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ARTICLE

The Rule of Law Derailed: Lessons from the Post-Communist World

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Abstract Twenty-five years after the fall of the Berlin wall the process of building the rule of law in post-Communist Europe is facing serious challenges. The analysis of this period clearly shows that organizing free and democratic elections is easier than creating constitutional democracy based on the rule of law. Rule-of-law institutions are often weak or underdeveloped, and hence fail to fulfill their essential function, i.e. to limit the abuse of uncontrolled state power. The current rule of law crisis in the region originates from certain structural features of the transition in Central and Eastern Europe. The single most important factor contributing to the current democratic setback is a failure of institutionalization of the rule of law and effective state institutions, which, together with democratic accountability, form modern liberal democracy. The reformers in the region too often neglected the importance of the 'homegrown development' and the need to adapt Western models to local conditions and needs. Many rule of law institutions created during the last 25 years need further reforms. It is time for real democratic deliberation and experimentation, which could usher in much needed institutional reforms in the region. In order to improve the rule-of-law institutions, we must not start from some idealized 'best model', but from the existing context in which these institutions function. New rule of law institutions in CEE may in the end resemble their Western models. But what is more important is that they actually work well for CEE, even if they look different than their Western counterparts.

Keywords Rule of law · Post-Communist Europe · State modernization · New historicism · Washington Consensus · Shallow institutionalization · Illiberal democracy · Isomorphic mimicry

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1 Introduction

Twenty-five years after the fall of the Berlin wall the process of building the rule of law in post-Communist Europe is facing serious challenges. The analysis of this period clearly shows that organizing free and democratic elections, though a formidable task, is easier than creating constitutional democracy based on the rule of law. It should therefore not be surprising that most post-Communist countries did well as far as 'electoral democracy' is concerned: today, elections in the region are free and fair, and quite frequently lead to turnovers of power. Rule-of-law institutions are a different story. As I argue in this article, these institutions are often weak or underdeveloped, and hence fail to fulfill their essential function, i.e. to limit the abuse of uncontrolled state power.[1]

In their overview of the state of democracy in the region, Jacques Rupnik and Jan Zielonka point to the fact that when CEE joined the European Union in 2004–2007, they were proclaimed to be consolidated democracies with 'seemingly workable constitutions, administrations, and markets', whereas nowadays they 'are seen as particularly vulnerable and susceptible to a dictatorial turn'.[2] Moreover, Jan Werner Müller argues that in CEE 'something new is emerging: a form of illiberal democracy in which political parties try to capture the state for either ideological purposes or, more prosaically, economic gains'.[3] He points to an alarming similarity of these new forms of 'democracy' with Putin's 'managed' democracy:

> Like Moscow, the governments of these countries are careful to maintain their democratic facades by holding regular elections. But their leaders have tried to systematically dismantle institutional checks and balances, making real turnovers in power increasingly difficult.[4]

The rule of law crisis in Central and Eastern Europe largely coincides with a worldwide trend of democratic recession and fatigue[5] and with the biggest crisis the EU has faced since its inception. One of the key questions is whether backsliding and democratic regression in Central and Eastern Europe partakes of the more general trend or represents a specific crisis. I argue that the current rule of law crisis in the region as a whole represents a specific crisis whose origins derive from certain structural features of the transition in Central and Eastern Europe. Western democracies can cope more successfully with various attacks on their liberal institutions because their courts, media, human rights organizations and ombudsmen have a longer and more developed tradition of independence and professionalism. Berlusconi's Italy is a good example. As Müller argues, Berlusconi, like Orban or Putin, also wanted to remove checks and balances and stay in power more or less

[1] As Martin Krygier argues, one of the deepest purposes of the rule of law is 'the legal reduction of the possibilityof *arbitrary* exercise of power by those in a position to wield significant power. See Krygier (2011), p 75.

[2] Rupnik and Zielonka (2013), p 21.

[3] Müller (2014), p 15.

[4] Ibid., p 15.

[5] Diamond (2011), pp 19–23.

permanently. But unlike in Hungary or Russia, the opposition, media and the courts in Italy prevented Berlusconi to achieve his political goals.[6]

In other words, in order to understand the current crisis, we need to return to 1989 and look at how the institutional actors in the region approached the transition from communism to democracy.

As Fukuyama argues, the single most important factor contributing to the current democratic setback is a failure of institutionalization of the rule of law and effective state institutions, which, together with democratic accountability, form modern liberal democracy:

> It is much harder to move from a patrimonial or neo-patrimonial state to a modern, impersonal one than it is to move from an authoritarian regime to one that holds regular, free, and fair elections. It is the failure to establish modern, well-governed states that has been the Achilles heel of recent democratic transitions.[7]

Modernization of state institutions in CEE countries was not a key policy priority during the initial stage of the transition. Given the anti-statist bias prevalent among the reformers of that time, this is not surprising. It is only during the accession negotiations with the EU that administrative reforms became an important item on the policy agenda of the CEE governments. More precisely, with very few exceptions, most of the governments started with various reforms of public administration only in the second half of the 1990s. Before that period, the neoliberal development experts were more interested in un-building and dis-establishing prior communist state structures than in building new ones.[8]

Furthermore, state modernization in the region was not only delayed but also badly designed. Many reforms in the region are example of what Matt Andrews, Lant Pritchett, and Michael Woolcock describe as 'isomorphic mimicry'—that is, reforms copying the forms of Western institutions but without their substance.[9] Such emphasis on the forms of Western institutions was a direct corollary of the dominant transition paradigm of the time, the Washington Consensus, and its insistence that a single set of most appropriate institutions—rule of law being one of them—is required for successful development. As a result, the reformers in the region too often neglected the importance of the 'homegrown development' and the need to adapt Western models to local conditions and needs. As William Easterly forcefully argues in *The White Man's Burden*, 'the great bulk of development success in the Rest comes from self-reliant, exploratory efforts, and the borrowing of ideas, institutions and technology from the West when it suits the Rest to do so'.[10]

[6] Müller (2013), p 13.

