

# Special Report

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# European Union at Risk

## The Judiciary under Attack in Romania

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### Executive Summary

Many of the methods used by the Communists in Romania pre-1989 to create a politicised system of justice and law enforcement are still in existence in contemporary Romania.

The control of judicial institutions and the subordination of the rule of law by the Romanian executive and its agencies continues to present a major challenge to attempts at reform.

In particular, the use of the justice system by the Romanian executive, and its agencies, to destroy political opponents remains a serious and ongoing problem.

EU-led external pressure to separate the judiciary and politics has failed, with the executive, including the Ministry of Justice, retaining considerable de facto power and political instruction of judges remaining commonplace.

Judicial independence came under sustained attack from 2012 onwards with the arrival of Prime Minister Victor Ponta. His administration presided over frequent political challenges to judicial decisions, the undermining of the constitutional court, the overturning of established procedures, the removal of checks and balances, and the manipulation of members of the judiciary through threats and intimidation.

Recent years have seen the executive use the judiciary, often deploying national security legislation, to stifle free speech and harass journalists, with both domestic and international journalists targeted.

The Romanian Anti-Corruption Directorate DNA has exerted heightened pressure on courts to issue convictions. Romania's domestic intelligence service – first under the guise of the *Securitate* and later as the SRI – has been characterized by extra-judicial and often unlawful activity throughout its history.

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The SRI's influence now reaches into the ranks of the judiciary, further compromising its independence. SRI General Dumitru Dumbrava has stated that the security services regard the judicial system as a 'tactical field' of intervention in which the intelligence services were 'keeping their attention until their final ruling.' He also stated that the SRI was engaged in monitoring and gathering information on judges.

*It is in this context that the following recommendations are made:*

Romania must finally start to institute a true separation of powers because current limits to executive power are insufficient. Neither government nor any state intelligence agency must seek to fix or dictate the outcome of judicial proceedings.

Packing of the courts by governments must be stopped by removing the serving Justice Minister from all judicial decisions.

The Romanian prosecution must respect the independence of the judicial process and should refrain from exerting undue influence on judges by threatening courts with investigations of corruption should they pronounce acquittals.

The current practice of preferring promotions of prosecutors to the posts of judges should be balanced out to prevent a prosecution-biased criminal procedure.

A new and truly independent judiciary must adhere to the basic principles of innocence until proven guilty and trial by jury.

All current serving domestic intelligence (SRI) officers among the judiciary must be disclosed by the SRI and resign.

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The SRI should officially abandon all policies of interference with the judiciary.

The Superior Council of Magistrates (CSM), which was created to assure the impartiality of Romania's judges, should be reformed in order for some of its members to be appointed by the judges themselves to strengthen its independence.

CSM must revise its nomination procedures and reject candidatures from former SRI officers or politically affiliated judges. An effort should be undertaken to significantly improve open government, which means providing more transparency and information to Romanian citizens.

Romania should adopt objective criteria to ensure that the immunity of members of Parliament is not used to avoid investigations and the prosecution of corruption but as an instrument to strengthen independence between separated powers.

Corruption has to be reduced, both at the governmental and justice levels, because it represents a serious burden on Romania's economy and administration. Anti-bribery mechanisms, such as whistleblowing and transparency, should be developed by the Romanian Government. Moreover, strengthening competition policy in public procurement and tender is a desirable solution for reducing corruption.

Romania should promote wider use of alternative dispute resolution schemes in order to create a quasi-competitive dynamic between private courts and public justice which can help the level of effectiveness of the judiciary.

The promotion of the culture of the rule of law among young Romanians, through scholastic, university programmes and EU initiatives, can help the next generation of voters to demand a better and more sound separation of powers.

## Introduction

In terms of structure, this report sets out to detail and examine:

1. The methods used by the Communists in Romania to create a politicised system of justice and law enforcement in the period immediately after the Second World War.
2. How that system of politicised justice and law enforcement was maintained by the Communists in the 'post-terror period', and how increasingly both the leadership of Nicolae Ceausescu, and the system he presided over faltered in the face of popular resistance.
3. How in spite of the end of Communist rule many of its institutional practices, including the linkage between politics, justice, and law enforcement persisted in the post-revolutionary period (1989-2000).
4. How the European Union (EU) sought to bring about reform of the Romanian judicial system through use of conditionality mechanisms in the pre-accession period. It also reviews the level of success and overall impact of the strategies pursued by the EU during this period.
5. The state of the Romanian justice system following EU accession, and the extent to which the need to comply with EU monitoring criteria has sadly led to the reestablishment of connections between the judiciary and institutions of the secret state.
6. The paper concludes with an overview of the current state of the Romanian judiciary, and its level of independence from political and state organisations. As such, it also makes a series of detailed policy recommendations.

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### The Communists Take Control of Judicial Institutions in Romania (1944-1948)

The control of judicial institutions and the subordination of the rule of law was a key objective of the Communists during the period of their take-over from 1944-1948. During World War II Romania had, under the leadership of the dictator Marshal Ion Antonescu been allied with Nazi Germany. Romanian military forces had taken part in the Nazi invasion of the Soviet Union which was launched on 22 June 1941. In August 1944, however, King Michael of Romania, with the backing of the National Peasants Party (PNT) led by Iuliu Maniu and including other

opposition groupings, sought to launch a coup against Antonescu with the aim of installing a new government which would be ready to make peace with the allies. On 23 August, Antonescu was dismissed from office and arrested after a meeting with King Michael. By the time Soviet forces entered Bucharest on 31 August a new pro-allied government was in place headed by General Constantin Sanatescu. These developments meant that the Soviet military were not at this stage in a position to install their own indigenous political appointees.

The Romanian Communist Party (RCP) had played a relatively marginal role in the coup against Antonescu. The Communists were, however, well organised and quick to seize the initiative in the aftermath of the coup. This enabled them to secure the appointment of Lucretiu Patrascanu as Minister of Justice (MoJ) in the new government. Over the period of the following year Romania saw the appointment and collapse of a series of short-lived governments. The Communists sought to increase their influence within these successive governments whilst at the same time exerting pressure on the governments from outside through demonstrations, strikes, and the promotion of unrest. This process culminated in March 1945 in the appointment of a Communist dominated government headed by Petru Groza, and supported by the Soviet Union. During the period of the Groza administration, Lucretiu Patrascanu set about constructing the Communist system of political justice.

