

TESTIMONY OF DAVID CLARK

Democracy in Europe is facing its greatest challenge since the fall of the Berlin Wall. This takes a variety of forms, such as the rise of populist and extremist movements, the re-emergence of authoritarian and illiberal political practices, and a decline in standards of governance. These trends are strongly, though not exclusively, represented in some of the former communist countries of Central and Eastern Europe. Notable examples include Hungary and Poland, where authoritarian governments have weakened judicial independence and undermined media freedom.

Romania should also be regarded as a country of concern due to longstanding and unresolved problems with corruption and the rule of law. The mass protests that forced the Romanian government to abandon efforts to limit the scope of anti-corruption investigations in January showed that there is overwhelming support for firm action in this area. Yet the strength of public feeling sometimes means that anti-corruption work is subject to inadequate scrutiny. In addition to dealing with many genuine acts of criminality, there are grounds for concluding that Romania's anti-corruption campaign has also provided convenient cover for acts of political score settling and serious human rights violations that show troubling disregard for the rule of law. Indeed, the methods used often show a considerable degree of continuity with the practices and attitudes of the communist era.

The conduct of Romania's anti-corruption campaign gives rise to five areas of specific concern.

1. The politicisation of justice: The claim that Romania's National Anti-corruption Directorate (DNA) and Directorate for the Investigation of Organized Crime and Terrorism (DIICOT) act as impartial prosecutors is difficult to reconcile with the facts. There has often been a strong correlation between those targeted for prosecution and the interests of whoever happens to be in power at the time. Cases have sometimes been accompanied by campaigns of public vilification designed to maximise their political impact. Far from being above politics, the DNA and DIICOT are active participants in its partisan struggles.
2. Collusion between prosecutors and the executive: The rule of law requires a separation of powers in which prosecutors act independently of the executive. In Romania, it is apparent that politicians have at times exerted considerable operational influence over the DNA using their control of key appointments. There is evidence in several cases to indicate improper contact between the DNA and the government, and suggest that investigations have been politically directed.
3. The covert role of the intelligence services: The Romanian Intelligence Service (SRI), successor to the communist-era Securitate, plays a significant and largely undisclosed role in directing anti-corruption prosecutions. It 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. These activities have not been adequately scrutinised and the government has refused to respond to calls from organisations representing Romanian judges to investigate suspicions that the SRI has infiltrated the judiciary and prosecution services.

4. Lack of respect for judicial independence: Both the SRI and the DNA have been criticised for undermining judicial independence, another core principle of liberal justice. 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%. One senior judge on the Constitutional Court has also accused the SRI of unlawfully attempting to intimidate him and his colleagues.
5. Abuses of process by anti-corruption prosecutors: Methods routinely employed by the DNA are incompatible with standards that apply 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 in advance of their trials and systematically leaking evidence to the media to preclude a fair hearing in court.

The 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 campaign. Political motive, abuses of process, collusion between different branches of the state and the subversion of judicial independence mean that defendants are often denied the right to a fair trial before an independent and impartial tribunal established in Article 6.1 of the ECHR. The right to a presumption of innocence set out in Article 6.2 has been another major casualty of the DNA’s determination to maximise conviction rates. Prison conditions are so poor that the widespread use of pre-trial detention often results in inhuman and degrading treatment in breach of Article 3.

When challenged on these points, the DNA is quick to resort to intimidatory tactics in order to silence its critics. I experienced this personally after a report I had written detailing many of these concerns was published in January of this year. I have provided a copy of that report to the Commission. Following widespread media coverage of the report, the DNA initiated an official inquiry by the Superior Council of Magistracy, which ruled against me on 9th May. In a bizarre example of Soviet-style doublethink, my work in exposing violations of judicial independence in Romania was itself deemed to be an assault on judicial independence. This process was intended to be intimidatory, revealing the DNA to be an organisation that operates without respect for core

democratic principles, including freedom of speech and the independence of civil society.

The infringements of human rights taking place under the banner of anti-corruption ought to be a matter of serious concern to Romania's international partners. The rule of law is a vital pillar of democratic governance and its weakness in Romania constitutes a major systemic risk in a strategically important region of Europe. The problem, as we saw with the protests earlier this year, is that Romanian politicians are not trusted to supervise the work of anti-corruption prosecutors. The DNA, DIICOT and the SRI exploit that fact to operate beyond the boundaries of legitimate scrutiny, in effect constituting a state within a state.

