvement of informal networks of power and influence. There have been notable examples of improper pressure being brought to bear in high-profile cases, along with evidence of collusion between judges, prosecutors and politicians. More worrying still, there are indications that the domestic intelligence agency – the successor to the Securitate – plays an important and mostly undisclosed role in directing prosecutions, producing evidence and influencing judges.

The final area where Romanian justice bears the imprint of the past is in its willingness to replicate major features of the communist-era show trial. Public figures charged with corruption usually begin their encounter with justice by being paraded in handcuffs for the benefit of the cameras. Prosecution evidence, including transcripts of telephone intercepts, is then selectively leaked to the media in order to reinforce the impression of guilt. Politicians, and even judges, offer negative comments about the behaviour of the defendant in a way that suggests the trial itself is going to be a mere formality. Having already been branded as a criminal, the defendant is turned into an outcast from society. It isn't enough to punish the alleged wrongdoer. The purpose of this PR circus is to attack and discredit what they represent – their political affiliation, their opinions or their business interests – and to ensure that anything less than a conviction in court would lead to a public outcry. Justice must serve the interests of propaganda.

²⁰ Harastasanu, A., 'Romania's anti-corruption fight sends mixed messages', Global Risk Insights, 5 July 2015, available at: <http://globalriskinsights.com/2016/07/romania-anti-corruption-fight-sends-mixed-messages/>, last visited: 4 December 2016.

4. Romania, European values and the fight against corruption

Given the extent of Romania's problem with corruption, the EU's determination to insist on change is entirely justified. Sovereignty sharing, free movement and economic integration make standards of law and governance in each member state the common interest of all. But corruption is not the only political issue raised by the most recent rounds of enlargement, and a single-minded focus on it to the exclusion of other considerations risks blinding policy makers to a serious deterioration in standards elsewhere. A more balanced understanding of the issues and how they relate to each other is needed.

The Copenhagen European Council in 1993 established a framework for assessing the membership prospects of countries that were still in the early stages of the transition to democracy. Known as the Copenhagen criteria, the conditions applying to new candidate countries were set out as follows:

Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.²¹

The political criteria for membership were subsequently elaborated in various documents published as part of the enlargement process or in parallel to it. One of the most important was the Charter of Fundamental Rights adopted by the EU in 2000 and incorporated into the Treaty of Lisbon nine years later. Building on the European Convention on Human Rights (ECHR), which candidate countries are required to ratify as part of the accession process, the Charter's preamble states the following:

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.²²

The main body of the Charter sets out these rights in more detail. Several of the most important relate to the administration of justice. The right to a fair trial is established in Article 47: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law". Article 48 states that: "Everyone who has been charged shall be presumed innocent until proved guilty according to law". Article 50 protects European citizens against the threat of legal persecution: "No one shall be liable to be tried or punished again in

²¹ 'Presidency Conclusions', Copenhagen European Council (1993), available at: http://www.europarl.europa.eu/enlargement_new/european_council/pdf/cop_en.pdf, last visited: 4 December 2016.

²² 'Charter of Fundamental Rights of the European Union', Official Journal of the European Union (2012), available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>, last visited: 4 December 2016.

criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law”.

The commitment to uphold fundamental European values applies to all aspects of government activity. States are obliged to fight corruption because it undermines the rule of law, corrodes democratic institutions, distorts the proper functioning of the marketplace and violates the principle of equality. At the same time, states are obliged to uphold the full range of European values in the way that they carry out that fight. Government ministers, prosecutors, law enforcement agencies and judges have a duty to respect human rights and act within the law. In the case of Romania, there are reasons to conclude that this has not been the case and that the country’s anti-corruption drive has led to serious lapses in standards of justice and the integrity of government. The main areas of concern include the politicisation of justice, collusion between prosecutors and the executive, the covert involvement of the domestic intelligence agency, attacks on the independence of the judiciary and abuses of process carried out by the DNA.

4.1. The Politicisation of Justice

The official assessment of the European Commission is that Romania is making progress in the fight against corruption and that the DNA acts as an “energetic and impartial prosecutor”.²³ As we shall see, this optimistic judgement is at variance with the facts. The pattern of prosecutions over the last 12 years seems to bear a clear relationship to the fortunes of the various political parties. Shortly before the parliamentary and presidential elections of 2004, Traian Basescu was accused by the DNA of corruption relating to his time as Minister of Transport in the 1990s. After becoming President, most of the significant political figures indicted came from the Social Democratic Party (PSD) and the National Liberal Party (PNL), rather than the Basescu’s Democratic Party. Indeed, the PNL ended its coalition with the President’s party in 2007 in protest at the way it was apparently being targeted. The most high profile indictment was against the former PSD Prime Minister, Adrian Năstase.

When the PSD returned to government in 2012 under Prime Minister Victor Ponta, a series of investigations was launched into critical media owners and members of President Basescu’s close circle and family. These investigations were sometimes accompanied by campaigns of public vilification led by Ponta himself and there is strong evidence, set out below, that at least some of them were politically instigated. Ponta looked set to increase his hold on power until, against expectations, he lost the presidential election in December 2014 to the main centre-right candidate, Klaus Iohannis of the PNL. Weakened by the loss, Ponta and a number of senior PSD colleagues were indicted on charges of tax evasion and money laundering by the DNA in July 2015. He eventually resigned as Prime Minister four months later following street protests sparked by the Colectiv nightclub fire in which 64 people died. Traian Basescu, having relaunched his political career with the formation of a new political party, also faces new charges of money laundering announced by the DNA in April 2016. The indictments forced Basescu to abandon his campaign for Mayor of Bucharest.