During the summer of 1945 over 1000 magistrates were purged, dismissed or pensioned off. Supreme Court judges were summoned to Patrascanu's office to have judgements dictated to them. Each judge was also accompanied to court by two assessors who could overrule judgements if these were seen to deviate from party policy.<sup>1</sup>

Parliamentary elections took place in Romania in November 1946. The official results showed the Communist backed coalition securing an overwhelming electoral victory with almost 70% of the vote to 12.9% gained by the National Peasant's Party. The elections were characterised by violence, intimidation, and electoral fraud. The British government headed by Clement Attlee refused to recognise the election results. Modern research on the Communist Party archives has, however, demonstrated that in reality it was the PNT who won the election and secured the parliamentary majority rather than the Communists.

In the aftermath of these fraudulent elections the Communists set about using the justice system to destroy its political opponents. On 14

July 1947 several leading members of the National Peasants Party were arrested at Tamadau airfield whilst trying to leave the country. Iuliu Maniu, the Peasants Party leader, was arrested at the same time.

The PNT leaders were accused of engaging in 'treasonous' activity. They protested in vain that leaving the country was not illegal, the Western powers with whom they were said to have conspired were not enemies, and that forming an 'alternative government' was a normal democratic procedure. The PNT leaders were sentenced to life imprisonment with hard labour. Iuliu Maniu died in prison in 1953. Ion Mihalache died ten years later in 1963. One of the PNT leaders, Corneliu Coposu, the PNT Deputy Secretary General, survived imprisonment and was released in 1964.

It has been estimated that in the period of the consolidation of Communist power 60,000 opposition supporters were executed, with a further 300,000 dying in Communist labour camps.<sup>2</sup> The scale and viciousness of the Communist repression in Romania gave rise to an armed resistance movement the last remnants of which persisted until the early 1960s.

### **Political Justice Under Communism (1948-1989)**

Article 65 of the constitution of the Romanian People's Republic enacted in 1952 defined the purpose of the justice system in Romania as being:

To defend the regime of popular democracy and the conquests of the working people, to assure the respect of popular legality, of public property, and of the rights of the citizens.

Under this system the court, consisting of judges and assessors, had the right to intervene in trials and present evidence. They were also able to appoint defence attorneys. In these circumstances the defence representatives had limited capacity to act effectively on behalf of their clients.<sup>3</sup>

This system, which guaranteed the primacy of the Communist Party in judicial matters was broadly typical of Communist regimes across the region in this 'post-terror' period. In neighbouring Bulgaria, for instance, the Communists had used similar methods in order to gain political control over the country's legal institutions.

Alongside these institutional similarities with other communist states in the region there was also a significant element of 'Romanian exceptionalism.' This 'exceptionalism' took the form of a particular

focus on the personality of the leader as a source of power which has been described as ‘sultanism.’<sup>4</sup> This personalist form of leadership was instituted by Nicolae Ceausescu after he came to power in 1965, and replaced the more collective forms of leadership which had existed under his predecessor, Gheorghiu-Dej.

This meant that the institutional power of the party was subject to interventions by the leader, his family, and clan associates. A popular Romanian joke of this period described this as ‘Socialism in one family.’ During the 1970s and 1980s Ceausescu increasingly sought to cultivate a ‘cult of personality’ which it has been suggested was modelled on the forms of governance he was able to observe in China at the height of the cultural revolution and in North Korea during visits to these countries.<sup>5</sup> The nature of Ceausescu’s sultanist rule brought a new element of arbitrariness into the already politicised judicial system. The personal nature of Ceausescu’s rule also acted to limit the possibilities for a non-violent, negotiated, change of government as was seen in other Communist states in the region, such as Bulgaria and Hungary.

Along with the politicised judiciary, the other main instrument for the maintenance of control in Romania’s communist system were the political police of the Securitate. At the time of the December 1989 revolution the Securitate had 15,312 personnel organised into six directorates.

These were:

1. First Directorate (Domestic Intelligence)
2. Second Directorate (Economic Counter-Espionage)
3. Third Directorate (Counter-Espionage)
4. Fourth Directorate (Military Counter-Espionage)
5. Fifth Directorate (Protection for Party Leadership)
6. Sixth Directorate (Penal Investigations)

The Centre for External Information, responsible for foreign espionage, and the 795 strong Special Anti-Terrorist Unit (USLA) were also designated as *Securitate* personnel.

In addition, there were 23,370 *Securitate* troops with bases in Bucharest, Constanta, Timosoara, and Cluj. These troops enjoyed better conditions and rations than the regular army, but many were conscripts like their military equivalents.<sup>6</sup> These figures did not, however, include those Romanians who had to a greater or lesser extent, acted as informers for the Securitate.



Following the December 1989 revolution, Silviu Brucan, the veteran Communist, put the number of *Securitate* informers at 700,000. Virgil Magureanu, the first head of the SRI, the *Securitate* successor organisation, gave the figure of 400,000 for the *Securitate* informers. Ultimately, however, the fact that most Romanians believed that there was an all pervasive network of *Securitate* informers was probably more important than the exact number of individuals involved in such a network. It has been observed that: ‘the *Securitate* were as much a state of mind as an instrument of terror.’<sup>7</sup>

In spite of the existence of a politicised judiciary and the activities of the *Securitate*, dissent continued to grow in Romania through the 1970s and 1980s.

