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Rule of Law Reforms in the Shadow of Clientelism: The Limits of the EU's Transformative Power in Romania

Abstract: This study examines the role of the European Union (EU) and domestic actors in the development of the rule of law (judicial quality) in Romania between 2000 and 2009. This study offers an empirical analysis of rule of law development across two key dimensions (1. judicial capacity, 2. judicial impartiality). The findings of the study show that, while the reform actions of domestic change agents and the EU led to improvement on the judicial capacity dimension of the rule of law (efficiency-related aspects), there was considerable persistence on the judicial impartiality dimension (power-related aspects). The limited transformative power of the EU is explained by the strong resistance of clientelistic veto players, who captured the reform process and undermined the creation of *de facto* rule of law.

Keywords: Romania, EU conditionality, rule of law, clientelism, state capture

Introduction

Several decades ago a group of scholars praised corruption and clientelism as the grease for economic and political development and stressed the beneficial role of corruption and clientelism (e.g. Huntington 1968; Nye 1967; Weingrod 1969, 1977; Powell 1970). This functionalist perspective stands in stark contrast to the moralist perspective (e.g. Banfield 1958; Alatas 1968; Barnes/Sani 1974) which has pointed out the detrimental consequences of corruption and its more specific forms (e.g. clientelism, patronage). More recently, clientelism—understood as mutually beneficial, particularistic and informal relationships between patrons and clients which inhibit equal access to public resources and markets (see Roniger 2004; Piattoni 2001; Kitschelt 2002)—has been identified as a "strategy for the acquisition, maintenance, and the aggrandizement of political power" (Piattoni 2001:2), and as a barrier to the development of democracy and the rule of law (e.g. Sajo 1998; Krygier/Czarnota 2006:316). The literature on clientelistic networks during post-communist transition stresses mainly its negative aspects (e.g. Miller et al 2001; Hellman et al. 2000; Karklins 2002; Sandholtz/Taagepera 2005; Della Porta/Vannucci 1999; Piattoni 2001) and only a few scholars have identified a beneficial role of clientelistic oligarchs (e.g. Aslund 2007).

The controversy among scholars reflects the ambiguous role of informal institutions (e.g. clientelism) during transitions to democracy (see Helmke/Levitsky 2004). It seems that clientelism and corruption have in general an ambiguous role in socio-economic development or differently stated they play "very different roles at different

stages of development and institutionalization" (Dor 1974: 81). The effects of clientelism and corruption are context-dependent as they vary with the level of economic development (or social order) or the political structure and their nature can change over time (see Khan 2006; Roninger 1994; Grzymala-Busse 2008). But we shouldn't forget that corruption and clientelism are not only causes, they above all symptoms of the macrosocial context and the attempt of its transformation (Medard 2007: 397; Roniger 1994: 11; Lemarchand/Legg 1972: 157).

Which role does clientelism play in European integration? The accession of Romania and Bulgaria to the European Union has once more revealed the salience of clientelism and corruption. Unfortunately, research on clientelism has seldom been addressed in the Europeanization literature (e.g. Graziano/Vink 2007; Schimmelfennig/Sedelmeier 2005; Featherstone/Radaelli 2003). One of the reasons why issues of conflict of interest have rarely been addressed by Europeanization scholars might be the difficulty to trace back informal and hidden structures or simply the relatively high levels of rule of law development in Central Europe and the Baltics (CEB), a region which has been the primary focus of early Europeanization research. However, with the accession of Romania and Bulgaria and the shift of Europeanization research to the Western Balkans, issues of rule of law promotion, the fight of corruption and clientelism have become a hot topic (see Magen/Morlino 2008; Mendelski 2009; Vachudova 2009; Ristei 2010; Elbasani 2011, forthcoming).

In Romania, recent rule of law reforms have been predominantly driven by the requirements of EU membership (Vachudova 2005; Pridham 2007) and were evaluated as a mixed outcome of success and failure (European Commission 2006a; Gallagher 2009: 7; Alegre et al. 2009). Despite considerable financial support to Romania and many changes, the World Bank indicator for the Rule of Law has barely evolved over the period 2000–2008 (World Bank 2010). The vague success of EU-driven judicial reform makes the Romanian experience particularly interesting and generates several research questions: How successful were EU-driven rule of law reforms in Romania (development of rule of law)? To what extent and under which conditions was the EU able to improve rule of law (EU's transformative power)? In which way did clientelism impact on the effectiveness of external rule of law promotion?

The article addresses such questions in a detailed case study on recent judicial (rule of law) reforms in Romania. The main argument of the article is that, while the EU was a very important change agent (among other domestic ones) in triggering rule of law reforms and bringing about formal and efficiency-related change (improving *de jure* rule of law and judicial capacity), it has not been able to change domestic power structures and create an accountable, impartial, and uncorrupt judiciary. The limited improvement of *de facto* rule of law is attributed to the inappropriate reform approach by the EU which couldn't work under domestic conditions of clientelism.

