

A House of Cards? Building the Rule of Law in East Central Europe.

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Abstract

This paper assesses the ten years of experience of East Central European (ECE) with the reform of the judiciary in view of EU accession. The paper examines in depth the cases where the challenges to rule of law and the EU conditionality were both at a maximum to generate some explanations (Romania, and Bulgaria in particular). It then proceeds to test the chief explanatory factors in a quantitative model of rule of law on the 28 postcommunist cases, concluding that democracy, and not organization or logistics is the most important determinant of rule of law.

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EU as a rule of law promoter

Controversy may persist about the meaning of European identity in theory, but in practice the core identity of the united Europe is only a body of laws and the commitment to enforce them. The capacity of a new EU member country to enforce EU law is key to successful EU integration. Consequently, the EU accession process consists mostly in the legal adoption of the *acquis communautaire*. Europeanization, or real domestic change under the influence of the EU,¹ is sometimes discussed in the literature as being analogous to such legal developments. But it is not: the legal country and the real country do not coincide perfectly even in the most advanced societies, and in the case of East Central Europe (ECE) there has always been a sizeable distance between them.² The European enlargement to ten post-communist countries had to bridge not only the difference in economic development between the two halves of the continent, but also the difference between two different legal cultures. Even if new countries were very eager to adopt anything European to make themselves accepted (so they practically adopted the whole *acquis* without any opt-outs or a real negotiation), their capacity for implementation and enforcement has always been a source of concern for some old member countries and the European Commission. Besides the largely formal process of adopting the *acquis*, the applicant countries had to engage in a flurry of reforms meant to increase the overall capacity of their legal system. The European Commission as well as various old member states assisted the process through monitoring, coaching and aid, a veritable rule of law promotion effort. During EU accession, EU financial aid accounted almost every year for more than 50% of the total aid provided by all international donors.³

The experience of assisting rule of law reforms in aspiring member countries was not new for the EU, though it had not dealt with former communist regimes before.⁴ This paper

¹ Tanja A. Börzel & Thomas Risse, *Conceptualising the Domestic Impact of Europe*, in *THE POLITICS OF EUROPEANIZATION* 57 (Kevin Featherstone & Claudio M. Radaelli eds., Oxford University Press 2003).

² Holm Sundhaussen, *Die 'Modernisierung' der Balkanländer in vorsozialistischer Zeit: ein Mißverständnis und seine Folgen* [The 'Modernization' of The Balkan Countries in Pre-socialist Times: A Misunderstanding and Its Consequences], in *RUMÄNIEN IM UMBRUCH. CHANCEN UND PROBLEME DER EUROPÄISCHEN INTEGRATION* 23 [ROMANIA IN UPHEAVAL. OPPORTUNITIES AND PROBLEMS OF EUROPEAN INTEGRATION] (Ilina Gergori & Angelika Schaser eds., Winkler 1993); Alina Mungiu-Pippidi, *Corruption: Diagnosis and Treatment*, 17:3 *JOURNAL OF DEMOCRACY* 86 (2006).

³ The only exception made Bulgaria with approx. 40% in the year 2002 and 2003. Data extracted on 13 Oct 2009 10:53 UTC (GMT) from OECD Stat.

⁴ Jensen distinguishes between five waves of rule of law promotion since the end of WWII that followed distinct rationales with different weight being put on the various dimensions. See Erik G. Jensen, *The Rule of Law and Judicial Reform*, in *BEYOND COMMON KNOWLEDGE. EMPIRICAL APPROACHES TO THE*

reviews this assistance effort and tries to assess the results and to learn from the process leading to them. Is EU accountable for the progress registered by the most advanced East European countries, and if so why had its positive influence decreased in the last ten years of accession compared to the first ten years of transition? Did EU external assistance and conditionality succeed in advancing rule of law in new member countries? What does this experience teach us about rule of law promotion in general? To answer these questions, I shall firstly explain the interest of the EU in this particular field; secondly, I will discuss the background of the state of the rule of law of East-Central Europe prior to accession; thirdly, I will look in depth at the cases where the challenge and EU influence were both at a maximum to generate some explanations⁵; and lastly, I will test the explanatory factors in more systematic comparative analysis using all post-communist cases.

Approaches to the definition of rule of law can be located on a continuum ranging from thin and more procedural understandings to thick and substantial definitions.⁶ While the latter is clearly closely associated with democracy in its more qualitative form,⁷ the former is restricted to having any rules at all.⁸ Alternatively, we can distinguish between instrumental approaches, which see rule of law as appropriate laws on the statute book, a trustworthy, efficient and independent judiciary and effective law enforcement, and more ambitious ends driven approaches.⁹ The latter see rule of law as a complex outcome resulting from a long historical evolution including a government subject to law, equality before the law, human rights or law and order. Assisting the former is simpler in practical terms, as it provides an easy guide to programming: but any assessment of the final outcome – rule of law itself- will invariably trespass on the broader definition. It is also

RULE OF LAW 336 (Erik G. Jensen & Thomas C. Heller eds., Stanford University Press 2003); RONALD J. DANIELS, MICHAEL TREBILCOCK & JOSHUA ROSENSWEIG, THE POLITICAL ECONOMY OF RULE OF LAW REFORM IN DEVELOPING COUNTRIES (University of Toronto 2008).

⁵ The sources for the data presented here are interviews with: OECD Sigma consultants (2); World Bank consultants working on rule of law and civil service reform (4); EU consultants in the field of rule of law (2); a questionnaire distributed via the Council of Europe GRECO network (on challenges faced after accession by anticorruption agencies addressed to all ten new member countries) and its discussion in a workshop in Berlin in November 2009 at the Hertie School of Governance; country negotiators from the Czech Republic and Romania (2); the materials of the Transparency International IACC workshop on lessons learned from EU anticorruption policy in Athens, 2004; and finally the material from a Freedom House anticorruption audit requested by the European Council in December 2004 as condition for Romania signing the accession treaty.

⁶ Jensen, *The Rule*, *supra* note 4, at 338.

⁷ Guillermo O'Donnell in Larry J. Diamond & Leonardo Morlino, An Overview, 15:4 JOURNAL OF DEMOCRACY 20 (2004).

⁸ Gerhard Casper, Rule of Law? Whose Law? in FESTSCHRIFT FÜR ANDREAS HELDRICH ZUM 70. GEBURTSTAG [ANNIVERSARY PUBLICATION FOR ANDREAS HELDRICH'S BIRTHDAY] (Horst Eidenmüller et al. eds., C.H. Beck 2005).

⁹ Rachel Kleinfeld Belton, Competing Definitions of the Rule of Law. Implications for Practitioners, 55 CARNEGIE PAPERS (2005).

this comprehensive version of rule of law, equivalent to the quality of the overall institutional framework of a society, which rules over other alternative explanations of development.¹⁰ In the words of Daniel Kaufman “an improvement in the rule of law by one standard deviation from the current levels in Ukraine to those “middling” levels prevailing in South Africa would lead to a fourfold increase in per capita income in the long run”.¹¹ But what this standard deviation actually measures is quite difficult to establish: a complex societal equilibrium historically reached, so difficult to capture in simple policy evaluation language.