[7] Fukuyama (2015), p 12.

[8] For a similar approach see Skapska (2011), particularly Chapter 5 'Dividing the Cake: The Constitutionalization of Economic Order', pp 185–212.

[9] Andrews et al. (2012), p 12.

[10] Easterly (2006), p 363.

In the Central and Eastern European context, I find three broad structural patterns, which, by and large, explain the rule of law travails and ensuing crisis in the post-communist Europe. Part One offers a critique of the one-size-fits-all ideology of the Washington consensus, which was dominant in the region since 1989. Section 2 explains why the absence of the rule of law tradition prior to 1989, in combination with an ahistorical approach to state modernization, has been one of the key reasons for the current malaise. Section 3 shows how the first two patterns contributed to the third one, the shallow institutionalization of rule-of-law institutions (Sect. 4), which further weakened the rule of law in the region. In Sect. 5, I offer some theoretical implications deriving from the analysis of the rule of law crisis in CEE, particularly for theories of legal and institutional development.

2 Building the Rule of Law in Post-Communist Europe: Pitfalls of 'One-Size-Fits-All' Universalism[11]

2.1 The Washington Consensus: Copy/Pasting Western Rule of Law Model(s)

A major part of the rule-of-law structures in contemporary CEE was built during the age of the Washington consensus (WC). The term Washington consensus usually refers to a set of policies advocating economic liberalization, privatization and fiscal austerity initially designed in the 1980s and 1990s by the IMF, the World Bank and the US Treasury to respond to the economic crisis in Latin America.[12] Later, a similar set of policies was applied to the former communist countries in CEE. According to the rule of law model, which prevailed during the transition and was heavily influenced by the Washington consensus, only one model of the rule of law is appropriate for all countries. At the heart of the WC and the expanded reform agenda is a universal approach to development based on imitation of 'international best practices'—i.e. the historically contingent and surprisingly diverse institutions, rules and practices of primarily high-income countries in North America and Western Europe.

The rule of law model was comprised of a set of institutions which are typically found in Anglo-American countries, and was therefore accompanied by a strong belief in the possibility of legal transplantation. With its pronounced emphasis on property, contracts and the administration of the judiciary, the rule of law model almost completely disregarded the importance of state and its many regulatory functions i.e. the role of the executive, legislature, regulatory agencies, civil service and the public regulation of markets.[13] It is therefore hardly a surprise that during the initial stage of the transition, the process of building administrative institutions was less important than the process of economic reform. This rule of law model was also highly formalistic. Great emphasis was placed on formal rules aimed at

[11] Parts of Sects. 2, 3 and 4 draw from my earlier work, see Bugaric (2015).

[12] The term was coined by John Williamson in 1989. See Williamson (1989).

[13] More about this problem see Bergling et al. (2010), pp 171–202.

constraining public authority on the one hand and creating 'the right rules' for market actors on the other. The importance of formal rules was so great that the law and development paradigm from the early 1960s was replaced with a 'rule of law' model.[14] As Charles Sherman argues, 'a central characteristic of this rule of law project was the idea that the formalization of Western-style law in the developing world was sufficient for promoting economic development'.[15] As a result, nearly all Central and Eastern European countries adopted neo-liberal ideas and policies at a dramatic rate for the better part of two decades. As Mitchell Orenstein claims, not only were domestic political elites in CEE quite eager 'model-takers' willing to adopt the basic tenets of neoliberalism, they also had very limited range of options:

> Ultimately, Central and Eastern European countries had few choices if they wanted to integrate into Western economic structures. They could choose to adopt neoliberal economic ideas and enjoy Western support or to adopt some alternative and lose it. For countries that wished to escape the Soviet bloc and join the European Union, there was no real choice. Adoption of neoliberal ideas was a sine qua non for membership in the Western club. Western governments and international institutions launched an enormous assistance effort to help Central and Eastern European countries implement neoliberal ideas. This effort was co-ordinated at the governmental level by the G-24 and organized through the International Monetary Fund and World Bank, as well as the EU's PHARE program.[16]

As one early study on the transition reports, the neoliberal experts deliberately weakened various reform proposal aimed at state modernization. For example, in Poland and Hungary, the World Bank explicitly required respective governments to disempower the ministries of industry, responsible for development and industrial policy, while providing both technical and financial assistance to ministries of privatization, which became the most effective government bureaucracies in the region. In Poland, the ministry of privatization had a special status within the government and was exempt from ceilings on civil service pay scales, which enabled it to attract the most capable staff members.[17] Next, the World Bank imposed a de facto ban on development banking. The Polish Development Bank's autonomy to lend directly to industry was limited by the World Bank's loan conditions. The theory behind such institutional un-building was the 'do nothing policy', based on the idea that once proper institutions for the market economy had emerged, the markets would do the rest of the job. Instead of pursuing their own developmental policy, CEE countries invested heavily in various structural reforms, another term used by the Washington consensus ideology, which amounted to de-industrialization rather than re-industrialization.

[14] Trubek (2006), p 86.

[15] Sherman (2009), p 1264.

[16] Orenstein (2013).

[17] Amsden et al. (1994), p 119.