The article proceeds as follows. In the second section I conduct an indicator-based analysis of rule of law development in Romania and explore the role of domestic actors and that of the EU in recent rule of law reforms. The third section explains why Romanian rule of law reforms were only partly successful. The last section concludes.

Rule of Law Reforms in Romania: The Struggle Between Change Agents and Clientelistic Veto Players

The Crucial Role of the EU in Rule of Law Reforms

In order to analyze the impact of the EU on rule of law development in Romania in a more differentiated way, I make two distinctions. First, I differentiate between two key dimensions of rule of law, a judicial capacity dimension, which consists of efficiency-related aspect (e.g. quantity of judicial staff; judicial training and salaries; computerization etc.) and a judicial impartiality dimension, which reflects power-related aspects of the rule of law (e.g. merit-based recruitment; judicial independence and accountability etc.). Second, I distinguish between formal, *de jure* judicial institutions (e.g. *de jure* judicial capacity and impartiality) and their factual enforcement in practice, i.e. *de facto* institutions (see Hayo/Voigt 2007).

It is important to note here that the EU's impact is not a direct one. It is rather mitigated or reinforced by domestic actors, which can be divided into reformist change agents and veto players (i.e. reform opponents). Through its strategy of conditionality, the EU has the ability to empower change agents (reform supporters) or to weaken veto players (reform opponents) and in this way influences the domestic redistribution of power (Tsebelis 2002; Risse et al. 2001: 11). The outcome of the power struggle between veto players and change agents determines the degree of rule adoption (formal rule and resource transfer) and thus the mix of *de jure* judicial institutions which are reflected in *de jure* rule of law. However, formal rule adoption and resource transfer is not the end of the story, as the new rules have to be implemented and the new resources have to function in practice (e.g. computers, management system). Effective rule implementation (effective use of resources) depends in turn on the existing (*de jure* and *de facto*) judicial capacity and the political will of domestic actors. In particular, the active resistance of. powerful clientelistic veto players can undermine effective rule implementation and the success of reforms.

Although many other external donors (e.g. World Bank, Council of Europe etc.) were involved in rule of law reforms in Romania, there is consensus among scholars that the EU and its strategy of conditionality was decisive for judicial and political reform progress (Pridham 2007: 252; Papadimitriou/Phinnemore 2008). As previous literature (see Grabbe 2001 and 2006) describes in detail the mechanisms of conditionality, it should be sufficient to point out the two distinctive features of EU conditionality with regard to rule of law reforms in Romania.

Firstly, the EU influenced Romania's judicial reform strategy through guidance and monitoring. This mechanism includes a set of different measures—such as the Europe agreements, Accession Partnerships, regularly issued progress and monitoring reports—which enabled the EU to guide judicial reform and monitor its progress. The introduction of the safeguard (postponement) clause[1] and of the accompanying

[1] The safeguard clause was introduced after the conclusion of accession negotiations in 2005 and prolonged EU leverage on Romania beyond the signing of the Accession Treaty (December 2004). The clause included the possibility to delay Romania's accession by one year and required among other reforms

Cooperation and Verification Mechanism (CVM) were further elements of guidance and monitoring. These were additional momentum upholding mechanisms for judicial and anticorruption reforms, which were more specific in nature and increased conditionality beyond the end of accession negotiations (Alegre et al. 2009: 5). This armada of principles, criticism and recommendations provided enough orientation to create (at least on paper) a well elaborated judicial reform strategy by the Romanian government. Evidence that EU criticism and the safeguard clause was taken seriously by Romanian elites (especially change agents) is reflected in the reform strategy formulation.[2]

A second tool of EU conditionality was institutional capacity building, which included the financial and technical assistance, as well as advice and twinning to build up the necessary judicial (administrative) capacity for the enforcement of the new legislation. The building-up of judicial and administrative capacity was mainly supported through the Phare allocations. Additional support was provided through the Twinning program (i.e. the long-term secondment of EU experts and practitioners to Romania), under which several projects addressed judicial capacity requirements (European Communities 2005: 21).[3] Taiex (Technical assistance and Information exchange) provided the necessary advice on the fight against corruption and law enforcement (see European Communities, 2007).