Notwithstanding the practical difficulties of operationalizing such general concepts and assessing the results in a short or medium term perspective, such conclusions from the World Bank widely translated across the donor community into policies and programs of getting that one standard deviation evolution. Governments were asked to develop policies to implement the rule of law and the donors on both sides of the Atlantic mobilized to guide and fund such efforts¹². As former British colonies top the hierarchies of good governance,¹³ some scholars rediscovered the British colonial experience as proof that sound institutions can be transferred.¹⁴ Indeed, while magistrates around the world in many new democracies are not in the vanguard of reforms, those in former British dominions (such as Pakistan) are the main promoters of a rule of law regime. As of 2010 we still do not have an impact evaluation of the many World Bank rule of law programs. A widely quoted Carnegie Endowment review of rule of law assistance efforts sent rather pessimistic warnings a few years ago when stating that “Rewriting constitutions, laws, and regulations is the easy part. [...]Rule of law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law.”¹⁵ But a more recent review sees the solution not in

¹⁰ Dani Rodrik, Arvind Subramanian & Francesco Trebbi, Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development, 9:2 JOURNAL OF ECONOMIC GROWTH 131 (2004).

¹¹ Daniel Kaufmann, Governance Redux: The Empirical Challenge, in THE GLOBAL COMPETITIVENESS REPORT 2003-2004, 145 (Michael E. Porter et al. eds., Oxford University Press 2004).

¹² See MAGEN & MORLINO, 2009, MAGEN & ALL 2009

¹³ Rafael La Porta, Florencio Lopez-de Silanes, Andrei Shleifer & Robert Vishny, The Quality of Government, 15:1 JOURNAL OF LAW, ECONOMICS AND ORGANIZATION 222 (1999); Daniel Treisman, The Causes of Corruption: A Cross-National Study, 76:3 JOURNAL OF PUBLIC ECONOMICS 399 (2000).

¹⁴ DARON ACEMOGLU & JAMES A. ROBINSON, ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY (Cambridge University Press 2005).

¹⁵ Carothers, Rule, *supra* note 5, at 110.

abandoning rule of law promotion, but in stepping up conditionality related to assistance from the West¹⁶ .

At first sight, the EU should pursue mainly the thick approach, as candidate countries need to satisfy some general democratic conditions (the so-called Copenhagen criteria) in order to qualify for membership. However, the ‘thick’ approach is the one difficult to operationalize and finds little agreement on the essential elements that it entails.¹⁷ It is also more politically sensitive. There are also specific European complications. How to promote the ‘European legal model’ , if a recent report of the Council of Europe warns readers that Europeans do not have one, and they might never have it?¹⁸

Although the rule of law has not been part of the European Treaties until Maastricht, it certainly had played a very important role in the field of Community law before.¹⁹ Lord Mackenzie Stuart characterized the rule of law in Community Law as “those who administer the Communities are themselves subject to limitations imposed by law and that those who are administered have rights in law which must be protected”.²⁰ The guardians of this legal space are the European Commission and the European Court of Justice. The Copenhagen criteria, however, step beyond the joint EU legal space and refer to the national legal systems of the candidate countries, as they require that “[...] Member States are free and democratic societies which share the belief that relations between citizens and the state should rest upon the rule of law”.²¹ The Copenhagen criteria do not specifically refer to judicial independence. However, the political criteria of ensuring “stability of institutions guaranteeing ... the rule of law” would be inconceivable without an independent and impartial judiciary.²² For postcommunist countries, the European Convention of Human Rights became part of the *acquis* as well. Domestic rule of law is thus required as a precondition to be invited to join,

¹⁶ Daniels et al., *THE POLITICAL*, *supra* note 4, at 120.

¹⁷ Jensen, *The Rule*, *supra* note 4, at 339.

¹⁸ Jean-Louis Bergel et al., *L'émergence d'une culture judiciaire européenne. Avancées et difficultés d'une culture judiciaire européenne dans l'espace judiciaire européen [The Emergence of a European Judicial Culture. Progress and Difficulties of a European Judicial Culture in the European Judicial Space]*, *SYNTHÈSE DU LABORATOIRE DE THÉORIE DU DROIT* (Université Paul Cézanne, Aix-Marseille III, 2009).

¹⁹ ANTHONY ARNULL (ED.), *ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION* (Oxford University Press 2002); MARIA L. FERNÁNDEZ ESTEBAN, *THE RULE OF LAW IN THE EUROPEAN CONSTITUTION* (Kluwer Law International 1999); STUART MACKENZIE & ALEXANDER JOHN, *THE EUROPEAN COMMUNITIES AND THE RULE OF LAW* (Stevens 1977); GERHARD BEBR, *RULE OF LAW WITHIN THE EUROPEAN COMMUNITIES* (Université Libre de Bruxelles 1965).

²⁰ MACKENZIE & JOHN, *THE EUROPEAN*, *supra* note 19, at 3.

²¹ MACKENZIE & JOHN, *THE EUROPEAN*, *supra* note 19, at 5 and 104.

²² EUROPEAN COUNCIL, *Conclusions of the Presidency*, SN 180/1/93 REV 1, at 12 (1993).

both in order to ensure that a country can safeguard EU law and because rule of law is a founding value of the EU club.

When the EU invited ten post-communist countries to join at the 1999 Helsinki summit, the region divided into clusters of countries which had seen very different types of Communism and consequently experienced quite dissimilar transitions. While some countries led the 'regatta' of would-be members of the EU and had seen very successful economic transitions, others were still struggling halfway. To help them prepare for membership, - the EU had to open a state building front next to the standard accession process. This involved both government capacity (for instance for planning and reporting), as well as judicial capacity, and as such it created an important front not previously covered by any enlargement. In order to proceed with legal harmonization and other more typical Europeanization processes the EU had to assist and try to speed up the process of institutional transformation of postcommunist countries, as its degree of accomplishment varied greatly across cases. This meant good governance and rule of law promotion on a scale not yet experienced by EU in previous enlargements. In this particular area, *Europeanization met transformation, and often an unfinished one.*

From Communism to EU Accession

What was the state of the rule of law prior to the EU's intervention? The EU applicant countries had important legal traditions in common, such as a heritage of French civil law, in their pre-communist past and a judiciary fully subordinated to the Communist executive after the 2nd World War. The structure of the judiciaries in ECE followed generally the French model, with the Ministry of Justice playing a significant role in the administration of the judiciary. French influences are evident in the Constitutions and the civil and criminal procedure codes. Communism could not have qualified even as rule *by* law, due to its selective enforcement (nomenklatura and agents of repression were generally above the law) let alone as rule *of* law, as laws were highly repressive.²³ The Communist organization of the legal systems left in place its essentials, as reforms were done in a piecemeal manner: if Constitutions were adopted in a few years, criminal codes revisions took more than a decade. The communist law was essentially an adaptation of the civil law tradition, strongly amplifying its shortcomings. While law was an instrument of the communist state control, it

²³ Martin Krygier, *Marxism and the Rule of Law: Reflections after the Collapse of Communism*, 15 LAW AND SOCIAL INQUIRY 602 (1990).

lacked democratic legitimacy as laws were produced by a single party system. The prosecutors' body (*prokuratura*) was a powerful instrument of the communist state and its main legal arm. In practice, judges were subordinated to prosecutors; even procedurally, prosecutors had an overall power to control the legality of any activity, in and outside the judicial system, and to apply sanctions. Interference with the decision-making was common, and the so-called '*telephone justice*' was largely spread among both judges and prosecutors. Military prosecutors and judges formed a parallel system of justice, and they enjoyed a higher status in the society. In the same way the relation between judge and prosecutor was reversed compared to an established democracy, the position of policemen was stronger than the position of prosecutors. Despite changes in legislation after 1989, these institutional arrangements proved difficult to eliminate overnight.

