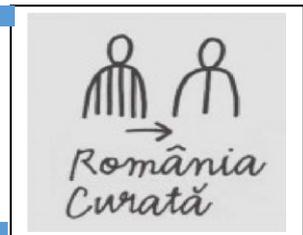


QUESTIONS AND ANSWERS ON ROMANIA'S ANTICORRUPTION IMPLOSION

European Centre for Anticorruption and State Building

www.againstcorruption.eu, www.romaniacurata.ro,
<http://sar.org.ro/?lang=en>, www.integrity-index.org



Abstract.

Romania's street protests of winter 2017 show the high sensitivity of young educated East Europeans to the problem of political corruption, but also the risks for the political use of anticorruption. Romanian charged or jailed the equivalent of a whole government in the last five years alone (eighteen ministers, two prime ministers, a former President, his brother, son-in-law, and so on) without any increase in trust in the political process and barely touching favoritism and diversion of public funds due to corruption. Instead, several elements of rule of law have come under siege.

Core story

On the evening of 31.01.2017, in its first month of government, the Romanian government chaired by Sorin Grindeanu adopted as a government ordinance a bill (Ordinance 13/2017) proposing amendments to Law no.268/2009 on the Criminal Code and Law 135/2010 on Criminal Code procedures. The government claimed that the changes were imposed by Romania's overcrowding prisons and repeated cases lost at the European Court of Human Rights in Strasbourg, who had threatened with a larger fine if some prison reform would not have been implemented. Romania has the largest number of prisoners in other EU member countries from all EU MS, besides a nearly double occupancy by domestic prisoners in the country. The government has the right to pass emergency ordinances, which become immediately enforced and are only later submitted to Parliamentary approval, and Criminal Code has been changed before in this way. Each government for the past twelve years has pledged to stop favouring this way of legislating over normal procedures, but in fact this has become the default way to pass bills due to high transaction costs in the Parliament. The other motive invoked by the government was that the Constitutional Court ruled

in May 2016 as unconstitutional an article on power abuse asking for clarification¹. The Court motivated with the Council of Europe (Venice Commission) report², which asks that this notion is well specified to prevent the political abuse of anticorruption.

Following the passage of Ordinance 13 (OUG 13 from now on) after a week of consultation strongly asked by President Klaus Iohannis, which allowed the rallying against of the judiciary (the Judicial Council, The General Prosecutor Office, the Anticorruption Prosecutor Office –DNA), most civil society organizations, an important part of the media and the opposition parties (National Liberal Party of President Iohannis, NPL, USR, Union Save Romania, a new group, and Popular PMP Party of former President Basescu), the opponents have called opponents to the streets. The result was the largest street rallies since 1990, when miners were brought in to crush the protesters who claimed Romanian Revolution had been ‘stolen’ by an occult conspiracy. Media ranges at between 100 000 and 200 000 the number of Romanians who demonstrated peacefully every evening since the passage of the ordinance, denounced by the government as a ‘coup’ attempt. On Sunday February 5, after daily protests from the European Council and several Member States, PM Sorin Grindeanu (Social-Democrat) cancelled the ordinance and intimated it will go to the Parliament for approval.

Question 1. How many people are affected by the ordinance?

No exact count exists. 2152 files are under work for abuse of power with DNA, as the prosecutors resort to this article article more often than to bribery (easier to prove), but not all should be affected. According to the Constitutional Court, power abuse should be circumscribed to breaking codified regulation. The recent ordinance tried to bring criminalization under the ceiling of 200 000 RON (roughly 40 000 Euro). Originally, DNA only had jurisdiction for a prejudice over one hundred thousand, so this actually was belong its jurisdiction altogether, but in practice the limit was continuously pushed down so it has arrived well under what would be classified as ‘grand corruption’. Also, some prisoners might be helped by the ordinance, but there

¹ https://www.juridice.ro/wp-content/uploads/2016/06/decizia_405.pdf

² [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)001-e)

is no official count. Many of the politicians said to profit are indicted on several files, and not all on authority abuse. The government claims that bribe cases are not at all affected, and this seems to be true. A second battle is around an article which no longer is considered criminal under OUG 13, the act of legislating itself, which concerns even the current minister of Justice, Mr. Florin Iordache, and might potentially be used against MPs. So far only a former minister of Justice was sentenced for signing a bill considered to favour private interests against the public one.

Question 2. Why are so many people upset and who organizes these rallies?