In August 1977 major industrial unrest broke out amongst the miners of the Jiu valley. Ceausescu was forced to travel to the Jiu valley and respond to the miners demands with a series of populist, and subsequently unfulfilled, promises. The aftermath of these strikes saw a major effort by the authorities to implant *Securitate* within the unions and mining community of the region. There were strikes and factory occupations in Bucharest, Galati, and Tirgoviste in the summer of 1980. An uprising took place in the Motru valley in the autumn of 1981. Demonstrations and strikes took place in Brasov, Romania’s second city in 1987/1988. Media reports from this period also show that prisoners continued to be sentenced for small-scale and individual acts of defiance against the authorities.<sup>8</sup> The revolution of December 1989 was the culmination of a series of protests in opposition to the Communist institutions of governance.

In many ways Romania has only just begun to confront the crimes committed under this system of political justice. On 10 February 2016 the Romanian appeals court upheld a twenty year prison sentence on Alexandru Visinescu for the killing of twelve people during the period from 1956-1963 when he was commander of the Ramnicu Sarat prison, ninety miles from Bucharest. Radu Preda, the head of the Institute for Investigation of Communist Crimes and Romanian Exiles (IICCRE) stated that: ‘...for the first time an instrument of Communism will face justice.’

He compared the trial to ‘a Romanian Nuremburg.’ Visinescu had until recently been living openly in central Bucharest on a ‘special military pension.’<sup>9</sup>

## Moving Forward and Standing Still: Justice in the Post-Revolutionary Period (1989-2000)

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The post-Communist period in Romania began with what seemed to many to be an act of political justice. On 25 December 1989 Nicolae and Elena Ceausescu were put on trial, found guilty, and subsequently executed. The trial observed formal legality, but was widely seen as being an act of political expediency. Many of those who stood in judgement over Nicolae and Elena Ceausescu were themselves senior figures from the Communist regime. The official reason given for the swiftness of Ceausescu's trial and execution was that his captors feared a rescue attempt might be made by elements of the *Securitate* still loyal to the regime. It has been suggested, however, that the more likely explanation for the speed of the proceedings was that the former leader's judges feared that a lengthy trial would serve to illuminate their own roles and activities within the regime. The ambiguity of this act, which was overwhelmingly approved by the Romanian population, in some ways set the tone for the immediate post-Communist period in Romania. The leader was gone, but the institutions remained in place.

This element of continuity in Romanian political and institutional life was emphasised by the results of the 20 May 1990 presidential and parliamentary elections in Romania. The presidential elections were won by Ion Iliescu who was the candidate of the National Salvation Front (NSF), a grouping of former Communist leaders and officials formed during the December 1989 revolution, who secured 85% of the vote compared to 11% for his nearest opposition rival. The NSF gained 67% to 7% for their closest competitors.

There were a number of 'positive' factors which accounted for the success of Ion Iliescu and the NSF at the polls. The most important of these was the fact that he and his associates in the NSF were seen by many voters as being the people directly responsible for the overthrow and subsequent execution of Nicolae Ceausescu. They were also credited with bringing to an end many of the directly oppressive aspects of the Ceausescu regime. The fact that the NSF inherited many of the old Communist Party structures, networks, and resources was also a significant element in their success in first post-revolutionary parliamentary elections.

On 21 November 1991, a new post-Communist constitution was adopted by the Romanian parliament. The constitution was confirmed following a popular referendum on 8 December 1991 in which 78.5%

voted in favour with a 69.7% turn-out. The constitution was largely the creation of Antonie Iorgovan, an academician and the only independent member of the NSF government. It was heavily influenced by the French constitution. The constitution established Romania as a unitary state with a bicameral parliament consisting of the House of Deputies and the Senate. It also sought to bring into existence judicial institutions which would be independent of political control replacing the old system of Socialist justice. Following a model common in many Western European countries, including France, Italy and Spain, the new constitution established the Superior Council of Magistrates (CSM), a self-ruling body whose role was to:

1. Guarantee the independence of the judiciary
2. Propose the appointment of judges and prosecutors
3. Deal with the careers and disciplinary liabilities of judges

The CSM was composed of:

1. Nine judges
2. Five Prosecutors
3. The Minister of Justice
4. The President of the High Court of Cassation and Justice
5. Two Representatives of civil society appointed by the Romanian senate

The establishment of the CSM was an important *de jure* step forward in terms of establishing a non-political judiciary. In practical terms, however, its impact during this period was limited. One of the main problems has been represented by the reduced independence of a body entirely appointed by the Parliament. In France and Italy, only part of the CSM members are appointed by the Parliament, while other members are appointed by the President of the Republic and another significant number chosen by the judges themselves.

Following the promulgation of the new Romanian constitution parliamentary and presidential elections took place in September 1992. Prior to these elections a major split took place in the ruling party with the Ion Iliescu's old guard faction renaming itself as the Democratic National Salvation Front (DNSF) and the leadership of the rump NSF being taken on by the former Prime Minister, Petre Roman. On polling day Ion Iliescu was re-elected as president with 61.4% of the vote to 38.6% for Emil Constantinescu from the Democratic Convention (DCR) coalition. In the parliamentary elections Iliescu's DNSF emerged as the largest party with 28.29% of the vote, The DCR gained 20.16% of the

vote and Petre Roman's 10.38% of the vote. Ion Iliescu was able to cling on to power with the support of two hard-line nationalist groupings, the Party of Romanian National Unity and the Greater Romania Party. During his second term in office Ion Iliescu used his political influence to override the theoretical independence of the judiciary and to pack its ranks with judges loyal to his regime and opposed to reform.

The slow pace of reform and stagnation in the economy led to a shift in the electoral landscape. The November 1996 elections were won by Emil Constantinescu from the DCR with 54.4% of the vote to 45.6% for Ion Iliescu. The Democratic Convention came to power eager to implement the reform agenda which had been stalled under Iliescu's governments. The DCR government saw the judiciary which had been packed with old guard communist judges as potentially obstructive to the reform programme. The new government sought to counter this by making the CSM consult the justice ministry on new judicial appointments. These actions, although motivated by the desire to promote economic and institutional reform, served to compromise the fragile independence of the post-communist Romanian judiciary.