2.2 Rule of Law and EU Accession

The EU-initiated accession negotiations with the candidate countries of CEE brought important modification to the previous neoliberal anti-statist policy. It was only during the period of EU enlargement that reforms of public law institutions came to the top of the agendas of both the CEE governments and the Commission. But given the prevalent mentality of the time, even EU-initiated reforms of public law institutions could not escape the dogmatic formalism of neo-liberal development experts. In other words, civil service reforms, anti-corruption campaigns, and judicial reforms were mostly about creating more and more new rules; if the new rules did not function, they were replaced with yet another set of rules. During the early stage of administrative reforms, the reformers followed such a simplified approach to the rule of law and hastened to transplant various Western-style administrative structures without paying sufficient attention to social context and disregarding the policy relevance of such rules. As Alina Mungiu Pippidi explains:

> Reforms were not driven by impact evaluations, but by the need to satisfy the pressing bureaucratic *reporting needs* for the regular monitoring reports of the European Commission… As the Commission went quite far in suggesting concrete means to achieve targets (like the creation of new government bodies) and governments needed positive ratings for their efforts to keep up the pace of the accession process, a sort of 'prescription-based' evaluation mechanism was created. Countries were thus rated in the monitoring not by the effectiveness of reforms or even their real change potential, but by the number of 'prescription pills' taken. A 'patient' or assisted country was rated higher the more advice it accepted, with little checking of 'symptoms'.[18]

While the initial effects of Europeanization in Central and Eastern Europe were immediately felt, they led to more 'shallow' institutionalization of European principles and ideas.[19] Reformers in CEE countries were under strong pressure to adopt adequate institutions post-haste in order to satisfy various conditionality requirements. Unlike in the old member states, the process of institution building was a short one with very limited sets of institutional and policy choices.[20] The desire of reformers to create institutions that 'look' European had an important legitimizing effect during the accession negotiations. The rhetoric of 'a return to Europe' was an important political and ideological device used by the CEE elites during the enlargement process. The question of whether the return to Europe helped to create the robust and well-working institutions sorely needed by the nascent democracies in Central and Eastern Europe or led to 'Potemkin harmonization' resulting in formal structures designed to please the EU, but having little impact on actual domestic outcomes, has become a fundamental part of transition literature.

[18] Mungiu-Pippidi (2011), pp 13–14

[19] Krygier and Czarnota (2006), pp 299–340.

[20] Cameron (2003), p 29.

CEE created institutions which, compared to the West, are 'more formal, more constraining of public authority over the economy, less open to institutional variation and less well embedded in the local institutional, social and economic context'.[21] As David Kennedy argues, 'the goal was less to ensure that state functionaries understood the needs of national development, than that both public and private experts understand the needs of (largely foreign) capital and are able to formulate rules to 'open markets' and encourage its arrival'.[22] Quite paradoxically, as CEE focused on formalistic rules aimed at limiting discretion and undue political influence over bureaucracy, they ended up with civil service structures which are neither sufficiently competent nor autonomous from political pressure. But civil service is not the only example showing such results. A very similar pattern can be found in other areas of institutional reforms in CEE such as anti-corruption campaigns, transparency legislation and creation of new developmental agencies.[23] It is an excessive focus on rules and legislation, disassociated from policy goals and social context, which has largely contributed to the creation of such 'formal structures without substance': i.e. institutions which look similar to their Western style counterparts, but fail to produce expected results.

As a consequence, CEE are ill prepared to tackle new challenges originating from the rule of crisis. While there is, as a result of the current economic crisis, an increased functional demand for all kinds of new regulatory policies and structures, there is only a few high quality regulatory structures and policies in place in CEE. The civil service is prone to politicization and corruption, the public sector (education, health care) is in grave need of modernization and various regulatory bodies and structures outside the core government (anti-corruption commissions, developmental agencies etc.) lack necessary independence and credibility. And paradoxically, until very recently, there was still very little demand in these countries for autonomous, homegrown reforms. More interestingly, such a demand originates from ideas which see the EU as a problem and not a source of inspiration. As Orenstein argues:

> In today's Central and Eastern Europe, an alternative set of economic ideas is on the march, in particular the more interventionist state capitalist ideas championed by China for the past several decades and Russia under President Vladimir Putin. Prime Minister Viktor Orbán of Hungary called his approach, adopted after his 2010 election victory, the 'Eastern winds' approach to economic policy, to distinguish it from Western liberalism.[24]

At the moment, the Hungarian version of 'illiberal democracy' represents the most problematic example of this trend. The Fidesz government achieved a fundamental revision of the rules of the constitutional and political order in Hungary. In only 5 years (from 2010 to 2015) it managed to transform Hungary from one of the success stories of the transition from socialism to democracy into a

[21] Kennedy (2013), pp 44–45

[22] Ibid., p 46.

[23] Batory (2012), p 66

[24] Orenstein (2013), p.375

semi-authoritarian regime based on an illiberal constitutional order, by systematically dismantling checks and balances and thereby undermining the rule of law. Such a 'constitutional revolution' produced a nominally democratic constitution, but, as Miklós Bánkuti, Gábor Halmai and Kim Lane Scheppele argue, Hungary 'can no longer be described substantively as a republican state governed by the rule of law'.[25] The major 'deficiency' of the new constitutional structure is that it vests so much power in the centralized executive that no real checks and balances exist to restrain this power. But Hungary is not the only case of democratic backsliding in the region. As Greskovits's composite index of backsliding[26] very clearly shows, there is a very high level of backsliding in countries like Slovenia, Latvia, Bulgaria, and Romania. As examples from Hungary and Slovenia show, even the most advanced CEE democracies are not immune to this backsliding. In a relatively short period of time, both countries regressed from consolidated democracies into two distinct forms of semi-authoritarian and diminished democratic regimes. Particular worrying is the ease with which this regression occurred. As a consequence, a dividing line between the 'success' cases of transition, concentrated geographically closer to Western Europe and other, more problematic cases, has become more blurred. This does not diminish the importance of vast differences between CEE countries' transition outcomes, due to their cultural and historical characteristics. What the most recent trends suggest, however, is perhaps that it is time to reconsider how these past legacies precisely affect the outcomes of particular transition countries.[27]

2.3 From Legal Transplants to Legal Irritants

One of the most flawed views of the Washington Consensus was that a single set of most appropriate institutions—which are typically found in Anglo-American countries, rule of law being one of them—is required for successful development. Such a naïve model confused description with prescription. The real life of institutions like parliamentary democracy, corporate governance, civil service or judicial review shows that they can assume many different forms. Only when discussed in highly abstract terms do these institutions appear to be uniform, core institutional structures ('independent judiciary', 'accountable government', etc.) which every democracy based on the rule of law must contain. With further qualification and specification, it becomes clear that these institutional structures have several possible alternative forms. Nevertheless, such a simplistic model prevailed in the development thinking of the last fourth decades.

