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## AN AMERICAN PROSECUTOR'S VIEW OF ROMANIAN CRIMINAL JUSTICE

James A. Goldston\*

During the fall of 1995, I was selected by the United States Department of Justice to spend three months in Bucharest as a Resident Legal Advisor to the Romanian Prosecutor General's Office. This opportunity was provided by the United States Information Service through its Rule of Law Program. At the time, I had been a prosecutor for almost five years and was serving as an Assistant United States Attorney in the Organized Crime Unit of the Southern District of New York.<sup>1</sup>

Having left for Romania the day after a Los Angeles jury acquitted O. J. Simpson of murder, I was keenly aware of the danger of seeing everything through American eyes and offering American solutions for Romanian problems. I was determined

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\* The following comments are offered as candid assessments based on my own experience over the course of three months working with prosecutors and speaking with numerous knowledgeable observers of the criminal justice system in Romania. In the exercise of caution, I should note what is perhaps obvious -- that many comments are in no way intended as personal indictments of anyone. Public service in a communist government, particularly the uniquely distorted brand which existed under President Ceausescu, led numerous persons of good will to make choices they might not have made had conditions been different. I harbor great affection for the overwhelming majority of prosecutors with whom I came into contact. My hosts at the Romanian Prosecutor General's Office generously attempted to accommodate virtually every request for information and to assist in arranging numerous meetings with a variety of government officials. In discussing cases, I have made every effort to avoid referring to by name to particular individuals.

1. In March 1996, after more than five years as a federal prosecutor, I left the United States Attorney's Office to work as a senior human rights officer for the Organization for Security and Cooperation in Europe ("OSCE") Mission to Bosnia-Herzegovina.

not to simply compare everything I saw with the Federal Rules of Criminal Procedure and then note critically the numerous differences. Avoiding that pitfall would be difficult because, as an American prosecutor steeped in the federal criminal justice system, I had brought to Romania a particular perspective. This perspective was shaped by experiences in supervising investigations, conducting trials and arguing appeals in accordance with federal law and federal rules of evidence. Although I have attempted to avoid simple comparisons and criticisms, my observations of Romania were necessarily molded by the nature of the legal system for which I had been trained.

Most of my work at the Romanian Prosecutor General's Office consisted of giving lectures and presentations to judges, prosecutors and police officers on various aspects of American federal criminal procedure and some of the investigative techniques commonly employed in long-term federal criminal investigations. The principal topics of these sessions included: (1) the nature of, and federal law concerning, organized crime, narcotics trafficking and money laundering in the United States; (2) the use of informants, undercover agents, visual surveillance, cooperation agreements, testimonial immunity, pen registers, trap and trace devices, electronic surveillance, and search warrants; (3) the nature of the adversary system, with attention to the distinct roles of prosecutors, judges, and defense attorneys; and (4) evidentiary rules and other checks on police and prosecutorial authority in the federal criminal justice system. I devoted substantial time observing Romanian criminal trials and immersing myself in pre-indictment prosecutorial investigative practices. During my three months in Romania, I engaged dozens of prosecutors, judges and criminal defense attorneys in lengthy discussions about the Romanian system's flaws, strengths, and need for and susceptibility to reform.

Over the course of my assignment, I became familiar with Romanian criminal procedure and the major actors in the criminal justice system. The problems afflicting the system are deeply rooted and will take the continued efforts of many individuals over a number of years to correct. It is my hope that the Rule of

Law program, together with the efforts of other visitors who have devoted time and energy to the Romanian criminal justice system over the years, may serve as the foundation for a more sustained and systematic program of foreign assistance and cooperation in the future.

This article will describe what I believe are some of the principal problems which currently plague the Romanian criminal justice system. My observations are not offered as a comprehensive review of Romanian criminal procedure law, nor do I pretend to have studied that law systematically. This is not an overview of the way a typical criminal case proceeds from beginning to end. Finally, this is not a systematic evaluation of Romania's conformance with international due process and fair trial standards.

As a prosecutor from the United States assigned to work with my counterparts in Romania, I was permitted an insider's view of the criminal justice system; an opportunity which is not widely available. This analysis is necessarily selective, based on my intimate, yet highly personal, observations of the system during my time in the country. The actions of prosecutors commanded much of my attention, given my assignment within the Prosecutor General's Office and the central role prosecutors have traditionally played and continue to play in the criminal justice system. Ultimately, I hope to provide an accurate snapshot of the way the Romanian criminal process works, day-to-day, in real life, more than six years after the fall of Ceausescu in 1989. Along the way I will identify some of the most egregious problems in the present system and briefly suggest some possible reforms. My objective is to assist the many independent Romanian lawyers, researchers, and human rights and public interest advocates struggling with few resources and often less respect to build a humane and democratic society out of the ashes of one of the harshest forms of communism in the former Eastern bloc.

## I. THE ROMANIAN CRIMINAL JUSTICE SYSTEM: A BRIEF SURVEY OF PROBLEMS

As I learned within days of my arrival, a number of characteristics significantly distinguish the Romanian criminal justice system from its federal counterpart in the United States. Many of these differences seem morally indeterminate in that neither system is unequivocally better or worse than the other in accomplishing the tasks required of a criminal justice system. Both systems strive to accurately solve crimes, identify the guilty, clear the innocent, and bring about swift and proportionate punishment. Indeed, many of the characteristics which distinguish the Romanian system from the American system are non-controversial. These differences represent rational choices, appropriately made by different nations, to combat crime and insure that justice is served.

The most obvious difference is the absence of an American-style jury system. In Romania, as in many European countries, judges, not lay citizens, find the facts in criminal cases. The majority of Romanians I encountered were simply astounded that a society as advanced as the United States would entrust to common citizens the power to judge questions of guilt and innocence, particularly in the aftermath of the Simpson verdict in Los Angeles.

Romania's criminal justice system, like those in many of its continental European partners, is less adversarial in nature than the American system. In broad terms, Romanian prosecutors are often more than advocates before the bar of justice. They play a defining role in the investigative and trial stages of a case. This broader role for the Romanian Prosecutor is significantly more comprehensive than the role of defense counsel or, for that matter, prosecutors in American courtrooms.<sup>2</sup>

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2. Many countries which, like Romania, have adopted what may generally, if somewhat inaccurately, be termed an "inquisitorial" as opposed to an adversarial model of justice have chosen to place relatively more power and discretion in the hands of prosecutors than Assistant United States Attorneys enjoy. By itself, this is a defensible, rational choice -- admittedly

Another noteworthy distinction is that the Romanian rules of evidence, unlike the Federal Rules of Evidence,<sup>3</sup> permit the use of hearsay. In Romania, out-of-court statements offered to prove the truth of the matter asserted are allowed into evidence not only in exceptional cases, but as a matter of course in criminal trials.<sup>4</sup>

Although some of the distinctive characteristics of Romania's criminal justice system reflect understandable differences of

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quite different from the American model. As is discussed in greater detail below, however, where Romania parts from its continental European partners - - and where the system, in my view, begins to shed its moral justification -- is in the extent to which the greater decision power given prosecutors is unchecked by independent judicial authority.

3. See FED. R. EVID. 801.

4. Once again, by itself, this choice to permit different kinds of evidence than are allowed as a rule in American courtrooms is not in itself problematic, so long as other safeguards are employed to ensure the reliability which American prohibitions against hearsay are traditionally intended to produce. In fact, Romanian law utilizes a number of methods to insure the reliability of evidence presented at trial. One of the most common is the pre-indictment procedure known as the "confrontation." This is an investigative tool which, though unknown in American federal practice, is often one of the crucial weapons in the prosecutor's pre-trial arsenal.

