Informal Institutions and EU Accession: Corruption and Clientelism in Central and Eastern Europe

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Abstract:

Scholars such as O’Donnell include rule of law among the key dimensions in the study of foundations of democracy and the implicit preconditions for democracy. Informal institutions among which we include corruption and clientelism establish main obstacle in establishing the rule of law thus fully and firmly establishing democracy in transition countries. In the Central and Eastern Europe, the most important factor accelerating the changes in the rule of law, initiated in the transition, was the EU accession process – EU together with other international organizations fostered major changes in the judiciary sector - concentrating mainly on the reforms in judiciary sector and various anti-corruption. However, the EU conditionality, as well as the leverage varied across the region, depending on contextual factors such as 1) cultural heritage; 2) institutional factors such as institutional set-up especially the functioning of the checks and balances system; and 3) actors – constellation as well as willingness of actors to implement proposed changes. The proposed paper seeks to fill the gap in existing research by 1) analyzing the interplay between rule of law and compliance in the CEE region in the context of EU accession process; 2) identifying key reform measures taken against corruption and clientelism in the CEE accession process and 3) outline the factors that played crucial role in this process and affect the quality of the rule of law in the CEE region.

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Introduction

Rule of law can be defined as a functional framework for democracy (Linz 1997, Lauth 2011). In recent years, the concept of rule of law has been used profusely in both theoretical literature and Western comparative research. The comparative studies often concentrate on new democracies, such as Latin America, Asia and Central and Eastern Europe, using the rule of law as an indicator of the quality of democracy.

In the Central and Eastern Europe (CEE), the most important factor accelerating the changes in the rule of law, initiated in the transition, was the accession process to the European Union (EU) – EU together with other international organizations fostered major changes in the judiciary sector - concentrating mainly on the reforms in judiciary sector and anti-corruption (Sadurski 2005, Sadurski et al. 2006). However, the EU conditionality, as well as the leverage varied across the region, depending on contextual factors such as cultural heritage, institutional factors such as institutional set-up especially the functioning of the checks and balances system; and actors – their constellation as well as willingness of actors to implement proposed changes. As a result, according to Mungiu-Pippidi it is necessary to concentrate in comparative perspective on identification of the key factors, and to assess not only the quantity of conditionality but also its quality in their individual cases across the CEE region (Mungiu-Pippidi 2006).

Informal institutions, under which we include corruption, clientelism and elite agreements, negatively affect democracy in various ways, among others they: disable mechanisms of control against the abuse of power, limit transparency, disrupt competition and contribute to disproportional allocation of resources, narrow interest representation, reduce accountability, distort representation, obstruct inclusion and legitimacy (Waggoner 2008, della Porta and Vannuci 1999). The bad informal institutions (hereafter BINIs) distort all aspects of the rule of law (Lauth 2011, Muno 2011, Thiery 2011) in particular the system of checks and balances and independence of judiciary.

The main aim of this paper is to provide an initial assessment and systematization of the findings from the fieldwork of the research project "Rule of Law and Informal Institutions: Central Europe and Latin America in Comparative Perspective" conducted between 2008 and 2010 in three CEE countries – Poland, Romania and Slovenia. The paper proceeds as follows: firstly, it identifies the variety of approaches to the rule of law and their
applicability in the CEE region; it than secondly analyzes the interplay between rule of law and compliance in the CEE region in the context of EU accession process; and thirdly puts forward initial answers to the questions regarding governance of bad informal institutions in Central and eastern Europe generalized by Lauth (Lauth 2011) and proposes measures for their curbing

Theoretical Framework

1. Rule of Law and Bad Informal Institutions

The aim of this part is to provide theoretical framework for the present paper based on the interplay between the rule of law and informal institutions. We will first briefly outline definition of the rule of law, without going into detailed theoretical elements of its features. Secondly, we will outline the informal institutions and their impact on the rule of law; thirdly, we will provide account of the most critical bad informal institution in the CEE region – corruption and its interplay with democracy and the rule of law, and lastly, we will touch up on the Europeanization literature, which provides important context for the changes in the CEE countries under study.

The rule of law is defined as universal legal order (O’Donnel 1993) and the definition encompasses three crucial features – (1.) equality - laws apply to everyone; (2.) clarity - the meaning of the law is clear; and (3.) public awareness - the laws are known (Carothers 1998, della Porta and Vannuci 1999, Waggoner 2008, Lauth/Sehring 2009). The rule of law is vital for the life of democratic polity - its institutions, elites and the citizens.