As the law was neither just nor predictable under Communism, informality flourished in these countries; this is one of the most serious institutional legacies they are left with. To put it simply, a normal citizen of Communist Romania in 1989 was walking on the brink of prison from morning till late night and the fact that few got arrested in the end was usually interpreted as proof of indulgence from the state rather than of its inability to cope with such massive law infringement. For instance, a couple going to bed risked breaking the law, as in 1989 Romania it was legally forbidden to practice any form of contraception under serious penalties for both the offender and the medical staff assisting an eventual abortion (unless she had already four children). A couple who preferred reading instead, risked breaking the numerous regulations concerning electricity savings. Listening to the radio - since the only alternative to domestic programs filled with poets praising the Ceausescu family people was Radio Free Europe or Voice of America - was a serious crime. Driving to work was problematic, as the monthly quota of 20 liters of gas was quickly exhausted and the police had the right to investigate the source of any additional gasoline, which could have only resulted from an illegal sale. Work also meant to slalom between forbidden things, regardless whether one was in a factory or in a university – and this enumeration could go on. The inaptitude of the laws was corrected by their lack of enforcement, which was arbitrary, discretionary and often absent.²⁴ Here the type of Communism mattered greatly: in nearly totalitarian systems, such as Albania, Romania and USSR in certain periods, this kind of legal insanity was pushed to the extreme, leading to widespread avoidance of laws by the

²⁴ Alena V. Ledeneva, Behind the Facade: 'Telephone Justice' in Putin's Russia, in DICTATORSHIP OR REFORM? THE RULE OF LAW IN RUSSIA (Mary McAulley, Alena V. Ledeneva & Hugh Barnes eds., Foreign Policy Centre 2006).

citizens. In more moderately communist Central European countries the regime was closer to the rule by law and initial constraints at the start of their reforms after communism were lower. The important lesson is that institutions thus created under Communism lagged behind, involving both state and society. The present lack of enforcement, even when the quality of judicial decisions is good or improving, in some countries continues to be a problem even today.²⁵

From 1989 on, the history of reinstating the rule of law is similar in all post-communist transition countries. The governments had to rule on the basis of Communist legislation due to the inability of replacing it all overnight. It could have been cancelled, but the agreement was that “the umbrella principle of upholding the law meant that however bad or inappropriate communist laws should continue to apply until revoked or amended”.²⁶ New laws regulated first and foremost political competition, and only then legislators have slowly moved to other areas. In many countries that meant that the corpus of law in force remained internally contradictory and laws were not always consistent with one another. New legislators, though democratically elected, also proved often to be incompetent and opinionated. “The inexperience and high turnover of parliamentary deputies did not facilitate the process of legal change. Much of the process was ad hoc and despite a line of continuity, changes of government often meant shifts and reversals in the underlying principle of legislation in various areas”.²⁷ The burden of the judiciary was particularly high in the context of ‘legal transition’. Statistics showed an increase of lawsuits of all kinds, while the judiciary remained inadequately paid and the infrastructure of Courts poor. The duration of law suits and the backlog of Courts only increased. Democratization does not necessarily increase legal coherence: in the Global Competitiveness Report 2008-2009 the indicator ‘efficiency of legal framework’ finds only Estonia in the top fifty effective countries, with the bulk in the second half of the top.²⁸

Democratization drove the initial reforms: the success of anticommunist parties in the first free ballot in Central Europe helped these countries achieve judicial independence early in the nineties; despite a later start, Eastern and Western Balkans followed in granting

²⁵ Wade Channell, *Lessons Not Learned: Problems with Western Aid for Law Reform in Postcommunist Countries*, 57 *CARNEGIE PAPER* (2005).

²⁶ FRANCES MILLARD, *POLISH POLITICS AND SOCIETY 89-90* (Routledge 1999).

²⁷ MILLARD, *POLISH*, *supra* note 26, at 63.

²⁸ MICHAEL E. PORTER & KLAUS SCHWAB (EDS.), *THE GLOBAL COMPETITIVENESS REPORT 2008-2009* 472 (World Economic Forum 2008).

life tenure to judges.²⁹ In the post-transitional period – the time of democratic consolidation – the political elites’ impact was gradually reduced as the newly created institutions became “... more robust and resistant to change”.³⁰ In this context, while political elites continued to be crucial for successful rule of law reforms, in the most advanced countries the people from the system increased in importance (magistrates, prosecutors). EU accession was initiated in this context. Public opinion surveys have consistently shown that the public does not perceive that people are equal before the law.³¹ In the World Bank 2009 rule of law indicator, an aggregate of various country sources, the postcommunist region groups roughly into an accomplished rule of law group close to the average of EU-15, a group of transitional countries (improved seriously, but still not there), a group of postcommunist countries (have departed from communist ways but have essential problems still to address) and finally a group of countries which have simply preserved the essentials of their past institutions (see Table 1). The ranking, which corresponds to colours in the World Bank charts (from green to red) is slightly different at Freedom House, which considers less countries accomplished or close to accomplishment. From the new member countries, Slovenia, Hungary and Estonia are the three countries unanimously seen as being the closest to EU level, and Romania and Bulgaria the furthest. The Global Competitiveness Report 2008-2009 finds only one consistent positive outlier, Estonia. Respondents of this business survey find far little difference between Romania and Bulgaria and the Central European countries than EU politicians do: the item ‘favoritism in decisions of government officials’, a measure of corruption has the Central European and Eastern Balkan countries at nearly similar levels stretching around position 115 (with 134 the last and worst), with only the Baltics doing better.

Table 1. Stage of rule of law achievement in postcommunist countries

²⁹ James H. Anderson and Cheryl W. Gray, *Transforming Judicial Systems in Europe and Central Asia* 333 (Paper presented at the Annual World Bank Conference on Economic Development 2007).

³⁰ Pedro C. Magalhães, *The Politics of Judicial Reform in Eastern Europe*, 32:1 *COMPARATIVE POLITICS* 43, 48 (1999).

³¹ Mungiu-Pippidi, *Corruption*, *supra* note 2.

	EU average level	Transitional level	Post-communist level	Communist level
Rule of law (World Bank)	Slovenia Hungary Czech Republic Estonia Croatia	Slovakia Romania Poland Montenegro Bulgaria Lithuania Latvia Croatia Bulgaria	Serbia Macedonia Bosnia-Herzegovina Albania Ukraine Moldova Georgia Azerbaijan Armenia	Uzbekistan Tajikistan Russia Kyrgyzstan, Belarus
Judicial Framework Freedom House Nations in Transit	Estonia Slovenia Hungary Latvia Lithuania	Czech Republic Poland Slovakia Bulgaria	Albania Bosnia Macedonia Montenegro Romania Croatia Moldova Serbia Georgia Ukraine	Armenia Russia Azerbaijan Kyrgyzstan Tajikistan Kazakhstan Belarus Uzbekistan Turkmenistan

Source: Based on World Bank and Freedom House Nations in Transit rankings 2008.