Demonstrating that the EU had a big potential leverage on initiating and upholding judicial reforms doesn't tell anything about the outcome of reform. Did rule of law really improve through the EU-driven judicial reforms? In the following case study on Romania, I use a time-sensitive design and trace back rule of law development during a period of increased EU involvement (2000–2009), which focuses on three different points in time (t_0, t_1 and t_2). As the starting point of analysis (t_0) I select the year 2000, i.e. the opening of EU accession negotiations with Romania, which represents the beginning of EU leverage and at the same time reflects the situation of a mostly unreformed Romanian judiciary. The remaining reference points in time (t_1=introduction of safeguard clause in 2005; t_2= introduction of Cooperation and Verification Mechanism (CVM) in December 2006) reflect the intensified EU conditionality in the area of rule of law reforms and will be contrasted with possible alternative domestic explanations (e.g. change in government).

Judicial Capacity Reform Works: Success in Creating *de jure* Rule of Law

2000–2004: Formal Judicial Reform Attempts

The first reform attempts of the Romanian judicial system which can be linked to EU membership requirements were launched in late 1999 and included the amendment

"the development and the implementation of an updated and integrated Action Plan and Strategy for the reform of the judiciary" (European Commission 2005).

[2] On details, see Strategy for the Reform of the Judiciary 2005–2007; IT Strategy for the Reform of the Judiciary 2005–2009 in Romania; Action Plan for the Implementation of the Strategy on the Reform of the Judiciary 2005–2007; Action Plan to Implement The National Anti-corruption Strategy for 2005–2007.

[3] However, Twinning's and Phare's impact was evaluated as mixed. See the independent reports by ECOTEC 2004 and MWH Consortium 2007.

of formal legislation (e.g. Law on the Organization of the Judiciary, Civil Procedure Code), as well as the creation of new agencies which were responsible for training, administration, the implementation of the new legislation (e.g. Training Centre for Clerks, court administrators) and the fight against (judicial) corruption (e.g. the National Anti-Corruption Prosecutor's Office). These new, as well as previously created bodies (e.g. National Institute of Magistrates, Superior Council of Magistrates) were, however, weak in terms of capacity (resources, staff, budget) and therefore not independent and neither powerful enough to improve *de facto* rule of law. The first years of judicial reform were also reflected in substantial, EU-inspired formal change (rule adoption) which included the drafting of new legislation or the revision of former law through constitutional amendments (emergency ordinances). Despite a considerable adoption of new rules, weak administrative and judicial capacity hindered in many cases the implementation in practice. The EU urged Romanian elites to overcome the lack of judicial capacity and independence with a judicial reform strategy that was, however, badly drafted (Gallagher 2009: 149) and poorly implemented during the mandate of Minister of Justice Rodica Stănoiu (2000–2004).

2005–2007: Improvement of Judicial Independence and Capacity

From 2005 onwards, the newly created Romanian government speeded up judicial reforms by launching a serious reform package. Romania's reputation and perception in the EU started to improve not because of previously often heard rhetoric (see Pridham 2006), but because of commitment to reform. Committed change agents (the new Minister of Justice Monica Macovei and President Băsescu) were able to accelerate rule of law reforms under the additional pressure of the postponement safeguard clause (Demsorean et al. 2008: 96). Three new laws were passed in July 2005 which introduced several provisions for stronger accountability, merit-based selection, independent court management and budgetary responsibility. The new judicial leadership prepared a revised and well-elaborated *Strategy for the Reform of the Judiciary 2005–2007*, which aimed to improve judicial capacity through technical and efficiency-related measures (e.g. strengthening the administrative capacity, endowment with IT hardware equipment) and to strengthen judicial independence and accountability. The judicial reform strategy was accompanied by the national anti-corruption strategy which designed several measures to fight judicial corruption.

What effect did the reforms have on judicial quality (rule of law)? As to judicial capacity there was considerable improvement within a short period of time. The number of judicial personnel increased, judicial salaries almost doubled with regard to the national average salary level, and the annual judicial budget more than doubled between 2002 and 2006 (see table 1). In addition, diverse technical and administrative-related measures enhanced the computerization and the court management of the Romanian judiciary.

As to *de jure* judicial independence and accountability, the reform actions seem to have been positive. Backed by the EU—which criticized the Superior Council of Magistrates' (SCM) insufficient capacity and weak accountability (European Commission 2006b: 10) and subjected this issue to one of the benchmarks of the safeguard

Table 1

Selected indicators of the judicial capacity dimension

	2002	2004	2006
Number of professional judges per 100.000 inhabitants	17.0	18.6	20.7
Number of court staff per 100.000 inhabitants (full time)	40.7	41.4	43.0
Number of public prosecutors per 100.000 inhabitants	9.5	12.8	12.7
Annual budget allocated to all courts and prosecution per inhabitant (EUR)	7.8	9.0	17.0
Judges' salaries (highest court level) with regard to the average gross annual salary (times)	5.7	7.8	9.3
Prosecutors' salaries (highest court level) in regard to the average gross annual salary (times)	4.1	—	7.7
Direct assistance to the judge (%)	—	62.0	82.0
Administration and management (%)	—	10.0	83.3

Source: Council of Europe 2005, 2006, 2008

Note: Direct assistance to the judge includes Word processing, electronic data base, electronic files, e-mail, internet connection (100%=highest level). Administration and management includes case registration system, court management information system, financial information system. (100%=highest level).

clause—domestic change agents were able to increase its administrative capacity[4] and strengthen *de jure* judicial independence, which translated partly into an improved *de facto* judicial independence (see table 2 and 3). The positive trend on judicial independence is attributed to the reform actions of Monica Macovei (Dumbravă/Călin 2009: 9; Papadimitriou/Phinnemore 2008: 136) and the increased involvement of additional change agents (e.g. civil society groups, professional associations of magistrates).