The security services, the other pillar of the Communist legal system, were also undergoing a period of change and adjustment at this time. In the immediate aftermath of the December 1989 revolution former Securitate cadres continued to exert an influence on the political scene in Romania. The *mineriada* of June 1990, in which miners from the provinces descended on Bucharest and attacked opposition supporters, was widely seen by domestic and international observers as an act of extra-judicial vigilante justice directed by ex-Securitate members on behalf of the Iliescu government. The new Romanian security service formally came into existence on 26 March 1990 (Decree Number 181) under the leadership of Virgil Magureanu. General Victor Stanculescu, the Romanian Defence Minister, told parliament:

No telephone conversations will be listened to now or in the future ... no citizen regardless of nationality, political affiliation or religion or religious convictions is the target of the cadres in the new army structures.<sup>10</sup>

This statement that the SRI had abandoned the use of surveillance and wire-tapping was widely disbelieved. This scepticism was further reinforced by the discovery in May 1991 of hundreds of SRI wiretap transcripts on opposition politicians buried near the village of Berev-

oiesti. Further evidence of continued SRI wiretapping was provided by the testimony of SRI whistle blower, Constantin Bucur, in November 1996. According to Bucur many of the wiretaps he had carried out had been ordered by Virgil Magureanu without official authorisation. He stated that:

I became convinced that this man was not working for state security, that he was working for personal and political interests.<sup>11</sup>

The SRI during this period saw repeated purges and reorganisations of personnel. The first wave of sackings took place between June and August 1991 apparently prompted by the Berevoiesti wiretap scandal. There was a second series of dismissals in mid-1994 when a number of senior SRI officers lost their jobs.<sup>12</sup> Virgil Magureanu held on to his position as head of the SRI, despite repeated reports of his imminent demise, until April 1997 when he was removed following the election of Emil Constantinescu as president.

The first decade after the fall of Ceausescu also saw allegations of the involvement of former and serving Romanian security personnel in criminal activity. In June 2000 a commission was set up by the Romanian government to investigate the collapse of the National Investment Fund. The commission stated the fund's collapse constituted 'a threat to national security' and that fraud had been 'committed within the fund.' The commission also announced that of the fund's forty county branch managers thirty six had been found to be former officers in the Securitate. The other four were former officials of the Interior and Defence Ministries.<sup>13</sup> A month later, Emil Constantinescu, the Romanian President, accused his predecessor Ion Iliescu and former Prime Minister, Teodor Melescanu, of involvement in a large-scale oil smuggling operation in violation of UN sanctions. The smuggling activities had, Constantinescu stated, been facilitated by serving SRI officers.<sup>14</sup>

### **The Rule of Law and EU Accession (2000-2007)**

Post-revolutionary Romania remained first in the sphere of the Soviet Union. A support and friendship agreement was signed in 1991. Hadn't it been abrogated after the collapse of the Soviet Union later in the year, Romania's path might have been different. Romania re-oriented

its views to the West. A Romanian diplomatic mission to the European Union had been established in Brussels in April 1990. The National Salvation Front stated that:

The entire external policy of the country must serve to promote neighbourliness, friendship, and peace in the world thus joining in the process of building a united Europe, the common home of all the peoples of our country.<sup>15</sup>

In 1991 a Trade and Co-operation agreement was also signed between the EU and Romania. This was followed in February 1993 by the European Agreement which created an association between Romania and the EU. Romania formally applied for EU membership on 22 June 1995.

There was a broad cross-party consensus in support of Romania's membership of the EU. The *Snagov Declaration*, issued to coincide with Romania's application for EU membership, was signed by the President, Prime Minister, and the leaders of thirteen political parties ranging from the pro-Western reformist Democratic Convention to the ultra-nationalist Greater Romania Party and the Party of Romanian National Unity. The signatories of the *Snagov Declaration* described the objective of joining the EU as 'a major point of convergence and solidarity.' Beyond these positive sentiments it wasn't clear to what extent the Romanian political leaders understood or were supportive of the measures it would be necessary to take in order to secure EU membership.

A European Commission report in 1997 identified a series of steps that Romania needed to take to reform its justice system if it was to secure EU membership. Following the decision made by the Helsinki European Council in December 1999 full negotiations on Romania's EU membership began in February 2000.

The start of negotiations with the EU coincided with the defeat of the pro-Western reformers and the return to power of Romania's political old guard. In presidential elections in November 2000 Ion Iliescu gained 66.83% of the vote defeating Corneliu Vadim Tudor, leader of the ultra-nationalist Greater Romania Party with 33% of the vote. In the parliamentary elections Iliescu's Social Democrats gained 37.09% of the vote. They were followed by the Greater Romania Party with 21% of the vote. Support for the pro-reform Democratic Convention collapsed and they managed to secure only 5.29% of the vote.

Rodica Stanoiu (born 1939) was appointed as Minister of Justice in the new Social Democrat government headed by Adrian Nastase. Stanoiu had previously been a researcher at the Bucharest University Institute for Judicial Studies (ICJ). She had been elected as a Senator for the Social Democrats representing Olt County in 1996 and 2000. In 2006, after the end of her period in ministerial office, the Council for the Study of Securitate Archives (CNSAS) published evidence showing that during the 1980s, whilst she was working at the ICJ, Stanoiu had worked for the *Securitate* compiling reports on her colleagues for the *Securitate*. In response to these statements by the CNSAS Stanoiu left the Social Democrats for the Conservative Party, the political vehicle of the businessman Dan Voiculescu, and launched a lengthy legal battle to prove that the allegations by the CNSAS were false.

In February 2014 the High Court of Cession and Justice ruled that the CNSAS allegations were true, upholding an earlier judgement made by a court in Oradea.<sup>16</sup> In view of her background, as revealed by the CNSAS, it is perhaps not surprising that during her period in ministerial office from 2000 to 2004 Rodica Stanoiu came to be seen as a major veto-player in relation to attempts to reform the judiciary.