Those determined to avoid seeing any pattern to these cases can point to the fact that indictments have been issued against senior politicians from all of the major parties, even when those parties have been in power. Ponta, after all, was indicted while he was still Prime Minister. It would certainly

²³ ‘Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism’, European Commission (2012), available at: http://ec.europa.eu/cvm/docs/com_2012_410_en.pdf, last visited: 4 December 2016, p. 11.

be false to suggest that the DNA works purely in the interests of whichever party happens to be in power at the time. Its structures are too diffuse for that, with individual prosecutors appointed at different times, under different governments, pursuing their own investigations and agendas. Yet there is ample scope within this system for different political interest groups to assert their influence. The DNA must be understood as an integral part of the ever-revolving carousel of alliances, interests and enmities that defines Romanian politics. To imagine that it is impartial just because it is capable of hitting out in multiple directions at once betrays a certain naivety about how the country works.

4.2. Collusion between prosecutors and the executive

The extent to which supposedly independent public prosecutors in fact rely on political patronage was revealed in a deal struck in May 2013 between President Basescu and Prime Minister Ponta over senior appointments to the General Prosecutor's office, the DNA and the Directorate for the Investigation of Organised Crime and Terrorism (DIICOT). Prosecutors are officially appointed by the President on a recommendation from the Ministry of Justice, but with the two branches of the executive locked in bitter personal conflict, it became impossible to agree a common list of names. The solution was to divide up the posts, with each side allowed to appoint their own preferred candidates. Laura Kovesi, Basescu's choice, was appointed as head of the DNA and Tiberiu Nitu, who is close to Ponta, became General Prosecutor, despite previously being vetoed by Basescu.²⁴ The appointments were criticised by the outgoing head of the DNA, Daniel Morar, on the basis that neither candidate was qualified.²⁵ What was described as a power-sharing deal looked, in reality, more like a power-splitting arrangement producing a bifurcated structure designed to serve two masters.

Another significant appointment that seems to have been part of the deal was that of Danut Volintiru, who became a prosecutor in the DNA's central office in June 2013 and was promoted to the post of Division Deputy Chief Prosecutor four months later on a recommendation from Ponta's Minister of Justice. The two men have known each other since at least 2004 when Ponta was elected to parliament representing the county of Gori and Volintiru became head of the DNA's regional office there. The nature of their relationship has become the subject of investigative reports alleging that Volintiru's wife received a suspiciously large notary payment of around €130,000 in March 2015 from the state-owned Oltenia Energy Complex.²⁶ The payment was approved by its General Manager, Laurentiu Ciurel, a prominent PSD member who is now a co-defendant in the money laundering case against Ponta. The allegations in that case relate to illegal payments from 2007-8 linked to the Rovinari Energy Complex based in Gori, which was headed at the time by Ciurel. As head of the DNA office in Gori during the period in which the payments were said to have been made, Volintiru closed two other investigations into Ciurel.

Volintiru's first major case in his new post was an investigation into Dan Adamescu, a prominent German businessman of Romanian birth who owned Romania Libera, one of the country's leading daily newspapers. Romania Libera had been a persistent critic of the PSD and a tireless campaigner against corruption over many years. An investigation was already underway into allegations of bribery in an insolvency case involving two of Adamescu's businesses, but the inquiry was focused on two

²⁴ 'Romanian president appoints prosecutors picked by PM', *Reuters*, 15 May 2013, available at: <http://uk.reuters.com/article/uk-romania-justice-idUKBRE94E14M20130515>, last visited: 4 December 2016.

²⁵ 'Romania - Nations in Transit 2014', *Freedom House*, 2014, available at: <https://freedomhouse.org/report/nations-transit/2014/romania>, last visited: 4 December 2016.

²⁶ 'Procurorul Dănuț Volintiru, numărul 3 din DNA, acuzat că primește bani de la un învinuit în dosarul Dan Șova', *BI*, 23 March 2015, available at: <http://www.b1.ro/stiri/eveniment/procurorul-danut-volintiru-numarul-3-din-dna-acuzat-ca-primeste-bani-de-la-un-invinuit-in-dosarul-dan-sova-106352.html>, last visited: 4 December 2016.

judges and an insolvency administrator. Within a few weeks of Volintiru's appointment, Adamescu had become the target and intercepts were ordered on his communications.

In May 2014, a lawyer employed by the insurance company confessed to bribery under interrogation and was given immunity from prosecution in exchange for implicating Adamescu. Another lawyer committed suicide shortly after being questioned. On 24 May, Prime Minister Ponta gave an interview on national television in which he talked about the case:

Traian Basescu is one of the main beneficiaries of Mr Adamescu's media support. Mr Adamescu publishes a newspaper that strongly campaigns against corruption. I think that this man, who has himself led a network of corruption to such great effect over a period of many years, presents himself as a publisher who speaks about the fight against corruption... I am convinced that we will shortly be hearing even more things about this from the state prosecutor's office.

Within two weeks, Adamescu had been arrested, charged and remanded in custody. That Ponta had inside knowledge of the investigation and advanced warning that an arrest was about to happen is undeniable. This in itself is proof of collusion and improper contact between prosecutors and the executive. Given Ponta's deep personal animosity towards Adamescu and his relationship with Volintiru, it is also impossible to avoid the conclusion that the investigation was politically driven from the start. In January 2015, after a legal process that featured countless procedure violations, Adamescu was found guilty on the uncorroborated testimony of a single co-operating witness and sentenced to four years and four months in prison.