In the absence of domestic authorities trusted to exercise the usual powers of democratic oversight, greater external supervision is required. The European Union should maintain its monitoring of Romania as part of its 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.

The US also has an important role to play as the senior member of NATO and Romania's most important ally. State Department human rights reporting should reflect increased concern about the consequences of Romania's approach to fighting corruption. Particular attention should be given to the question of whether Romania's domestic intelligence service operates under effective civilian control, as required by the terms of NATO membership. Additional tools should also be used to deal with the politicisation of justice. In at least one high profile case, there are strong grounds for triggering the provisions of the Global Magnitsky Human Rights Accountability Act against individual human rights abusers in positions of authority.

SUBMISSION ON THE HUMAN RIGHTS IMPLICATIONS OF ROMANIA'S ANTI-CORRUPTION PROCESS

1) Introduction

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 European Union (EU) in 2007. The official verdict is that progress is being made because more and more cases of high-level corruption are being successfully prosecuted in court.

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 and North America together. Even more troubling, there are clear examples of the justice system being used to pursue political vendettas and of state agencies involved in anti-corruption work operating beyond the boundaries of democratic scrutiny, effectively as a state within a state. In short, there are signs that Romania's anti-corruption drive has itself become a tool of corruption.

2) Corruption in post-communist Romania

A decade after it joined the EU, corruption remains a huge problem for Romania and a major source of concern for its international partners. The 2015 Corruption Perceptions Index, 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.¹ 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.²

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

¹ [The Cost of Non-Europe in the area of Organised Crime and Corruption, Annex II, European Parliamentary Research Service, March 2016, p44.](#)

² [Special Eurobarometer 397 - Corruption, February 2014, pp80-1.](#)

rooting out corruption”.³ 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 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 date was set for 2007.

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. The state’s investigative machinery was upgraded and put to work under the energetic leadership of the Minister of Justice, Monica Macovei. A string of indictments followed against high-profile figures, including the outgoing Social Democrat Prime Minister, Adrian Năstase, but the methods used were often controversial. Those indicted during Macovei’s 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.⁴

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 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.

In 2013, the appointment of Laura Kovesi as Chief prosecutor of the National Anti-corruption Directorate (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 1250 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

³ [Agenda 2000 – Commission Opinion on Romania’s application for Membership of the European Union, July 1997, Sections 1.1 and 1.3.](#)

⁴ [A Controversial Minister: Monica Macovei, EuroZIUA, 6 March 2007.](#)

wide variety of senior officials.”⁵ The Social Democrat leader, 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.

The return of the Social Democratic Party (PSD) to power following parliamentary elections in December 2016 triggered a domestic political crisis when the new government introduced an emergency decree intended to limit the scope of anti-corruption investigations and pardon many already convicted. The measures decriminalised ‘abuses of office’ involving amounts less than €44,000 and would have overturned the 2015 conviction of PSD leader, Liviu Dragnea, for election fraud. The self-serving motive behind the changes provoked legitimate and widespread concern that the fight against corruption was under threat. After a week of mass street protests and criticism from Romania’s Western partners, the decree was withdrawn on 5th February 2016.

Romania clearly needs to maintain and step up its efforts to stamp out corruption. Yet the tendency of ordinary citizens and foreign observers to measure Romania’s progress by the scale and intensity of anti-corruption activity means that the conduct of state agencies responsible for carrying it out is subjected to inadequate scrutiny. Far from showing that Romania is moving in the right direction, the attitudes and working methods of these agencies often exhibit a disturbing level of continuity with the communist past.

This is particularly evident in the continued use of the legal system as a political weapon rather than an impartial instrument of justice, in the failure to maintain a proper separation of powers between the different branches of the state responsible for the administration of justice and in extraordinarily high conviction rates more typical of authoritarian regimes in which courts operate on a strong presumption in favour of the prosecution. Romanian justice even continues to mimic features of the Communist era show trial, including the ritual humiliation and public denunciation of defendants, the disproportionate and routine use of pre-trial detention, and the use of black propaganda, such as the pre-trial leaking of evidence to the media.