Table 2

Selected indicators of the judicial impartiality dimension

	2002	2003	2004	2005	2006	2007	2008	2009
Judicial independence[a]	2.7	2.4	3.00	2.60	2.9	3.1	3.3	3.5
Efficiency of legal framework[a]	2.6	2.4	3.20	2.80	3.1	3.0	3.2	3.0
Irregular payments in judicial decisions[a]	2.9	2.8	3.40	3.60	3.9	—	—	—
Independent media[b]	4.5	4.5	4.25	4.25	4.0	4.0	4.25	4.25
Corruption in the legal system/judiciary[c]	—	—	4.10	3.70	3.9	3.8	4.20	—
Trust in justice[d] (%)	—	35	28	33	30	26	27	25

Sources: [a] World Economic Forum's Executive Opinion Survey; [b] Freedom House; [c] Transparency International; [d] Eurobarometer.

Notes: The ratings for the first four indicators are based on a scale from 1 to 7, with 1 representing the lowest level of democratic progress and 7 the highest. The ratings for Corruption are based on a 1 to 5 scale, with higher values reflecting higher levels of judicial corruption.

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[4] Within a short period of time (2005–2008) the annual budget of the SCM increased from nearly 3 million EUR to 20.1 million EUR and the number of administrative posts augmented from 151 to 240 filled posts (European Commission 2006a and 2008).

To sum up, the reform efforts under Monica Macovei led to certain improvement of *de jure* judicial quality, which in the case of judicial capacity and partly judicial independence translated into higher *de facto* judicial quality. This positive trend was recognized also by the EU (European Commission 2006a: 7) and is reflected in the improved indicators on judicial independence and irregular payments in judicial decisions (see table 2). Despite positive trends a caveat remains, namely that these indicators are still at low absolute levels and have recently regressed, making sustainability of these reforms questionable.

Judicial Impartiality Reform Fails: Failure to Establish *de facto* Rule of Law

2007–2009: Towards a Backsliding Despite Increased EU Conditionality

While formal and efficiency-related reform measures were relatively successful there is evidence that overall *de facto* judicial quality continues to be weak, despite increased and more tailored EU pressure in the form of the CVM.

First, despite improved *de jure* judicial independence, *de facto* judicial independence is undermined in practice and its absolute levels remain rather low (see table 2). The Global integrity index, which distinguishes between *de jure* ("in law") and the *de facto* judicial independence ("in practice") points to continuing politicization in the appointment of judges (see table 3). Especially high-ranking national level judges in the constitutional courts continue to be appointed on a political basis and "seniority and networking still matter more than the performance or qualification" (Global Integrity scorecard Romania 2008:56). Survey results show that *de facto* judicial independence continues to be directly and indirectly undermined through the absence of a free press, pressure exercised by political parties, and other judiciary-related factors (e.g. pressure by the chief of the section or legal instability) (Transparency International 2007). Most pressure on the judicial system is exerted by the mass media, which according to Freedom House is far from independent (see table 4), often being in the hands of powerful media oligarchs who are often politicians (Freedom House 2009). Furthermore, the SCM, as a guarantor of independence, is perceived as "politically biased in its functioning" (Global Integrity Scorecard: Romania 2008: 57). Some recent official reports and surveys point to the increased politicization in the years after Romania's accession (see e.g. Transparency International 2007: 17; Initiative for a Clean Justice 2007, 2008), pointing to backsliding of reforms due to the resistance of domestic actors.

Second, *de facto* judicial accountability continues to be weak. Snapshot evidence (year 2008) for weakly enforced legislation on judicial accountability is provided in the global integrity index (table 3). A brief glimpse at the data reveals that the practice of judicial accountability lags behind its formal rules. Although Romania's values are very high on judicial accountability in law (100%) its scores on implementation in practice are low (42.7%). This implementation gap concerns besides legislation on judicial accountability, appointment and independence also regulations governing conflicts of interest and asset disclosure of judges, pointing to a limited impact of EU-conditionality on rule implementation in practice (see Demsorean et al. 2008: 105).