It was not until September 2003 that, in response to pressure from the European Union and the European Court of Human Rights, the Romanian government produced a new *Judicial Reform Strategy*. The strategy was intended to respond to strengthen the division between the judiciary and politics, and to respond to key concerns from within the judiciary over:

1. The authority of the Ministry of Justice
2. Poor working conditions
3. Political pressures on the work of the judiciary

The development of the Judicial Reform Strategy was greeted by the European Commission as a 'positive sign,' but they urged the Romanian government to go further in its efforts to achieve judicial reform. Other observers described the strategy as 'badly designed and poorly implemented'.<sup>17</sup> In 2003 the Romanian constitution was revised to strengthen the status of the Superior Council of Magistrates in relation to the Ministry of Justice. Considerable de facto power, however, remained with the Ministry in spite of this constitutional change. In June 2004 three new laws on the judiciary were adopted by the Romanian parliament:

1. Law on the Superior Council of Magistrates
2. Law on the Organisation of Judiciary
3. Law on the Status of Magistrates

While this constituted a significant package of new legislation in practice they encountered familiar problems in terms of a lack of government commitment to implementation of the laws. Two Romanian judges, writing in 2009, described Rodica Stanoiu's Ministry as: 'The darkest period in our legal system from the standpoint of post-communist justice.'<sup>18</sup>

By the end of 2004 the European Union was increasingly treating judicial reform and anti-corruption as priorities in terms of Romania's EU accession. It was stated that if significant progress in these areas was not made during 2005 then Romania would not be able to join the EU in 2007 as planned.

In November 2004 a significant shift took place in the Romanian political landscape when Traian Basescu, the candidate of the centre-right Justice and Truth Alliance, with 51.23% of the vote, narrowly defeated Adrian Nastase, the former Prime Minister and candidate for the Social Democrats, who gained 48.77% of the vote.

Monica Macovei was appointed as Justice Minister in the new government. Macovei (born 1959) was a lawyer, academic, and human rights activist with strong links with civil society within Romania and internationally. Macovei was not affiliated with any political party. She was identified by the EU as a key agent for change within Romania in terms of judicial reform - in contrast to her predecessor who was seen as a veto player, obstructive to the reform process.<sup>19</sup>

Monica Macovei moved quickly to revise the 2004 package of laws on the judiciary. The revised *European Reform Law* would, it was stated, represent a 'new deal for the judiciary.' The law was passed, in the face of resistance in parliament through the use of an emergency ordinance by the government. The Constitutional Court, however, then ruled that elements of the law were unconstitutional, and the law was referred back to parliament in its entirety. A modified version of the law was subsequently adopted by the Romanian parliament.

In early 2006 similar political conflict was witnessed in response to anti-corruption measures proposed by Macovei. The result was also similar in that it saw the measures proposed by Macovei being adjusted downwards in the face of strong political resistance. Monica Macovei did, however, succeed during her period in office, strengthening



the Anti-Corruption Directorate (DNA), which had been originally established in 2002.

In spite of this limited or qualified progress in judicial reform Romania became a member of the EU on 1 January 2007. Its capacity to achieve this objective in spite of the failings of its reform progress has caused it to be described as a ‘Successful laggard.’<sup>20</sup>

Monica Macovei had sought to develop support for her reforms through contacts and engagement with civic society, academia, and professional legal organisations. Politically, however, she was an isolated figure. Much of her political backing came from the country’s president, Traian Basescu, and the external institutions, principally the EU. On 13 February 2007 Macovei faced a vote of no-confidence in the Romanian senate. The no-confidence motion had been moved by the Conservative Party, and was backed by the ultra-nationalist Greater Romania Party and the Social Democrats. The motion was passed by 137 votes to 81, figures which suggested that at least some of Traian Basescu’s Democratic Party had voted for Macovei’s removal. The Romanian constitutional court subsequently ruled that the vote did not mean that Monica Macovei was obliged to resign. Macovei’s reprieve was, however, only temporary. On 2 April 2007 Calin Popescu Tariceanu, the Prime Minister, whose relations with Traian Basescu had broken down, moved to oust Macovei.

### **Judicial Independence under Attack The Rule of Law in Romania (2008-2012)**

The removal of Monica Macovei stifled any impetus for reform which had existed within the Romanian government. Her replacement was Tudor Chiuariu (born 1976), a National Liberal MP loyal to the Prime Minister, Calin Popescu Tariceanu. He acted quickly to modify the laws on the judiciary brought in by Monica Macovei as part of her reform strategy. He also moved, whilst Traian Basescu was suspended as President prior to the May 2007 referendum, to oust Doru Tulus as head of the DNA. Tulus was replaced by a prominent Social Democrat known for his opposition to judicial reform.

Chiuariu also ensured that although the legislation setting up the National Integrity Agency (ANI) was passed through parliament it did so in a considerably weakened form. The appointment of Lidia Barbulescu, an active Social Democrat opponent of reform, as head of

the SCM was seen as undermining judicial independence. It was also suggested that there was a conflict of interest in Barbulescu's appointment to head the SCM whilst she was at the same time serving as a Supreme Court judge. Tudor Chiuaru was Justice Minister until December 2007. Chiuaru continued to serve as a National Liberal member of the Chamber of Deputies, and then as a Senator from 2012. In January 2015 he was forced to resign from the National Liberal Party after he received a three and a half year suspended sentence for influence peddling, money laundering, and joining an organised crime group.<sup>21</sup> He currently sits as an independent in the Romanian Senate.

Between January and February 2008, the role of Justice Minister was held on a temporary basis by Teodor Melescanu. He was followed by Catalin Predoiu who was Minister of Justice from February 2008 to May 2012.<sup>22</sup> In October 2011 Catalin Predoiu became mired in controversy when the Ministry of Justice awarded a 1.5 million lei contract to RVA Insolvency, a company to which his father-in-law was linked. This was ruled not to be contrary to conflict of interest regulations because the contract was funded by the World Bank rather than the Romanian state budget. Catalin Predoiu was Prime Minister for three days from 6 to 9 February 2012 following the resignation of Emil Boc. In 2005 he was elected as head of the National Liberal Party organisation in Bucharest. He was forced to resign in June 2016 after he came third in local elections in the city.