3) Democratic values and the fight against corruption

Romania’s commitment to respect democratic values is set out in numerous international treaties and instruments, including the membership requirements of the various international organisations to which it belongs, such as the EU, OSCE, Council of Europe and NATO. The Charter of Paris obliges OSCE members to uphold human rights, democracy and the rule of law. Its Office of Democratic Institutions and Human Rights monitors the activities of member states to ensure that standards are maintained through the conduct of free

⁵ [Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, 28 January 2016, p10.](#)

and fair elections, as well as the establishment of strong and independent systems of justice.

In theory, the EU has some of the most developed instruments for enforcing democratic standards. The 1993 Copenhagen Summit 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."⁶

The political criteria for membership were subsequently elaborated in various documents published as part of the enlargement process or in parallel to it, such as the Charter of Fundamental Rights adopted by the EU in 2000 and incorporated into the Treaty of Lisbon nine years later. 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 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."⁷

The commitment to uphold fundamental democratic 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 meant to uphold democratic standards in the way 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 and DIICOT.

3.1) 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

⁶ [Presidency Conclusions, Copenhagen European Council. 21-22 June 1993.](#)

⁷ [Charter of Fundamental Rights of the European Union, Official Journals of the European Union, 26 October 2012.](#)

“energetic and impartial prosecutor”.⁸ Unfortunately, this optimistic judgement is at variance with the facts. The pattern of prosecutions over the last twelve 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 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 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 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.

3.2) 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

⁸ Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, 18 July 2012, p11.

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.⁹ The appointments were criticised by the outgoing head of the DNA, Daniel Morar, on the basis that neither candidate was qualified.¹⁰ 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. Ponta and Volintiru 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. 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 focussed on two 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 24th May, Prime Minister Ponta gave an interview on national television in which he talked about the case in the following terms:

⁹ [Romanian president appoints prosecutors picked by PM, reuters.com, 15 May 2013.](#)

¹⁰ [Nations in Transit 2014 - Romania country report, Freedom House.](#)

“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, there are grounds for suspecting that the investigation was politically driven from the start. Indeed, evidence currently under consideration by the British courts indicates that Adamescu was imprisoned because senior politicians and officials colluded to frame him. In January 2015, after a legal process that featured countless procedural 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. He was still in detention in January 2017 when he died of an infection contracted in prison. According to his family, he had been denied adequate medical treatment.¹¹

3.3) 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.

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

¹¹ [How Romania’s inhumane prison system led to the tragic death of a campaigning newspaper owner, David Hencke, byline.com, 26 January 2017.](#)

number of intercepts conducted for reasons of national security.¹² According to Victoria Stoiciu of the Friedrich-Ebert-Stiftung (FES), Romanian courts granted sixteen times more phone-tapping mandates in 2015 than the US.¹³ 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.¹⁴ 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.¹⁵

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.”¹⁶

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.¹⁷

The controversy prompted MEDEL, an association representing judges in thirteen European countries, to warn that the SRI was “undermining the independence of the judiciary and threatening the democracy in Romania”. In addition to criticising the failure to investigate suspicions that undercover SRI

¹² Nations in Transit 2016 - Romania country report, Freedom House.

¹³ În România au fost date de 16 ori mai multe mandate de interceptare pe siguranța națională decât în SUA, mediafax.ro, 31 October 2016.

¹⁴ Romanian Intelligence Service wiretapping is unconstitutional, Court rule, Romania-Insider.com, 18 February 2016.

¹⁵ 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.

¹⁶ Dumitru Dumbravă: SRI este unul dintre anticorpii bine dezvoltăți și echipați pentru înșănătoșirea societății și eliminarea corupției, juridice.ro, 30 April 2015.

¹⁷ Nations in Transit 2016, op cit.

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."¹⁸

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. 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.¹⁹

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 29th 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.

¹⁸ [European magistrates concerned that the involvement of the secret services in the Romanian judiciary process has not been clarified yet, unjr.ro, 21 November 2015.](#)

¹⁹ [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.](#)

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 seventy-two 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 twenty-four DNA cases that year had been opened on referral from the SRI, she said.²⁰ 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.