The bulk of proof in most Romanian criminal investigations consists of the "declarations" of witnesses or suspects -- handwritten police and prosecutor summaries of witnesses' (or suspects') statements in response to questioning. When, during the course of a criminal investigation, the declarations of two witnesses (or one witness and one suspect) conflict in important ways, the prosecutor will commonly call both witnesses (or the witness and the suspect) before her so that each can answer questions in the presence of the other. By compelling the witnesses to confront one another with their contrasting testimonies, the prosecutor hopes that one of the two will concede that he is mistaken or has previously lied, and therefore amend in a manner consistent with the statements of other witnesses his prior declaration.

Useful as the confrontation is as a means for the prosecution to reconcile inconsistent versions of events prior to indictment, in practice it is often insufficient in preventing the widespread use of hearsay evidence from seriously impairing the accused's ability to probe the integrity and conduct of the police investigation (commonly the focus of much attention in American trials). In particular, the near-universal practice of allowing police officers to submit the results of their investigation in writing, rather than through live testimony subject to cross-examination, risks impeding the truth-finding function in the search for evidence of guilt.

opinion, others are more problematic to one schooled in the American system. By ceding to the prosecution inordinate and often unlimited power over the investigation and trial, defendants are often deprived of certain fundamental protections. These differences risk seriously compromising the fairness of criminal proceedings in many cases. The difficulties which attend the Romanian criminal justice system stem, to some extent, from the attitudes and behavior of prosecutors who resist shedding the excessive authority they wielded under the communist regime. However, not all the problems of the system can be laid at the prosecutors' door. In fact, many problems pervade the structure and functioning of the entire criminal process. There is urgent and substantial need of reform in both the laws that govern criminal procedure and the manner in which it is practiced.

In order to understand some of these problems, it is helpful to highlight one of the principal features of most Romanian criminal investigations, particularly those involving garden variety crimes such as theft or robbery. It might be alarming to learn of the high frequency with which police and prosecutors obtain confessions from defendants. In the majority of cases with which I became familiar, the defendant's admission of guilt was the principal piece of evidence in the file. Indeed, confessions are such an integral part of most criminal investigations that, by law, no arrest warrant may issue until a prosecutor has first interviewed the defendant in the presence of his attorney.

In Anglo-American countries, the adversary system virtually mandates that police and prosecutors proceed on the assumption that the defendant will not speak to them and that they must gather other evidence in order to obtain a conviction. By contrast, in Romania, the heart of many investigations is a series of interviews the police and prosecutors undertake with the defendant. Often, numerous interviews are required because most defendants do not admit their guilt immediately. Defendants must be persuaded of the futility of persisting in denial; thus, only in successive interviews does a complete admission generally come forth.

One should not assume that Romanian police and prosecutors do not gather additional evidence. To the contrary, Romanian law specifies that a confession alone is not sufficient to convict with additional corroboration.<sup>5</sup> I have examined numerous files in complex cases chock-full of reports, photographs, test results, witness interviews and other evidence apart from defendant admissions. However, it should be noted that the defendant's admission is the most crucial piece of evidence in the file and much of the corroborative evidence is often obtained only after the defendant has confessed to her crime.

Romanian law also includes the familiar provision that a defendant may not be compelled to incriminate himself. This conforms with the international standards of fair trial and due process. In practice, however, the traditionally submissive attitudes of Romanian citizens towards law enforcement authorities, combined with the willingness of prosecutors and police to exploit this vulnerability to their advantage, often deprive the Romanian defendant of this protection.<sup>6</sup>

The pressure on law enforcement authorities to obtain confessions stems from several factors which include: (1) the responsibility of the prosecutor in the Romanian system not only to prove his case, but to find the truth as well; (2) the belief that best evidence of the truth is the defendant's own admission; and (3) the fact that the Romanian criminal justice system does not permit plea bargaining.

During my stay I was repeatedly reminded that Romanian prosecutors and police are concerned not simply with gathering enough evidence to prove their case beyond a reasonable doubt, but with revealing the full truth about what crimes were committed and who was responsible. I think it fair to say that prosecutors in Romania, more so than my colleagues in the United States, see themselves as uniquely responsible for

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5. Romanian Code of Criminal Procedure art. 69.

6. I frequently baffled prosecutors and police by asking what legal power they had to compel witnesses and suspects to submit to questioning, even where they encountered resistance. Time and again, I was told that, as a practical matter, Romanian citizens rarely resist police or prosecutorial requests to answer questions.



ensuring that each investigation yields the truth regarding the crimes at issue. However, I do not mean to overstate the significance of the distinction between the Anglo-American/adversarial and Continental/inquisitorial models of justice or the extent to which any one national justice system embodies the attributes solely of one model or the other.

The vigorous search for the truth is due in part to the fact that the Romanian criminal justice system relies more exclusively than the American system on the judgment of prosecutors to ensure that the investigation and trial yield the truth. Prosecutors in the United States are often said to be more than mere advocates. They owe allegiance not only to the cause of conviction, but to the overarching promise that justice will be done.<sup>7</sup> American prosecutors are not alone in their search for justice. They are supported by vigorous defense counsel and independent judges, along with constitutional, procedural and evidentiary rules which check prosecutorial discretion. Romanian prosecutors generally stand alone in the search for justice and truth, and many are pleased to exercise the greater power which is implied by that task. The success of a Romanian criminal investigation and trial in producing a just outcome stands or falls on the shoulders of prosecutors.

In keeping with the Romanian prosecutor's higher moral purpose, law enforcement officials do not simply gather enough evidence to persuade a judge or jury. They seek the most compelling evidence of guilt -- the defendant's own admission. Cast partially in the role of confessors, many prosecutors require a confession as the only reliable proof of what really occurred. It should not be surprising that prosecutors instinctively look first to the accused herself as the best source of the evidence, particularly in a society where confessions, however obtained, have long been customary.

The absence of plea-bargaining discretion by the Romanian prosecutor places additional pressure on both police and prosecutors to seek confessions. The ability to plea bargain allows American prosecutors to dispose of cases as they see fit.

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7. See ABA STANDARDS FOR CRIMINAL JUSTICE § 3-1.2 (1992).

In the United States, the prosecutor has the authority to allow a defendant to plead guilty to a lesser charge than that contained in the charging instrument.<sup>8</sup> This authority acts as a safety valve for an overcrowded criminal justice system and for overworked prosecutors who must ration their limited energy and resources according to the relative strength of each case. Where an investigation does not gather overwhelming evidence of guilt, prosecutors may accept a plea to a lesser charge, rather than risk acquittal at trial. In Romania, however, all cases are sent to court for trial. Prosecutors do not have the luxury of picking and choosing among cases based upon the quantum of evidence. The absence of the plea-bargaining safety valve forces police and prosecutors to gather sufficient evidence of guilt in every case. The most compelling proof of guilt, and often among the easiest to obtain if the defendant can be persuaded to cooperate, is a confession.

Many of the factors contributing to the undue pressure on Romanian prosecutors and police to obtain confessions exist in other European countries which employ a civil law system of justice. Fortunately, in many of these countries other factors counteract the pressures on prosecutors and police to obtain confessions. These factors include: a strong and independent judiciary, an able corps of trained and effective defense attorneys, and a tradition of respect for individual rights. The overall effect is that defendants in many of these countries generally receive both fair trials and due process. In Romania, these countervailing tendencies are often minimal or absent. Below I discuss some of the deficiencies which currently plague the Romanian criminal justice system. Each one by itself would not likely produce the gross distortions of power which presently afflict the criminal process. When combined, however, these deficiencies ensure that the system as a whole suffers from the exercise of inordinate influence by police and prosecutors over the conduct and outcome of criminal investigations and trials.

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8. See FED. R. CRIM. P. 11(c)(1).