Traian Basescu secured a convincing victory in the impeachment referendum vote which took place on 19 May 2007 with 74.48% against impeachment to 24.75% in favour. In the November 2008 parliamentary elections, however, his Democratic Liberal party gained 32.4% of the vote to 33.1% for the Social Democrats. The National Liberals gained 18.6% of the vote. In the December 2009 presidential elections Traian Basescu was narrowly re-elected with 50.33% of the vote to 49.65% for his Social Democrat opponent Mircea Geona with 49.65% of the vote. Basescu's victory was secured at the last moment following the counting of votes from Romanians living abroad.

These results produced a period of political stalemate and legislative stagnation. The lack of progress in judicial reform and the prevalence of corruption was increasingly the subject of criticism by the EU. In the 2010 EU monitoring report the Romanian government was criticised for lack of accountability and commitment to reform. There was increasing recognition within the EU that the formal pre-accession com-

mitment to Europe was not paralleled, in view of the lack of effective mechanisms of conditionality, by a post-accession readiness to move forward with the process of reform.

The continued vulnerability of the Romanian judiciary to political pressure was underlined by the political crisis in 2012 which came to a head with the move by Prime Minister, Victor Ponta, to hold a second impeachment referendum directed against President Traian Basescu in July of that year. The move to impeach Traian Basescu was approved by the Romanian parliament on 6 July 2012. Victor Ponta and his allies in parliament accused Basescu of exceeding his powers as President of Romania. Traian Basescu for his part accused Victor Ponta of staging a 'putsch.' In addition to using the referendum as a mechanism to remove his primary political opponent, Victor Ponta also sought to move against other public institutions. He used emergency ordinances to remove the speakers of both the House of Deputies and the Senate, and the Ombudsman. Measures were brought in to restrict the power of the Constitutional Court, and to make possible the impeachment of judges.<sup>23</sup>

Crin Antonescu, one of Victor Ponta's key allies asserted that the Senate had the right to remove judges, and asserted that composition of the Constitutional Court was 'a disgrace.'<sup>24</sup>

In a significant parallel set of actions Victor Ponta and the Social Democrats also sacked the head of the National Archives, purged state tv, and targeted the Romanian Cultural Institute.<sup>25</sup>

The European Commission reacted strongly to Victor Ponta's assault on key and supposedly independent institutions in Romania. In a twenty-two-page report the Commission accused him of ignoring the constitution, threatening judges, illegally moving officials, and tampering with the democratic system.

The report acknowledged the polarised nature of Romanian politics: However, this political context cannot explain the systematic nature of several actions. They raise serious doubts about the commitment to the respect of the rule of law in a pluralist democratic system. Political challenges to judicial decisions, the undermining of the constitutional court, the overturning of established procedures, and the removal of checks and balances have called into question the government's respect of the rule of law and judicial review. The Commission is in particular extremely concerned by the indications of manipu-

lations and threats which affect institutions, members of the judiciary.<sup>26</sup>

The Venice Commission of the Council of Europe was also harsh in its criticism of the actions of the Ponta government. Judges from the Constitutional Court sent two letters to the Venice Commission, one before the poll in July and one afterwards in August, complaining about the 'virulent attacks' they had faced from the Ponta government.

Polling for the referendum took place on 29 July 2012. Traian Basescu had urged his supporters to boycott the poll. The results showed 88.7% of those voting to be in favour Basescu's impeachment with 11.3% against. Turn-out, however, stood at 46.24% putting it below the 50% threshold. The 50% threshold had been an established part of Romanian regulations on the holding of referendums. It had been removed by Victor Ponta and his allies, but reintroduced immediately prior to the referendum under EU pressure. The Constitutional Court ruled that the referendum was invalid.

In the aftermath of the referendum Philip Gordon, US Assistant Secretary visited Bucharest and met both Victor Ponta and Traian Basescu. In a statement to the media he drew attention to: 'Credible allegations of large scale fraudulent voting, attempts to alter voter lists, and attempts to pressure the Constitutional Court.'<sup>27</sup>

The constitutional crisis of 2012 was characterised by the political analyst, Vladimir Tismaneanu, as a failed 'coup attempt against democracy.'<sup>28</sup> These events illustrated the continued willingness of some politicians to attempt to assert control over Romania's public and judicial institutions. More positively, however, it also showed the readiness of the Constitutional Court to resist the attempted encroachment on its sphere of activity by the government.

### **Romania's Renewed Alliances: The Judiciary, the Secret State and the Anti-Corruption Drive (2012-2016)**

In spite of his failure to remove Basescu in the referendum Victor Ponta was able to consolidate his political position within Romania in elections held at the end of the year. In the December 2012 elections, Victor Ponta and his Social Democrats secured an overwhelming victory with 58.61% of the vote to 16.21% for the opposition Right Romania Alliance. It was widely assumed that Victor Ponta would be able to go on to secure the presidency of Romania in an election held in November 2014.

In an unexpected result, however, Ponta was defeated in the second round of elections by Klaus Iohannis, the centre-right candidate from Sibiu in Transylvania, who gained 54.43% of the vote to Victor Ponta's 45.4% of the vote. Victor Ponta remained as Prime Minister until 4 November 2015 when he was forced to resign over charges of corruption and public demonstrations over the *Colectiv* night club fire in which 32 people had died. Victor Ponta was replaced as Prime Minister by Dacian Ciolos, a former EU Agriculture Commissioner, who headed a technocratic government.

The arrival of Klaus Iohannis and Dacian Ciolos in government was seen by international observers as ushering in a supposedly new era in Romanian politics. This positive political trend was viewed as being paralleled by developments in the legal/judicial sphere.

The National Anti-Corruption Directorate (DNA), under the energetic leadership of Laura Kovesi since 2013, and the Directorate for Organised Crime and Terrorism (DIICOT), were taking an increasingly active role in acting against corruption and criminality in Romania. In 2014 the DNA secured the convictions of twenty-four former mayors, five ex-MPs, and two former ministers including former Prime Minister, Adrian Nastase. In 2015 the DNA brought charges against fifteen MPs, four of whom were former ministers including Victor Ponta, and Sorin Oprescu, the former Mayor of Bucharest.<sup>29</sup>

Romania was praised in the European Commission's Co-operation and Verification Mechanism (CVM) monitoring report for 2015. It stated that: 'The track record of the key judicial and integrity institutions in addressing high levels of corruption remains impressive.'