Further indications of the unhealthy relationship between prosecutors and politicians emerged recently in the form of allegations against the head of the DNA, Laura Kovesi. Leading businessman and PSD parliamentarian, Sebastian Ghita, who has been indicted for money laundering along with Ponta, made a statement to the General Prosecutor's office in September 2016 alleging that he and other leading figures close to Ponta participated in a cover-up to protect Kovesi from accusations of plagiarism in 2012 when she was the General Prosecutor.²⁷ Kovesi at the time faced allegations that she had plagiarised her doctoral thesis, but according to Ghita, the expert report clearing her of the charge was written by the government, not by an independent committee, as previously stated. An investigation has been opened and Kovesi denies the claims. If correct, however, they would make a nonsense of the DNA's carefully cultivated reputation as an independent and fearless pursuer of the truth.

4.3. The Role of the Intelligence Service

The reality of the DNA's relationship with politics is indicative of a system in which there is still no proper separation of powers and the judicial process is open to manipulation for partisan advantage. Yet government and the political parties are not the only power centres capable of exerting improper influence over the direction of anti-corruption prosecutions. In a country where memories of the Securitate are still fresh, there are also major concerns about the role that the domestic intelligence agency plays within the criminal justice system.

²⁷ 'Romanian MP reignites media scandal about alleged plagiarism by anti-graft prosecutor', *Romania-Insider.com*, 27 September 2016, available at: <http://www.romania-insider.com/romanian-mp-reignites-media-scandal-alleged-plagiarism-chief-anti-graft-prosecutor/>, last visited: 4 December 2016.

The Romanian Intelligence Service (SRI) is the lineal descendent of the Securitate, having taken over its infrastructure and most of its personnel in 1990. Concern has long centred on the SRI's communications surveillance operations and the post-communist period featured several scandals involving phone-tapping activities that were supposed to have been banned. Phone tapping without a warrant was revived for anti-corruption investigations under Monica Macovei and the DNA has become heavily dependent on the support of the intelligence services in providing evidence from intercepts. According to the DNA's own reports, the SRI listens to an average of 20,000 telephone conversations a year in pursuit of anti-corruption investigations, ten times the number of intercepts conducted for reasons of national security.²⁸ According to Victoria Stoiciu of the Friedrich-Ebert-Stiftung (FES), Romanian courts granted 16 times more phone-tapping mandates in 2015 than the US.²⁹ In February 2016, Romania's Constitutional Court declared the use of SRI phone-tapping evidence by the DNA to be unconstitutional, even with a warrant.³⁰ The Government issued an emergency ordinance a month later allowing SRI phone-tapping for the DNA to continue despite the fact that the Romanian constitution states that laws concerning rights and freedoms cannot be changed by decree.³¹

The SRI's involvement in the judicial sphere goes well beyond the passive role of supplying technical support in communications surveillance to anti-corruption prosecutors. In April 2015, a senior SRI General, Dumitru Dumbrava, gave a revealing interview in which he described how his agency intervenes in the prosecution of cases:

Specifically, if a few years ago we believed that we achieved our goal once the DNA was notified, for example, if we subsequently withdrew from the tactical field once the court was notified by the indictment, appreciating (naively as we can say now) that our mission had been completed, we now maintain our interest until the final settlement of each case.³²

The revelation that the SRI regards the legal system as a "tactical field" of operations, in which it retains an active role during court hearings, offers a direct parallel with the past. In common with the secret police of other communist regimes, the Securitate infiltrated the judiciary as a way of increasing its control over society and there have been long-standing suspicions that the practice has continued into the democratic era. Dumbrava's interview caused uproar within the judiciary. Organisations representing judges, such as the Romanian Union of Judges (UNJR) and the Centre for Judicial Resources, raised concerns that SRI operatives were active within the prosecution service and the head of the Superior Council of Magistrates (CSM) called on the President to look into the allegations.³³

The controversy prompted MEDEL, an association representing judges in 13 European countries, to warn that the SRI was "undermining the independence of the judiciary and threatening the

²⁸ 'Romania - Nations in Transit 2016', *Freedom House*, 2016, available at: <https://freedomhouse.org/report/nations-transit/2016/romania>, last visited: 4 December 2016.

²⁹ 'În România au fost date de 16 ori mai multe mandate de interceptare pe siguranța națională decât în SUA', *mediafax.ro*, 31 October 2016, available at: <http://www.mediafax.ro/social/in-romania-au-fost-date-de-16-ori-mai-multe-mandate-de-interceptare-pe-siguranța-națională-decat-in-sua-15887928>, last visited: 4 December 2016.

³⁰ Romanian Intelligence Service wiretapping is unconstitutional, Court rule', *Romania-Insider.com*, 18 February 2016, available at: <http://www.romania-insider.com/romanian-intelligence-service-wiretapping-is-unconstitutional-court-rules/>, last visited: 4 December 2016.

³¹ 'PM Dacian Cioloș, first reaction in phone tapping ordinance scandal: "SRI cannot be a criminal prosecution body except in cases that concern national security and terrorism"', *nineoclock.ro*, 14 March 2016, available at: <http://www.nineoclock.ro/pmi-dacian-ciolos-first-reaction-in-phone-tapping-ordinance-scanal-sri-cannot-be-a-criminal-prosecution-body-except-in-cases-that-concern-national-security-and-terrorism/>, last visited: 4 December 2016.

³² 'Dumitru Dumbravă: SRI este unul dintre anticorpii bine dezvoltati și echipati pentru însănătoșirea societății și eliminarea corupției', *juridice.ro*, 30 April 2015, available at: <http://www.juridice.ro/373666/dumitru-dumbrava-sri-este-unul-dintre-anticorpii-bine-dezvoltati-si-echipati-pentru-insanatosirea-societatii-si-eliminarea-coruptiei.html>, last visited: 4 December 2016.