*A. The Prosecutors*

Not surprisingly, prosecutors in Romania are widely seen, and generally see themselves, as the most powerful actors in the system. Forty years of Communist rule left scars all over this society, but nowhere more so than in prosecutorial offices. Prosecutors in Romania exercise far greater legal authority with less judicial supervision than do their counterparts in the United States and Western Europe. Under the communist regime, prosecutors were among the principal executioners of state policy and had broad power to ensure compliance with the law. The attitude of many prosecutors toward their colleagues on the bench and within the defense bar was often more tolerant than respectful. Despite the six-year transition from communism to a democratic form of government, surprisingly little has changed.

Prosecutors in Romania possess the legal power to issue arrest and search warrants without judicial authorization. In Romania, unlike in the United States, where a defendant's fate is decided at trial, by the time an indictment is prepared and the file submitted to court, the prosecutor has usually already made the essential decisions. He has decided which physical evidence to gather, which tests to perform, and which witnesses to call. These decisions will effectively determine the outcome of the case. Admittedly, this in part reflects the civil law tradition wherein the proof at trial consists of a "case file" containing written documents prepared by the prosecutor and the police. However, unlike in many other civil law countries, judges in Romania have no role in the investigation prior to indictment. Prosecutors make virtually all decisions regarding investigative techniques independently. This entails a delicate balancing of society's interest in obtaining evidence of crime and the liberty of the individual. In many other European countries, as well as in the United States, this responsibility is reserved for judges. Moreover, even during trial, Romanian judges play a more limited role than their counterparts in other civil law countries, often simply deferring to the findings reached by prosecutors during the investigative stage. Accordingly, many prosecutors

view court proceedings as an unnecessary duplication of work they have already completed.

Following the events of 1989, calls for restrictions on prosecutorial authority were made with increasing frequency. However, prosecutors have remained decidedly resistant to the notion that their authority should be curtailed. They have, thus far, largely succeeded in forestalling efforts to change the way that they investigate and prosecute crimes. Six years after the revolution, prosecutors continue to do their work essentially as they did it under Ceausescu.<sup>9</sup> Despite the implementation of certain reforms, the criminal justice system continues to reinforce a general tendency toward unreviewed prosecutorial power. Perhaps unwittingly, one senior prosecutor, in a moment of uncharacteristic candor, underlined the continuity between the present and former systems. "So you see, Jim," he said, "we are not Communist gorillas who just fell out of the trees. We have a good justice system. And it is the same justice system we had under Ceausescu. It was a good justice system then, too."

Prosecutors who see themselves as guardians of order, as many of those in Romania do, might be expected to devote themselves tirelessly to their task. To the contrary, most prosecutors work a maximum of eight hours a day, five days a week, with smoking and coffee breaks interspersed throughout. Weekend work is unusual. These work habits reflect both the low pay prosecutors receive and the traditions developed under a forty-year communist regime wherein employment was guaranteed and working longer hours was not rewarded or expected. They are also symptomatic of a more fundamental flaw in the criminal justice system.

Unlike their counterparts in the United States, prosecutors in Romania need not spend countless hours meticulously reviewing their own work and that of the police. The investigative activities

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9. Other foreign observers have reached similar conclusions. See, e.g., A. Spielmann and J. A. Frowein, *Report on Human Rights in Romania for the Parliamentary Assembly of the Council of Europe*, 14 HUM. RTS. L.J. 133, 140 (1993) (citing the "procuratura" as one of the "institutions which to a large extent seem founded on the old principles of a state system where the rule of law and democratic forces did not prevail").

of law enforcement officers -- the seizing of physical evidence, the conducting of forensics tests, and the interviewing of witnesses and suspects -- will rarely, if ever, be scrutinized closely by a judge or defense attorney. Largely absent in Romania is one of the essential features of any criminal justice system that purports to uphold the rule of law -- the system's capacity to compel police and prosecutors to conduct their investigations in a lawful fashion and to prove that they have done so. Thus, prosecutors behave accordingly.

Similarly, six years after the end of communist rule, prosecutors in Romania are still willing to entertain political and other considerations that have no bearing on guilt or the quality of evidence in deciding whether to indict. This unfortunate practice severely compromises the prosecutorial commitment to apply the law impartially. Despite protestations to the contrary, there are severe problems associated with prosecutions of police abuse and violence against Roma and other ethnic minorities, two prominent types of criminal activity. These cases are generally treated differently from ordinary thefts and robberies. Some of the problems stem from a tendency among many prosecutors to discredit those who make allegations of police abuse and violence against Roma. Further, prosecutions have been sidetracked by the flexing of political "muscle" on the part of influential interested parties. That prosecutors have repeatedly succumbed to such pressures only underlines how elusive the rule of law remains.<sup>10</sup>

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10. One widely publicized case of violence against members of the Roma minority illustrates some of the difficulties. In the late afternoon of September 20, 1993, an ethnic Romanian resident of Hadareni, in Mures county, was killed in a conflict with some Roma men. Shortly thereafter, at about seven p.m., approximately 400 ethnic Romanian and ethnic Hungarian villagers set fire to a house with three Roma inside. One Roma man died in the fire, and two escaped, only to be beaten to death by the mob. Later that evening, residents of the village set fire to many Roma houses, destroying thirteen and seriously damaging an additional four.

In November 1993, and again in May 1994, local prosecutors on the case were quoted by international human rights organizations as saying that sufficient evidence had been gathered to warrant the arrest and indictment of more than a dozen individuals implicated in the violence in Hadareni. However, the chief prosecutor for Mures County complained that indictments

The widespread resistance to change that prevails in the prosecutorial corps reflects the fact that many of the most senior Romanian prosecutors served for many years under the communist regime. Perhaps understandably, they have retained many of the attitudes and practices that they acquired before December of 1989. Habit is a factor in that prosecutors who have been handling cases the same way for twenty years can hardly be expected to change. Self-interest is also a factor in that prosecutors who have grown accustomed to exercising largely unbridled power under the communist regime are reluctant to accept new restrictions upon their discretion. Both of these factors will militate against substantial reform within the

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could not be issued, because local political leaders were interfering in the investigation.

For several days in November 1995, I visited Targu-Mures and spoke about the case with local prosecutors, police officers, political leaders, and representatives of non-governmental organizations. It became clear during the course of this visit that the Hadareni prosecution has been impeded by political considerations from the start.

Prosecutors involved in the investigation of this case made clear the role of electoral politics in the prosecution. "For me," one career prosecutor said, "it's a simple case. I have the evidence" to convict at least eleven persons for their involvement in the attacks on Roma in Hadareni, but political factors have prevented the case from going forward. This prosecutor specifically cited the political power of the Party of Romanian National Unity (PUNR) in Mures County, as well as the hostility to Roma expressed by many PUNR officials. According to this prosecutor, PUNR officials at the national and local levels spoke about the case with senior government officials both within and outside of the Prosecutor General's Office.

According to prosecutors in Mures County, Gheorghe Bucur, who was at the time and remains Vice Mayor of Hadareni, intervened in the case in July 1994, when a number of persons -- some of them allegedly Bucur's relatives -- were brought to the prosecutor's offices in Targu-Mures to be formally charged. According to prosecutors, the protests of Bucur and other PUNR officials at the time served to prevent arrest warrants from being issued. When I met with him, Bucur confirmed that political influence in the Hadareni case reached high and deep. Bucur acknowledged that he had spoken with senior PUNR officials about the Hadareni prosecution, and that those officials, in turn, had complained about the investigation to the Romanian Minister of Justice, as well as to senior prosecutors and police officials in Targu-Mures and Bucharest.

prosecutorial sector until the present generation of senior officials retires.<sup>11</sup>

The importance of seniority is reflected both in the rigid structure of offices and in the progressively greater amounts of work experience required to ascend to each level within the prosecutorial hierarchy. The organization of offices mirrors the four-tier court system created in 1992 by the Law of Judicial Organization. Thus, the Prosecutor General's Office, which is attached to the Supreme Court of Justice (the highest court), is responsible for exercising control over all other prosecutors. Below the Prosecutor General's Office are, in downward succession, the prosecutor's office attached to the Court of Appeal, the prosecutor's office attached to the "tribunal" (court of second instance), and the prosecutor's office attached to the "judecatorie" (court of first instance).<sup>12</sup> In order to join the prosecutor's office attached to the "tribunal," a prosecutor must have at least six years of prosecutorial experience. To work in the prosecutor's office attached to the Court of Appeal, a prosecutor must have at least ten years of experience. Finally, in order to advance to the Prosecutor General's Office, a prosecutor must have at least 15 years under his belt.