While the theoretical literature on rule of law is abundant, the development of rule of law itself was scrutinized in far less detail. Lauth (2001) therefore proposed the distinction between a state with deficient rule of law and a hybrid legal system. He analyzed the primary reasons, which are leading to such constellations instead of a In his 2001 contribution, Lauth identifies three types of causes, which undermine the rule of law: 1. insufficient administrative and financial capacities, 2. existing constellations of power and interests, 3. existence of informal norm systems. Based on these causes, he constructs the typology of three subtypes of deficient rule of law: 1. Lack of capacities - based on management approach and attributing the failure to comply with the existing rules; 2. Powerful interests - associated with the rational choice approaches and attributing the non-
compliance to powerful interests; and High acceptance of alternative norms, related to normative approaches and ascribing the lack of compliance to the high approval of alternative norms (Lauth 2001, Lauth/Sehring 2009, Lauth 2011).

Informal institutions shape behavior of political actors creating incentives and constrains outside the formal arena (Ristei 2008, Burduja 2006, Grzymala-Buse 2008, Dobovšek and Meško 2008). In this paper, we follow the definition of Hemke and Levitsky, who seek to differentiate informal institutions from formal institutions, informal behavior and organizations as well as from culture (Helmke and Levitsky 2004, 2006). We accept their definition of informal institutions as “socially shared rules, … that are created, communicated and enforced outside officially sanctioned channels” (Helmke and Levitsky 2006:5).

We concentrate on three key elements of informal institutions: 1. shared expectations: weakness of formal institutions (to which bad informal institutions contribute) establishes uncertainty, thus actors aim to protect themselves by allowing loopholes and lacunae into the laws in order to allow future procedural arguments; 2. to whom do informal rules apply: informal rules apply to a group of powerful actors from high level politicians, state administration, business and media; 3. enforcement of informal rules: informal rules are enforced by informal pressure – in the CEE countries under study, the positive incentives include preferential access to public procurement, and to the EU funds, nomination to boards of state-owned or semi-state-owned companies. Failure to comply with the goals shared by bad informal institutions (e.g. the accumulation of campaign funds by acquiring percentage from awarded contracts) results in exclusion from bad informal institutions- i.e. loss of power, position, access (Helmke and Levitsky 2006, Ristei 2008).

Both formal and informal institutions are key elements of democracy, because they reduce uncertainty and create constrains within which individuals make rational decisions (Ostrom 1991: 240). Applying Ostrom’s typology of four models of interaction between formal and informal institutions: complementary, substitutive, competing and accommodating to the three CEE countries under study, we find that the majority of existing bad informal institutions are competing and substitutive, thus highlighting the key factor contributing to the persistence of bad informal institutions in the countries under study which is the lack of effectiveness of formal institutions.
The change over time, seen in the countries under study can be attributed to exogenous as well as endogenous factors. The earlier, being the change of formal institutions due to EU leverage and the latter (with lesser degree of impact) to the changes in shared beliefs and collective expectations (this can be for example documented by the 2004 Romanian, 2006 Polish and 2008 Slovenian elections, in which the main program of the winning political party was to address corruption). Similarly, the stagnation in effectively implementing rule of law reforms can to some degree be attributed to the persistence of bad informal institutions, which aim at preserving the status quo.

2. Corruption – The Key Bad Informal Institution in the Central and Eastern Europe

In the Central and Eastern Europe, the most crucial problem of the rule of law is corruption. This fact is conditioned on the weakness of formal institutions. In this part, we will thus briefly outline corruption, concentrating on its conceptual interplay with the rule of law.

In recent years growing attention is being paid by both researchers and policy-makers to corruption, in particular to political corruption in the context of democratization (Moreno 2002, Montinola and Jackman 2002, Balmaceda 2008). The term is often related to the nature and viability of the political system (Williams 1999), regime legitimacy (Etzioni-Halevy 1985, Seligson 2002) and trust (Rothstein and Uslaner 2005). Corruption is highly relevant, and highly researched topic, yet it is suffers from rather vague, and often contradictory conceptualizations. Along with the conceptual elusiveness of the concept, there are other critical problems with its measurement, as the researchers often rely on indices assessing perceived corruption, which is framed as (legal) political corruption.