During negotiations with the EU, reforming the judiciary and fighting corruption were crucial issues, particularly for the accession of Romania and Bulgaria (but also Slovakia and Latvia). Despite the EU not having an *acquis per se* in these areas, the Commission with the help of other international organizations invested a considerable amount of assistance, monitoring and coaching in these areas. Conditionality was also strong, particularly for these ‘laggards’: action plans on home and justice affairs submitted in 2005 before the signing of the accession treaty of Romania and Bulgaria became mandatory (under the penalty of related safeguard clauses - mechanism included in all accession treaties). The main instrument of monitoring was the regular Commission report, issued twice a year. Detailed roadmaps and recommendations were also drawn tracing the benchmarks the aspiring EU members had to target and the steps needed to reach them. The total EU allocations for administrative and judicial capacity reforms between 1998 and 2006 amounted to 452 million

EUR for Romania and 260 million EUR for Bulgaria, notwithstanding the considerable domestic expense, as budgets were raised repeatedly.³²

What did this effort amount to? The indicators we can use to assess progress leave much to be desired. Very detailed indicators, such as American Bar's Association assessment of judicial reform are available only on selected years for selected countries. Only in 2005, the Council of Europe (through the CEPEJ program) started collecting data on the judiciaries in the region unfortunately based on questionnaires answered by countries themselves, not completed by a researcher with the care to render meanings uniform and check contents. World Bank and EBRD have produced a jointly sponsored survey on businesses, BEEPS, which measures perceptions on governance. Freedom House Nations in Transit (NIT) expert scores, as well as World Bank aggregated governance indicators (WGI) monitor corruption and judicial independence (NIT), rule of law, control of corruption, regulatory quality (WB)³³. The methodology of these scores is explained at length by authors.³⁴ A review and analysis of such World Bank governance indicators such as rule of law and control of corruption, as well as of the Freedom House NIT scores between 1999 and 2008 finds no statistically significant evolution during accession years.³⁵ The greatest measurable developments in the field of rule of law were registered prior to the 1999 Helsinki summit; there was little evolution on the Copenhagen criteria since, despite EU's continued pressure and assistance in the field of justice and anticorruption. Only some Western Balkan countries (like Serbia) progressed significantly, but also due to the fact that they started at the very bottom with the disintegration of former Yugoslavia. Former Soviet Union, except for Georgia, stagnated. The lack of sufficient progress is particularly problematic for Bulgaria and Romania, who were trailing behind the other countries from the start. The Czech Republic, which had been on top, registered the largest regress since 1999; Slovakia, after some years of catch up prior to accession, regressed after accession.

The mixed and non-conclusive results so far of the domestic judiciaries reform after 1999 is showed also in the high rate of appeal to the European Court of Human

³² COMMISSION OF THE EUROPEAN COMMUNITIES, Support to Public Administrative and Judicial Capacity in Bulgaria and Romania. Thematic Evaluation Report of the European Union Phare Programme (2006).

³³ "Aggregating Governance" and "Governance Matters" introduced the Worldwide Governance Indicators in 1999. Since then, a cohort of papers followed, some by World Bank authors further refining and explaining these indicators, others by external authors expressing varying degrees of criticism.

³⁴ Daniel Kaufmann, Aart Kraay & Pablo Zoido-Labatón, Aggregating Governance Indicators, 2195 WORLD BANK POLICY RESEARCH WORKING PAPER (1999).

³⁵ T-test for Freedom House NIT scores; World Bank estimation.

Rights precisely during or after accession years. Romanians filed in 5242 law suits to the Strasbourg Court in 2008, compared to 3776 in 2004, Slovaks 488 compared to 470 and Slovenians 1353 compared to 285, while in Poland, Hungary, Czech Republic (most significant) and Bulgaria the numbers decreased slightly. Although these figures also reflect an increase in the awareness of this final appeal path, and some cases might not be accepted by the Court, the overall numbers for Central Europe and the Eastern Balkans remain high. East Europeans continue to see the EHCR as a sort of Supreme Court, where they appeal regularly to redress what they perceive as injustice of their own Courts.³⁶

On 1 January 2007, when Romania and Bulgaria were the last to join, the Commission established a Cooperation and Verification Mechanism (CVM) to assess the commitments made by these late entrants in the areas of judicial reform, fight against corruption and organized crime. By 2009, it has become clear that the progress was insufficient: ‘more needs to be done to deliver convincing results in judicial reform, tackling corruption, and in the case of Bulgaria in the fight against organized crime’³⁷. For the first three years after accession, the Commission could resort to the triggering of the safeguard clauses included in the accession treaties with these two countries. After this legal mechanism expired, the Commission decided to keep the CVM active: ‘The CVM ...should only be removed when all the benchmarks it set have been satisfactorily fulfilled. ... The CVM is a support tool in this endeavour; it is not an end in itself nor can it replace commitment that ... authorities need to make in order to align the judicial system and practice with general EU standards.’³⁸ It had meanwhile become clear that the CVM can resort to other sanctions than the special safeguard clauses: in 2008 the unprecedented decision was taken to cut Bulgaria’s EU funds due precisely to rule of law problems.³⁹ Encouraged by negative media in EU member countries, the European Commission cut Bulgaria’s agriculture and structural funds in 2008 after having pushed for the resignation of

³⁶ EUROPEAN COURT OF HUMAN RIGHTS, Annual Report 2008 (Registry of the European Court of Human Rights 2008); EUROPEAN COURT OF HUMAN RIGHTS, Annual Report 2004 (Registry of the European Court of Human Rights 2004).

³⁷ COMMISSION OF THE EUROPEAN COMMUNITIES, Interim Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification Mechanism (2009); COMMISSION OF THE EUROPEAN COMMUNITIES, Interim Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism (2009).

³⁸ COMMISSION, Interim, *supra* note 36.

³⁹ COMMISSION OF THE EUROPEAN COMMUNITIES, Report from the Commission to the European Parliament and the Council on the Management of EU Funds in Bulgaria (2008).

key stakeholders in the government⁴⁰. ‘Soft’ power was over and hard power returned with a vengeance.

Explaining EU’s limited influence in the field of rule of law

The remarkable transformative role of the EU enlargement is well covered by the scholarly literature.⁴¹ There is little doubt that enlargement brings tremendous direct and indirect advantages to an invited country, instantly priming it as a successful transformation, so encouraging investment on top of EU funds. It is easy to notice that new EU members are doing far better than the rest of ECE: but on one hand they are both geographically and historically closer to Western Europe, and on the other they were invited to join after they had already proven successful. What we know less is the internal mechanism of Europeanization. What makes it work when it works? And what prevents it from working when it does not work? The chapter of rule of law, one of the most difficult assistance areas, and the cases of Romania and Bulgaria, which were not enjoying successful transitions by the time they were invited to join, are privileged situations to reflect at such questions. To understand EU influence, we have to look both at the supply side – the EU’s rule of law promotion efforts - and at the demand side- national circumstances and factors in the recipient countries.

The supply side – EU efforts – was not without problems. One problem was the speed and timing of the process: the time factor. In the effort not to miss the political opportunity, while at the same time not allowing any room of real negotiations with the newcomers (who had to adopt the *acquis* in full), the whole accession process became quite bureaucratic. The detailed requirements of the European Commission and the related conditionality created a relationship where the European Commission became the sole principal (instead of domestic publics or their representatives) and the governments its agent. Reforms were not driven by

⁴⁰ See Irina Iavnova, Reuters Factbox: Seven scandals from Bulgaria, REUTERS (29 June 2009), <http://www.reuters.com/article/idUSTRE55T02R20090630>.