Underlying this emphasis on seniority is the principle of "hierarchical control," which guides prosecutors at each level of the bureaucracy. Every decision made by an individual prosecutor in the course of an investigation is subject to review by superiors within his office and in offices further up the organizational chain. At the top of the pyramid, officials in the Prosecutor General's Office have the power to amend or reverse

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11. Many new prosecutors have been hired since 1990, but they are moving up the ladder of power slowly. Since many senior officials are still in their 40's and 50's, it may take more than a decade for prosecutors entering the system after 1989 to assume positions of influence.

12. The "judecatorie" has jurisdiction over many common crimes, including numerous thefts and frauds. The "tribunal" sits as a court of first instance for more serious crimes, including murder, and as a court of appellate jurisdiction with respect to cases initially judged in the Judecatorie. The courts of appeal and the Supreme Court of Justice are primarily, though not exclusively, appellate courts.

decisions made by prosecutors in every other office within the country.<sup>13</sup>

The strength of the structure of prosecutorial power is remarkable. Most of the senior posts in the Prosecutor General's Office are filled by officials with more than ten years of supervisory prosecutorial service under Ceausescu. Furthermore, several prosecutors who presently wield policy-making authority at the Prosecutor General's Office have distinguished themselves in the past by their loyalty to powerful government officials or to the institutions of law enforcement, notwithstanding the demands of justice.<sup>14</sup>

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13. The principle of hierarchical control is expressly mandated by the Law of Judicial Organization (1992).

14. To take one example, in the mid-1980's, a Romanian citizen (the "victim") was arrested on suspicion of having written a number of entries in his personal diary which were critical of Ceausescu. The victim was taken to the lockup maintained by the feared Securitate police force, where he was beaten to death. A high-level prosecutor (the "first prosecutor") was assigned the investigation into the victim's death in custody. Relying in part on the initial medical examiner's report, which was fabricated to indicate that the victim had died of a heart attack, the first prosecutor reached a "non-indictment decision," concluding that, as the death was not caused by violence, no Securitate officer could be held responsible.

In 1990, following the fall of the Communist government, the victim's family demanded that the investigation be re-opened. A second prosecutor was assigned the case. The investigation was prolonged. The victim's cellmates from the Securitate lockup at the time of his death were interviewed. A new medical examiner's report concluded that the victim had been beaten to death. By 1993, the second prosecutor had accumulated substantial evidence implicating a Securitate officer in the murder. However, before a formal charging instrument could be submitted to the court, the first prosecutor, having since been promoted to a very senior position within the prosecutorial hierarchy, took the file from the second prosecutor. The first prosecutor kept the file for some time, after which he sent it, not back to the second prosecutor, but to a third prosecutor. There the file remains. Many observers suspect that the second prosecutor's investigation has been squelched for political reasons.



### B. *The Judiciary*

One of the most striking characteristics of the Romanian criminal justice system for an observer from the United States is the limited nature of judicial authority and the relatively low regard in which many judges are held among both lawyers and the population at large.

In general, judges exercise less power than do prosecutors over the course of criminal investigations and the results of trials. This fact is reflected in the greater status accorded to investigative, as opposed to trial, prosecutors within the prosecutorial branch.<sup>15</sup> Thus, in contrast to the United States, where a prosecutor often "cuts her teeth" on trial work, in Romania, the investigation is where the action is, and prosecutors commonly make their mark solving a crime. It is the prosecutor who, together with the police, during the investigative phase builds the case file that eventually reaches the court. To a great extent, therefore, the prosecutor literally shapes what the judge will consider at the time of trial. In the view of many prosecutors, by the time a typical criminal case file gets to court, all the relevant witnesses have been interviewed, all necessary evidence has been gathered, and all that remains is for the judge to affirm what the prosecutor has already found -- that the defendant is guilty. Judges, of course, can and do re-interview witnesses, seek additional evidence, and draw different conclusions than the investigative prosecutor. In most cases, however, a judge will go along with the prosecutor's findings. Where many trials are simply reaffirmations of pre-indictment prosecutorial actions, rather than a true contest over the facts, it should not be surprising that

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15. In Romania, prosecutors divide themselves according to function. Certain prosecutors work on investigations -- either by themselves or supervising the police in gathering evidence to build a case. Other prosecutors work in court, either at trial or on appeals. These prosecutors are assigned to the case only after the investigation has been completed and an indictment (*rechizitoriu*) has been drafted and submitted with the case file to the court.

prosecutors involved in investigations are frequently considered more “macho” and important than their trial colleagues.<sup>16</sup>

The relative power of prosecutors vis-à-vis judges is a function, in part, of the fact that like prosecutors, judges may join the magistracy immediately upon graduation from law school. Insofar as students obtain the equivalent of a J.D. degree in Romania after only four years of university education, newly minted judges may take the bench in their mid- to late-twenties. Prosecutors twice that age and older -- who have been in office for 10, 15, 20 and 25 years -- can hardly be expected to accord these younger judges much respect.

Moreover, the attitude of dismissive superiority which some prosecutors display toward judges at times extends beyond the personal to the institutional actions of prosecutors' offices. The Prosecutor General's Office has gone so far as to disregard the rulings of the Constitutional Court, a judicial body established after the revolution to adjudicate constitutional questions. Thus, in July 1994, the Court limited the application of Article 200 of the Criminal Code -- which criminalized homosexual conduct -- to those acts which provoke public scandal or are perpetrated in public places.<sup>17</sup> Notwithstanding this authoritative construction of the law, a number of prosecutions have subsequently been brought, and at least two convictions secured, for violation of Article 200 where the homosexual conduct at issue did not provoke public scandal and was not perpetrated in public. Prosecutors have also disregarded Constitutional Court rulings regarding offenses against state property and the imposition of terms of imprisonment for failure to pay a court-levied fine.

Finally, the greater power of prosecutors is rooted, not merely in their own attitudes, but in the law itself. Thus, under the Code of Criminal Procedure, prosecutors may and do issue search warrants and arrest warrants on their own, without judicial

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16. In a society which, like Romania's, still has a long way to go in the struggle for gender equality, it is perhaps not insignificant that, among the investigative prosecutors I met, men generally outnumbered women, while the reverse was true among trial prosecutors.

17. Decision Number 81 of the Court, dated July 15, 1994.

authorization or knowledge. And, although the lawfulness of an arrest can later be reviewed by a judge, there exists no mechanism whereby judges may second-guess prosecutors' decisions to issue search warrants. A defendant who believes that a search warrant was improperly issued must appeal to a supervisory prosecutor at each level in the hierarchical chain. If, at the end of this internal appeal procedure, the Prosecutor General affirms the initial decision to issue the warrant, a defendant has no further recourse in the courts.<sup>18</sup>

The Romanian Constitution further contributes to the subordination of the judiciary in the manner of judges' selection and discipline. Thus, the Superior Council of Magistracy, which must confirm all judicial appointments made by the president and discipline judges once in office, is composed of prosecutors as well as judges. As a result, the professional careers of judges depend not only on other judges but on prosecutors as well. Prosecutors, by contrast, are subject to the disciplinary authority of a body composed solely of their peers.<sup>19</sup>

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18. Under the National Security Law, prosecutors may also issue warrants for electronic surveillance -- i.e., wiretaps -- in cases involving threats to national security. Once again, no judicial authorization is required, and the courts have no power to entertain the claims of citizens who believe their rights have been violated. Rather, such claims must be presented to the Prosecutor General's Office -- the same institution which has the exclusive power to issue a warrant in the first place.