MPs have tried for years to reverse or cut the teeth of anticorruption legislation. They suffered many losses at the hands of DNA- so many that last December some of their kin had to fill in their seats as the parents were sent to jail, for the county of Prahova, for instance. But the voters of deep, poor, dependent Romania returned the families of their corrupt patron politicians to Parliament regardless, as they hope for more redistributive policies in return. In contrast, the protest crowds in the big cities are mostly made of English speaking Romanians working in multinationals and NGOs. Their political choices are different.

In this climate where distrust in politicians is well founded, DNA has gained the trust of Romanians. When DNA, the President and a part of the media called against the new bill, presented as the first step of an all-assault on the judiciary, the urban young answered the call. They had not answered at elections, which had poor turnout (under 40%), as they did not see any plausible alternative to vote for. But the public demand for having the corrupt go to jail- and stay there indefinitely- is strong and has been growing for years. People are furious that convictions take years, that in each regime somebody enjoys impunity and that, once jailed, politicians manage to get out in just a few years and using various unorthodox procedures (like claiming to write 'academic' literature in jail to reduce their time). A strong majority told an online survey that they believe corruption crimes should have no statutes of limitation, despite half of them confessing to some corrupt act themselves, such as bribing or tax evasion in the recent past³. The ordinance was at first

³ <http://www.romaniacurata.ro/referendumul-incepe-pe-romania-curata/>

mixed with a pardon act for smaller offences, afterwards separated and sent to Parliament for ordinary approval. That was unpopular with everybody.

This being said, the rallies are not assumed by anyone, political parties prefer to have civil society in the most visible seat, but no established civil society organization has assumed the rallies, including Clean Romania!. Opposition politicians are every evening with the crowd, including President Iohannis at the very first one, before drawing serious criticism. Also present were many NGOs, media and pop celebrities associated with the center-right. The big numbers are explained by this ad-hoc alliance, as efforts by civil society alone, also using Facebook, have never returned more than 50 000 people in all. On corruption issues (for instance, at a previous decriminalization attempt, even more serious, in December 2013, or when former Justice Minister Macovei was fired in 2007, both organized by NGOs in the Clean Romania! coalition), NGOs never mastered more than 5000 people. So the current rallies are not NGOs alone. In fact, evidence exists that the political marketing company working for the opposition helped shape some messages and aesthetics, including by posting instructions online for participants⁴.

Question 3. Is anticorruption used for political ends in Romania?

Romania is the only country in Europe where politician number 2 (head of the Senate) and politician number 3 (head of the Chamber of Deputies), who had just won elections with a comfortable majority fear imminent arrest and conviction. Most of the freshly elected members of Parliament could themselves be prosecuted on any count, from having hired their relatives in the past, like Mr. Fillon (except that in Romania that's illegal), having passed legislation to favour some private interests or simply for having lunched with someone who is suspected of corruption and not acknowledging it. Mr

⁴ http://www.stiripesurse.ro/strategul-lui-iohannis-se-implica-in-proteste--propunere-surpriza-pentru-manifestanti_1179197.html

lordache is already investigated by the anticorruption agency (DNA) for having passed the bill limiting its powers. Supported by Brussels, DNA has long become a political actor, and of course its sympathies are not with those who threaten anticorruption legislation.

Romania is the country where generalized corruption and the toughest anticorruption in Europe have been co-existing for the past ten years. The result is not less corruption, but crowded jails: eighteen ministers from the governments in power since 2004 had been charged or convicted, including one prime minister, who was jailed (Adrian Năstase), and without counting another (Victor Ponta), indicted on several counts, for instance for having a party businessman sponsoring a Tony Blair event in Romania. The family of former anticorruption President Traian Băsescu, the power sponsor of DNA for many years, also counts already some people in jail or on the way to it. However, it was only the decline of his power that it turned out that his favorites were running huge defrauding schemes of property restitution claims at about the same time that DNA was putting in jail Mr. Nastase, his rival and predecessor in power.