⁴¹ Andrew Moravcsik & Milada A. Vachudova, National Interests, State Power, and EU Enlargement, 97 HARVARD CENTER FOR EUROPEAN STUDIES WORKING PAPER (2003); Frank Schimmelfennig & Ulrich Sedelmeier, Conclusions: The Impact of the EU on the Accession Countries, in THE EUROPEANIZATION OF CENTRAL AND EASTERN EUROPE 210 (Frank Schimmelfennig & Ulrich Sedelmeier eds., Cornell University Press 2005); Wojciech Sadurski, Accession’s Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe, 10:4 EUROPEAN LAW JOURNAL 371 (2004); GEOFFREY PRIDHAM, DESIGNING DEMOCRACY: EU ENLARGEMENT AND REGIME CHANGE IN POST-COMMUNIST EUROPE (Palgrave Macmillan 2005); MILADA A. VACHUDOVA, EUROPE UNDIVIDED: DEMOCRACY, LEVERAGE AND INTEGRATION AFTER COMMUNISM (Oxford University Press 2005); HEATHER GRABBE, THE EU’S TRANSFORMATIVE POWER. EUROPEANIZATION THROUGH CONDITIONALITY IN CENTRAL AND EASTERN EUROPE (Palgrave Macmillan 2006).

impact evaluations, but by the need to satisfy the pressing bureaucratic *reporting needs* for the regular monitoring reports of the European Commission. “One-off special efforts” to reach certain EU targets and “islands of excellence” administrative units empowered in this respect prevailed as approaches versus sound, system-building reform.⁴² As the Commission went quite far in suggesting concrete means to achieve targets (like the creation of new government bodies) and governments needed positive ratings for their efforts to keep up the pace of the accession process, a sort of ‘prescription-based’ evaluation mechanism was created. Countries were thus rated in the monitoring not by the effectiveness of reforms or even their real change potential, but by the number of ‘prescription pills’ taken. A ‘patient’ or assisted country was rated higher the more advice it accepted, with little checking of ‘symptoms’. Latvia became a success of anticorruption (it soon showed it was not) not because they had managed, but because they followed all the steps they were suggested to. The situation applies particularly to the so-called ‘Helsinki group’, countries invited only in 1999, keen to do whatever they were suggested in order to catch up with the first more advanced group (Czech Republic, Poland, Slovenia, Hungary). In the most spectacular case, the European Council ordered an international audit of the whole Romanian anticorruption strategy to assess if the accession treaty could be signed or not in 2005. Freedom House International, who undertook the audit, delivered a critical report whose recommendations were fully integrated in revised strategies to reform the judiciary and the anticorruption agency, and in March 2005 Romania signed the treaty with EU. But the government could never deliver half the measures included in the strategies. In June 2005 the Constitutional Court stripped the proposed changes in legislation of their main teeth. An integrity agency inspired from the US Office for Government Ethics (OGE) was supposed to be created by the end of that year: it was born only after the 2007 accession, and with such weak attributions that it was unclear if the 2005 engagement was respected or not. In other words, due to the calendar of accession which was tight, conditionality could only rely on promises: their contents and the general impact of proposed actions on the policy problems could not be checked on time, and they frequently proved disappointing at a later stage.

The second problem on the supply side was to take a ‘performance’ approach, presuming that political will existed and the whole problem was one of capacity, which can be built regardless the motivation for change of the judiciary, if certain organization steps are adopted. As the Commission perceived correctly that the rule of law varied across countries,

⁴² Tony Verheijen, *Administrative Capacity in the New EU Member States the Limits of Innovation?* 115 WORLD BANK WORKING PAPER ix (2007).

they pushed for reforms, mostly organization reforms, oscillating between standard recommendations or piecemeal attempts to solve problems, with serious inconsistencies in the process. Thus, in Slovakia the Commission repeatedly advocated the abolition of the probationary period for judges (obviously with a view to strengthen judicial independence), while in Bulgaria it supported a constitutional amendment in 2003 which extended the probationary period from three to five years.⁴³ The 2002 critical report of the Commission concerning Latvia complains about the Ministry of Justice's influence over career paths of judges, while a positive report on the Czech Republic covering the same powers of the Ministry of Justice displays no criticism or concern over judicial independence, as this was not problematic in the Czech Republic. Although several European legal models exist, all producing equally positive outcomes in their original member states, by the end of accession the French-Italian model of Judicial Councils became the main exported institution in order to ensure judicial independence, for both the World Bank and the European Commission.⁴⁴ The evidence from Latin America had already shown, however, that independence is a complex phenomenon and the introduction of Judicial Councils does not solve the problem. Even though judges may be independent from direct political control, they may become dependent on other forces such as senior judges in a judicial hierarchy, or they may become plainly unaccountable and corrupt.⁴⁵ Reforms in Romania and Bulgaria had frequently to be pushed against the will of those supposed to implement them.

The third problem was precisely the absence of a unitary model of rule of law to offer. Frequently the German twinning expert on the ground would clash over what are in fact the European 'standards' with the French constitutional lawyer and the British prosecutor sent to assist anti-corruption.⁴⁶ There is a variety of administrative and judicial practices across the EU, which did not simplify the task of those assisting accession countries.⁴⁷ Aid is also disbursed from different sources with little coordination between Commission and member countries, though constant efforts of communication do exist. The

⁴³ Daniel Smilov, EU Enlargement and the Constitutional Principle of Judicial Independence, in *SPREADING DEMOCRACY AND THE RULE OF LAW? THE IMPACT OF ENLARGEMENT ON THE RULE OF LAW, DEMOCRACY AND CONSTITUTIONALISM IN POST-COMMUNIST LEGAL ORDERS* 313 (Adam Czarnota, Martin Krygier & Wojciech Sadurski eds., Springer 2006).

⁴⁴ Linn Hammergren, Do Councils Further Judicial Reform? Lessons from Latin America, 28 *CARNEGIE RULE OF LAW SERIES WORKING PAPER* (2002); Magalhães, *The Politics*, supra note 30.

⁴⁵ Owen M. Fiss, The Right Degree of Independence, in *THE ROLE OF THE JUDICIARY IN THE TRANSITION TO DEMOCRACY IN LATIN AMERICA* 55 (Irwin Stotzky ed., Westview Press 1993); Nuno Garoupa & Tom Ginsburg, The Comparative Law and Economics of Judicial Councils, 27:1 *BERKELEY JOURNAL OF INTERNATIONAL LAW* 52 (2009).

⁴⁶ This particular example is from 2007 in Romania, but such examples abound.

⁴⁷ Smilov, EU Enlargement, supra note 42; *OPEN SOCIETY INSTITUTE, MONITORING THE EU ACCESSION PROCESS: JUDICIAL INDEPENDENCE* (2001).

fact that three experts as those from the anecdote above are also paid from three different budgets (two by member countries through ‘twinning’ programs and one by the European Commission) leads in practice to a situation where they actually compete with their respective solutions for the attention of the national policymaker, thus contributing to the weakening of the European position even further.