Frans Timmerman, First Vice-President of the European Commission, commented on the report saying that:

Over the last year we have seen the professionalism, commitment, and good track record of the judiciary and anti-corruption prosecutors and reforms being internalised. I am encouraged to see that Romania continues to make reforms and the positive trend continued in 2015. These efforts must be stepped up in 2016. In particular to prevent corruption and see that judges can do their job properly.<sup>30</sup>

The methodology used by the DNA has, however, raised serious questions with regards to its impact on the independence of the judiciary. The DNA and DIICOT anti-corruption investigations are heavily dependent on the Romanian secret state, in particular the Domestic

Intelligence Service (SRI) for logistical support in the form of the provision of wiretapping evidence.

In February 2016 the Romanian Constitutional Court ruled that it was unconstitutional for the SRI to conduct wiretapping operations on behalf of the DNA and DIICOT. Laura Kovesi responded by stating that this move would endanger the anti-corruption fight. On 11 March the Romanian Prime Minister, Dacian Ciolos, used an emergency ordinance to overrule the Constitutional Court and enable the DNA and DIICOT to continue to use wiretap evidence supplied by the SRI. In April 2016 Laura Kovesi publically criticised the head of Romania's External Intelligence Service, the SIE, for failing to provide surveillance evidence on Romanians living abroad.

The support provided by the SRI is undoubtedly useful to the DNA and DIICOT in the conduct of their investigations. It is interesting, however, to note the difference between the situation in 2016 when the use of surveillance by the security services is presented as essential to the establishment of a society governed by the rule of law and the situation in the 1990s when, as noted earlier, the ending of security service surveillance was seen as a key requirement for creating a free, open and truly democratic society.

It is in this context that there have also been recent suggestions that the influence of the SRI has reached into the ranks of the judiciary thereby further compromising their independence. In an interview given in May 2015 SRI General Dimitriu Dumbrava stated that the security services regarded the judicial system as a 'tactical field' in which the intelligence services were 'keeping their attention until their final ruling.' He also stated that the SRI was engaged in monitoring and gathering information on judges. Following this interview, a complaint was issued by the National Union of Judges, Association of Prosecutors, and the Association of Magistrates of Romania which called on the Superior Council of Magistrates to determine whether the SRI had compromised the independence of the judiciary. A press statement issued by the judges stated that:

General Dumbrava's statements unveil a system that pretending to watch over respecting human rights and the fight against corruption is actually brutally breaking these fundamental rights.<sup>31</sup>

The Superior Council of Magistrates subsequently determined that such a comment did not indicate an infringement of judicial independence. Interestingly when, in August 2016, a vacancy arose on the Superior Council of Magistrates it was not considered to be a barrier to Lavinia Nicoleta Cotofana's candidacy that previously she had been a member of the SRI for eleven years.<sup>32</sup>

### **Reaching Beyond Romania's Borders: The Case of the British Journalist Stuart Ramsay and German writer Alexander Adamescu (2016)**

On 7 August 2016 Sky News ran a story in which their highly awarded senior correspondent, Stuart Ramsay, and a news team met a group of gun runners offering weapons for sale in a forest in western Romania. The Romanian authorities reacted with fury to the story. The DIICOT Chief Prosecutor, Daniel Horodniceanu, was swift to declare that the report was merely a: 'A scenario made up by British news.'

While Stuart Ramsay and Sky News stood by the integrity of their investigation, and the Romanian authorities subsequently arrested the Romanian gun runners who they said were really hunters pretending to sell legally held rifles, DIICOT also sought to start a criminal investigation against Stuart Ramsay and the other Sky journalists for 'spreading false information affecting the security of Romania.'

Alongside this story a number of journalists and NGOs in Romania were equally swift to voice their unease at the authorities' actions stating that it was likely to do more damage to Romania's reputation than the original Sky News report.<sup>33</sup>

Likewise, the arrest warrant procedure for German writer Alexander Adamescu has sparked worldwide criticism. Alexander Adamescu is the son of businessman Dan Adamescu, accused of bribery charges in 2014 and seemingly Romania's public enemy number one. After Alexander Adamescu spoke out about the treatment of his father, whose case was highlighted by the NGO Fair Trials International as having "failed to respect the presumption of innocence,"<sup>34</sup> the DNA Chief Prosecutor Laura Kovesi appeared on live television in March 2016 to request Alexander Adamescu's arrest on the same charges. The case was filed in front of a judge who summoned, heard, deliberated, wrote and

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published Adamescu's arrest warrant in less than two hours. Alexander Adamescu was subsequently arrested in London through a Romanian EAW shortly before he was due to speak at a public conference with British journalists on the topic of the abuse of EAWs and the erosion of the rule of law in Romania.

While these stories initially appear to be of minor importance, in reality they have profound implications in the context of the European Arrest Warrant for writers and journalists in Western Europe. For if nothing else they provide a worrying insight into the way that the Romanian legal and security authorities operate, choosing to use legal threats against journalists and writers rather than face a potentially embarrassing and truth-telling story.

## Conclusion and Recommendations

In the aftermath of the Second World War the destruction of the independent judiciary in Romania was a key priority for the Communist Party. Considerable resources and a methodology based on terror were utilised to bring about the dismantling of the independent judicial system. Once in power the Communists put in place a system which was subordinate to the leader and the party, and maintained by the pervasive security services.

In the post-Communist period the task of rebuilding an independent judicial and legal system has been formidable. Those seeking to bring about change have frequently faced opposition from political forces, and from within state institutions.

During the pre-accession period Monica Macovei's attempts to institutionalise judicial independence in preparation for joining the EU were repeatedly obstructed and the measures watered down by political actors who did not share her enthusiasm for the practicalities of reform, as opposed to a theoretical commitment to joining Europe.