In regard to rule of law and democracy in general, the approaches to corruption are rather contradictory, while some researchers highlight limiting impact of corruption on the rule of law “(Leff 1970) and point out the complexity of political corruption, which is both a cause and an effect of poor government performance, affecting trust in government’s capacity and the reliance on informal networks to gain access to decision makers (Della Porta 2000: 205).
Contrary to this approach, other authors see corruption, especially in emerging democracies, as contributing factor in establishing political competition (Huntington 1968: 64). The ambiguity of this debate is best summarized by Seligson as the “sand versus grease in the wheels of democracy” debate (Seligson 2002).

In order to explain the impact of corruption and bad informal institutions on democracy and the rule of law, two types of endogenous factors – structural and contextual – can be identified (Burduja 2006). Structural factors explain the lack of internal incentives on behalf of political elites to curb bad informal institutions. Burduja points out, that corruption establishes vicious circle in which corruption leads to private gains, due to ineffective mechanisms of punishment (Burduja 2006:55-56). We can broaden this circle to include bad informal institutions (aside of corruption also clientelism and elite agreements as actors, power, lower transaction costs, as well as private and group gain as a goal and ineffective mechanisms of punishment as intervening factor.

The elite’s lack of internal motivation to curb bad informal institutions or the failure to effectively implement measures to curb them can be attributed to five types of factors – 1. political, 2. cultural, 3. habitual - heritage of the past, 4. international and 5. temporal as well as to weak sanction mechanisms - both judicial and electoral (Burduja 2006, Dimitrova and Pridham 2004, Sandholz and Gray 2003, Ledeneva 2008, Hellman et al.2000, Pomerancz 2010). Before briefly highlighting the individual factors, we would like to stress, the role of sanction mechanisms. Sanction mechanisms and their application overlap, while crosscutting and affecting the above outlined factors to a varying degree (Hutchcroft 1997, Herreros and Criado 2007).

In terms of political factors in the CEE region small majority coalition governments with severe internal differences undermine the capacity to deliver the necessary reforms (Dimitrova and Pridham, 2004, Knack 2007). Cultural and habitual factors encompass both heritage of the past and prevailing acceptance of bad informal institutions (in particular of corruption and clientelism) as effective mechanisms to achieve desired goals. In terms of weak sanction mechanisms, these encompass both the judiciary, which is in the CEE region largely ineffective and striving for independence (the Romanian judiciary was partially successful in this struggle) in prosecuting BINIs and electoral - in which citizens lack information (or interest) necessary to sanction politicians through electoral
mechanisms. However, as noted above in all countries under study, this has changed with the 2004 Romanian, 2006 Polish and 2008 Slovenian elections, which saw the incumbent to lose the office and the challenger winning with the anti-corruption ticket.

The last two factors are also highly relevant in the Central and eastern Europe it is the combination of temporal and international factors as manifested in the processes of European integration and the accession to the European Union. These dimensions and their interplay will thus be crucial which highlights the impact of Europeanization on the changes in the rule of law and corruption in the CEE region. In their study Sandholtz and Gray present thesis, that the greater the degree of international integration the lower the levels of corruption. They conclude, that an international integration increases the costs of corruption, and the research shows, that participation in international organizations reduces corruption (Sandholz and Gray 2003: 787). The general hypothesis of our research thus is, that corruption will be reduced in the countries under study after the EU accession due to the increase of costs for bad informal institutions.

3. Europeanization

The process of European integration is defined as “the formation of a whole out of parts, increasing interaction of member states with one another, removal of obstacles to flows of goods and factors, emergence of an independent entity at the supranational level” (Caporaso 2004. Ongoing Europeanization is, in both quantitative and qualitative terms, a source of transfers of powers and legislative activities from the national to the supranational level.

One of the most important effects of Europeanization is the pressure of adaptation, which the process exercises over individual member states in all of the above described areas. The comprehensive enlargement program, based on the Copenhagen criteria, helped the candidate countries to prepare for the EU membership by adopting and implementing the acquis communautaire. However, in general greater attention was paid to acquis related to the performance of state institutions and economic actors in the internal EU market (i.e. competitiveness) than to the democratic criteria. Furthermore, the measurement of compliance was based on the adoption of the legislation, rather than on implementation and enforcement (Dimitrova 2002 in Vachudova 2009, Vanderhill 2009).
The failures were criticized; pressure intensified; but in general the failure to comply was not punished. Until 2006, when based on critical evaluation of the state of the rule of law and corruption in Bulgaria and Romania, the European Commission required immediate action and institutional reform in both countries. Furthermore, the EU not only postponed the accession, but also unlike in the case of the 2004 accession countries extended its direct leverage after the accession. The accession itself was conditioned not only on adoption, but also on successful implementation of crucial reforms, especially measures combating corruption (ibid).