Fourth, the Commission had to act blindly, as instruments to monitor progress were not quite there. Judicial statistics were meaningless, as monitored categories were legacies from Communist times; corruption is notoriously difficult to measure, and the impact of anticorruption even more so. If stagnation shows clearly in retrospect, it was not so evident during accession. The timeframe of six months between monitoring reports left few alternatives to relying on input indicators and to setting performance targets as qualitative ‘benchmarks’. Occasionally, Commission reports did quote impact indicators found in other sources: but a systematic effort to develop a comprehensive set of impact indicators for Europeanization was not present. Designing governance and rule of law benchmarks is also a difficult art, especially if it is not anchored in a sound, evidence-based theory of organizational performance. For instance, if Judicial Councils are in fact unable to deliver the expected goods (an accountable magistracy), creating further benchmarks in relation to such Judicial Councils risks becoming irrelevant, though their monitoring might be both accurate and regular.

If reform projects are to be effective, the particularities of post-communist societies have to be considered as well. From the experience with ECE countries, we would have expected several problems: poor implementation due to a culture of informality, lack of funds to support the reform financially, inadequate culture of magistrates socialized in Communist times and reluctance of politicians to grant autonomy to the judiciary. Resistance to EU-driven governance reforms was indeed present even in some of the most advanced countries.⁴⁸ Some governance reforms were bound to threaten the vested interests of the power establishment in new member countries as they were aimed at cutting discretion and limiting politicization. Once EU lost all levers (the second day after accession) this ‘coalition of the unwilling’ Europeanizers have returned to profitable practices such as patronage, control of public media and immunity from corruption accusations.⁴⁹ The situation varies

⁴⁸ Interview with Pavel Telicka, the former Czech negotiator, by the author (November 2007).

⁴⁹ GUY PETERS, TONY VERHEIJEN & LÁSZLÓ VASS (EDS.), COALITIONS OF THE UNWILLING? POLITICIANS AND CIVIL SERVANTS IN COALITION GOVERNMENTS (NISPACee 2005).

across countries, of course,⁵⁰ but there is also a discernable general regional trend, especially when Warsaw Pact countries are concerned. Freedom House Nations in Transit scores have shown from 2004 on a continuous degradation of governance and democracy in the new member countries.

As Bulgaria and Romania embarked on the transition from the most disadvantaged position, the lack of progress during accession mattered for them far more than for the other countries. Romania progressed in 2005-2006 after anticommunists returned to power, but then fell back to the old practices. A 2009 report by the Centre for European Policy Studies concluded that in Bulgaria “The process of modernisation and democratic transition of the country’s judiciary and law enforcement ... has never been systematically implemented”, while in Romania “changes are introduced not for the country’s benefit in the long term but rather to please Brussels”.⁵¹

Not only politicians proved reluctant Europeanizers. In both Romania and Bulgaria Judicial Councils and judges in general were not supportive of reforms. Magistrates had been promoters of reform as long their independence from political intervention was at stake; once they became completely independent their *esprit de corps* flourished and no incentives were left to pursue self-improvement. Both in Bulgaria, where reforms were quite shy, and in Romania, where bold ones were pushed forward by Monica Macovei, the Justice Minister in 2005-2006, top magistrates were not allies of reforms but promoters of self-interest. In both Romania and Bulgaria the conservatives in the judiciary managed to make use of their administrative positions as heads of Courts to be elected into the Judicial Council or Constitutional Court in order to use their office there to oppose substantial reforms to the way these judiciaries operate. The magistrates’ pay was increased to stimulate performance and curb corruption, but attempts to set up any serious checks on their performance did not succeed and accountability rose to become the salient problem (Freedom House 2005). By 2007, evidence was pouring in on this count from more than one country, so the World Bank agreed that the problem has changed and the most pressing issue has become ‘ensuring judicial accountability, given newfound independence’.⁵² The European Commission also upgraded its benchmark asking for an accountable, not only an independent Judicial Council. But, unlike the

⁵⁰ Alina Mungiu-Pippidi, EU Accession is no End of History, 18:4 JOURNAL OF DEMOCRACY 8 (2007).

⁵¹ Susie Alegre, Ivanka Ivanova and Dana Denis-Smith (2009), Safeguarding the Rule of Law in an Enlarged EU: The Cases of Bulgaria and Romania, CENTER FOR EUROPEAN POLICY STUDIES SPECIAL REPORT, 82.

⁵² Anderson & Gray, Transforming, *supra* note 29, at 333.

government, which can lose elections for under-performing on EU accession, the Judicial Council had no EU accession stakes. The lack of regard of the judiciary for other interests than its own was shown blatantly in the unprecedented 2009 strike of the Romanian judiciary. At the height of an economic crisis, amidst negotiations with IMF for a stabilizing loan, the Romanian judiciary claimed a bonus for magistrates, which had been previously canceled by a 2000 law and advanced its cause by individual law suits which were judged by themselves. Flooded with thousands of successful claims including demands to make retrospective payments (as superior courts also ruled in favor of their colleagues) the government of Emil Boc had no choice than to accept the claims.⁵³ The public perceives the judiciary as highly corrupt: Bulgaria's judiciary lead in 2008 in the Gallup Corruption Barometer, a global survey by Transparency International as the most allegedly corrupt judiciary in the world.⁵⁴ However, business surveys of Global Competitiveness Report 2004-2006 do not show great difference at the chapter irregular payments to the judiciary between Bulgaria and the other postcommunist new EU member countries.

European conditionality was the strongest in the area of anti-corruption, where EU member states were seriously concerned and pressing the Commission to be drastic. Post-communist countries embarked on their EU accession path with Transparency International scores below the lowest level in Western Europe and their culture was frequently described as entirely corrupt.⁵⁵ Surveys on bribing cannot fully capture the systemic nature of East European corruption, which can be defined best as governance by particularism, the discretionary distribution of authority by the state to the benefit of particular groups or individuals. At one extreme we find total state capture and rent-seeking, like in some post-Soviet states,⁵⁶ at the other modern impartial state behavior in some areas running in parallel with particularism in others, such as procurement and policy making. The most problematic cases were considered to be Latvia, Slovakia, Romania and Bulgaria, but in all the former Communist countries transition meant an

⁵³ See Thomas Escritt, "State has few options in face of judges' strike", FINANCIAL TIMES (28 September 2009).

⁵⁴ <http://www.transparency-bg.org/?magic=0.5.0.2&year=2007>

⁵⁵ WILLIAM L. MILLER, ÅSE B. GRØDELAND AND TATYANA Y. KOSHECHKINA, A CULTURE OF CORRUPTION? COPING WITH GOVERNMENT IN POSTCOMMUNIST EUROPE (Central European University Press 2001); Daniel Treisman, Postcommunist Corruption, in POLITICAL ECONOMY OF TRANSITION AND DEVELOPMENT: INSTITUTIONS, POLITICS, AND POLICIES 201 (Jan Fidrmuc & Nauro Campos eds., Kluwer 2003); JÁNOS KORNAI & SUSAN ROSE-ACKERMAN (EDS.), BUILDING A TRUSTWORTHY STATE IN POST-SOCIALIST TRANSITION (Palgrave Macmillan 2004).