19. Prosecutors' expansive role in the administration of criminal justice, and their own sense of superiority in relation to judges, were revealed during a trip I made to Targu-Mures in November 1995. On November 20, all judges of the first instance court of Targu-Mures refused to conduct trials in protest against the failure of the President to grant them life tenure, as the law required. The Law of Judicial Organization of 1992 provides that all judges except those on the Supreme Court of Justice have life tenure, and requires the President to so declare within two years of the effective date of the Law -- i.e., by August 1994. As of November 1995, President Iliescu had failed to render the required declarations for a large number of judges. Significantly, it fell to a prosecutor -- in the prosecutor's office attached to the Court of Appeal in Mures County -- to ask the judges to go back to work. When they refused, the prosecutor contacted his colleagues at the Prosecutor General's Office in Bucharest. An official at the Prosecutor General's Office told his colleague in Mures County to do what he had to do to get the judges back to work. After

### C. *The Criminal Defense Bar*

Criminal defense attorneys in Romania are, in many ways, second class citizens of the justice system. Particularly in cases involving ordinary theft or robbery, defense counsel generally lack the status and legal authority enjoyed by prosecutors. Both the legacy of the communist system of justice -- in which much of the defense bar essentially acquiesced in the demands of state prosecutorial power -- and the paucity of capable, aggressive, independent criminal defense attorneys, contribute to this inequality.

Perhaps the most visible manifestation of the disparity between prosecutors and defense attorneys becomes apparent the moment one walks into a courtroom in Romania where a criminal case is being tried. At the front of the room, as in most courtrooms in the Western world, judges in black robes sit behind a long bench.<sup>20</sup> In Romania, two other persons are seated at the bench. To the judges' left sits the court clerk. To the judges' right sits the prosecutor. Defense attorneys sit down below the bench in the well of the courtroom.

Many defense attorneys complain that prosecutors exercise a disproportionate influence over the outcomes and course of criminal trials through their privileged and unequal access to judges. Bucharest Bar Association officials report that prosecutors and judges frequently engage in *ex parte* conversations -- outside the presence of defendants or defense counsel -- about pending cases. In some instances, these conversations take place out of public view. In other instances, neither party attempts to hide the fact that *ex parte* communications are occurring. According to

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additional appeals to the judges' collective sense of responsibility, the courts finally reopened. Days later, the prosecutor in Targu-Mures complained, "These judges have stupid ideas that they are independent."

20. The number of judges depends on the kind of case at issue and the particular court.

some defense attorneys, in the middle of the courtroom a prosecutor might simply raise a piece of paper to cover his mouth, then speak in a low voice to the judges while the defendant and his lawyer look on in helpless befuddlement.

By contrast, in many cases defense attorneys and their clients often lack the opportunity to confer in private. In courtrooms, police officers frequently overhear conversations between defendants held in pre-trial detention and their attorneys. During interviews in prosecutorial offices, prosecutors and police are commonly privy to the conversations that take place between defendants and their lawyers.<sup>21</sup>

These problems are compounded by the ineffective assistance provided -- through the system of assignment *ex officio* -- to defendants who cannot afford to retain private counsel. According to the Bar Association, approximately 400 lawyers in Bucharest currently accept assignment of cases *ex officio* on behalf of criminal defendants. The *ex officio* system frequently discourages assigned counsel from providing clients with vigorous representation. At the same time, it is susceptible to police manipulation.

Under the panel system of assignment operative in federal courts in the United States, private attorneys are paid by the hour to represent indigent defendants.<sup>22</sup> In Romania, as of 1996, each *ex officio* attorney receives a flat fee of 30,000 lei (equivalent to about ten U.S. dollars) for each case, regardless of the amount of time devoted to representation. Accordingly, a lawyer assigned *ex officio* has little incentive to do more than the bare minimum, that is, show up in court on the date of an appearance. Judging by the number of postponements due to the failure of defense attorneys to appear on scheduled dates, even this requirement appears to be more than some attorneys can bear.<sup>23</sup>

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21. Indeed, under art. 172 of the Criminal Procedure Code, when in her determination "the interest of the criminal investigation requires," a prosecutor may prevent a defendant from contacting his attorney for up to five days while the defendant is in pretrial detention.

22. See 18 U.S.C. § 3006A (1996).

23. The low fee awarded to *ex officio* attorneys is bad enough, but Bar Association officials advise that the Ministry of Justice, the government body

Bar Association sources and prisoners at Aiud, Targu-Mures and Jilava Penitentiaries further complain that *ex officio* lawyers rarely visit their clients in police lockups or in prison. Many inmates with pending cases interviewed at these institutions did not know the names of their lawyers and had not spoken with them for several months. Even then, most reported contact took place in court, for a few minutes in the presence of police officers, with no opportunity for private consultation.

Because *ex officio* fees are so low, attorneys who take such cases are under pressure to accept as many as they can to survive financially. As a result, such attorneys often devote little time to any one case, and, as noted above, sometimes fail altogether to keep required court dates. Some judges, understandably perturbed by the failure of certain *ex officio* attorneys to appear at scheduled proceedings, have taken to asking other attorneys who happen to be present on the day a case is called to stand in on behalf of their absent colleagues. One experienced defense attorney related that he was recently asked to fill in for an absent *ex officio* lawyer on behalf of a defendant who was to be sentenced. Not having reviewed the file, the attorney had no knowledge of the case or the defendant's background. He simply stood up and gave a pat appeal for leniency before sentence was imposed.

The method of assignment utilized by the present *ex officio* system further contributes to the poor quality of representation. Generally, assignment is limited to one phase of a case -- either investigation or trial, not both. Hence, when trial commences, defendants are often represented by newly assigned lawyers who are not familiar with the course of the investigation prior to indictment.

Additionally, even where more than one defendant is charged, only one *ex officio* lawyer is often assigned to represent all the defendants in a case who cannot afford their own attorneys. This gives rise to numerous potential and actual conflicts of interest which should -- but in Romania do not -- bar continued

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responsible for reimbursing attorneys under the system, frequently delays payments for long periods of time.

representation by the same attorney of more than one defendant in the case. I spoke with an attorney who was assigned *ex officio* to represent two defendants, each of whom during police and prosecutorial questioning had implicated the other in criminal activity. When I asked the attorney about the possible problems inherent in her continued joint representation, she said it did not matter, since both defendants had admitted their guilt. Among other things, this response ignores conflicts arising from the participants' relative culpability (i.e., who was the leader and who the follower) which might arise at sentencing, as well as the possibility that either or both defendants would subsequently recant their prior admissions.

Finally, the system of *ex officio* assignment is susceptible to manipulation by the police. At present, *ex officio* attorneys are not assigned randomly to cases according to a pre-established duty roster. Rather, when the police arrest a defendant, they may choose which lawyer to call. Often, the police call only those lawyers with whom they have established relationships. Understandably, the police look for attorneys who accommodate their needs, not those who might provide the most vigorous defense. I have observed the results of this police-friendly assignment system in practice. *Ex officio* attorneys permit clients to sign written statements without reading them. They also encourage clients to admit to non-charged criminal activity, even absent any indication that the police could prove such crimes without the defendant's admission.<sup>24</sup>

As presently implemented, the *ex officio* system serves the interest of everyone but the defendant. Defense attorneys favored by the police gain more frequent case assignments, and the relatively steady flow of income that results. The police and prosecutors gain the obvious benefits that the power to choose

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24. Bar Association officials complain that, even where an arrested defendant has a retained lawyer, police frequently do not permit the defendant to contact that lawyer during the initial 24-hour detention period. Rather, during that time, the police commonly arrange for a favored *ex officio* attorney to represent the defendant. Any admissions the defendant makes during the initial detention period severely compromise the ability of a privately retained attorney subsequently to defend the case.

attorneys affords: a more pliant defense, greater frequency of confessions, and less combative relationships with their legal adversaries.