Based on the outlined theoretical perspectives and drawing on the interplay between rule of law, corruption and Europeanization literature the general hypothesis of this paper states, that corruption will be reduced in the countries under study after the EU accession due to the increase of costs for bad informal institutions. Secondly, we aim to answer questions if one prevailing type of deficient Rechtsstaat can be identified in the countries under study, and what is their effect on democratic order in Poland, Romania and Slovenia. Thirdly we aim to determine the extent to which political, cultural, habitual, international and temporal factors as well as contextual issues play role in curbing corruption and bad informal institutions in the countries under study.

Methodology
The methods employed here are twofold – analysis of EU documents and qualitative interviews in Poland, Romania and Slovenia. As for the analysis of documents, we have analyzed wide range of the EU accession reviews and reports of the Central and eastern European applicant countries from 1997 until the respective accessions - 2004 for Poland and Slovenia and 2006 for Romania, as well as biannual reports on the Progress under the Co-operation and Verification Criteria (CVC) in case of Romania between 2006 and 2011. Where available, additional reports, documents and evaluations were included in the analysis. The main aim was to detect the impact of EU leverage on the countries under study over time.

As for our qualitative research, we have conducted 41 semi-structured in-depth interviews: 14 Slovenia (between June and September 2009), 11 in Poland (May and June 2010), and 16 in Romania (November 2010). All interviews were conducted face-to face, mostly in English with an exception in Slovenia (one interview in Slovenian) and in Poland (one
interview in Polish and one in Czech). The respondents included following types of actors: judges and attorneys, police officers, government officials and members of state administration, representatives of civil society including international watchdog organizations representatives, reformers – politicians, whistle-blowers - journalists, and scientific experts - political scientists, sociologists, legal scholars.

For each country a list of potential respondents was compiled based on analysis of secondary documents. Local experts were than consulted and the list continually updated. During the interviews the list of potential respondents was further updated using the snowball sampling method – asking the respondents to identify other key actors involved in the process. In each country between 30 and 40 respondents were contacted via email and telephone. Each potential respondent was contacted at least three times. The average answering rate was approximately 50 percent.

Each interview consisted of following six parts: general understanding of the rule of law, functioning of informal institutions, corruption, organized crime/threats of violence, elite agreements and structural issues. Most of the questions were open-ended, giving the respondent the possibility to fully express his or her opinions. The duration of the interviews varied between 30 minutes and 3 hours, with average length of interview approximately one hour.

Most respondents provided the researcher with further materials in form of information about the organization the respondent was representing, reports as well as publications on related topics. This material was included in the analysis. Within the research project "Rule of Law and Informal Institutions: Central Europe and Latin America in Comparative Perspective" similar interviews using identical interview guide (in Spanish and in English) were conducted by the members of the research team between 2009 and 2010 in Argentina, Chile and Mexico.

Rule of Law in Central and Eastern Europe and the EU Accession Process: Analyzing the Effects of the Co-operation and Verification Mechanism

In the countries of Central and Eastern Europe, the major incentive in adopting the rule of law was the fact, that rule of law was included in the Copenhagen criteria. The
Copenhagen European Council, based on the Article 6 of the Amsterdam Treaty, which enshrines the constitutional principle as ‘The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law’ stated ‘membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, and the respect for and protection of minorities’ (Briefing no. 23/1999 of the European Parliament on legal requirements of accession). So rather than specifying what exactly these criteria mean, it is bundled together with other basic criteria such as democracy, human rights, respect for and protection of minorities, the existence of a viable market economy, the ability to respond favorably to competitive pressures and market forces within the Union.

Analyzing the reviews of the applications of the CEE countries from 1997 until the respective accessions (2004 for Poland and Slovenia and 2006 for Romania, as well as biannual reports on the Progress under the Co-operation and Verification Criteria (CVC) in case of Romania between 2006 and 2011) we see only slight initial specification in defining the rule of law – it is connected with democracy as one category with two distinct features. While democracy relates to the existence and functioning of the legislative and executive branches, the rule of law element encompasses the structure and functioning of the judiciary.