The limited impact is reflected in the poor functioning of the Supreme Council of Magistracy (SCM), a disciplinary body which was initially set-up to guarantee judicial independence and accountability, but whose members seem to be unaccountable and politicized. This body was harshly criticized for its (in)actions in practice, described in a public statement by the "Initiative for a Clean Justice" as an institution "not accountable to anyone, which takes fundamental decisions in an nontransparent and unjustified manner, and whose standards do not guarantee the impartiality in the decision making process" (Initiative for a Clean Justice 2007: 5). Recently the EU Commission admitted in a document that "Despite its key role in promoting a transparent and efficient judicial process, the SCM has not yet fully taken responsibility for judicial reform and for its own accountability and integrity" (European Commission. 2008b: 7). This example shows that the sole creation of new agencies won't produce any transformative change if the the actors inside the agency don't change their mentalities. Not forms but content matters!

Table 3

Overview of selected *de jure* and *de facto* judicial indicators in Romania (2008)

Judicial appointment		Judicial independence		Judicial accountability		Conflict of Interest		Asset disclosure	
de jure	de facto	de jure	de facto	de jure	de facto	de jure	de facto	de jure	de facto
100	25	100	50	100	42.7	100	62.5	100	50

Source: Global integrity 2010.

Note: Values are given in % and correspond to de jure adoption of legislation ("in law") and its de facto implementation ("in practice"). Lower values reflect weaker law implementation in practice.

Third, absence of impartiality continues to be a problem. Despite some improvement of the "efficiency of legal framework" indicator (see table 2) which reflects impartiality of economic legislation,[5] the judiciary continues to act in a biased way. Survey results indicate that politicians and the rich "are above the law" (see Mungiu-Pippidi 2005: 58). According to the European Commission, "A consistent interpretation of the law at all level of courts is not fully ensured…" (European Commission 2006a: 7). More recent reports indicate a continuing biased and inconsistent application of law (via resort to emergency ordinances), especially with regard to high level corruption cases (Initiative for a Clean Justice 2007; European Commission 2008a:4; European Commission 2009: 4–6).

Fourth, despite some improvement in the fight against corruption (e.g. reduction of irregular payments in judicial decisions), judicial and overall corruption continue to be high. Several recent reports reveal that the pace of the fight against high-level corruption after accession has not been maintained (De Pauw 2007; Freedom House

[5] Efficiency of legal framework: The legal framework in your country for private businesses to settle disputes and challenge the legality of government actions and/or regulations is (1 = inefficient and subject to manipulation, 7 = efficient and follows a clear, neutral process). (see World Economic Forum's Executive Opinion Survey).

2009; Initiative for a Clean Justice 2007, 2008). In particular, there have been attempts to modify previously adopted anticorruption legislation or diminish the power of anticorruption agencies. A recent example for political and judicial resistance to corruption reforms—despite ongoing formal *de jure* changes (e.g. adoption of new civil and criminal code in June 2010)—is the recent decision by the Romanian Constitutional Court on the law on the National Integrity Agency (ANI), which was declared as unconstitutional. According the European Commission, the revised and less strict version of this law "seriously undermines the process for effective verification, sanctioning and forfeiture of unjustified assets" and in general "represents a significant step back in the fight against corruption" (European Commission 2010: 3 and 5). In addition, the EU Commission observes that "exceptions of unconstitutionality continue to delay high-level corruption cases" and that corruption-related "trials remain lengthy with only a few against prominent politicians having yet reached a first instance decision" (European Commission 2010: 6). (European Commission 2010: 6). This recent worrying development is reflected in the perception of judicial corruption, which has reached the same low levels as before the start of the reform (see table 5).

Fifth, indicators of state capture as measured by the World Bank Business Environment and Enterprise Performance Survey (BEEPS) exhibit relatively high levels of firms' "extra, unofficial payments to public officials to influence the content of new laws, decrees and regulations" (2002–2005), leaving Romania a "high capture economy" (see BEEPS 2005; Hellman et al. 2000). State capture is reflected in clientelistic "elite networks" (Vachudova 2009: 56) which "play a dominant role in politics on all levels" (BTI Romania 2006: 17).

To sum up, some observations can be drawn from the previous analysis. First, EU conditionality was most effective when accompanied by reform actions of committed domestic change agents (and vice versa), pointing to mutually reinforcing effects. Second, the EU-driven capacity-based approach to reform was not good enough to tackle politicization and corruption, to raise *de facto* impartiality and accountability, to change power structures and the overall personalistic and inefficient judicial culture (see Beers 2010). A reflection of weak *de facto* judicial quality could be the continuing low trust of citizens in the judiciary (table 6). Third, the recent backsliding in judicial reform reflects the unsustainable nature of externally-driven reforms reform and the revival of old practices after Romania's accession to the EU (see European Commission 2010; Mendelski 2009; Jasiecki 2008).