⁵⁶ Joel S. Hellman, Winners Take All: The Politics of Partial Reform in Postcommunist Transitions, 50:2 WORLD POLITICS 203 (1998).

effort to impose for the first time the norm of impartial government. The distribution of public funds - including the new remarkable resources of EU money (replacing the old privatization resources) - persisted in being anything but random even after accession. Government favoritism and passing 'special' legislation to favor certain economic interests was another frequent occurrence during transition years and continued during accession. The European Commission, following OECD SIGMA advice, pressed for the creation of policy management units within governments to take charge of planning and impact evaluation of new legislation, in the hope that this will bring a more objective and transparent basis for policy formulation. SIGMA consultants found, however, that most of decision making continued to go through informal channels like ministers' cabinets, with the management units being frequently bypassed. There were also strategic errors. The EU spent a lot on inefficient anti-corruption awareness campaigns and granted the bulk of anti-corruption funds to governments to pass legislation and set up institutions, despite evidence that the public was well informed and it was government precisely which needed to be more accountable.⁵⁷ All this legislation had therefore to be implemented by problematic enforcers in an environment where the main problem for the rule of law was lacking political will from top party politicians. Once the accession pressure was over, the whole front of EU sponsored anti-corruption institutions came under assault. A motion against the European Commission's praised Justice Minister, Romania's Monica Macovei, had been prepared by some MPs weeks in advance but was presented only after the accession date. The accusing text read like the list of bills passed in the previous two years at the request of the EU. The Slovenian Commission for Prevention of Corruption, an agency entrusted with control of assets of elected politicians, was saved in the last instance by the Constitutional Court, as MPs promptly voted for its closing down after accession. In Latvia, a success story for anti-corruption in the accession years, the public had to rally to defend the anticorruption agency boss from being fired by the Prime Minister in 2007, but did not succeed defending him the Parliament a year later. Daniel Morar, Romania's anti-corruption chief who was highly appreciated by Brussels lost office in summer 2008, then was reappointed when the government narrowly lost elections the same year. In Slovakia, which gained its Freedom House progress scores due to creation of a special Court to judge on corruption, the threatened politicians

⁵⁷ Martin Tisné & Daniel Smilov, *From the Ground Up. Assessing the Record of Anticorruption Assistance in Southeastern Europe*, CPS POLICY STUDIES SERIES (2004).

managed to return to power and attack it in their turn⁵⁸. By the end of 2009 it was not clear if this Court would manage to save its independence. According to GRECO, the Council of Europe's anticorruption program chaired by Drago Kos, budgets for anticorruption in most new member countries were reduced beyond the limit of survival.⁵⁹

Scholars of EU enlargement are frequently tempted to presume that this is the only game in town. But that is not the case, and hence the importance of understanding domestic reform dynamics. The process of EU accession is only one of the motors for public policy evolution: apart from Europeanization and ideologically driven reforms, *transformation processes* are unfinished in many countries, especially in those which had a late start, consisting in designing and building whole new systems, from fiscal ones to the rule of law. The main motor for change remains 'revolutionary' in toquevillian terms, as new emerging elites have not successfully disrupted the old ones from the main positions of influence and continue to push.⁶⁰ Estonia and East Germany, which are doing the best, are the only countries which had intensively purged their judiciaries. The problems that Romania and Bulgaria in particular are confronting in the field of rule of law seem to be due to a great extent to their half-done revolutions. But one should not idealize the degree of accomplishment elsewhere. Legal systems are medium- to low-specificity activities with high transaction volumes, i.e. they are the most difficult to reform.⁶¹ These countries covered a lot of grounds in twenty years, but twenty years is simply not enough from Ceausescu's power monopoly to rule of law.

Testing explanations for the rule of law in East Central Europe

The disagreement between the pessimists and the optimists of rule of law promotion finds a good test case in Eastern Europe. The post-communist region is seen as more successful than

⁵⁸ Beata Balogová, "A year of crisis and scandal", THE SLOVAK SPECTATOR (21 December 2009), http://www.spectator.sk/articles/view/37477/11/a_year_of_crisis_and_scandal.html.

⁵⁹ Kos' statement at the Berlin workshop on trends in anticorruption, Hertie School of Governance (18 November 2008).

⁶⁰ Alexis de Tocqueville's memoirs open with this remarkable definition of 'revolution' as disruption of old elites by new ones, as watching the 1848 events unfolding he sees them only as the last episode of the 1789 Revolution. See ALEXIS DE TOCQUEVILLE, SOUVENIRS, OEUVRES COMPLÈTES [MEMORIES, COMPLETE WORKS] (Gallimard 1968).

⁶¹ Francis Fukuyama, The Imperative of State-Building, 15:2 JOURNAL OF DEMOCRACY 17 (2004).

others when rule of law reforms are concerned.⁶² However, results vary greatly across countries: indeed it is highly problematic to see the whole of Eastern Europe as a unitary region only because of its former Communist background. Post-communist countries differ greatly, despite the homogenizing factor of Communism. A model of rule of law in post-communist Europe is difficult to construct in the absence of reliable judicial data. After a few more years of CEPEJ work perhaps the data situation will improve. For now, there is no judicial data for all 28 postcommunist countries and some of it is based on government statements which need double checking. We have data enough only to venture to test the essentials of the findings reported in the previous section.

The difficulty of evaluating assistance is separating it from the broader context influencing the desired policy outcome. What determines rule of law? A consensus seems to exist that, as Rodrik, Subramanian and Trebbi argued, "...there is growing evidence that desirable institutional arrangements have a large element of context specificity, arising from differences in historical trajectories, geography, political economy, or other initial conditions".⁶³ In the East European context, legacies mean Communism: most institutions are rooted in the past decades. Linz and Stepan, for example, pointed out the important differences between the nature of transitions, opposing post-totalitarian and authoritarian regimes; considerable path dependence is presumed to exist in post-communist settings, rendering institutional reforms difficult.⁶⁴ We can therefore presume that we should find a country is furthest from the rule of law ideal the more years it spent under Communism. Development legacies are presumed to matter as well: we know the association is close between rule of law and development. Development means many things: autonomy of the population, decent payment for judges but also overall institutional development. It is quite unlikely that Courts, regarding how much is invested in them, can be neutral and impartial in a context of systemic corruption and particularism in politics and society. As a third explanatory category, we could consider testing the EU influence as countries vary in their relation with EU, from an intensive one of new EU member countries to high EU influence in accession countries, then lower in countries included in the European neighborhood

⁶² RONALD J. DANIELS & MICHAEL J. TREBILCOCK, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* (Edward Elgar 2008).

⁶³ Dani Rodrik, Arvind Subramanian & Francesco Trebbi, Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development, 9:2 *JOURNAL OF ECONOMIC GROWTH* 131, 22 (2004).