Roberto Unger developed a powerful legal critique arguing that such identification of institutional conceptions like representative democracy or a market economy with a single set of institutional arrangements represents a theoretically

[25] Bánkuti et al. (2012), p 268.

[26] Greskovits (2015), p 32. The composite index is based on the Bertelsmann index of democratic transformation, Freedom House data on the freedom of the press, the World Bank's Voice and Accountability and Political Stability and Absence of Violence Indices, and data on the vote share of radical right-wing parties (Greskovits 2015, at p. 31).

[27] See Sects. 3.2 and 3.3.

and historically flawed version of 'institutional fetishism'. Defending his theory of democratic experimentalism, he further argues that 'representative democracies, market economies, and free civil societies can assume legal-institutional forms very different from those that have come to prevail in the rich industrial democracies'.[28] A more recent work on 'varieties of capitalism' confirms that there are substantial differences among institutional forms of rich industrial economies.[29]

As a consequence, the above described simplistic model of appropriate legal and political institutions has to be replaced with a normative idea that there are many different models of market economies and representative democracies, each suitable for a particular country or a group of countries. As Gunther Teubner argues, the logic of legal transplants has to be replaced with the idea of legal irritants. The theory of legal transplants wrongly suggests that 'after a difficult surgical operation the transferred material will remain identical with itself, playing its old role in the new organism'.[30] In a similar vein, the dominant thinking about the transition assumed that legal institutions of market democracy can be simply imported from Western democracies to the post-communist world. But, as Teubner further argues, transplantation of legal institutions has a rather different logic: 'when a foreign rule is imposed on a domestic culture, I submit, something else is happening. It is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events.'[31]

In other words, the idea of legal irritants necessitates a fundamentally different approach to legal borrowing. Instead of being told to simply transplant legal elements from rich industrial economies, the CEE countries should be encouraged to experiment with various forms of institutional configurations in order to find out which are most likely to advance and promote their development. As Andrews, Pritchett and Woolcock argue, a more suitable approach to state modernization should be based on 'problem-driven iterative adaptation', encouraging 'positive deviance' and 'experimentation', focusing on solving locally nominated and defined problems in performance (as opposed to transplanting preconceived and packaged 'best practice' solutions), and eliciting support of broader set of actors in order to avoid too technocratic top-down diffusion of innovation.[32]

Countries like Bulgaria, Romania, Slovenia and Hungary, for example, invested too many resources in the formal transplantation of various transparency and anticorruption codes without paying sufficient attention to incentive structures likely to render such models workable, or to the context in which such models operate. Civil service reforms in CEE offer another good example of institutional 'fetishism': CEE countries were ill-advised to follow specific models which turned out to be quite inappropriate for them. Instead of experimenting with a combination of a more traditional Weberian model and certain features of modern 'position'

[28] Unger (1996), p 7.

[29] Hall and Soskice (2001).

[30] Teubner (1998), p 12.

[31] Ibid., p 12.

[32] Andrews et al. (2012), p 2.

models, they uncritically endorsed the Weberian model. While the Weberian or 'career' model represents a classical top-down hierarchical bureaucratic organization, the position model borrows many of its features from business organizations and is often associated with the new public management turn in organization theory.[33] The result was models that were too rigid, hierarchical and formalistic for the tasks they currently face. In this respect, Tony Verheijen's critique of civil service reforms is very instructive.[34] He argues that the CEE countries followed the wrong strategy of administrative reforms. With an over-reliance on legislation, buttressed by the strong legalistic tradition already present in the region, CEE countries sought to adopt new civil service laws first, and reform people later. As Verheijen argues, they should have first designed appropriate strategic approaches, invested more in training and education, and devoted more time to tackling structural problems.

It is not surprising that similar problems also occur in the judicial context. There can be no independence for this 'least dangerous branch' of government without independent people sitting on the bench. In other words, legal independence of the judiciary is a necessary, but not a sufficient, condition for an independent judiciary. This last point is most eloquently elaborated in the work of Adam Czarnota, who argues that it is much easier to declare new rules than to change people.[35] This last aspect has proven to be quite significant in Slovenia, where the independence of judges has been seriously questioned. The Slovenian judiciary, with the exception of the Constitutional Court, is among the least trusted institutions in Slovenia. In a high profile case, the County court sentenced the leader of the major opposition party Janez Janša to two years in prison in a highly problematic criminal case. According to a former justice of the Constitutional Court, Matevž Krivic, the whole case was based on insufficient, largely circumstantial evidence. Janša was consequently stripped of his seat in the parliament. Janša appealed the case to the Constitutional Court which invalidated the sentence of the lower court and set Janša free.[36]

As a consequence, rule-of-law institutions like the judiciary, the civil service, anti-corruption commissions, the media, etc., which are essential for constitutional democracy, have very superficial roots in these post-communist societies.[37] Vladimir Tismaneanu's nearly prophetic argument that 'political reform in all these post-communist societies has not gone far enough in strengthening counter-majoritarian institutions (including media and the market economy) that would diminish the threat of new authoritarian experiments catering to powerful egalitarian-populist sentiments' therefore is not surprising.[38]

As a leading developmental economist Dani Rodrik argues, adopting 'second best' institutions in developing countries is a much better choice than trying to

[33] Bossaert and Demmke (2003), p 15.

[34] Verheijen (2003), p 491.

[35] Czarnota (2009), p 330.

[36] Avbelj (2014), Avbelj (2015).

[37] For a very illustrative account of shallow internalization of legal norms and institutions in the post-communist world, see Galligan (2003), pp 1–23.