Further specification of the rule of law can be found in the 2005 monitoring report assessing the Copenhagen criteria in Bulgaria and Romania (COM 2005/534). In this report the EU is moving from abstract to more concrete understanding of the rule of law, in negatively connecting corruption to the rule of law – corruption is understood as failure to successfully implement the rule of law. Additional aspects include organized crime (negatively related), justice system and public administration (positively related and defined as safeguards for the functioning of the rule of law).

Throughout the accession process, it was the judiciary, which was viewed as major challenge of the CEE region in complying with the Copenhagen criteria (in Poland and Romania in particular). While courts were generally seen as independent, their overload is highlighted as critical, together with the length of proceedings (which generally exceeds three years and is one of the most challenged rule of law aspects at the European Court of Human Rights). The underlying reasons for the poor performance of the judiciary are the
inadequate experience and qualification of the judges, as well as to understaffing and inadequate facilities of the courts.

In interviews in Poland and in Romania, our respondents (some of them judges themselves) mentioned, that judges are not well equipped with computers, databases of court judgments, etc. It is very difficult (and time consuming) to be able to follow exactly what is happening and also make sure that courts in other cities do not reach some other conclusion. This fact goes beyond the lack of capacity, as it undermines the legal certainty. In Romania, several NGOs currently plan to compile database of court decisions of regional courts and provide access to it free of charge to judges and the public.

The biannual reports on the Progress under the Co-operation and Verification Criteria for Romania (and Bulgaria), based on four benchmarks targeting the rule of law (Bulgaria has six benchmarks, which address rule of law and the fight against organized crime) offer more detailed insight into the weakness of the Romania rule of law and the way in which these weaknesses are addressed. Unlike in the case of Slovenian and Polish pre-accession report, the Romanian Co-operation and Verification Criteria Reports address the rule of law reforms and its problematic areas in great detail. Starting in 2008 the CVC reports document the struggle of the Superior Council of Magistracy for the independence of judiciary. It notes that after the 2007 backlash, starting in 2008 Romania renewed its commitment to judicial reform\(^4\) and fight against corruption.

The positive elements of the new reforms are the introduction of the National Anti-Corruption Directorate and the National Integrity Agency (body responsible for monitoring of the fiscal asset flows and regulating conflict of interest of public officials), while the key weaknesses remain the pending adoption of the civil and criminal procedure codes, and more importantly the lack of full commitment on behalf of the parliament to pursue high level corruption, inconsistency and not dissuasive high-level corruption trials – while

\(^4\) The rule of law reforms only started in Romania in 2003, with a package of judiciary reforms (prepared by the Minister of Justice Cristian Diaconescu and followed by Minister of Justice Monica Macovei). These reforms had two key elements: 1. package of laws in judiciary, followed by 2. the 2004 Law on State Magistracy, and the 2005 Law on Organization of the Council of Magistrates. The result of these reforms was shift of powers from the Ministry of Justice to the Council of Magistrates, and the improvement of the independence of judges – after this reform, the government had no long leverage against judges, because the reform established clear career of judges, as well as the body safeguarding the independence of judiciary - the High Council of Magistrates with six years terms (2004 first elections and 2010 the second elections).
praising the pre-trial work of the state prosecutors, the QVC report criticizes the work of the courts and the trial procedures (QVC reports, 2007, 2008, 2009, 2010).

Overall the EU pre-accession reports as well as CVC enumerate the reforms in the area (whilst rarely addressing their implementation), however, some respondents in Poland and Romania pointed out, that the laws are adopted top-down and are thus not based on social agreement, which negatively affects their implementation and social acceptance.

Our respondents also point out, that the issue of integrity brings back the ‘ghosts of the past’ – in Romania the Lustration Law was only adopted in 2005 and after being challenged at the Constitutional Court came to effect only in 2010. Even after in effect, there is number of high-level actors which do not abide the law, including the members of the Council of Magistrates, some of whom are indicated as former collaborators of the former communist secret service Securitate. Similarly in Poland, number of politicians was implicated as collaborators of the secret services, and according to some researchers the former secret services dominate the bad informal institutions and shape the country’s political life (Zybertowicz 2002).

In general, within the annual reports, both abstract and concrete aspects of the legal/constitutional dimension of the rule of law were regularly evaluated such as the overall reform process of the judiciary, the amendments to the Constitution (for example regarding the status of magistrates). Battling corruption and organized crime was often seen as insufficient and/ineffective (COM 2003/67). The reports addressed both the need for legislative action and the implementation of the necessary legislation in this area (Strategy paper 2002). Nonetheless, in most countries, further progress tackling the problems of judicial backlogs was deemed necessary.