The current Number 2, Mr Liviu Dragnea, the big winner of December 2017 elections with his Social Democrat Party could not even be a prime minister due to a suspended jail sentence for having planned a lottery to encourage participation in the 2012 referendum to impeach the then President Traian Basescu (although the second day he recalled it, realising that it was illegal). A reading of the motivation of his sentence, issued nine months after it was legally due, exactly during the protests, raises more issues. His sentence was raised to two years instead of one in the first instance due to his contestation of the original sentence, although this is a legal right. In the end, only two of the five judges sign a motivation where they say clearly that he has not ordered any fraud, but only the mobilization by means of the cancelled lottery a few hours after the instruction to do a lottery to encourage participation was issued (he claims not to have ordered the instruction at all), and for asking party members in the voting committees to communicate turnout and names of people who had not yet voted so to be subject to more mobilization by militants⁵. The impeached President Basescu had issued a call for people not to

⁵ <http://www.romaniacurata.ro/wp-content/uploads/2017/02/C5-decizia-penal%C3%84%C6%92-nr.-114-2795-Dragnea-PDF.pdf>

vote in the referendum, knowing that the vote was mostly against him, and hoping that his enemies would not meet the threshold, a circumstance that needs being known to understand better why the stale of turnout was so high in that referendum.

Just before the 2016 elections Mr Dragnea was again charged for having talked an associate into putting on the public payroll his party secretary when the party's funds went dry some years ago. The case of administrative abuse is reminiscent of the operating mode of Paris City Hall under Jacques Chirac (party staff on the payroll of the city), but seeing how widespread the practice is in Romania, the low value of the prejudice (about 20 000 euros for the while period) and the extraordinary means for the investigation (prosecutors wire tapped the whole department for orphans in this poorest region of Romania as they ransacked archives to falsify the time sheets of year ago of this particular secretary), the claim of Mr. Dragnea of being singled out does not seem implausible.

If he gets a second conviction, the first becomes active and he does time on both. The situation of No 3, President of Senate Calin Popescu Tariceanu is no better; he is the one charged of not confessing to have met someone briefly during a luncheon, although there is no other crime or suspicion related to him. The charge was brought before elections, when he was still President of the Senate (and of a small, king-maker party), and after elections he was invited by Number 1 (President Klaus Iohannis) to switch sides. He refused publicly, and this denied Mr. Iohannis' party from government⁶. Mr. Tariceanu is the head of the camp claiming that the judiciary is politically controlled, and that President Iohannis himself is blackmailed by the secret service over one of his houses, purchased after a fraud⁷. Article 28 of EU directive 343 of the EU, that Romania has not yet implemented if however stating that individuals are allowed not to incriminate themselves by their testimony and should only be indicted if other evidence exists.

Question 4. What are the camps opposing one another in the field?

⁶ <http://www.mediafax.ro/politic/calin-popescu-tariceanu-presedintele-mi-a-spus-canu-rea-sa-numeasca-premier-psd-16041173>

⁷ <http://www.riseproject.ro/investigation/the-forgery-that-made-romania-president-rich/>

The camps are as follows.

- **Against the ordinance**

Mr. Iohannis is the Liberal President elected in 2014, who controls secret services, and in particular the Romanian Information Service (RIS), an important source of evidence for corruption convictions until spring 2016, when the Constitutional Court asked for a better separation of roles between RIS and the DNA. His party managed just 20% of the vote in December 2016, being decimated by DNA itself. Also on his side are a small part close to his technocratic appointee of last year, former PM Dacian Ciolos (USR), and many NGOs who used to defend DNA and Basescu also during the repeated impeachment attempts of President Basescu. Basescu's own party, PMP, who entered Parliament, is also on this side. Together, they represent less than 35% of seats in the current Parliament. Mr. Iohannis is himself attacking a final Court decision using an extraordinary contestation procedure after Brasov Appeals Court ruled that one of his properties was acquired by fraud.

- **In favor of the ordinance**

The new government coalition (250 out of 465 seats) is formed of Social democrats and a Liberal splinter, ALDE, chaired by Mr. Tariceanu. With Mr. Dragnea unable to assume premiership due to his prior conviction, whom he denounces as 'political', junior Sorin Grindeanu was appointed instead. The Justice minister, Florin Iordache already had a reputation as a MP to legislate for people who hired him as a consultant (one of his former clients, a Mr. Vlasov, former President of Commerce Chamber, is serving time in jail for this⁸). Of the 465 members of Parliament, 37% have known public integrity problems, according to Clean Romania (Romania Curata, www.romaniacurata.ro), a watchdog which had been blacklisting candidates for corruption since 2004. Support for the bill might be larger in Parliament than the current government coalition, as every party has problematic candidates, though most are on the government side.

- **Former President Traian Basescu**

⁸ <http://www.romaniacurata.ro/exclusiv-rc-cum-se-fac-legile-la-romani-florin-iordache-alina-gorghiu-si-altepersonaje/>

Mr. Basescu, although critical of the government, accuses the prosecutors and the President for lying to the foreign media by not stating that Romania has the legal obligation of changing over 50 articles in the Criminal Code due to the need to implement Ordinance 343 and the some Constitutional Court rulings. He is not a neutral bystander, however, since he has some family members and close entourage charged on power abuse or related articles.