#### *D. The Police*

Like prosecutors, police officers retain a special status in law which stems from their outsized role as an organ of state power during four decades of communist rule. The different manifestations of this legacy of communism -- from enhanced salaries to the lingering military justice system to a virtual immunity from the obligation to testify in court -- all reinforce those tendencies in the criminal justice system which undermine the fairness of investigations and trials.

By law, the salaries of police officers are not public.<sup>25</sup> Nonetheless, both police and prosecutorial officials confirmed that, by and large, the police are better paid than both prosecutors and judges. As an example, as of late 1995, the Chief of Police for Mures County was paid over one million lei per month after taxes -- more than all but the very highest judicial officers in the country. In addition, military prosecutors and judges receive higher salaries than their civilian counterparts. This pay disparity between the police and prosecutors -- and between military and civilian magistrates -- seems more than idiosyncratic. A society which rewards its police and military officials more handsomely than its civilian judges and prosecutors sends a very powerful signal about who is considered more important.

The disproportionate power of the police is also reflected in the fact that, as a general rule, police officers do not testify in criminal trials. Accordingly, the very persons who conduct searches, make arrests, and build the heart of most criminal cases are shielded from the rigors of cross-examination, and their work

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25. According to information provided by the Romanian Prosecutor General's Office, the salaries of police officers have been established by law, then amended by ordinances promulgated by the Prime Minister which have yet to be published.



is rarely scrutinized to the extent that live testimony would require. The principal reason why officers are rarely called as trial witnesses is that hearsay evidence -- consisting of out-of-court statements, including written documents, offered to prove the truth of the matter asserted -- is generally admissible as evidence in criminal proceedings in Romania. A judge is permitted to rely on a written report, even where the report's author is available to testify orally. Moreover, most reports prepared by police officers in the course of a criminal investigation are entitled to special consideration; they are presumed true unless proven false. Given the difficulty in the absence of cross-examination of developing concrete evidence that a report's contents have been fabricated, judges tend to credit documents authored by the police.

One of the main consequences of police officers' absence from the courtroom is that common defense claims of police misconduct do not get the sufficient hearing they require for proper adjudication. When, for example, a defendant asserts that (1) he was coerced or tricked into making admissions, or (2) the police report misrepresents what the defendant said -- not uncommon claims -- a judge routinely does not require that the officer in question appear in court to be questioned under oath. Rather, in most cases, the judge simply records the defendant's accusations in the file, then resolves the conflict between the defendant's in-court denial of guilt and his prior admissions contained in the police report by crediting the latter. As a result, with limited exceptions, allegations of police misconduct go uninvestigated, and defendants are convicted on the basis of evidence which is not adequately tested for reliability.<sup>26</sup>

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26. In fact, given police officers' understanding that they will never be called to testify, it should not be surprising that Amnesty International and other monitoring organizations have reported, as recently as 1995, that physical abuse of detainees in police lockups is a common practice. I have no first-hand evidence of such conduct. However, I have received what I believe to be reliable reports from prosecutors that the police not uncommonly (i) fail to advise defendants of their rights to remain silent, or (ii) employ threats and/or physical abuse to obtain confessions from defendants, particularly those charged with crimes of violence. The pressure to obtain confessions described

Two additional structural problems diminish the legal system's capacity to deter police misconduct. First, the police might be more inclined to avoid improper behavior if their alleged victims could sue for damages. Unfortunately, the Romanian Civil Code provides that no citizen may bring a civil action against any party for conduct which also constitutes a crime under the Penal Code, unless and until the party has first been convicted of the crime.<sup>27</sup> In practice, this means that police are virtually never the subjects of civil lawsuits.

Second, more than six years after the end of communist rule police officers are still considered members of the military who, when accused of criminal wrongdoing, are investigated by military prosecutors and judged by military judges in military courts. Civilian prosecutors may not undertake investigations of police officers. The rules of law applied in military courts are the same as those which apply in civilian criminal proceedings. However, military prosecutors and judges answer to higher military authorities, not, ultimately, to civilian officials.<sup>28</sup> If an investigation involves mixed civilian/military elements -- i.e., both police officers and civilians are suspected of having committed crimes -- only a military prosecutor may undertake the prosecution.<sup>29</sup>

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above, coupled with police officers' knowledge that they will not have to defend their actions in court, certainly creates a powerful incentive to employ extra-legal means in the search for evidence.

27. Romanian Civil Code § 998 *et seq.*

28. Law No. 54/93, the Law on the Organization of Military Courts and Prosecutors Offices, provides that only active military officers may be appointed to serve as military judges or prosecutors. All military magistrates, including judges and prosecutors, have military grades and are promoted in accordance with the military grading system -- i.e., from colonel to general, etc. -- set forth by the Ministry of Defense.

29. In January 1993, the Council of Europe Rapporteur for Romania criticized the reliance on military prosecutors to investigate allegations of police abuse as "not in keeping with the normal arrangements for supervising the police force in its dealings with individuals." Spielmann and Frowein, *supra* note 7, at 139. The Rapporteur noted that, during a visit to Romania three months earlier, he had been assured that the rule prohibiting anyone but military prosecutors from investigating the police for alleged abuse was to be amended. *Id.* However, as of December 1995, this rule remained in existence.

Yet another legacy of the elevated status enjoyed by the police under communist rule is contained in Articles 238 and 239 of the Penal Code. Article 238 sets forth the crime of "Offense Against Authority" as follows: "Damage to the honor (or threat) proffered in public against one of the persons provided by Article 160, in connection with that person's official duties, if it is of such nature as to damage the state authority, shall be punished by prison from 6 months to 5 years."<sup>30</sup> Article 239, defining "ultraje [outrage]," criminalizes "[i]nsult, libel, (or threat), whether perpetrated directly or by means of direct communication against a civil servant holding a position which presupposes the exercise of state authority, during office hours or for facts related to his/her duties."

These provisions effectively make it a crime to publicly criticize police officers and other law enforcement officials, even where the criticism is truthful. The fact that these laws not only remain on the books, but continue to serve as the foundation for criminal prosecutions, only underlines how far the legal system still has to go if the rule of law is to be firmly established in Romania.

### *E. Corruption*

Corruption is pervasive throughout the criminal justice system. At various times, judges, prosecutors, defense attorneys, and the police sell their decisions to the highest bidder.

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Indeed, resistance to change is so pronounced among certain elements in the government that, in late 1995, the Ministry of the Interior submitted to Parliament draft legislation which would bar investigation of any police officer for alleged criminal activity absent express prior authorization by the Interior Minister. As of December 1995, this proposal was still being considered by a parliamentary commission.

30. Article 160 refers to any "person serving an important state or public function," and has been applied by prosecutors and the courts to, among others, senior police officers.

Obtaining an accurate accounting of the extent of corruption is impossible. Introduced to members of the criminal justice system as a federal prosecutor from the United States, I was hardly in the best position to witness first-hand any grossly untoward behavior. Still, numerous reports I received from lawyers, judges and prosecutors indicate that corruption is endemic in the Romanian justice system. Some suggest that corruption is most pronounced in civil and commercial cases, particularly where large amounts of money are at stake. But even in criminal cases, stories about payoffs to judges, prosecutors, and defense attorneys are rampant.