³³ 'Romania - Nations in Transit 2016', op. cit.

democracy in Romania”. In addition to criticising the failure to investigate suspicions that undercover SRI agents have penetrated the judiciary, the MEDEL statement questioned the legality of the SRI’s wider involvement in court hearings:

We are also concerned about the SRI’s acknowledgment in its 2014 activity report that this intelligence agency constantly took actions in order to assess the quality and consistency of the information addressed to the prosecutor’s office, the accuracy of the judicial argumentation and, respectively, the relevancy of the evidence. In other words, SRI acts as an active party in the trial, which is strictly and totally prohibited by law.³⁴

An even more sinister example of the SRI’s reach into the judiciary came in January 2015 when the Constitutional Court struck down a cyber-security bill that would have given the intelligence services unprecedented access to personal computer data. The Court had already declared two other security bills supported by the SRI to be unconstitutional. The day after the vote, one of the Constitutional Court judges responsible for the decision, Toni Grebla, was arrested by the DNA and accused of using his influence to circumvent sanctions against Russia.³⁵ This led Daniel Morar, a fellow judge on the Constitutional Court, and Laura Kovesi’s predecessor as head of the DNA, to complain publicly that the SRI was attempting to intimidate the Constitutional Court and that these attempts were unlawful.³⁶

The timing of Grebla’s arrest leaves little room for doubt about its intended effect. Any evidence that he was guilty of criminal wrongdoing would have been known to prosecutors before the Constitutional Court’s ruling. The decision to arrest him afterwards was an act of retribution and a sign that, when necessary, Romanian justice still works according to the old Soviet principles of ‘*kompromat*’ and ‘hyper-legalism’. Intelligence services in the Soviet bloc would gather compromising materials, real or fake, on their own citizens. These could then be used, at the convenience of the state, to punish acts of dissent through what appeared to be normal and unrelated legal proceedings. The technique is still used in Russia today, and apparently also in Romania. This explains why so many recent anti-corruption investigations involve the resurrection of old allegations from a decade ago or longer. The evidence has been saved up for the right moment.

This point is illustrated again in the case of Elena Udrea, a high-profile parliamentarian close to former President Basescu. On 29 January 2015, a few weeks after standing in the presidential election as the candidate of the newly launched People’s Movement Party (a centre-right rival to the PNL of President Iohannis), Udrea was questioned by the DNA on suspicion of money laundering and falsifying her declaration of assets. The following day she made a statement alleging that the acting Director of the SRI, Florian Coldea, had asked her ex-husband, Dorin Cocos, for €500,000 to support Romania TV, the television station owned by PSD politician and Ponta ally Sebastian Ghita.³⁷

³⁴ European magistrates concerned that the involvement of the secret services in the Romanian judiciary process has not been clarified yet’, *unjir.ro*, 21 November 2015, available at: <http://www.unjr.ro/2015/11/21/european-magistrates-concerned-that-the-involvement-of-the-secret-services-in-the-romanian-judiciary-process-has-not-been-clarified-yet/>, last visited: 4 December 2016.

³⁵ Romanian Constitutional Court judge, accused of corruption’, *Independent Balkan News Agency*, 22 January 2015, available at: <http://www.balkan.eu.com/romanian-constitutional-court-judge-accused-corruption/>, last visited: 4 December 2016.

³⁶ ‘Daniel Morar, judecător CCR: “Amenințările SRI la adresa Curții Constituționale au depășit cadrul legal. Așa ceva nu se întâmplă într-o țară civilizată”’, *adevarul.ro*, 4 June 2015, available at: http://adevarul.ro/news/societate/interviu-daniel-morar-judecator-ccr-amenintarile-sri-adresa-curtii-constitucionale-depasit-cadrul-legal-asa-e-neacceptat-intr-o-tara-civilizata-1_556f20d3cfbe376e35e4060f/index.html, last visited: 4 December 2016.

³⁷ ‘When the Blond lady sings’, *Independent Balkan News Agency*, 31 January 2015, available at: <http://www.balkan.eu.com/weekly-review-blonde-lady-sings/>, last visited: 4 December 2016.

Shortly after making the allegation, the DNA issued three arrest warrants on the same day against Udrea. The charges concerned allegations that in 2009 her then husband had participated in a public procurement scam involving the sale of Microsoft software. They claim that, as his wife, she benefited from the proceeds and must have known that they were corruptly obtained. The DNA successfully appealed for her parliamentary immunity to be lifted and she was remanded in custody for seven days. She was re-arrested a month later over allegations that she accepted bribes and misused public funds in the organisation of a boxing match in 2011 when she was Tourism Minister. This time she was held in preventive detention for 72 days. A fifth arrest warrant in a new case, centred on a property acquisition, was issued the following October. In the midst of this unprecedented barrage of legal action, the file concerning Udrea's allegations against Florian Coldea was quietly closed by the DNA in March 2015.

Laura Kovesi gave an interview in September 2015 in which she claimed that the role of the SRI in her agency's work had been exaggerated. Only 24 DNA cases that year had been opened on referral from the SRI, she said.³⁸ That any cases at all were initiated on that basis is a shocking enough admission given Romania's past. Two dozen is quite enough for the secret state to exert an undue influence on public life. Moreover, Kovesi omitted to say what additional support the SRI provided in cases it didn't initiate. In what cases did the SRI act as instigator? What role did they subsequently play in each case? What due diligence, if any, did the DNA carry out to verify the credibility of any evidence supplied to them from intelligence sources? And in how many other cases did the SRI play a significant role? Despite what appears to be an unhealthy and almost completely undisclosed relationship between the DNA and the SRI, these are the questions that no one in a position to get answers seems to want to ask.

4.4. Judicial Independence Under Attack

The relationship between judges and prosecutors is another area where the separation of powers is regularly undermined. The conviction rate in cases prosecuted by the DNA is a staggering 92% and the agency has a bureaucratic interest in making sure it stays that way. This can only be achieved if the scales of justice are tipped heavily in its favour and the court system functions on a presumption of guilt. To that end, the DNA uses various tactics of intimidation and incorporation to ensure that judges co-operate in keeping the conviction rate as high as possible.