- **Important less visible actors**

Mr. Dragnea did another far-fetched gesture except legislating in his own interest. He cut by ten percent the budget of secret services, in particular Romanian Information Service (RIS). RIS is not an institution to trifle with. Since 2005 it has grown from 6.370 wiretaps to 44.759 in 2014, the double of FBI at a population sixteen times smaller, claiming to help anticorruption⁹. The number of wiretaps used in corruption files exceeds by ten times the number of warrants, as many national security wiretaps end up in the corruption files when needed¹⁰. Just a few days before the scandalous legislation was passed, RIS' top general, Florian Coldea, stepped down accused of sharing holidays with Romania's corrupt IT magnate, and an avowed collaborator of the service, Mr. Sebastian Ghita¹¹. Mr Ghita, the winner of hundreds of millions in government contracts, especially from secret services and internal affairs during the top anticorruption years, is meanwhile a fugitive from justice searched for by Interpol¹². In another risky promise, Mr. Dragnea vowed that this Parliament will try to bring secret service under proper civilian control for the first time.

NGOs are split. Clean Romania and its allies, APADOR CH, ACTIVE WATCH, and others have actually brought law suits against RSI in recent months for using EU funds abusing regulation to fund an unapproved mass surveillance program, SII Analytics, by which RIS collects and interconnects all databases related to 'life events' of people. Mr Ghita's TV station waged a war against

⁹ <https://www.sri.ro/rapoarte-de-actiivitate.html>

¹⁰ See Judicial Framework and Independence section in Freedom House report, <https://freedomhouse.org/report/nations-transit/2016/romania>

¹¹ <http://www.balkan.eu.com/romanian-secret-service-heads-surprise-resignation-raises-eyebrows/>

¹² <http://www.euractiv.com/section/justice-home-affairs/news/former-romanian-mp-among-europols-most-wanted/>

these NGOs, portrayed as George Soros funded and manipulated. RSI is regulated by an outdated 1991 law, and it turned out during recent scandals that anticorruption allowed it to increase its powers surreptitiously by secret Supreme Defense Council decisions¹³. The constitutionality of such classified decisions cannot therefore be challenged.

Question 5. So is this a political conflict?

Two conflicts are mingled into one.

While a recent suit was filed at Constitutional Court to claim that the executive and the judiciary were 'in conflict' over the recent bill, the long, deep conflict is actually between sovereignty of the Parliament over legislation and the Brussels sponsored anticorruption bills that DNA uses to indict politicians. The Romanian judiciary, no. 66 in rank in Independence of the Judiciary according to World Economic Forum Global Competitiveness Report, is in the same time no. 112 when trust in politicians is concerned. The embattled judiciary supported by the European Union is fighting its own battle for influence against frequently corrupt elected officials, who try to defend themselves by restricting its powers.

But a political conflict exists as well, between those who lost elections, and those who won. President Iohannis openly supported Dacian Cioloș in the campaign and vowed not to invite SDP to govern even if they win. He rejected their first nomination for PM and indeed did not invite any opposition politician on December 1st for Romania's National Day. He was severely disappointed by elections' results and has tried to mobilize public opinion against SDP ever since. His popularity ratings have fallen to 20% by end 2016, so he is the main to profit from current mobilization and the return of corruption as main topic on the agenda.

Question 6. Actually, how corrupt is Romania and is this changing?

Romania's standing has long been as the most corrupt country in the European Union, but it has improved a little over Bulgaria in perception rankings.

¹³ <http://www.unjr.ro/2017/01/16/document-csat-privind-relatia-dintre-serviciile-de-informatii-si-justitie/>

Romania has evolved a little in the fact based integrity index produced by ERCAS, due to cutting red tape and improving judicial independence, but still trails behind on media freedom and poor regulation. Corruption in areas as education and health are signs of widespread policy failure, with the lowest investment in Europe. Prosecutors have dealt mostly with infrastructure corruption, where most of the money is, but jailing entrepreneurs and their public counterparts has not managed so far to change an established generalized practice of kickbacks and poor delivery standards¹⁴. On the positive side, some obvious corruption forms, such as single bidding in public procurement, are decreasing, and the part two governments (Ponta and Ciolos) have made some minor steps to cut red tape and boost e-government. Romanian progressed slightly in the new index for public integrity since 2012, though its progress was surpassed with countries such as Latvia or Lithuania from the region. It has now managed not to be on EU's last position switching places with Bulgaria.