Towards an Explanation of Failure: How does Clientelism and State Capture Undermine the Creation of *de facto* Rule of Law

Why did EU-driven rule of law reforms not create an accountable, impartial, uncorrupt and *de facto* independent judiciary? Answers can be found both on the supply side (EU as reform giver) and on the demand side (Romania as reform taker). Due to space constraints let me focus here on the demand side of reform which deals with three domestic constraints for establishing the rule of law: 1. Weak judicial

capacity, 2. Resistance of domestic veto players and 3. Different forms of state capture.

Especially in the initial years of reform, a weak judicial capacity inhibited rule implementation enforcement in practice. With the helping hand of the EU, which stressed judicial strengthening, domestic change agents have been largely able to overcome the burden of the past and modernize Romania's judicial system in a short period of time. While nowadays judicial capacity is far from being perfect and needs continuing strengthening (especially on the regional level), the Romanian judiciary has been modernized in the last years and its judicial capacity has been improved. Therefore, ongoing weak *de facto* rule of law must have another domestic source.

A second and more relevant obstacle has been the resistance of domestic veto players who have opposed genuine and *de facto* judicial reforms in practice. Veto players in the Romanian case were identified among clientelistic networks of politicians, influential businessmen, media moguls, as well as members of the judiciary and the bureaucracy (see Gallagher 2009; Freedom House 2009). While on the surface veto players even promoted formal reform and the modernization of the judiciary, in practice they have been able to maintain *de facto* political power (see Acemoglu/Robinson. 2006) and block genuine institutional change. The resistance to judicial independence reforms (despite formal rule adoption) was for instance reflected in reform-blocking decisions of senior judges from the Constitutional Court[6] and the actions of reform-opposing political elites (e.g. Năstase government) who continued to influence the judiciary via party networks despite the reform actions of committed change agents (Pridham 2006:21). The discrepancy on the content of reform (modernization vs. the creation of a non-politicized and impartial judiciary) among Romanian elites is reflected by a generational discrepancy between judicial and political old guard figures and reform-minded young magistrates or administrators (Gallagher 2000: 121 and 240). While in quantitative terms, most magistrates are young, skilled and impartial, they do not have the scope of authority (see Larkins 1996: 12) to challenge the power of politicians and conservative senior judges, who are located in the Highest Romanian Courts, as well as in the SCM and continue to undermine *de facto* change.

Third, the EU-driven rule of law reform was captured by domestic veto players which managed to undermine the effectiveness of EU conditionality, leading to different forms of state capture. Candidate countries with an inadequate level of rule of law (judicial quality) face a quandary, which I call the *dilemma of reform ownership*, namely that domestic judicial and political actors (who are the owners of reform) are at the same time the objective of reform, i.e. they have to reform themselves in order to achieve change. But how can someone change his clientelistic and corrupt behavior when this kind of behavior is most rational and efficient to fulfill his particularistic needs under given domestic conditions? How can an external actor like the EU reform the judiciary with the help of a weak, biased, and corrupt judiciary, which

[6] It is argued that to assure the survival of its loyal senior members in the judiciary, the PSD-influenced Constitutional Court declared some of the Tăriceanu Government's proposed reforms as unconstitutional. See The Hubbub on Judicial Reform: Was Romania's Constitutional Court Wrong?, The Romanian Digest: Vol. X No. 8, August 2005.

does everything possible to uphold the status quo? This dilemma makes externally-driven rule of law reforms particularly difficult and may explain why EU democratic conditionality (related to the Copenhagen political criteria), as opposed to acquis conditionality (related to the acquis communautaire), is more prone to failure (see Schimmelfennig/Sedelmeier 2007: 99).

The identified ownership dilemma of reform reflects the more general idea of state capture (see Hellman et al. 2000). State capture is usually identified with the influence of private interest on the content of state regulations (laws, provision with public goods etc.). I term this form of private influence *external state capture*, in order to stress the capture of the state by a group which is external to the state (e.g. private companies). In addition, the Romanian case study suggests another form of state capture, which I term *internal state capture*. This form of capture inside the state is reflected in the capture of the judiciary, itself a state body, which is captured less by private interests but rather by a clientelistic network of state actors (e.g. politicians, state officials, high-level judges). The phenomenon of internal state capture occurred in Romania, when politicians and high-ranking judges had an interest in blocking reforms which dealt with the power-related dimension of the rule of law, while not necessarily obstructing efficiency-related reforms. I would argue that the EU didn't consider sufficiently the persistence of *de facto* power (informal) structures of domestic veto players, who continued to undermine rule adoption and implementation even after a more reformist government came into power. By offsetting the loss in *de jure* political power—for instance through continued control of key offices, corruption and manipulation and lobbying (see Frankfurter Allgemeine Zeitung, 3. December 2009; Gallagher 2009: 56)—clientelistic veto players were able to keep *de facto* power and to pick the most convenient ingredients of reform. This "raisin picking reform" is reflected in the Romanian case, as mainly those reform elements were selected (judicial capacity measures) which did not endanger the status quo of the well established elites. In contrast, many on paper well-elaborated reform elements (e.g. creation of an impartial, uncorrupt and *de facto* independent judiciary), which would have altered existing power structures, failed to be implemented.