[38] Tismaneanu (2007), p 37.

emulate the best practice institutions. The second best institutions are those that take into account context-specific market and government failures that cannot be removed in short order. As such, they promise more effective institutional framework conducive for economic development than 'best practice' institutions, which are 'almost by definition, not contextual and do not take account these complications'.[39] Almost the same conclusion is reached by Haggard, MacIntyre and Tiede in their systematic review of the literature dealing with relationship between the rule of law and economic development: 'Yet for countries at low levels of development, the types of informal institutions that generated trade in early modern Europe may be more relevant than the complex statute and demanding institutions of the American or current European legal systems.'[40]

Most fundamentally, there is no development without indigenously created developmental strategies by developing countries themselves. As Nancy Birsdsall and Francis Fukuyama once again caution, 'development has never been something that the rich bestowed on the poor but rather something the poor achieved for themselves'.[41] For the last four decades, the development agenda was generated primarily in the developed world for implementation primarily in the developing world. Yet many of the most pressing problems are political economy obstacles that require local knowledge of who benefits and loses from reform, and ultimately a political solution. The World Bank and other international donors are not well-positioned to address these types of local political contests, in some cases, because of limited mandates, in other cases because of the lack of local knowledge and other financial and institutional limitations. Accordingly, ready-made models of legal texts, political institutions or economic policies must yield to a more dialogical approach based on context-specific discussions between the donors and the recipients of developmental aid. Although the developed world and international institutions will remain important sources for development advice and financial aid, actual configuration of appropriate development models will have to be done at home, in the periphery.

One of the key elements of the existing approaches to rule of law reforms is monitoring rule of law progress in countries receiving developmental aid. The main problem with monitoring is that it is based on concepts of the rule of law which hardly capture cultural and historical contexts that are essential for rule of law to function. Moreover, neglecting this cultural and historical dimension is an obstacle to real rule of law reforms so that attempts at measuring as currently conceived not only miss the point but mislead in suggesting that institutional change goes hand in hand with real reform. The implications for attempts at oversight by the EU with respect to rule of law at the national level in CEE and elsewhere are not that monitoring is not possible, but rather that we need a different kind of monitoring, including different contextual measures, in order to capture the real rule of law progress. In many ways, monitoring will have to become more complex and more sociologically oriented. Kim Lane Scheppele, for example, has suggested a 'forensic

[39] Rodrik (2008), p 100.

[40] Haggard et al. (2008), p 233.

[41] Birdsall and Fukuyama (2011), p 53.

legal analysis', which approaches legal orders as 'integrated wholes' and can more satisfactorily explain complicated interrelations between different parts of the system than simple rule of law checklists.[42] Fukuyama, on the other hand, criticizes an implicit bias present in various measures attempting to examine only limits or checks on state power, and not power deploying institutions which use and accumulate power. Yet, both are essential for a well-functioning modern state.[43] And finally, Tom Ginsburg nicely captures some of the key problems of measuring the rule of law:

> Furthermore, there is no single ideal formula to achieve it. It may be that, in some countries, an independent judiciary is a crucial element; in other countries the judiciary can become too autonomous and can itself become a major political actor. In some countries, prosecutors will be key actors for ensuring that the rule of law is upheld; in others, civil society might be more important. It is partly for this reason that efforts to simply transpose institutional structures have produced generally disappointing results. One-size-fits-all solutions and 'best practices' may simply be illusory if contextual factors are determinative of outcomes.[44]

3 Rule of Law in Context: Why and How History Matters

3.1 Rule of Law before Democracy?

A second major flaw of the dominant rule of law model is its almost complete neglect of history. Not only were the representations of Western models in these theories inaccurate; they also expose an almost reckless ignorance of the importance of history in understanding the transition. Of the many theoretical objections to these theories, perhaps the most fundamental is that they confuse description with prescription. There was little theoretical argument or empirical evidence to back up the notion that the particular features of simplistic theories of transition were necessary, let alone sufficient, for development, or to support the ahistorical universalist assumption that all countries could or should follow the same road to riches as Western Europe and the US.

One of the most fascinating aspects of these theories is that they totally disregarded the importance of one crucial historical difference between Western models and CEE reality: the rule of law in Western Europe pre-dated the development of democracy by many centuries. As Fukuyama notes, Western Europe was quite exceptional in this respect: 'the rule of law became embedded in European society even before the advent not just of democracy and accountable government, but of the modern state-building process itself',[45] The best

[42] Scheppele (2013), p 562.

[43] Fukuyama (2013), p 347.

[44] Ginsburg (2011), p 272.

[45] Fukuyama (2010), p 36.

example is probably the *Rechtsstaat* in nineteenth-century Prussia, which established a certain form of legal checks on the executive authority well before democracy emerged in Prussia. However, we should be careful in not equating the Rechtsstaat with the rule of law. As Palombella argues, the Rechtsstaat was identified with the use of formal law (i.e. the principle of legality), but there were hardly any legal limits to the State in the form of constitutional review until the establishment of the Constitutional Court in 1949.[46] The same pattern prevailed in many other now high performing governments- Japan, France, and Denmark, for example, but under authoritarian conditions. Their rule of law system and 'Weberian' bureaucracies were created before these countries became democracies. They simply inherited meritocratic state apparatuses from their authoritarian predecessors. What is also important is that the main motives for modernization of governments did not come from grassroots pressure from mobilized citizens but rather from elite pressure, often for reasons related to national security.[47] Charles Tilly's famous dictum that 'war makes the state and the state makes war' pretty much explains the origins of modern state in early modern Europe.

Such a tradition was almost completely absent in the CEE countries, with the exception of Poland and the Austro-Hungarian provinces, which enjoyed limited but nonetheless important exposure to the rule of law as it existed in the Polish-Lithuanian Commonwealth and the Habsburg Monarchy.[48] However, as Ivan Berend argues, these countries never fully modernized their legal and political institutions and remained on the periphery of the advanced Western world: 'Both the states and the governments were traditionally autocratic and remained authoritarian, with an autocratic interpretation and practice of law and civil rights.'[49] Furthermore, in the 1930s most of these countries turned into 'anti-liberal' dictatorships.[50] After World War II, Communist rule in these countries almost completely destroyed the last remains of the rule of law tradition and replaced it with the 'socialist' concept of legality, which was antithetical to the core elements of the rule of law. Not surprisingly, today only very old people in these countries still remember the pre-Communist rule of law tradition. CEE countries therefore had to create, basically from scratch, new legal rules and institutions.