Unlike the relatively positive evaluation of the judiciary changes, the fight against corruption was viewed critically by the European Union– while the countries implemented the anti-corruption strategies and reinforced the anti-corruption bodies, made progress in areas such as public procurement, financing of political parties, and awareness rising - there were still strong indications that in a number of CEE countries (in Romania and Bulgaria in particular), popular awareness of the dangers of corruption was still relatively low. On a regular basis, further encouragements were made to encourage further
development in the areas of transparency, accountability and efficiency of the public administration (COM 2002/700).

To conclude this analysis we can summarize that the main problem of the reforms enforced by the EU was, that some lacked contextual knowledge, some steps or partial solutions which were successful in other countries and other legal systems were transplanted, but as a whole, the system is overwhelmed and overloaded. Furthermore, the EU pre-accession reports as well as the Co-operation and Verification Criteria benchmarks fail to tackle key cultural issues, which, based on our research and interviews, we find predominantly in Romania, and to a lesser extent also in Poland and even in Slovenia. Given the prevailing cultural patterns and political culture in the countries under study, the political elites often feel, they do not need to abide the laws they themselves create. This creates vicious circle of the disrespect of the law – the citizens feel no need to follow the laws, as the political elites themselves do not act accordingly.

**Evaluating the Key Factors Affecting Rule of Law in the Central and Eastern Europe**

The case of the selected Central and eastern European countries demonstrates, how closely interlinked are the concepts of rule of law and corruption with the processes of democratization. In assessing the role of the European Union and its leverage in countries under study in the pre-accession period, we can sum-up the role of key aspects as follows.

In terms of cultural factors, until 2006 the European Union failed to recognize the substantial variation in regard to the quality of democracy among the CEE countries. Our research points out, that the regime type prior to democratization plays crucial role in persistence of informal institutions – the sultanic regime of Ceausescu’s Romania with its imbedded corruption and clientelism provided significantly better conditions for the persistence of bad informal institutions. Furthermore, cultural heritage together with structural conditions played crucial role both in the regime change and in shaping the political competition in the transition era – the cultural and habitual reasons for elite’s weak responses to the persistence of the bad informal institutions in Romania and Poland can be, according to our respondents, partially traced to the historical legacy of the Ottoman and Russian empire respectively (for similar argumentation see also Burduja 2006).
The narrow political elite combined with low effective scrutiny by media, troublesome media ownership, low intensity citizenship and weak civil society resulted in particularization of the society and persistence of strong bad informal institutions. As a result the new democracies in the CEE region are facing wide-spread rent-seeking practices among the relatively narrow political elite, which both in pre-accession and post-accession continues to target EU structural funds and aiming at gaining and maintaining control of the redistribution process – the research points out that public procurement is the area most often targeted by bad informal institutions – political corruption, clientelism and elite agreements are all prevalent in redistribution of the European structural funds.

In regard to institutional factors, the institutional set-up was firmly established prior to commencement of the accession process, however in certain periods prior to the EU accession (and in the case of Poland and Slovenia also after the EU accession) the separation of powers was problematic in all countries under study – in particular the relationship between the President and the Prime minister in the case of Poland and Slovenia and the relationship between the government and the parliament in the case of Romania. In the accession process the main aim of the EU leverage was the increase of the performance of the CEE institutions – the stable institutional set-up was presumed, however in all countries under study the judicial branch was the weakest institution throughout the process, as well as the one most resistant to systematic change.

The main weakness of judicial branch in all countries under study is both structural – related to the unfinished and inconsistent legal order, in other (legal words) lack of legal certainty as well as in the lack of capacity due to resource and personnel constrains. Another issue related to the judiciary is the independence of judiciary, this issue was most pronounced in Romania, where the Highest Council of Magistrates fought against the political control of the judiciary by the Ministry of Justice, which by controlling the budget and its allocation, effectively exercised control over the judiciary.

The individual aspects of the rule of law reforms were fragmented - various experts with different background (in terms of law as well as of legal traditions) contributed to selected aspects, this was most pronounced in Romania, where the reform processes sometimes resulted in institutional paralysis of the judicial branch (several respondents illustrated this fact by pointing to the case of abolition of the regional branches of the Courts of Appeal,
which was centralized; the pending case files transferred to the Court of Appeals in Bucharest and resulted in six month halt in the work of the court).