I learned of a number of recent examples. There was the prosecutor who terminated her criminal investigation of a prominent candidate for national political office after accepting gifts from, and sleeping with, the target. There was the judge who, in a civil property dispute, drafted two diametrically opposed judgments, then sold both -- one to one party, the other, containing a contrary ruling, to his adversary -- leaving them to fight it out when they presented the conflicting decisions to the property clerk's office. And there was the judge who, one year after quitting the bench to set up his own law office, still kept more than twenty active case files in his house, to the severe detriment of defendants in pretrial detention. The defendants' court dates were continually postponed -- and their detention prolonged -- until the files could be located.<sup>31</sup>

Although corruption would appear to be rife among judges and prosecutors, it is not absent among the defense bar either. Not long ago, the mother of a young man arrested and jailed pending trial approached a friend who happened to be a prosecutor to explain that the lawyer, assigned the case *ex officio*, was doing nothing for her son. Upon hearing the facts, the prosecutor concluded that the defendant should be released upon making a standard written application to the judge, then prepared such a document for the mother to give to the defense attorney. When

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31. In fairness, it is not clear whether the judge had simply neglected to return the files, or was keeping them in order to benefit financially in some way from his continued possession of them.

approached, the attorney refused to do anything absent payment of a 100,000 lei (\$US 33) fee. The mother, who survived on a 40,000 lei (\$US 13) monthly government pension, pleaded with the attorney, who finally agreed to submit the application prepared by the prosecutor only if the mother could pull together 10,000 lei (\$US 3). The mother, bereft and desperate for her son to come home, approached the prosecutor, who gave her the money so the defense attorney would do his job.

Although not an excuse for corruption, the extremely low pay received by judges and prosecutors is certainly one of its causes. Law No. 52/1991 on the Salaries of the Staff of the Judiciary (1991) provides for equivalent salaries for judges and prosecutors at the same grade of seniority. At the high end of the scale, as of 1996, a Judge on the Supreme Court of Justice and the Attorney General earned roughly the same monthly salary -- approximately 1.5 million lei (\$US 500) after taxes. In the middle range, a senior, non-supervisory judge or prosecutor with twelve years experience earned about 750,000 lei (less than \$US 300) monthly after taxes. At the bottom, a beginning judge or prosecutor with no more than two years' experience earned approximately 400,000 lei (\$US 200) monthly after taxes. Since 1989, the potential income of successful attorneys in private practice has far exceeded magistrates' meager salaries, and, as a consequence, has acted as a drain on the staffs of the courts and the prosecutors attached to them. Partly as a result of this mass exodus to the private sector, fewer than two-thirds of the more than 1,500 prosecutorial positions nationwide were filled as of December 1995.

## II. PRELIMINARY SUGGESTIONS FOR REFORM AND ASSISTANCE

As noted above, my own presence at the Prosecutor General's Office came about through the Rule of Law Program of the

United States Information Service and the cooperation of the Department of Justice. Since 1990, agencies of the United States government, the American Bar Association and other organizations have sponsored a variety of assistance programs designed broadly to assist Romania in bringing its legal order -- criminal, civil, and commercial -- into conformity with Western standards. These programs have enjoyed varying degrees of success in promoting exchanges of ideas among judges, prosecutors, government officials, and members of the bar.<sup>32</sup> As indicated in the foregoing discussion, Romania's criminal justice system still requires numerous changes -- in law and practice -- if it is to consistently produce fair trials and due process in the search for the truth. Below I offer three possible areas of focus for future legal assistance programs: (1) aiding the Romanian Parliament in reforming criminal legislation; (2) helping to train the criminal defense bar; and (3) promoting clinical legal education.

*A. Assisting Parliament in Reforming Legislation Related to Crimes and Criminal Procedure*

Some of the most serious problems which plague Romania's criminal justice system stem from the law itself. The Penal Code and Code of Criminal Procedure both date from 1969. Understandably, they reflect the Communist regime in which they were born. Although members of Parliament recently spent more than two years considering a series of amendments to these codes, the proposed changes were rejected in late November 1995. A year later, debate on necessary reforms resumed, following the change in government brought about by national elections in the fall of 1996. Reform of existing laws, urgently

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32. See generally the comprehensive and searching analysis of United States legal assistance programs in T. Carothers (Carnegie Endowment 1996).

required to remedy Romania's ailing criminal justice system, is thus on the agenda for legislative action in the next year or two. Accordingly, assistance to members of Parliament and their staffs in the drafting of amended criminal legislation is not only necessary, it is timely.

### 1. Addressing Rule of Law Problems

Some of the legislative reforms which might be considered address the kinds of problems -- a number of which are discussed above -- which give the police and prosecutors a disproportionate position in the criminal justice system. Thus, American law enforcement experts, judges, and attorneys could, in conjunction with their Romanian counterparts: (1) educate members of Parliament and their staffs about the distorting effects of certain existing legislative provisions, and (2) help formulate modifications necessary to bring Romania into compliance with international rule of law standards.<sup>33</sup> Some of the possible legislative amendments which require serious consideration include the following:

- Remove from prosecutors the unilateral authority to issue search, arrest and electronic surveillance warrants, and require that judges (i) participate in the initial decision to issue a warrant, and (ii) have the power to review both the initial issuance of the warrant, and law enforcement actions taken pursuant thereto.

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33. I will not explore the precise contours of such a parliamentary assistance program. It may well be that such a program should envision not only technical assistance to the legislative drafters, but also educational and/or organizational assistance to a range of actors in Romanian society -- from human rights advocates to public interest lawyers, journalists and defense attorneys -- who have, since 1989, been pushing for change in the criminal justice system.

- Alter the structure of the Superior Council of Magistrates to ensure that prosecutors do not participate in the hiring or disciplining of judges.
- Amend the criminal procedure code to provide that a defendant in pre-trial detention may not be denied the right to consult with his attorney.
- Increase salaries for judges and prosecutors to levels above those for police officers of comparable experience and seniority.
- Reform the *ex officio* system of assigning criminal defense attorneys for indigent defendants by increasing the fees paid to attorneys, linking payment to the quantity of time devoted to representation, creating a tamper-proof random assignment system, and barring representation of more than one defendant per case.
- Reduce reliance on *ex officio* attorneys by creating a public defender system, i.e., offices of attorneys employed full-time by the government to represent criminal defendants.
- Exclude from the jurisdiction of military prosecutors and judges cases in which the police are under investigation for possible criminal conduct, and specifically authorize civilian prosecutors to investigate and prosecute, and civilian judges to judge, cases involving crimes by police officers.
- Amend the criminal procedure code to provide that the employment status of the author does not by itself entitle reports by police and other law enforcement officers -- i.e. process verbal -- to any greater or lesser evidentiary weight than written documents prepared by others.
- Allow private citizens to bring civil lawsuits against, and collect monetary damages from, law enforcement officers for alleged misconduct, even where no criminal charges are brought.



- Amend provisions of the penal code defining crimes of outrage and offense against authority to ensure that law enforcement officials enjoy no greater immunity from public criticism than private citizens.

## 2. New Substantive Criminal Legislation

In addition to promoting the foregoing reforms, assistance should also be considered in the area of substantive criminal legislation. Here, however, the needs are not as clear, and further study of existing problems is necessary. Romanian law enforcement officials are quick to claim that a surge of criminal activity has afflicted Romania in the wake of communism's fall, and that new legislation and Western tools are needed to combat the new criminals. There is some truth to this notion, but it must be examined carefully.

I think the extent of Romania's vulnerability, and thus the potential need for new or reformed legislation, is clearest with respect to financial crimes -- particularly money laundering -- and, to a lesser extent, narcotics trafficking. No one knows precisely how much illegally obtained money is currently flowing through Romania. However, with a cash economy in which personal checking accounts are still unknown, the country is attractive to criminals looking to launder the proceeds of illicit transactions. At present, Romania has no money laundering law or any requirement that cash transactions over a certain amount be reported. United States law enforcement officials can assist the Romanian parliament in its efforts to remedy these problems.