In 2012 the judicial system faced a concerted attack on its independence led by Victor Ponta and the Social Democrats. It was an attack which was only thwarted with difficulty. This failure of this attack was partly due to international intervention, on the part of the EU and the US government, but also due to the readiness on this occasion of the judiciary to resist state encroachments on their sphere of activity.



In recent years a wide ranging anti-corruption drive headed by the Anti-Corruption Directorate (DNA) has been underway in Romania. The anti-corruption drive has produced large scale convictions on corruption charges of senior political and business figures. While the anti-corruption drive has been praised by some in the EU and US, it has however also thrown up its own contradictions with many suggesting that the Romanian secret state is once again proactively undermining and compromising the independence of the nation's judiciary.

Considering the Rule of Law Index 2015 of the World Justice Project, Romania is part of the second group selected by the index, classified as an upper-middle income nation. The first group is composed of EU, EFTA and Northern American countries. Every country's justice system and rule of law enforcement is evaluated through a set of macro and micro indicators. In the global ranking for the enforcement of the rule of law Romania is 32<sup>nd</sup> of 102 nations. In its group of upper-middle ranked countries it is third of thirty one. As far as the macro-indicators of "Constraints on government powers" are concerned Romania is significantly under the average of the western developed nations in every micro-indicator. Regarding the macro-indicator of "Corruption" the worst micro-indicators are "corruption in the executive branch" and "corruption in the legislature" where Romania is very far from the developed countries and under the average of the upper-middle income nations.

The worst result for Romania among the macro-indicators of the index concerns "open government" where its average is significantly underdeveloped compared with the average of its group. Romania's best performance is seen in the macro-indicators of fundamental rights, order and security, and law enforcement. In these sectors, the indicators show that the country is significantly over the average of its group and not so far from the group of developed countries. Regarding civil justice some indicators such as "accessibility and affordability" and "no discrimination" are very close to the average of developed countries, while other indicators such as "justice corruption" and "improper influence of government" show very poor results, significantly far from the average of the developed nations. The last macro-indicator is criminal justice. Here, lower scores are, as in the case of civil justice, "improper influence of government", "corruption" and "due

process of law". Indicators that measure effectiveness and efficiency of criminal justice are much better and consistently above the average of upper-middle countries.

Romania is in a top position among the upper-middle income nations but it is still far from the standards of developed countries. Its justice system is acceptable concerning the respect of fundamental rights and order and security. Procedures and practices are fast, with a good level of efficiency and effectiveness. However, rule of law indicators, in particular corruption and the improper influence of government in the justice system are too low and seriously compromised even for a post-soviet country.<sup>35</sup>

While some analysts have demonstrated that progress has been made in terms of institutionalising change within the Romanian judicial system, progress remains slow and patchy.

Cristina Dallara has highlighted the positive role played by the involvement, particularly of younger Romanian judges and legal professionals, in international networks and organisations, Dallara has emphasised the role these networks play in socialising and changing the attitudes of those involved.

Similarly, Martin Mendelski has argued that while the EU-supported attempts to push forward the judicial reform process have had a positive effect in terms of increasing legal capacity and bringing Romanian laws in line with international legal standards, he also presents evidence of how the reform process has been much less successful in entrenching judicial impartiality.<sup>36</sup>

Today, the Romanian judiciary continues to face pressure in terms of political and institutional demands and exigencies. This issue needs to be addressed if the rule of law is to become institutionalised, over the long term, within the country.

It is in this context that this paper makes the following specific policy recommendations:

1. Romania must finally start to institute a true separation of powers because current limits to executive power are insufficient. Neither government nor any state intelligence agency must seek to fix or dictate the outcome of judicial proceedings.
2. Packing of the courts by governments must be stopped by removing the serving Justice Minister from all judicial decisions.
3. The Romanian prosecution must respect the independence of the judicial process and should refrain from exerting undue influence

on judges by threatening courts with investigations of corruption should they pronounce acquittals.

4. The current practice of preferring promotions of prosecutors to the posts of judges should be balanced out to prevent a prosecution-biased criminal procedure.
5. A new and truly independent judiciary must adhere to the basic principles of innocence until proven guilty and trial by jury.
6. All current serving domestic intelligence (SRI) officers among the judiciary must be disclosed by the SRI and resign.
7. The SRI should officially abandon all policies of interference with the judiciary.
8. The Superior Council of Magistrates (CSM), which was created to assure the impartiality of Romania's judges, should be reformed in order for some of its members to be appointed by the judges themselves to strengthen its independence.
9. CSM must revise its nomination procedures and reject candidatures from former SRI officers or politically affiliated judges. An effort should be undertaken to significantly improve open government, which means providing more transparency and information to Romanian citizens.
10. Romania should adopt objective criteria to ensure that the immunity of members of Parliament is not used to avoid investigations and the prosecution of corruption but as an instrument to strengthen independence between separated powers.
11. Corruption has to be reduced, both at the governmental and justice levels, because it represents a serious burden on Romania's economy and administration. Anti-bribery mechanisms, such as whistleblowing and transparency, should be developed by the Romanian Government. Moreover, strengthening competition policy in public procurement and tender is a desirable solution for reducing corruption.
12. Romania should promote wider use of alternative dispute resolution schemes in order to create a quasi-competitive dynamic between private courts and public justice which can help the level of effectiveness of the judiciary.
13. The promotion of the culture of the rule of law among young Romanians, through scholastic, university programmes and EU initiatives, can help the next generation of voters to demand a better and more sound separation of powers.

In 2017, Romania will have been an EU member for ten years. It has attempted to modernize the judicial system since the pre-accession phase and it is likely that it will continue to do so for many years to come. What happens to Romania is a crucial test for the entire European Union. The Romanian experience could serve as an example to potential future EU member states (mainly Serbia, Macedonia, Montenegro, Bosnia Herzegovina and Albania). It will tell us if the EU enlargement has been beneficial – in promoting the rule of law and in determining a real political, economic and social convergence – as it was intended to be.



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