According to Sedelmeier, in 2004 the eight post-communist states outperformed older members in respect to adoption of the EU law as well as dealing with infringements – hence the external pressure led to higher level of general compliance among the CEE countries in comparison to the old member states (Sadelmeier 2008 in Vachudova 2009); however, our research shows, that the key problem is in the lack of political will for the implementation of extensive rule of law reforms; as well as low capacity in absorbing the changes - again in particular the case of Romania, where several intervening endogenous factors aggravated the situation, can serve as an example of the need to concentrate on implemented rather than (only) adopted reforms.

While in all countries under study insufficient administrative and financial capacities, as well as lack of legal personnel played important role – among the rule of law reforms the EU was most successful in addressing this issue and providing assistance including support in establishing the system of education for judges and attorneys – however, in Slovenia and in Romania our respondents pointed out, that while the newly educated judges and state attorneys bring about the change in judiciary, the executive branch continues to significantly influence the nomination procedures as well as administratively dominate the process – i.e. due to the severe understaffing of the courts majority of newly appointed judges did not take part in the newly established educational activities; for example in Romania, according to the former director of the National Institute of Magistrates; only approximately twenty percent of the new judges and state attorneys are alumni of the NIM, the rest being “seconded” from other institution; furthermore, the judges and attorneys appointed outside the official nomination procedures are more vulnerable to the political pressure as well as to corruption and clientelism.

The factor withstanding the EU pressure prior to accession (and partially after the accession in the case of Romania) and contributing to the perseverance of the BINIs was the existing constellations of power and interest – this led to limiting implementation or in some cases reversing the reforms made under the EU guardianship (i.e. Romania withdrew and reversed several judicial reforms and in February 2007 dismissed the Minister of Justice because of these reforms).
The issue in which the EU involvement and leverage had no impact in the CEE countries under study is the existence of the alternative system of norms. This was most prominent in Romania, country with deeply imbedded culture of everyday corruption penetrating all levels of life and politics, or the deeply imbedded system of clientelism in Slovenia.

The all above described causes have an effect on the overall quality of rule of law, trust in law by citizens as well as on the low ability of the CEE formal institutions to effectively fight BINIs– in particular the high level corruption cases involving politicians tend not to reach any outcomes, as the process is prolonged and ends in lacunae of formal legal aspects without delivering outcomes – furthermore in particular in Poland and in Romania the anti-corruption agencies are sometimes suspect to be part of the political struggle, as majority of the prosecuted cases target the politicians of the opposition parties.

Another key element in further improving the rule of law in the CEE countries under study is ensuring the independence of the courts and the functioning of the system of checks and balances – in the period after the EU accession in numerous CEE countries, cases appeared in which the government attempted to influence the due process of law in high profile cases (Romania, Poland).

In regard to actor constellations, the CEE region, the regime change resulted in emergence of relatively narrow political elite, in all countries under study, the former nomenklatura dominated the initial transformation phase – in particular in Romania, where the absolute control of the former nomenklatura lasted until 1996 (see Ciobanu 2006, Burduja 2006). These actors together continued to shape the rule of law during the transformation as well as during the EU enlargement process.

The actor constellations with blocks of political, business and media actors with similar interests appeared continued to shape the legal system, individual laws and in some cases hinder the implementation of reforms, which could endanger their interest or threaten to implement effective mechanisms of prosecution. Among political actors we find low commitment to pursuing the democratic reforms – due to small governing majorities and unstable governing coalition, the political actors concentrate on short-terms electoral gains
rather than on implementation of long-term reforms, this was most pronounced in Romania, but also shaped the reform process in Poland.

Areas most affected by bad informal institutions are: political parties (party finances, financing of electoral campaigns – both financially and in form of providing advertising space and services – especially relationship with private media groups and political parties), judiciary, healthcare, education, regional governments, and traffic police.

**Results and their implications**

In all countries under study informal institutions play an important role in a number of policy areas, however, the health care, together with judiciary was ranked as the most affected by the majority of respondents. The role of bad informal institutions in the form of corruption and clientelism as well as elite agreements is evident in health care system on all levels. Bad informal institutions penetrate all levels of health care provision from the everyday petty corruption targeting patients to embezzlement of funds at hospital and ministerial level.