As Fukuyama argues, the two known models of modernization from a patrimonial to a modern state were simply not available in the post-Communist context. The first model comprises a set of countries (China, Prussia) which developed their modern states through wars, military competition and formation of a nation state. The second one, exemplified by the US and UK, represents a distinct model of modernization, where a newly created middle class strongly fought and pushed for peaceful political reforms aiming at state modernization in their respective countries. But in both models, the strong tradition of the rule of law

[46] Palombella (2010).

[47] Fukuyama (2015), p 16.

[48] Armour (2012).

[49] Berend (2003), p 235.

[50] Berend (1998), p 301.

predated the development of modern democratic states.[51] Post-communist countries thus faced quite a unique situation. There are very few historical examples of modern states which had to simultaneously create democracy, the rule of law and a market economy. This specificity of the post-Communist countries was simply neglected and played almost no role in the dominant accounts of transition from communism to democracy. The transition was simply conceived as just another example of transition from authoritarian rule to democracy. Such modernization theory paid no respect to history and to the fact that even within the Communist bloc, there were important difference between various communist regimes, due to different factors, such as history, culture, geopolitics. Although there were some accounts emphasizing the importance of communist legacies and of the problem of 'simultaneous transition', they were eventually overshadowed by the dominant neo-liberal approach which paid only a scant attention to the role of history and tradition in the institutional design of post-communist countries.[52]

3.2 Communist Legacy and Varieties of Post-Communism

Thus when the transition started, there were very few vestiges of a rule of law tradition in the CEE countries; several key conditions for a robust, 'polyarchic' democracy, such as free media, the rule of law and a vibrant civil society, did not exist in most CEE countries prior to 1989. It is therefore quite astonishing that the rule of law ideology of the time (the Washington Consensus) often paid no attention to such structural differences between Western democracies and CEE countries and opted for a largely ahistorical approach to building constitutional democracy. The WC treated all post-communist countries equally. Most of its prescriptions assumed that countries like Poland, Hungary, Romania or Belarus all suffered from similar problems. Even when it was acknowledged that there were certain differences between different versions of communism, they were not considered as important in terms of reform agenda.

This aspect of transitional constitutionalism is brilliantly problematized by Grazyna Skapska in her contrast between 'institutional optimism' on the one hand, which was largely based on an ahistorical understanding of the rule of law, and 'sociological realism' on the other, which exposed many fundamental weaknesses of the post-Communist governments and their lack of resources for the efficient implementation of law and protection of the rule of law.[53] Using the case of the privatization of state-owned property in the CEE countries, Skapska shows how a neglect of such contextual features led not to a wide distribution of property rights and a smooth transition to capitalism, but instead to corruption, nepotism and clientelism as key mechanisms of privatization.[54] The Russian example of corrupt

[51] Fukuyama (2014), pp 199–204.

[52] Elster et al. (1998).

[53] Skapska (2009), p 289.

[54] Skapska's insights have been recently confirmed by a sociological study. See Hamm et al. (2012), p 295–324.

'prihvatization',[55] which led to the creation of a group of oligarchs who controlled vast sectors of Russian economy, is only the most extreme manifestation of this problem. But in the Polish context, for example, privatization was fairer and less corrupt, mainly due to the strong political competition of various political parties, which played a major role in preventing many negative side-effects of privatization. However, it was only much later that the differences among various forms of post-Communism were acknowledged and taken seriously in the transition literature.[56]

3.3 A New Historicism?[57]

At the same time, the argument about the importance of historical differences should not be understood as yet another argument for 'sequentialism', i.e. that CEE countries need a strong state and the rule of law first and democracy second. I reject such a view and argue CEE should follow simultaneous processes of democratization and the development of the rule of law. In this context, the notion of a more historically oriented approach to institution building has a completely different meaning. The historical turn in transitional constitutionalism should not be understood as a search to identify a 'deep past', as this could lead to historical determinism, but rather to new historicism as a paradigm. As Grzegorz Ekiert explains, 'deeper structural factors, including cultural ones, are behind the diverging trajectories of East European transformations. They include long-run economic developments, cultural affinities, historical ties, institutional continuities, and political and social traditions.'[58] But, at the same time, Ekiert further argues, 'reassessments of communist and long-run historical legacies highlight the importance of the diachronic perspective, emphasizing episodic events, critical junctures, and importance of time series data.'[59] Hence, the new historicism emphasizes contextuality of its findings and 'social ecologies' of countries and how they are built.[60]

Paradoxically, the more we search for the historical origins of legal institutions, the more we come to realize the path-dependent and context specific nature of these institutions[61]: the relationship between institutions and development changes over time. What might be good for one country in a certain period is not necessarily good for another country facing different circumstances. This insight was completely neglected during the transition process; if nothing else, it could have helped CEE elites avoid the mistakes of their early nineteenth-century predecessors, who, like them, attempted to emulate Western institutions and ended up with shell institutions that had little impact on their respective societies.

Fukuyama notes that this historical excursus into the origins of the rule of law has important implications for the promotion of rule of law:

[55] The verb 'Hvatat' in Russian means 'to grab' or 'steal'.

[56] Bohle and Greskovits (2012); King (2007).

[57] Ekiert (2015), p 330.

[58] Id., p 331.

[59] Id., p 332.

[60] Id., p 332.

[61] Ekiert and Ziblatt (2013), p 103. Contrast Ekiert and Ziblatt's approach with the overly deterministic approach of Becker and Woesssmann (2013), who argue that being a part of the Habsburg Empire created a long-lasting legacy of formal institutions in those parts of Central and Eastern Europe which were part of the Empire.