⁶⁴ JUAN J. LINZ & ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA AND POST-COMMUNIST EUROPE* (Johns Hopkins University Press 1996).

framework as associates, to finally no EU influence in countries like Russia, Explaining Eastern European politics by foreign influence and the role of international actors is traditional.⁶⁵ A fourth factor, which emerges from the monitoring reports of European organizations (the Venice Commission, GRECO, the European Commission) focuses on the organization of the judiciary, with the implicit presumption that certain types of organization are conducive to better performance. We should be able to test if the organization of the judiciary, the target of so many reforms, matters at all, since we have quite different systems operating against the broad postcommunist region. Finally, a fifth factor, to be found in scholarly work as well as non-EU reports (World Bank, EUMAP-OSI, Freedom House) focuses on the political economy of rule of law reforms, in other words, on the political will of those responsible for enacting and implementing reforms. “Law is a tool of power”, as Stephen Holmes noted insightfully.⁶⁶ The role of political elites and political competition as a key determinant of the success or failure of political and economic reforms was discussed in the general framework of Europeanization and democratic reforms,⁶⁷ as well as more specifically only for rule of law reforms.⁶⁸ For instance, Daniels and Trebilcock divide countries into three categories: those where politicians, legal professionals and the public all support reform (central Europe after the fall of communism, South Africa after apartheid); those where politicians support reform, but lawyers and police do not (Chile and Guatemala); and those where lawyers want change, but not politicians (Pakistan).⁶⁹

Table 2. A model of rule of law in postcommunist Europe

Determinants of rule of law	Coefficient	Std. Err.	P
Human Development	1.9220	2.5716	0.462
Freedom	0.4102	0.0770	0.000
Years under Communism	0.0272	0.0095	0.009
Corruption	-0.0570	0.0126	0.000
<i>Constant</i>	<i>1.8452</i>	<i>2.2437</i>	<i>0.419</i>

Linear regression with dependent variable ‘Rule of law’ proxy the Freedom House score for Judicial framework (1 representing the highest level, to 7, representing the lowest),

⁶⁵ BARRINGTON MOORE JR., SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY. LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD (Beacon Press 1966); Michael McFaul, The Fourth Wave of Democracy and Dictatorship: Non-Cooperative Transitions in the Post-Communist World, 54:2 WORLD POLITICS 214 (2002); VACHUDOVA, EUROPE *supra* note 40.

⁶⁶ Stephen Holmes, Introduction, 11:1/2 EAST EUROPEAN CONSTITUTIONAL REVIEW (2002).

⁶⁷ VACHUDOVA, EUROPE *supra* note 40; Mungiu-Pippidi, Corruption, *supra* note 2.

⁶⁸ Magalhães, The Politics, *supra* note 30; Anderson & Gray, Transforming, *supra* note 29; Alegre et al., Safeguarding, *supra* note 50.

⁶⁹ DANIELS & TREBILCOCK, RULE, *supra* note 61.

2008⁷⁰. *Independent Variables: HDI- Human Development Index from UNDP; Communism – years of; CPI – Corruption Perception Index (1 representing the lowest level, to 10 representing the highest) by Transparency International, 2005; Freedom House - Civil liberties score (1 representing the highest level, to 7, representing the lowest), 2008.*

A test of our hypotheses returns unequivocal results (see Table 2). The most important determinant of rule of law is democracy, measured either as civil liberties score from Freedom House, or in years since a country is declared free by FH. Corruption also matters greatly: the Corruption Perception Index and the evaluation of the judiciary by Freedom House that we used are closely associated. The Communist legacies also proved a significant determinant: the fewer years a country has spent under Communism, the greater the chances it will be closer to the rule of law. Development, measured either as Human Development Index, or as GDP/capita, or finally as Courts budget (CEPEJ data, for only twenty countries) proved insignificant with the proper controls. Also, the EU influence proved significant only in bivariate regressions, so it was dropped from the final model. The organization of the judiciary proved equally insignificant: one cannot predict rule of law based on a country's magistrates being appointed solely by the executive versus any other institutional arrangements. No specific form of judiciary organization seems to matter, which is unsurprising seeing that one cannot compare a Judicial Council which has real power to one which has nominal power only: there are too many informal institutions in the modus operandi of the justice systems in these countries for the formal structures to make any difference. The final model includes the four significant factors: Communist legacy, degree of democratization and corruption, with a control for development (Human Development from UNDP) and explains nearly all variation.

Rule of law seems therefore to be tied to power distribution, and its promotion, as Holmes and Carothers already suggested is inherently political and closely connected to

⁷⁰ Judicial Framework and Independence is an expert score computed by Freedom House in the *Nations in transit* project. Highlights the constitutional framework for protecting human rights (including business and property rights); independence and impartiality in the interpretation and enforcement of the constitution; equality before the law; criminal code reform; the treatment of suspects and prisoners; the appointment and training of judges; judicial independence; and compliance with judicial decisions. See http://www.freedomhouse.org/template.cfm?page=352&ana_page=327&year=2005, last accessed 23.01.2010; The Corruption Perceptions Index (CPI) measures the perceived level of public-sector corruption in 180 countries and territories around the world. The CPI is a "survey of surveys", based on 13 different expert and business surveys interrogated on their experience with bribing. See http://www.transparency.org/policy_research/surveys_indices/cpi/2009/methodology, last accessed 23.01.2010. Neither conceptually, nor methodologically, these two scores do not measure related concepts.

democratization.⁷¹ The success of some Central European and Baltic lie in their deep democratization and replacement of Communist time elites. Estonia, the positive outlier, is a perfect case in point. Estonia practically closed down the judiciary inherited from Soviet times and reinvented it under a new Constitution: by end of 1994. By then the judicial body had undergone a 67 per cent renewal in this country and judges had held office for an average of 3.7 years. From all ECE cases it was the closest to the East German model. In former Eastern Germany, higher Courts judges were lustrated by a Western German commission. The whole judiciary body was evaluated and purged. As in the other successful cases, in Estonia fast and deep democratization preceded the invitation to join EU. It might have been driven by emulation and desire to be sometimes joined with Europe, but it was certainly not driven by conditionality. Romania and Bulgaria, where conditionality was at a maximum, only proved its limited effects. Of course, the European Commission, despite having important leverage, could not compare with the power that West Germany had in reforming East Germany. On the whole, the region shows that deep and sustainable Europeanization is not driven by European conditionality as much as by domestic drive to emulate and reform. In the absence of reform minded elites being in the driver's seat, no form of judicial organization suggested or imposed from outside cannot work some miracle. As the best instruments to promote rule of law are not technical, but political, assistance for rule of law will gain effectiveness if it stops relying solely on assisting the government. To develop accountability, power distribution has to be balanced, and this presumes endorsing domestic drivers of change wherever they are to be found, government, opposition, media or civil society.

The next cases in line of EU accession, Turkey and the Western Balkans have problems closer to Romania and Bulgaria than to Central Europe.⁷² The experience of Eastern Balkans should be understood and applied in these countries. The question is not if they need more or less conditionality. The problem is not with the *quantity* of conditionality, but its *quality*. Assistance strategies have become too detailed and prescriptive going into the smallest details, as if EU bureaucrats and their experts would indeed know not only what the goods are in these very complicated domestic contexts, but also how to deliver them. This is not the case. To succeed producing sustainable changes, EU conditionality needs to be better grounded in the understanding of local landscapes of change and resistance to change in

⁷¹ Holmes, Introduction, *supra* note 65; THOMAS CAROTHERS, PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE (Carnegie Endowment for International Peace 2006).

⁷² Milada A. Vachudova, Corruption and Compliance in the EU's Post-communist Members and Candidates, 47 JCMS ANNUAL REVIEW 43 (2009).

order to empower the drivers of Europeanization. Programs have to be more flexible to help create momentum and build on it. If EU fails to empower domestic drivers of reforms over profiteers of the status quo, no other recipes to 'promote' rule of law across borders will work.

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