Besides the aforementioned forms of state capture, *donor capture* as a more transnational form of capture can be observed in Romania. Donor capture refers to the capture of international donors' interests (e.g. European Union) by domestic actors (e.g. veto players). By taking advantage of the main weakness of external conditionality (its necessity to act through intermediating structures), domestic actors are in a relatively powerful position to undermine the real content of reforms on the ground. While power asymmetries make the international donor (e.g. EU) more powerful in the initial phase of rule adoption (see Moravcsik/Vachudova 2003), information asymmetries tend rather to benefit domestic actors, as those have hidden information (adverse selection problem) and can resort to hidden actions (moral hazard problem) and thus are in principle able to undermine *de jure* reform actions in practice. Indeed, the *de facto* power for rule implementation remains almost entirely at the domestic level, assigning to domestic actors and institutions a crucial role in the effectiveness of EU conditionality, but at

the same time exhibiting different principal-agent dilemmas (see Moe 1984; Weingast 1984).

The here analyzed Romanian case has demonstrated the conflicting and complementary relationships between the EU on the one hand and domestic veto players or change agents on the other hand, suggesting that the EU impact can be either weakened by veto players or reinforced by change agents. Thus the effectiveness of EU leverage heavily depends on the power of supporting coalitions at the domestic level. Let me stress again that it is not always the quantity of change agents which matters, but their quality in terms of power. While there are currently many young and open-minded change agents in Romania (e.g. young judges, officials, politicians) these potential change agents do not have yet the relevant power positions which could bring about real and sustainable change. So despite the positive attitudes of most Romanians towards a fair and uncorrupt democracy (rule of law), change is further being blocked by the powerful and well-connected old guards, who receive sometimes even support from different actors inside the EU and other international donors. While EU authorities and EU member politicians manage to weaken some of the most obvious veto players (e.g. radical right parties), relationships with less obvious veto players (e.g. former communist politicians or judges) are maintained (see Gallagher 2009: 56). By doing so the EU and other international organizations risk to fall into the trap of donor capture and thus strengthening the already established power structures.

How detrimental is clientelism for external rule of law promotion? Does it promote or undermine rule of law reforms? The role of clientelism in economic and political development has been identified as ambiguous (Roniger 1994: 11). Similarly, the role of clientelistic networks in the creation of the rule of law is ambiguous as well. Whether clientelistic networks promote or undermine the development rule of law doesn't depend on the form of this specific mode of organization but on its content. In other words, not clientelism per se is relevant but the intentions and values of the actors who participate in clientelistic networks. On the one hand we can describe the well-intended rule of law promotion reforms by international donors, who create "clientelistic networks" (or transnational coalitions) with domestic change agents (Stewart 2009: 817), or networks of anti-communist opposition as beneficial forms of clientelism (see Vorozheikina 1994). On the other hand we can portray the powerful, formerly communist, veto players as detrimental forms of clientelism. The "clientelistic" or coalition approach is in normally pursued by the EU and the West in general, who focus on redistribution of power and on particular political election outcomes rather than on the process of democratization (Stewart 2009). Once watershed elections (Vachudova 2005) or color revolutions are achieved, financial donor support is shifted away from the bottom-up drivers of the rule of law (e.g. civil society) towards elitist state actors (Stewart 2009). Whether this top-down approach is appropriate and brings about sustainable change is questionable. Furthermore, despite good intentions, there might be some unintended and negative effects of EU-driven rule of law reforms (e.g. more judicial independence produces less accountability) and a change in elite power structures doesn't have to produce a change in behavior of

elites, leading to phenomena such as "the iron rule of oligarchy" (Michels 1962), i.e. a backsliding into old practices.