One method is for the DNA to open investigations against judges that anger it by acquitting defendants. This creates a climate of fear that skews judicial decision-making. Corruption within the judiciary is undoubtedly a problem in Romania and combatting it has become a higher priority for the DNA in recent years. Yet there are questions about whether its role as the investigating authority in cases of judicial corruption creates a conflict of interests. That power can be abused, as it was in the Grebla case.

Prosecutors have also been accused of using heavy-handed tactics to monopolise judicial governance. In 2013, they managed to elect one of their own as head of the Superior Council of Magistrates (CSM), the governing body that controls judicial appointments. This provoked a negative reaction from judges who attempted to overturn the decision on the basis that prosecutors

³⁸ Kovesi: Din 4.200 de dosare la DNA, 24-deschise anul acesta ca urmare a sesizărilor SRI și 204-urmare sesizărilor MAI, *agerpres.ro*, 24 September 2015, available at: <http://www.agerpres.ro/justitie/2015/09/24/kovesi-din-4-200-de-dosare-la-dna-24-deschise-anul-acesta-ca-urmare-a-sesizarilor-sri-si-204-urmare-sesizarilor-mai-21-45-34>, last visited: 4 December 2016.

are constitutionally subordinate to the Ministry of Justice and some of them are suspected of being SRI officers. The reaction of the DNA was to open investigations against two of the CSM judges who had led the protest.³⁹ Although the investigations were subsequently dropped, this incident demonstrated the readiness of the DNA to abuse its power for political ends.

Just as the DNA is willing to target judges deemed unfriendly to its interests, it is equally willing to do favours for those thought to be on its side. This was illustrated in the bizarre case of Mariana Rarinca, prosecuted by the DNA on charges of blackmail in 2014. Rarinca worked as a secretary for a lawyer who was married to the then head of Romania's Supreme Court, Livia Stanciu. In June 2014, Rarinca was arrested by a SWAT team and charged with attempting to extort €20,000 from Stanciu and her husband. She was held for six months in preventive detention. Rarinca denied blackmail and claimed that the only money she asked for was a much smaller amount that she was owed as back pay. She was found guilty and given a three-year suspended sentence, but the verdict was overturned on appeal in May 2015.

The ruling could not be allowed to stand because Judge Stanciu was known to prosecutors as a reliable ally. In a glowing tribute to the DNA delivered in February 2014, Stanciu described herself as a “trusted partner” of the agency.⁴⁰ Its officers set out to repay that loyalty. The two appeal court judges who ruled in Rarinca's favour, Risantea Gagescu and Damian Dolache, were placed under investigation and the DNA took the exceptional step of demanding an extraordinary revision of the final judgement. Rarinca was effectively re-tried in September 2015 and the original guilty verdict was re-imposed along with the sentence. In 2016, President Iohannis promoted Livia Stanciu to sit on the Constitutional Court

The use of sticks and carrots ensures that the DNA usually gets what it wants. This means that the court environment can be extremely hostile to defendants. The treatment of Dan Adamescu, the newspaper owner prosecuted in 2014, is a vivid example. In denying Adamescu's application for bail at his first court appearance, the judge referred to “the seriousness of the illegal actions committed by him”, as if these had already been proved, and added that Adamescu “must be exposed to public shame”. At a subsequent hearing, the judge cited Adamescu's unwillingness to admit his guilt as a reason for keeping him in pre-trial detention.⁴¹ The case was later cited by Fair Trials International in its submission on the EU's proposed directive on the presumption of innocence.⁴²

4.5. DNA Abuses of Process

The DNA is a rare example of a government agency that is almost universally feted at home and abroad. Its head, Laura Kovesi, gets glowing coverage in the international media and has received countless awards, including a *Légion d'honneur* and the 2016 Reader's Digest European of the Year. The DNA is regularly held up by Western leaders as an example for other countries to follow. Its approval ratings within Romania are exceptionally high. Bureaucratic self-interest means that the agency has a strong motive for defending its reputation as an energetic, fearless and successful

³⁹ ‘Romania - Nations in Transit 2014’, op. cit.

⁴⁰ A Picurat Numai Miere’, *luju.ro*, 27 February 2014, available at: <http://www.luju.ro/magistrati/dna/a-picurat-numai-miere-prezenta-la-bilantul-dna-pe-2013-sefa-iccj-livia-stanciu-a-tras-niste-laude-care-i-au-facut-pe-multi-dintre-procurorii-din-sala-sa-se-simta-stingeriti-dragi-colegi-procurori-ati-demonstrat-ca-reprezentati-o-institutie-eficienta-func>, last visited: 4 December 2016.

⁴¹ ‘The European Arrest Warrant is making Britain complicit in political persecution’, Daily Telegraph, 19 October 2016, available at: <http://www.telegraph.co.uk/news/2016/10/19/the-european-arrest-warrant-is-making-britain-complicit-in-polit/>, last visited: 4 December 2016.

⁴² ‘Joint position paper on the proposed directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings’, Fair Trials International (2014), available at: <https://www.fairtrials.org/wp-content/uploads/Presumption-of-Innocence-Position-Paper2.pdf>, last visited: 4 December 2016.

instrument of law enforcement by keeping conviction rates as high as possible, especially against the kind of high-profile targets that generate favourable media headlines. Its public standing is such that it doesn't feel inhibited in the methods it deploys, many of which would cause outrage were they to be used in the UK or other European countries.