Similarly, notoriously corrupt border police make the country particularly inviting to international narcotics dealers. Existing narcotics legislation, which dates from the 1960's and provides for relatively insubstantial terms of imprisonment (particularly by comparison with American laws), must be adapted to cope with a growing influx of transit activity from the East, and, as incomes

rise for some, the beginnings of a domestic market for drugs.<sup>34</sup> Once again, given the United States' long and expensive, if far from victorious, battle against drug trafficking, American assistance in the legislative drafting process would be useful.

With respect to organized crime, the nature of the problem is less clear. At present there is no overarching law directed against organized crime in Romania. As of December 1995, officials at the Ministries of Justice and Interior were working on draft legislation concerning organized crime, which apparently draws on American and Western European models.

When asked to describe the kinds of organized crime presently in Romania, prosecutors and police give vague and often contradictory responses. Some suggest there is no organized crime; others warn that the country is being besieged by it. Specifics, however, are few and far between. Many law enforcement officials include within the rubric of organized crime a two or three-man con game robbing tourists in front of the Intercontinental Hotel. Others report more substantial items, though their frequency is not known: murders and armed robberies by bands of former Russian soldiers in Moldavia, extortion rackets by Chinese immigrants demanding protection payments from their countrymen operating businesses in Bucharest, illegal immigrant smuggling,<sup>35</sup> the counterfeiting of

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34. Until 1989, drug dealing was virtually non-existent in Romania. In the years following the events of December 1989, the number and size of seizures have increased significantly. Thus, according to the General Inspectorate of Police (the Romanian language acronym is "IGP"), in 1991, 35 kilograms of narcotics (of all kinds) were seized by Romanian police. In 1992, 30.5 kilograms were seized. In 1993, 11 tons and 380 kilograms (most of this in one seizure) were seized. In 1994, 1,900 kilograms were seized.

According to the IGP, the composition of the drug traffickers has changed over the five years since the revolution. In 1991-92, most drug traffickers were foreign citizens. Today, more than half the drug dealers operating in the country are Romanian citizens.

35. According to IGP officials, the principal route for illegal immigrant smuggling starts in India and Pakistan, goes through Moscow, Chisinau, Bucharest, and Budapest, and ends in Austria and Germany. Immigrants are typically concealed inside trucks or railway cars along with items of merchandise. From 1991 to the fall of 1995, more than 50,000 illegal

Romanian and foreign currencies, and trafficking in stolen cars. Given the lack of knowledge on the part even of many Romanian prosecutors as to the extent of the organized crime problem, further investigation is required before precise legislative remedies can be prescribed.

With respect to violent crimes, such as murder and physical assault, Romania knows nothing of the rate or severity of criminal activity we must endure in the United States. According to one leading Romanian homicide prosecutor, there were eighty-two murders in 1994 throughout the entire city of Bucharest, with a population of 2.3 million. This murder rate pales in comparison to New York's. Despite the influx of armed Russian, Chinese and Middle Eastern gangs, guns are still extremely rare among members of the general public. Thus, only one of the eighty-two murders in 1994 was by gunshot.

As economic difficulties increase during the long transition to a market economy, and as criminal organizations avail themselves of Romania's outdated criminal laws, the crime rate, including violent crime, will no doubt increase. Indeed, this has already begun to take place. In 1995, according to the General Inspectorate of Police, crimes of all kinds occurred at a rate five times that of 1989. However, most Romanians have still not been forced to adopt even the most basic personal security measures common in Western countries. For example, although the rate of theft appears to be rising rapidly, the front entrances of most Bucharest apartment buildings remain unlocked twenty-four hours a day.

The Romanian government should, of course, prepare for a more dangerous world with more sophisticated criminals, and law enforcement officials will need different tools to deal with those threats.<sup>36</sup> But that world has not yet arrived. It is within this

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immigrants who were being smuggled into Romania were captured at the Romanian border.

36. In the fight against crime, the Romanian government has already increased its deployment of manpower resources since 1989. There are currently 53,000 police officers nationwide, approximately 40% more than in 1989. In addition, a squad within the IGP specifically devoted to the investigation of organized crime and narcotics was formed in 1993. It consists

context -- of a society undergoing significant change, but, by comparison to much of the West, still remarkably non-violent -- that American assistance in the reform of Romania's substantive criminal legislation should be considered.

### *B. Training Criminal Defense Attorneys*

One of the most serious problems hampering the criminal justice system is the paucity of able defense attorneys available to represent the majority of defendants charged with crimes. As noted above, most criminal defense attorneys in Romania typically adopt a passive role with respect to the prosecution. It is rare in my experience for a defense attorney to perform many of the tasks which many American criminal defense attorneys undertake as a matter of course, for example, interview witnesses prior to trial, research the strengths and weaknesses of the government's expected witnesses, or conduct an independent investigation into the facts of the case.

Even absent legislative reforms along the lines suggested above, a more effective and less docile criminal defense bar would go a long way toward improving the fairness of most criminal investigations and trials. Lawyers who demand access to defendants in police lock-ups in the first hours after arrest, who insist on the right to confer privately with their clients, who educate their clients about the risks of speaking with police officers or prosecutors, who interview prosecution witnesses on their own and develop inconsistencies as the basis for attacks on the witnesses' credibility, and who act in such a way as to give force to the presumption of innocence, could, I believe, make a genuine difference. With a tradition of vigorous representation on behalf of criminal defendants and a plethora of talented, experienced defense counsel, the United States is well-qualified

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of 125 police in Bucharest, plus between seven and 23 police officers and sub-officers in each of the 40 other counties nationwide.

to offer training to Romanian attorneys in the ethics, tactics and strategies of criminal defense.

Through workshops, lectures, training sessions, mock trials and other educational devices, American defense attorneys could help their Romanian colleagues in a number of ways. First, by their very presence and example, Americans would serve as vital role models -- which are sorely lacking in Romania -- of economically successful, intellectually powerful, morally upstanding and highly respected attorneys who devote their working days to the defense of persons charged with crimes.

Second, United States defense attorneys might provide training in specific skills which are critical to effective advocacy on behalf of criminal defendants, such as critical reading of police reports and scientific tests, arguing for leniency at sentencing, and cross-examining witnesses.<sup>37</sup> Other topics might include counseling a client charged with a crime: reconciling the obligation to defend zealously a client's interests with adherence to ethical standards of professional behavior; and dealing with prosecutors and the police.

Finally, assistance programs might bring one or more American public defenders to Romania to help in the establishment of a public defender office. During my stay in the country, a number of attorneys and government officials mentioned the desirability of such an office. The effort to establish a publicly funded defender service would have to address the concerns of private lawyers who fear competition for a limited client base. Still, an adequately funded and staffed public defender office could well have a significant positive impact on Romanian criminal justice, and the U.S. could help make such an office a reality.

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37. In Romania, lawyers do not directly address witnesses. Rather, they may suggest questions for the judge to ask.

*C. Contributing to Legal Education*

Governmental and private legal assistance programs could also contribute to the education of law students and young prosecutors and judges. Among the goals of this effort would be to improve advocacy and problem-solving skills, and to highlight the ethical component of legal practice. In addition, by offering as lecturers “real-life” examples of satisfied, adequately-compensated lawyers engaged in criminal practice, the program would help encourage the best and brightest among the nation’s law students to consider public service and criminal law as careers following graduation.<sup>38</sup>

At present, younger prosecutors and judges would benefit from training in written and oral advocacy skills and courses addressing and reinforcing ethical obligations. In addition, a course in comparative criminal law and procedure might, by exposing students to Western models of criminal justice, produce more enthusiastic and better informed advocates of reform.

The Magistrates’ School, which presently offers courses in Romanian law to newly minted judges and prosecutors, could serve as one appropriate forum for classes and workshops. The law school at the University of Bucharest would provide another forum in which to support classes and clinical programs for law students.

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38. Of course, financial grants to encourage young law school graduates to embark upon careers in criminal defense would be helpful as well.