> In purely technical terms, legal systems are among the most difficult and costly governmental systems to construct because they have huge infrastructure needs and require both human and physical capital. Historical experience with law suggest that more targeted programs may set important precedents that will eventually bear fruit as the society develops the capacity to spread them more broadly. There may be lower-cost alternatives based on customary or hybrid rules that will work better in the meantime.[62]

And it is no surprise that Fukuyama concludes his observation on transitions to the rule of law with a call for humility among rule-of-law promoters:

> We should admit to ourselves that we have very little historical experience in successfully constructing a rule of law in societies where this pattern is reversed and where a strong state precedes law.[63]

In order to improve the rule-of-law institutions, we must not start from some idealized 'best model', but from the existing context in which these institutions function. It is therefore quite important to acknowledge that 'the actual history of the relationship between state modernity and democracy is far more complicated than the contemporary theory suggests'.[64] With this insight in mind it is easier to understand why such historical complexity of the origins of the rule of law requires a more experimental approach to rule of law, presented in Part One. The rule of law promotion in CEE should therefore follow a different strategy. New rule of law institutions in CEE may in the end resemble their Western models. But what is more important is that they actually work well for CEE, even if they look different than their Western counterparts. Needless to say, such an experimental approach should not be an excuse for flirtation with authoritarianism disguised as some kind of 'original' approach to democracy, such as found in Victor Orban's speech in July last year in Tusnadfurdo, which made it more than clear that he wants to create an illiberal state, a different kind of constitutional order from liberal democracy. In his speech, he denounced a decadent and money-based West and out outlined a future Hungarian state, based on 'a work based society… of a non-liberal nature'.[65]

4 'Forms without Substance': Shallow Institutionalization of the Rule of Law

4.1 Rule of Law Building as a Political Process

The universalistic, bureaucratic, and elite-driven approach to rule of law building significantly contributed to a 'shallow institutionalization' of rule-of-law norms and practices in CEE countries. While policy strongly emphasized 'getting institutions

[62] Fukuyama (2010), p. 41.

[63] Id., p. 43.

[64] Fukuyama (2015), p. 17.

[65] Edy (2014).

right' and required the formal compliance of the newly introduced institutions with idealized Western models, much less attention was paid to the actual implementation and enforcement of the new rules. As a result, many rule-of-law institutions mostly took the form of 'façade' institutions, devoid of importance or real substance. As already mentioned, they resemble 'forms without substance' from late 19th century modernization experiences, when CEE countries unsuccessfully attempted to emulate Western European democratic institutions.[66] While CEE countries adopted many Western-style civil service laws, statutes declaring the independence of the judiciary and modern anticorruption strategies, these new formal rules neither created professional, politically independent judiciaries or civil services nor provided effective tools for fighting corruption.

State modernization as practiced in Central and Eastern Europe thus has a built-in paradox: while it tried to build the rule-of-law institutions needed to curb the excesses of the majoritarian will, it simultaneously weakened these institutions by neglecting to elicit broader political support for their actions. Today it is commonly acknowledged that the whole process of accession systematically favored executives over parliaments and civil society.[67]

One of the main reasons for such an elitist, top down, and depoliticized approach to state modernization in CEE was over-simplification of how constitutionalism *actually* works in Western democracies. Under the strong influence of the Washington Consensus, a court-centered, rights-based and depoliticized account of constitutional democracy prevailed during the early stages of the transition.[68] Accordingly, constitutional courts and other non-political bodies such as independent agencies, central banks, etc. emerged as the key agents of the constitutional transformation in Central and Eastern Europe. However, as Sheri Berman has argued, the history of democracy in the West shows a different pattern:

> The idea that a gradual, liberal path to democracy exists and that it makes sense to discourage countries that do not follow it from democratizing is a chimera based on a misreading or misinterpretation of history…. Indeed, the political backstory of most democracies is one of struggle, conflict and even violence.[69]

In other words, the history of state modernization in the West clearly reveals the importance of continuous civic and political struggle for successful modernization. This aspect of state modernization was almost 'lost in translation' in the CEE context, where the process of rule of law building was very much an elitist project based on the assumption that political elites knew exactly how to get from failed communism to idealized Western rule of law. As Mungiu-Pippidi notes,

> In Western Europe and North America, the historical process of building accountable government and creating a politically neutral and professional

[66] Berend (1998), pp 300–301.

[67] See Grabbe (2001), pp 1013–1031.

[68] Blokker (2010).

[69] Berman (2007), p 38.

> service was generally lengthy and time-consuming. Depending on the historical context, various actors, from Swedish aristocrats to British financiers and American intellectuals, put forward assertive demands for professional and accountable government. These demands led to changes in both formal and informal institutions.[70]

She further argues that the development of good governance institutions was a struggle fought and won primarily by the political opposition, civil society or even enlightened despots. The role of the political dimension of the process of generating democracy and rule of law has been profoundly underplayed by the 'new constitutionalism' in Central and Eastern Europe. Similarly, Fukuyama argues that state building is 'above all a political act'.[71] State building is hard work, and it takes a long time to accomplish. But, at the same time, it is important to emphasize that a quarter-century is not particularly long period of time in terms of state building, and rule of law promotion. For example, it took the United States more than forty years to eliminate patronage at the federal level. Hence, CEE countries need not only avoid past mistakes in building the rule of law, but also need more time. The transition from communism to democracy, if viewed from a long term historical perspective where time of one generation is not enough for such a tremendous transformation to happen, especially because the region cannot just 'return' to the pre-communist past, is to remain a complicated political process requiring strong political will finally to transform these countries into functioning democracies.

4.2 Rule of Law Building as Socially-Inclusive Process

The almost exclusive focus of reformers in CEE on courts and rights-based democracy is part of a larger worldwide trend towards the judicialization of politics.[72] Needless to say, the role of courts in democratic society is always problematic. Aggressive judicial activism inevitably raises issues of the counter-majoritarian difficulty and the democratic accountability of independent institutions like courts. My concern here, however, is not with the anti-majoritarian dilemma and its obsession with the 'gouvernement des juges'. I argue that the very different political context in Central and Eastern Europe requires a different approach to the role of courts in society. The region has a weak or sometimes non-existent tradition of protection of human rights, particularly the rights of minorities. Almost the entire region has a strong history of ethnic nationalism aimed at suppression rather than accommodation of ethnic minorities, Roma, homosexuals and Jews. Central and Eastern Europe needs liberal democracy to tame such horrible and violent excesses. Majoritarian rule therefore needs those limitations which are imposed in liberal democracy by independent political institutions and constitutionally codified rights and freedoms. I thus share the view of those who see strong constitutional courts as one of the key democratic players in this region.