In order to inflate its success rate, the DNA adopts the loosest possible interpretation of what constitutes corruption. Article 297 of Romania's criminal code includes an offence of "abuse of office". With no clear definition of what this means, prosecutors have been able to pursue politicians and officials for a wide range of executive acts, many of which would not be considered corrupt in any other part of the EU. For example, the DNA pursued charges of manslaughter and abuse of office against the former Deputy Prime Minister, Gabriel Oprea, after a police outrider was killed in a traffic accident while escorting the minister's official car in October 2015. Riding a wave of public resentment at the perks enjoyed by the political elite, the DNA argued that Oprea was not entitled to a police escort.⁴³ What may well have constituted an abuse of privilege warranting a ministerial resignation in most countries could be classified as a criminal act of corruption under the broad terms employed by Romanian prosecutors.

According to Kovesi's estimate, up to 42% of all DNA cases concern abuse of office, suggesting that a large proportion of the offences it investigates are not corruption in the generally accepted definition of the term. In June 2016, the Constitutional Court ruled that Article 297 could only apply to abuses of office involving acts specifically defined as criminal. In other words, it would no longer be possible to prosecute individuals for executive acts simply because the DNA considered them deficient or mistaken. In advance of the ruling, Kovesi aggressively lobbied against any narrowing of the definition, drawing a complaint from the National Union of Judges that she was exerting "a form of pressure on the Constitutional Court, which is not in accordance to the magistrate's statute and to the principle of separation of powers".⁴⁴ It remains to be seen what impact the Court's decision has on the scope and conduct of cases brought by the DNA.

Another area of concern relates to the range of intimidatory tactics used by the DNA in pursuit of its targets. A clue to one of these can be found in the agency's own published data. Of the 10,947 cases that remained open in 2015, only 1,258 resulted in indictments. To have such a large group of individuals with the threat of indictment hanging over them suits the purposes of prosecutors in gathering evidence. In some cases, investigations are opened against members of a suspect's family as a way of exerting pressure and forcing a confession. At other times the objective is to use the threat of indictment to extract a witness statement against another target. In the style of a classic witch-hunt, and with the goal of maximising media impact in mind, minor suspects are offered immunity from prosecution in exchange for implicating someone more important.

Pressure is also exerted on suspects through the routine use of pre-trial detention. Romanian law allows courts to order pre-trial detention periods of up to 180 days during the investigative phase. A report compiled by the Bucharest-based NGO, the Association for the Defence of Human Rights in Romania-Helsinki Committee, found that pre-trial detention is used significantly more often than other preventive measures, that courts lean heavily in favour of prosecution arguments and that the most common reason given by judges for granting their requests is the seriousness of the alleged

⁴³ Romania's former deputy PM may face trial over motorcade scandal', *Reuters*, 25 January 2016, available at: <http://uk.reuters.com/article/uk-romania-corruption-idUKKCN0V318Z>, last visited: 4 December 2016.

⁴⁴ 'CCR: 'Deficiently' in relation to abuse of office means 'in breach of law', *nineoclock.ro*, 16 June 2016, available at: <http://www.nineoclock.ro/ccr-deficiently-in-relation-to-abuse-of-office-means-in-breach-of-law/>, last visited: 4 December 2016.

offences, which is a breach of guidelines established by the European Court of Human Rights.⁴⁵ Courts frequently grant DNA requests for pre-trial detention in high-profile corruption cases, despite the non-violent nature of the crime and the availability of alternatives, such as house arrest or judicial control. This helps to stigmatise the accused, reinforce the impression of guilt and disrupt efforts to prepare a successful defence. Romania's cramped and unsanitary prison conditions mean that pre-trial detention has also become a kind of punishment before the fact. Prison standards are so bad that between 1998 and 2015, the European Court of Human Rights found Romania guilty of 178 violations of Article 3 of the ECHR prohibiting inhuman or degrading treatment. The court recorded 27 violations in 2015 alone.⁴⁶

There is a pattern to the way that some of the DNA's most important cases have unfolded. The handcuffed suspect is frogmarched to detention in front of the cameras. Incriminating testimony is extracted from colleagues and acquaintances with the threat that they too face indictment unless they co-operate. A perfunctory court hearing orders the suspect to be detained on remand as if to prove how dangerous he or she is. The process culminates with a blizzard of negative media coverage as carefully edited transcripts of telephone intercepts that could only have come from the DNA or SRI are systematically leaked to the press. By the time the suspect is delivered to court, the possibility of a fair trial has already been extinguished.

Most of these techniques featured in the case of Alina Bica who was the Chief Prosecutor of DIICOT when she was dramatically arrested by the DNA on suspicion of bribery and abuse of office in November 2014. Initially accused of accepting bribes for approving land compensation at above market value when she worked with the National Authority for Property Restitution, Bica served eight months of pre-trial detention in a prison alongside many people she had helped to convict. Her husband was arrested on tax evasion charges that were subsequently dropped and even her lawyer was detained at one stage. DNA files detailing new charges covering her work at DIICOT were leaked to the press a month after her initial arrest. Bica's friendship with Elena Udrea even became an issue. Udrea and her husband were linked to the accusations against Bica and surveillance photos of the two women on holiday together in Paris surfaced in the media. As Bica commented: "It feels like the 1950s when the communists came. You get called an enemy of the state, you get put in the truck... they damage your family".⁴⁷

Bica was a powerful figure within the Romanian elite at the time of her arrest, but she appears to have upset people who were more powerful still. By her own account, she had repeatedly crossed swords with Florian Coldea of the SRI:

He used to call me and make demands that I always refused. For example he would make a demand that a specific person be arrested in the coming August. When I would refuse, telling him there was not enough evidence, he would respond by saying: 'You are not right for the position you are in. You should change or you will not end well.'