Components	Component Score	World Rank	EU Rank	Income Group Rank
Judicial Independence	5.58	44/105	20/29	8/28
Administrative Burden	8.93	28/105	17/29	5/28
Trade Openness	8.04	35/105	24/29	9/28
Budget Transparency	8.71	20/105	10/29	6/28
E-Citizenship	6.08	42/105	29/29	8/28
Freedom of the Press	6.26	43/105	28/29	7/28

Table 1. Romania's standing in index of public integrity (general score 7.27, ranks 31/ 105 countries Source: www.integrity-index.org

Question 6. What is going to happen next and will the conflict end if the ordinance is retired?

¹⁴ <http://anticorpp.eu/publications/report-on-romania/>

The government issued Ordinance 14 cancelling Ordinance 13 after 200 000 people gathered in protest on February 5.

The Judicial Council (CSM, in Romanian), as well as the Presidency, notified the Constitutional Court on 1 and 2 February respectively that there was a constitutional conflict between the relevant institutions (government, parliament and CSM) with regards to the procedure chosen by the government to pass the controversial ordinance. On 8 February, the Constitutional Court ruled the following: "A constitutional conflict did not exist between the Executive Power (Government) and the Legislative (Parliament), because the Government decision to adopt the Government ordinance bills regarding the modification of the Penal Code and the Penal Procedural Code cannot be qualified as an act of arrogation of legislative powers that otherwise belongs to the Parliament. By adopting the Government ordinance bills, the Government acted in accordance with its own competences, as expressly provided in Art. 117 of the Constitution. ... A constitutional conflict did not exist between the Executive Power and the Supreme Council of the Magistracy (CSM), because the Government does not have legal obligation to request approval from the CSM for such ordinances."¹⁵

CC also denied the petition from the Ombudsman, on the grounds that the government retired the ordinance, so there is no need to pass judgement on substance¹⁶. A no-confidence vote against the govt failed in the Parliament in the following week, but Mr. Iordache nevertheless resigned, citing the Court decision as proof that he had been within his own rights but admitting he had communicated poorly. It is unclear what will happen with the inquest against him that DNA had started for drafting and issuing Ordinance 13, for which they had already confiscated papers at the Ministry.

The Parliament is left to decide, although its decisions can again go the Constitutional Court, and upheld only with a two- thirds majority.

¹⁵ <http://www.reuters.com/article/us-romania-corruption-decree-idUSKBN15O1HA?il=0>

¹⁶ <http://www.bbc.com/news/world-europe-38907233>

What does each party want?

The government wants amnesty for its own top people, so they are unlikely to stop trying, even if they cannot pass the current ordinance.

The President and the opposition parties want the government to go and Mr. Tariceanu and Dragnea arrested. The frequent slogans of their supporters are 'To jail, not to government', and 'SDP, the red plague'. Even if they do not have the numbers now, they hope to erode SDP in view of early elections.

NGOs have a more limited and neutral agenda, but it is not them who call the shots.

The main question thus remains if Romania's tough repressive strategy against corruption is sustainable against the majority of its own Parliament.

Corruption fights back. MPs sometimes allow the investigation of their colleagues, but they often withhold it- as, indeed, do many Parliaments in Europe, Greece most notoriously, but not only. Romanian MPs have no immunity per se, but an approval of the Chambers is needed to be searched or otherwise investigated, though they can be sent to trial if evidence can be collected from other sources.

Although Romania arrested many people, those who replaced those arrested have turned no better. One chief reason is that MPs and governments seldom pass any policy to cut rents and the many opportunities for them, and no administrative deterrents exist, therefore corruption remains widespread. Arrests look often arbitrary, as far more people indulging in similar practices exist at any given moment in time than those arrested, raising questions on why were they targeted. As early elections are practically impossible, and the degree of organization and capacity of current opposition remains poor, the country remains thus divided, and the conflict is bound to continue until a party with a good governance mandate and clean politicians will manage to get 51% of the seats in Parliament.

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She is the author of the Cambridge University Press book *A Quest for Good Governance. How Societies Build Control of Corruption*, <http://www.cambridge.org/us/academic/subjects/politics-internationalrelations/comparative-politics/quest-good-governance-how-societies-develop-controlcorruption?format=HB>

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