The DNA and SRI form a tight nexus of power based on mutual co-operation and support. The relationship between DIICOT and the SRI is equally close, although even less transparent due to DIICOT's national security remit. Senior prosecutors and intelligence officers both benefit from this relationship. The DNA gets covert assistance through the provision of surveillance capabilities and the support of SRI operatives and agents of influence working in public service and the media. This enables the DNA to maintain a high rate of successful prosecutions and strengthen its bureaucratic powerbase. In return, the SRI expects and receives the right to initiate the prosecution of certain individuals by indirect and deniable means. This gives it enormous power, including over politicians nominally responsible to holding the SRI to account. The ability of the DNA/SRI nexus to operate effectively as a state within a state has potentially serious implications for the maintenance proper constitutional order.

3.4) 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. One example of this is the

²⁰ [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.](#)

frequency with which trials result in cut-and-paste justice, with the judge's ruling reproducing, word for word, the prosecution's written submission. To achieve these results, 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 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.²¹ 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 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.²² 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-

²¹ Nations in Transit 2014, op cit.

²² [A Picurat Numai Miere, luju.ro](http://A.Picurat.Numai.Miere.luju.ro), 27 February 2014.

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.²³ The case was later cited by Fair Trials International in its submission on the EU's proposed directive on the presumption of innocence.²⁴

3.5) 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 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 most Western 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.²⁵ What may well have constituted an abuse of privilege warranting a ministerial resignation in most countries

²³ [The European Arrest Warrant is making Britain complicit in political persecution, Daily Telegraph, 19 October 2016.](#)

²⁴ 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, November 2014.

²⁵ [Romania's former deputy PM may face trial over motorcade scandal, uk.reuters.com, 25 January 2016.](#)

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".²⁶ 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 1258 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 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 offences, which is a breach of guidelines established by the European Court of Human Rights.²⁷ 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

²⁶ CCR: 'Deficiently' in relation to abuse of office means 'in breach of law', nineoclock.ro, 16 June 2016.

²⁷ Is pre-trial detention used as last resort measure in Romania?, Association for the Defence of Human Rights in Romania-the Helsinki Committee, September 2015.

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.²⁸

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 cooperate. 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."²⁹

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 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

²⁸ [Romania's Minister of Justice admits to lying to the European Court of Human Rights, globalriskinsights.com, 21 October 2016.](http://globalriskinsights.com)

²⁹ [Romania's results on anti-corruption come at a high cost to human rights, eureporter.co, 16 February 2016.](http://eureporter.co)

her that she realised who her suspect was. Sergiu Lascu is the brother of Laura Kovesi.

4. Conclusions and Recommendations

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 1258 individuals and secured convictions in 92% of its cases, all with a mere 131 prosecutors on its payroll.³⁰ 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 submission, 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 be a matter of indifference to those responsible for defending democratic values and ensuring Romania's compliance with its international obligations, 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. The EU's CVM monitoring needs to be maintained and enhanced with quantitative indicators supplemented by quality control procedures that enable the EU to monitor the practical impact of anti-corruption policies on human rights and standards of justice. The Commission should also trigger its Rule of Law Mechanism established in 2014 as a tool for dealing with emerging

³⁰ [Why the UK should Reform or Exit the European Arrest Warrant: Problems and Excesses of the Romanian Anti-Corruption Fight, The Hampden Trust, 2016, p18.](#)

systemic threats to the rule of law among EU member states.³¹ 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.

These concerns should also be reflected in US policy. The State Department's human rights reporting needs to cast a more critical eye on standards of justice and the rule of law in Romania. Serious consideration should be given to the question of whether Romania is meeting its NATO commitment to ensure civil control of the military in view of the SRI's ability to operate beyond the boundaries of democratic accountability. US policy makers should also explore the potential for applying the provisions of the Global Magnitsky Human Rights Accountability Act to target individual human rights abusers in positions of authority in Romania, specifically in the case of Dan Adamescu. In understand that evidence about to be presented in a British court currently considering a Romanian extradition request against his son, Alexander Adamescu, indicates that the businessman was framed and imprisoned as the result of a high level conspiracy involving the government, the DNA and the SRI. I have become aware that a confidential internal report prepared by the British Foreign Office within the last year likewise concluded that Adamescu senior was framed. Given his subsequent death due to mistreatment in detention, the parallels with the Magnitsky case are obvious and pertinent.

³¹ [A new EU Framework to strengthen the Rule of Law, European Commission, 19 March 2014.](#)