She also suspects that the case against her was provoked by her 2012 decision to open an investigation into allegations of theft and corruption at the state gas company, Transgaz in which one

⁴⁵ 'Is pre-trial detention used as last resort measure in Romania?', Association for the Defence of Human Rights in Romania-the Helsinki Committee (2015), available at: <https://www.fairtrials.org/wp-content/uploads/Pre-trial-detention-in-Romania-by-APADOR-CH.pdf>, last visited: 4 December 2016.

⁴⁶ 'Romania's Minister of Justice admits to lying to the European Court of Human Rights', *Global Risk Insights*, 21 October 2016, available at: <http://globalriskinsights.com/2016/10/romania-justice-minister-lies-to-court/>, last visited: 4 December 2016.

⁴⁷ 'Romania's results on anti-corruption come at a high cost to human rights', *EU Reporter*, 16 February 2016, available at: <https://www.eureporter.co/frontpage/2016/02/16/romania-results-on-anti-corruption-come-at-a-high-cost-to-human-rights-the-pursuit-of-alina-bica/>, last visited: 4 December 2016.

FIGHTING CORRUPTION WITH CON TRICKS

of its then directors, Sergiu Lascu, was a key suspect. It looked like a routine enquiry, but it was only after the DNA moved against her that she realised who her suspect was. Sergiu Lascu is the brother of Laura Kovesi.

5. Conclusions and Recommendations

In July 2012, the European Commission and several EU member states issued a strongly worded *démarche* against the Romanian government, which at the time was locked in its impeachment struggle with President Basescu. It accused Prime Minister Ponta of weakening constitutional checks and balances, undermining the rule of law, intimidating the judiciary and using emergency ordinances to bypass the constitution. The threat that Romania would face serious consequences was only lifted when the government agreed to back down.

This makes it all the more extraordinary that the European Commission has remained completely silent as the Romanian authorities have continued to plunder the same toolbox of authoritarian techniques as part of their anti-corruption campaign. The separation of powers has been subverted by the willingness of prosecutors to collude with politicians, who in turn – together with the domestic intelligence agency – exert pressure on the judiciary. The government has circumvented the Constitutional Court with the use of an emergency ordinance in a policy area that affects fundamental rights and freedoms. What was considered unacceptable as part of an internal power struggle in 2012 is now apparently allowed in the service of the surveillance state and its anti-corruption bureaucracy in 2016. The EU's willingness to turn a blind eye to these abuses goes beyond mere negligence and constitutes a form of culpability in undermining the values on which it is supposed to be based.

The figures published by the DNA about its own work are intended show its officers heroically succeeding against the odds. In 2015 alone, it maintained 10,947 active cases, charged 1,258 individuals and secured convictions in 92% of its cases, all with a mere 131 prosecutors on its payroll.⁴⁸ Instead of being cause for praise, these figures should give rise to reasonable suspicion that Romania's system of justice is, in fact, fundamentally flawed. Prosecutors in the more established and better-resourced legal systems of Europe's mature democracies typically secure conviction rates in the range of 70-80%. How is it that the DNA manages to achieve so much more with so much less?

The answer, of course, is that corners are being cut and results are being achieved at a heavy cost to standards of justice. As the abuses catalogued above show, the right to a fair trial before an independent and impartial tribunal established in Article 47 of the EU's Charter of Rights (Article 6.1 of the ECHR) has been repeatedly infringed as a result of the covert relationships linking politicians, prosecutors, judges and intelligence operatives. This has led to a spate of selective and politically charged prosecutions in which the accused have been given little meaningful opportunity to defend themselves. As has been shown, the specific right to a presumption of innocence enshrined in Article 48 of the Charter (Article 6.2 of the ECHR) has been a major casualty. Even the protection offered by Article 49 of the Charter against legal persecution by re-trial was clearly infringed in the *Rarinca* case.

There can be no doubt that among the hundreds of people tried and convicted of corruption in Romania each year, a large proportion are guilty of serious offences. Yet, given the major flaws and lapses highlighted in this paper, there can be little doubt that these figures also include a significant number of innocent people who have become victims of grave miscarriages of justice. This cannot

⁴⁸ 'Why the UK should Reform or Exit the European Arrest Warrant: Problems and Excesses of the Romanian Anti-Corruption Fight', The Hampden Trust (2016), available at: <http://www.tfa.net/wp-content/uploads/2016/09/finalversion2.0-1.pdf>, last visited: 4 December, p. 18.

be a matter of indifference to those responsible for defending European values and ensuring compliance with the EU's treaties, however important they regard the fight against corruption.

It is time for Romania's transatlantic partners to take a closer and more sceptical look at how that country is pursuing its anti-corruption campaign. Recommendations that follow the conclusions of this report are as follows:

- CVM monitoring by the EU should be maintained and enhanced with quantitative indicators supplemented by quality-control procedures that enable it to assess the practical impact of anti-corruption policies on human rights and standards of justice.
- The European Commission should trigger its Rule of Law Mechanism established in 2014 as a tool for dealing with emerging systemic threats to the rule of law among EU member states.⁴⁹ This establishes a three-stage process in which the Commission, in dialogue with the member state, produces an assessment, issues recommendations and then monitors their implementation. The use of this mechanism should be considered appropriate because of the overwhelming evidence that Romanian justice remains systemically flawed.
- The US government should use its influence to ensure that Romania fights corruption in a way that is consistent with the rule of law and its international human rights obligations. The State Department's human rights reporting should reflect growing concern about the methods currently being used. At the moment, this problem is largely glossed over.