[70] Mungiu-Pippidi (2006), pp 90–91.

[71] Fukuyama (2014), p 212.

[72] Hirschl (2006), pp 721–753.

The problem, therefore, is not that the courts are too strong, but rather that the new constitutionalism has a subversive effect on a more inclusive, republican version of constitutionalism and, paradoxically, a negative effect on the quality of rule-of-law institutions. As numerous examples show, rule-of-law institutions in Central and Eastern Europe were all too often created from above, without support from various political groups and civil society associations. Yet it is precisely this political element, in the form of political demands and pressure for such institutions, which ultimately determines the success or failure of attempts at good governance building. As Venelin Ganev succinctly points out, 'the Rule of Law cannot live by judicial review alone'.[73] Referring specifically to Central and Eastern Europe, Paul Blokker argues that 'participatory dimensions, popular democracy, and civil society promotion, even if certainly not wholly absent from constitutions in the region, seem then to ultimately have an only secondary priority in constitutional hierarchies'.[74]

That such a depoliticized approach to rule-of-law building can lead only to formal routines with surprisingly limited effect on society is made abundantly clear by the example of anti-corruption campaigns in Central and Eastern Europe. One problem is that the very institutions which politicians created to prove their commitment in the fight against corruption are not supported by political forces truly committed to continuous anti-corruption efforts. On the contrary, one can discern a cognitive dissonance between politicians' symbolic support for anti-corruption strategies and their political support for a real fight against corruption. As Mungiu-Pippidi argues, one of the major reasons why so many anti-corruption initiatives fail is that they are non-political in nature, unlike the corruption they are designed to fight, which is largely political. Instead of creating institutions and legislation which mimic Western models, these countries should focus on the 'institutional triggers' which led to the creation of institutions of this kind in 'clean countries'.[75] Best practices should include not only legislation, but also anti-corruption initiatives which lead to the creation of anti-corruption legislation.

Mungiu-Pippidi also argues that a formalistic approach to anti-corruption campaigns faces severe limitations. It is not surprising that due to a lack of political support, the largely symbolic work of anti-corruption agencies is not followed by actual work on anti-corruption. She urges these countries to find a mechanism which would involve the political opposition and civil society in supporting anti-corruption initiatives. At the same time, such campaigns cannot be successful without the cooperation of the government. As Agnes Batori notes, anti-corruption laws fail in Hungary 'at least in part because they can be expected to elicit only limited support from the citizens whose behavior they seek to change'.[76] Hungary therefore presents a clear example of 'the paradox… [that] although its legislative framework against corruption is rather well-developed, neither perception-based indicators such as CPI nor survey data on citizens's experiences with various forms of bribery in daily life

[73] Ganev (2009), p 270.

[74] Blokker (2010), p 20.

[75] Mungiu-Pippidi (2006), p 86.

[76] Batory (2012), p 9.

show any significant improvement in the last decade'.[77] The best recipe for compliance in anti-corruption campaigns is the normative commitment of citizens to the declared goals of such campaigns. At the moment, 70 % of respondents in Hungary said that 'bribery and corruption are commonplace'.[78] The government responded with a series of new anti-corruption measures. Without stronger support and participation from Hungarian citizens, such measures are not likely to change the current state of affairs in Hungary.

5 Conclusion

Just ten years after their triumphant 'return to Europe' in 2004, CEE countries are facing a serious crisis of their state modernization processes. As I tried to show in this article, rule-of-law institutions in these countries are less robust than in Western countries. In other words, Western democracies can cope more successfully with various attacks on their liberal institutions because their courts, media, human rights organizations and ombudsmen have a longer and more developed tradition of independence and professionalism. Conversely, where such institutions are weak and underdeveloped, as is the case in Central and Eastern Europe, there is always the potential danger of a drift towards authoritarianism and 'illiberal democracy'. As examples from CEE show, even the most advanced CEE democracies are not immune to this backsliding.

Many rule of law institutions created during the last 25 years need further reforms. During EU enlargement, the speed and conditionality of reforms left little time for the involvement of various groups and forms of civil society. Now that these states are full members of the EU, they should have more time for their own, domestically-driven, reforms. It is time for real democratic deliberation and experimentation, which could usher in much needed institutional reforms in the region. Only a climate marked by strong societal consensus and the broader involvement of civil society can help bring about the much needed reform of rule of law in the region. By learning from the past mistakes, they can initiate a new wave of state modernization reforms promising to improve the quality of weak rule of law institutions in the region.

However, the political context for reforms in 2015 differs quite fundamentally from conditions in 1989. As Ivo Banac argues:

> there are no guarantees that the region has succeeded in effecting a permanent transformation of its societies in a more democratic and economically progressive direction. Slippages are possible and, as in 1989, much depends on the developments in Russia and the West. Unfortunately, in both cases, the overall situation is significantly worse than it was25 years ago. That is the real balance a quarter century later.[79]

[77] Id., p 78.

[78] Gulyas (2013).

[79] Banac (2015), p 655.

In this more volatile and insecure international context, the reformers in post-Communist Europe have a difficult task. The region still belongs to the periphery of Europe with a mostly dual economy and low level of income. Modern sectors and the entire banking industry are subsidiaries of Western multinationals. The political system is often authoritarian. Democratic forms often cover non-democratic contents. Corruption, tax evasion and other symptoms of peripheral political behavior are quite common. In the end, what is left to reformers is only Gramscian aphorism of the 'pessimism of the intellect and optimism of the will'.[80]

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