Regarding the typology of the three subtypes of deficient Rechtsstaat proposed by Lauth and Sehring (Lauth/Sehring 2009) we can conclude, that none of the countries under study established one clear type. In Poland, Romania and Slovenia, all three types of factors occur simultaneously, albeit with different strength. Their impact can be summed up as follows.

Regarding lack of capacities the factors contributing to this type of weaknesses are i.) the rushed, compromised or unfinished constitution-making – number of judges among our respondents attributed their difficulty in applying the law, to the lack of underlining constitutional principles; ii.) lack of coherent reform strategies; as well as iii.) the need for long term strategies as well as structuring the reform into individual tangible steps; and iv.) sequencing and prioritizing; last but not least, the lack of coherent training and educational programs shapes and undermines the quality of law in the countries under study and in the CEE region as a whole (see also Samuels 2006).

In respect to interests, we find, first, that in number of occasions, limiting the rule of law reforms as well as preparing laws with internal formal issues and lacunae is in the interest
of powerful actors, who are aware, that they do not comply with these laws. Hence, the
gaps in laws provide them with insurance against possible future prosecution and
application of sanction mechanism. Secondly, the political actors tend to prioritize their
own interest. This prioritization of interests is documented by the number of international
arbitrage cases lost by the CEE countries in recent years. Most of the decisions against the
CEE states cited in their reasoning the lack of legal certainty, weak legal environment, and
high-level political corruption, which distorted the market competition.

As for alternative norms, we find dominance of informal and traditional over formal rules;
lack of domestic actors of change and the lack of political will and compromise as the most
crucial factors undermining the quality of the rule of law in the countries under study.

In terms of the varying strength of the factors outlined in the theoretical overview, we can
note, that political, cultural and contextual issues (both exogenous and endogenous) play
key role in determining the impact of reform attempts to curb bad informal institutions and
to improve the rule of law in newly established democracies under study. Furthermore, our
field-work detects only limiting change in the situation over time. To sum up, we conclude
that in Central and Eastern Europe in the period under study the bad informal institutions
influence and shape the democratic order.

Our research findings therefore falsify the general hypothesis based on Sandholz and Gray
(2003)– the processes of Europeanization strengthen formal features of the rule of law in
the countries under study but had only limited impact on curbing corruption. The main
reasons being that in terms of rule of law, the accession process was selective in
accentuating economic performance and overestimating the democratic capacity of the
accession countries. The crucial weakness of the accession criteria was the evaluation of
formal compliance, which was based on adoption of laws rather than their implementation
and enforcement. In connection with the vast amount of EU legislation, some countries
adopted ‘speeding’ mechanism (i.e. in Romania, the government skipped parliament in the
policy making process by adopting laws in the form of emergency decrees). Thus the
effective control of the legislative process was limited, laws were sometimes were not
really debated, but simply adopted citing the urgency of EU accession as the main reason.
Yet, some laws were adopted really last moment; in that context it was difficult to evaluate
their implementation.
This has partially changed with the Co-operation and Verification Criteria (CVC) and its benchmarks adopted for Bulgaria and Romania, which continue to biannually assess key areas of the rule of law after the countries accession to the EU (for more detail analysis of the criteria and their outcomes see next part). Overall the enlargement process was perceived as normatively desirable, thus the compliance pressure was not fully explored until the 2006. The case of the state capture of Romania and Bulgaria, the close ties between their political elites and organized crime, failure to strengthen the rule of law and effectively fight corruption resulted in postponed and conditioned transition of both countries as well as in change of EU policy for future accession from monitoring legislation to stress on implementation and outcomes of the reforms.

In terms of further implications of our research, we can state that in the three Central and eastern European countries under study, bad informal institutions continue to negatively affect democracy by undermining the trust in the rule of law, narrowing the interest representation process, reducing the accountability, distorting the representation circle; as well as leading to unfair provisions of public services. The situation is most critical in Romania, where we can speak about the state capture. While both Poland and Slovenia face these issues to a lesser degree, and are more successful implementing the rule of law reforms, our research points out, that after the EU accession, all countries under study faced important issues such as high level corruption cases in Poland, Romania and Slovenia; attempts of politically control Anti-Corruption Agencies in Poland and Romania, or an attempt to dissolve the Anti-Corruption Office in Slovenia.

**Literature:**


Argentina and Chile in Comparative Perspective”, paper prepared for the Joint Workshop of CIDE DEP and Würzburg University “Rule of Law and Informal Institutions”, Mexico City 11.3.2011.