Clientelism becomes a problem for external donors when domestic veto players are better organized and have more available resources (e.g. money and influence) than pro-Western change agents. Although the EU and other external donors manage to empower change agents financially, they seldom succeed to provide them with enough influence. This happened in the case of EU-driven reform in Romania, in which change agents didn't create a comprehensive strategy which would have produced systemic, transformative change. While from time to time civil society and NGO representatives were included in the process of reform, the main change agents were the European Commission and reform-minded domestic elites (e.g. Monica Macovei, Traian Băsescu, and Romania's anti-corruption chief Daniel Morar). In this way the success of reform was dependent on a few committed domestic change agents who, however, faced fierce resistance and could be simply replaced or dismissed (for instance through a motion or in the parliament) by a network of powerful veto players from the government, the parliament, or the judiciary. This happened for instance to Monica Macovei and to chief prosecutor Doru Tulus of the Anti-Corruption Directorate (DNA) in 2007. Even President Băsescu (a strong supporter of judiciary and corruption reforms) was not safe in his position and escaped demission only through the positive outcome of an impeachment referendum. A more comprehensive reform strategy, including other actors (e.g. citizens, civil society, law enforcement agents, law professors) would have created a broad, transnational coalition of reform agents to induce *de facto* change (Epstein 2006; Jacoby 2006). However, clientelistic veto players were influential enough to block a crucial element of rule of law, namely its power-related aspects.

Finally, it would be easy to blame clientelistic veto-players for the failure of EU-driven judicial reforms, which although produced a more capable judiciary failed to establish a completely impartial, uncorrupt and accountable one. However, when treating domestic conditions of clientelism and informalism, as a "normal" situation in closed access orders (North et al. 2009) we could also argue that the EU-driven reform strategy was inappropriate and prone to failure under a particularistic mode of organization (see Mungiu-Pippidi 2006). The Romanian case suggests, therefore, not to fight clientelism and informal structures with the *de jure* weapons stemming from more developed social orders, i.e. Western democracies (see Krastev 2005). But what to do instead? What should the solution look like?

The answer is not easy and is most probably context-dependent, however, the Romanian case (as well as the failure of most judicial reforms in Latin America) tells us that a simplistic reform approach based on the quantitative addition of capacity-related reform ingredients that doesn't challenge the established legal/social order results in a superficial and unsustainable reform outcome (see Mendelski 2009). According to the findings of this study, a more qualitative, bottom-up and complementary reform approach, which is incentive compatible (i.e. creates incentives for veto players behavioral change) and which is based on a broad transnational coalition (see Jacoby 2006) of change agents (e.g. civil society organizations, judicial associations,

media etc.) should work better than a top-down, elite-driven reform approach. It is also important to consider reform complementarities (see Hall/Gingerich 2009), i.e. mutually reinforcing reform measures. This could be done by linking better capacity with impartiality-related elements of reform (e.g. higher salaries as an incentive for fairer judicial decisions) or by creating private judicial structures or alternative mechanisms of dispute resolution in order to provide alternatives and enhance competition. Together with the provision of alternatives or exit strategies for powerful veto players (e.g. senior judges and politicians), such a comprehensive approach to judicial reform should create the required critical mass (Schelling 1978) which would bring about transformative and sustainable change.

Conclusion

My intention was to illustrate the processes (drivers and barriers) and outcomes of rule of law reforms in Romania. A special emphasis has been put on the role of actors (clientelistic veto players and change agents) and informal institutions in the reform process. With regard to processes it was demonstrated that the EU had a considerable impact on launching judicial reforms and maintaining reform momentum, but at the same time was heavily dependent on the will and commitment of domestic actors as well as existing domestic capacity. The Romanian case makes clear that EU-conditionality alone was not sufficient to bring about change without the will and commitment of domestic change agents, who at the same time were also empowered by the EU. Moreover, it was demonstrated how powerful clientelistic veto players have successfully undermined rule implementation in practice despite rule adoption on paper, ultimately culminating in reform reversals after Romania's accession. In this context, I have pointed to two main problems encountered during rule of law reforms in Romania: The first one was the dilemma of reform ownership, i.e. the dilemma of how to reform domestic (judicial) structures with the help of those actors who are part of these structures. Solving this kind of "credible commitment" problem might be especially important for future EU-driven policy reforms in the Balkans. Secondly, I have identified problems of internal state capture and donor capture (raisin picking approach), two phenomena which can subvert and undermine most well-intended, externally-driven reforms by domestic change agents and international donors.

With regard to outcomes, it can be firstly observed that there was considerable change in the efficiency-related dimension of the rule of law (judicial capacity), leading to a rapid modernization of Romania's central judicial system (not necessarily at the regional level) and secondly that there was considerable persistence in the power-related dimension (judicial impartiality) of rule of law, ultimately undermining the factual implementation and the achievement of *de facto* rule of law (i.e. an impartial, non-corrupt judiciary and not just a more efficient one). EU-driven rule of law reforms in Romania can be therefore characterized as change within continuity and overall as a limited success. These results should caution us against simplistic assumptions on the "transformative power of the EU" and make us aware of that countries can

remain stuck for many years in a mixed state of "transitional rule of law" (Teitel 2005), in which clientelistic elites can capture state institutions (e.g. the judiciary) and hinder the creation of genuine rule of law.

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