The implications for the UK in the context of Brexit are different. Although the official position of the British government is that it will continue to play a full role in the EU as long as the UK is a member state, its capacity to influence the future of an organisation it intends to leave has already become negligible. However, the UK will continue to belong to several multilateral organisations with an interest in standards of democracy and human rights. This includes the Council of Europe, the Organisation for Security and Co-operation in Europe and NATO. The first two, in particular, have effective tools for monitoring compliances with European standards and the UK should be active in promoting their use in the case of Romania.

Perhaps the biggest question facing the UK in relation to human rights in Europe concerns the future of the European Arrest Warrant (EAW) post-Brexit. The EAW was sold during the referendum as a positive reason for staying in the EU because it enables the rapid extradition of suspects between different member states. Unfortunately, the assumption on which the EAW is based – that all EU countries respect the same high standards of justice – is clearly false. It is an example of the EU's tendency to make big integrationist leaps on the basis of wishful thinking.

The EAW would have needed significant reform even if the UK had voted to stay in the EU because its effect is to turn the British legal system into an extension of legal systems, like Romania's, that fail to respect basic rights. The risk to human rights in the UK has been highlighted by two recent cases involving Romania. The first concerns Alexander Adamescu, son of Dan Adamescu, who has become the target of an EAW request here in the UK where he lives as a writer with his wife and three children. The younger Adamescu angered the Romanian authorities by repeatedly challenging their treatment of his father, so they applied for an arrest warrant in Bucharest on 4 May 2016. When this was rejected on 19 May, the case was reassigned to a different judge, although the

⁴⁹ 'A new EU Framework to strengthen the Rule of Law', European Commission (2014), available at: http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf, last visited: 4 December 2016.

documentation required to certify that this had been done randomly, in accordance with the law, was not provided. The new judge ordered another hearing at only 30 minutes notice and summoned Alexander Adamescu at the door of the court. The hearing started at 2.40pm and lasted for roughly 40 minutes. By 3.40pm Alexander Adamescu's arrest warrant was on its way to the police. It had taken the judge barely 20 minutes to deliberate, take a decision and hand down his ruling.

It is obvious that the judge could not have considered all of the case papers, which contained a total of 37 arch lever files. Needless to say, the written judgement repeated word for word the arguments used by the DNA. The sentence was instantaneously leaked to the media. By 5pm a major Romanian newspaper had posted an article about the judge's ruling online. Adamescu's lawyer didn't receive the judgement until the following day. An EAW request was then sent to the UK authorities and Adamescu was arrested as he was about to address a public meeting in London on 13 June. No evidence of criminal wrongdoing has been presented and none is needed under the EAW. The charges against Alexander Adamescu are identical to the ones levelled against his father. His chances of receiving a fair trial in Romania are non-existent, yet the grounds for contesting his extradition are extremely narrow.

The second case involves Stuart Ramsay, a Sky News journalist who ran a report about gun running in Romania in August 2016. Officials in Bucharest strongly disputed its findings, but instead of limiting themselves to a formal denial, they decided to charge Ramsay and his colleagues with the crime of "spreading false information". Romania's Directorate for Combatting Terrorism and Organised Crime has approached the UK with a formal request for legal assistance. An EAW may follow, but even if it doesn't, the message is clear: journalists expressing opinions that incur the disapproval of the Romanian state will need to watch their backs.

The fact that judicial cooperation can be used by a foreign government to pursue political grudges and attack free speech on British soil shows that a successor agreement to the EAW is needed that includes stronger human rights safeguards. Recommendations for the UK are therefore as follows:

- A reformed EAW or successor agreement should give courts in the UK explicit authority to refuse an extradition request if there are reasonable grounds to believe that the requested person's fundamental rights, as defined in the ECHR and the EU's Charter of Rights, could be infringed. The most important of these should be the right to a fair trial.
- Pending a review that amends or replaces the current arrangement, co-operation with Romania under the EAW should be suspended.

The response of Romania's partners to the surge of anti-corruption prosecutions has been to accept at face value the claim that the country is finally getting to grips with its biggest problem. At a time of unprecedented international turmoil, there is a receptive audience in Western capitals for the idea that there might be one less thing to worry about. Yet the price of this inattention could be to store up even bigger problems for the future. The first and most obvious danger is to the integrity of the EU and its system of sovereignty sharing. In the same way that Greece falsified its national accounts in order to meet the convergence criteria for monetary union, Romania is falsifying the results of its anti-corruption drive in order to secure accession to the Schengen zone. The EU's willingness to believe the convenient fiction that progress is being made risks exposing it to a form of political contagion. How long before others realise that a war against corruption offers a scrutiny-free opportunity to cut corners and ignore fundamental rights?

FIGHTING CORRUPTION WITH CON TRICKS

The danger for the West as a whole is that a deterioration of judicial standards could quickly morph into something far worse if it is allowed to go unchecked. It is easy to take the view that the ends justify the means when it comes to stamping out corruption, but it is much harder to control what happens once that logic takes root. Authoritarian tools fashioned for one purpose can readily be used for another, especially when governing elites have already managed to weaken the checks and balances meant to hold them to account. That is why moral relativism has no place when it comes to human rights and the rule of law. Democracy in Europe is facing its greatest challenge since the fall of the Berlin Wall. In addition to the threat posed by those who openly question the values on which modern Europe is based, there is a risk that some countries will succumb to a process of creeping authoritarianism that is more difficult to deal with because it is harder to spot. The sooner that problem is recognised and addressed, the easier it will be to secure Europe's long-term democratic future.



First published in 2016 by The Henry Jackson Society

Millbank Tower
21-24 Millbank
London
SW1P 4QP

www.henryjacksonsociety.org

© The Henry Jackson Society 2016
All rights reserved

The views expressed in this publication are those of the author and are not necessarily indicative of those of The Henry Jackson Society or its Trustees.

ISBN 978-1-909035-28-7

£10 where sold