Anitta M. Orzan[1]

The Europeanization of the Judiciary in Eastern Europe

A comparative case study of Romania and Hungary

Abstract

Almost two decades after the fall of the Berlin Wall, Central and Eastern Europe (hereinafter: CEE) finally received through the European Union (EU) membership the official recognition of being a part of the European family. The 'return home' of several countries – mostly from the former Eastern bloc – began in March 2004 when ten CEE countries (hereinafter: the CEEs: Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Estonia, Latvia, Lithuania, Cyprus and Malta) joined the EU. The process was completed in January 2007 with the EU membership of Romania and Bulgaria. The paper analyses the development of Judiciary in Hungary and Romania as a special aspect of complying with UE norms.

The Eastern European enlargement represented a completely new experience both for the EU and for the CEEs even though at the time of the regime changes in the CEEs the EU was in need of a strategic and a comprehensive vision about the promotion of democracy in the new member-states. The EU finally decided to assume a responsibility apart from the already existing economic as well as political dimensions. The decision of actively contributing to the transformation of autocratic regimes into democracy led to the elaboration of strategies, instruments and mechanisms that were meant to strengthen the new-born democracies.

[1] Author is a PhD candidate at Albert-Ludwigs University Freiburg; visiting researcher in 2008 at the European Studies Centre in Szeged (Hungary). The findings of her research are set forth is this article.

The CEEs, on the other hand, after experiencing almost 50 years of communism set foot on the path of a new orientation directly under EU guidance. As presumed, the road to the EU membership implied for both EU and the CEEs a constant 'learning by doing' process with many unknown variables. The legitimate fear of the acceding countries was overcome because the post communist political elites agreed that the possibility of accession to the EU will represent a winning situation in every CEE country. In the speeches of the European officials the enlargement process was seen "both as a historic necessity and a historic achievement - for newcomers and old member-states alike."[2] For the former communist countries the accession process represented not only the hope for welfare, security and peace, but also the recognition of belonging to the same community with shared values, identity, history and beliefs. The belief that the countries will benefit by joining the EU increased the support of the population and elites for the cooperation with the EU.[3] However, the initial euphoria began to fade along the years.

The year 2008 brought about changes in the pro-European propaganda of the post communist elites and the promoting speeches switched to a point of view that became more and more nationalistic. At the same time, the critical voices became virulent towards the enlargement policy from within the EU. Moreover, the lack of an internal EU-institutional reform haunted the Community through the mourning of the Irish "No"[4] and the 2007 Lisbon Treaty was facing legitimacy crisis. The Western Balkans and Turkey are still waiting in the enlargement queue but at the moment the EU Commissioner Rehn announced a stop to further enlargements.[5] The international financial crisis which affects the EU since early October 2008 challenges the EU stability and the democratic consolidation of the CEEs even more.

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[2] http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/EN/discours/86895.pdf (17.10.2008).

[3] According to Gallup, 61% of the candidate countries in CEE think that the EU integration will bring benefits. (http://www.gallup.ro/romana/poll_ro/releases_ro/pr021119_ro/pr021119_ro.htm)

[4] On 12th of June 2008 Ireland rejected the ratification of the European Union reform treaty in a referendum. This was the second time when Ireland showed its lack of confidence it the EU policies as in 2001 the Irish voters rejected the Nice treaty. It was only passed in a second vote. (http://news.bbc.co.uk/1/hi/world/europe/7452171.stm (4.11.2008)

[5] http://news.bbc.co.uk/1/hi/world/europe/7452171.stm (3.11.2008).

These recent developments offer a perfect occasion to reflect on the EU impact on the democratic consolidation in CEE and to evaluate how efficient the EU strategies and mechanisms were. Critics argue that the lack of legitimacy the EU faces led to distrust in democracy (democratic deficit) instead of consolidation, especially in CEE where the institutional framework is still facing problems.

Methodology

This article will argue that the EU had a positive impact in helping the CEEs to transform. Which EU mechanisms and strategies functioned and what challenges the transformation process had to face in Eastern Europe remains to be analysed in the following comparative case study on the justice reform in Romania and Hungary. The reform of the judicial system will be the major focus of the article hence a Judiciary as a functional and independent branch of government represents the core of the democratic consolidation, and, furthermore, institutional change could be easily detected and tracked in its framework than transformation in other areas in this respect, e.g. civil society.

The use of comparative analysis will provide for a better differentiation of the inputs and outcomes in the reform of the justice system. Therefore the major focus of this article is the reform of the judicial system in Hungary, which responded very well to the EU promotion mechanisms, and in Romania, one of the acceding countries with deficits in the field of justice. In the past years an increased debate arose in the pace-setting literature concerning the explanation of the EU impact on Eastern Europe, and the theories emerging were dominated by the following paradigms:

(i) a top down approach, which evaluates the EU impact and the domestic changes and considers the EU an independent variable; and

(ii) a bottom-up approach, which explores the relationship between the EU and the member-state by focusing on the process itself, instead of analysing just the inputs and outcomes of the EU strategies

To grasp the essence of the interdependence between the EU and the acceding countries both perspectives should be taken into consideration, as the success of the reform depends on the extent of

the EU-input as well as on the political will of the national actors to implement the laws necessary to facilitate transition (i.e. lustration laws). Based on above reasons, this article analyses the EU impact on the reform of the justice system in Romania and Hungary from a top-down perspective.

The examination of the interdependence between the EU and the acceding countries is constructed as set out below, taking the following variables into consideration:

(i) The EU represents the independent variable;
(ii) The reform of the justice system is the dependent variable;
(iii) The intervening variables will comprise factors of the political elites; while
(iv) The international environment and the existing national patterns, as well as the timetable for the changes are construed as contextual variables.

The article follows the structure set out below, based on the variables presented above:

(i) The concept of Europeanization and the main EU instruments serving the promotion of democracy will be presented with regard to CEE in the first part, also discussing the relation of Europeanization to the concept of rule of law.
(ii) The second part of the article will discuss the effect of the contextual variables: the international and national circumstances before the fall of the Berlin Wall, as I consider that the existence of different interfering variables might play a quintessential role in explaining the outcomes of the different reactions in Romania and Hungary.
(iii) The third part of the article will evaluate the EU strategies and mechanisms of promoting democracy and the reactions of the political elites to these strategies.

The main thesis of this article being that EU strategies need to be backed by the domestic actors otherwise the only short term changes could be reached as an outcome scrutinizes the political will that exists in favour of the transformation of the justice system. Moreover, it is also important to reflect on the political attitude towards change. If the reform process is imposed by the EU and is deemed as a mere 'To Do List' on the part of the candidate country, the outcome of the EU impact will be weakened. On the contrary, if the political elites

consider the reform process necessary to facilitate the adhesion to the Community and eventually initiate it without being pressured, the outcome can reveal long-lasting structures as a result of an autonomously commenced transition.

The above methodology will be further applied to seek answer to two basic questions:

(i) How, if at all, the different stimuli used and offered by the EU have been adapted to the national institutional frameworks?
(ii) How did the political elites react to the EU political conditionality in Romania and Hungary?

Prerequisites of Rule of Law and Europeanization in CEE

The transformation process in Romania and Hungary was very different from other 'conventional' democratization processes in Western Europe as the countries had to abate a double challenge, i.e. the simultaneous transformation of the political and the economic system. This is the phenomenon the literature refers to as the "Dilemma der Gleichzeitigkeit."[6]

According to Schmitter's phase-division the post-communist countries experienced three phases:

(i) *Liberalization.* A process whereby the new elites allow a few political organizations and different interest groups to organize themselves but there is a significant remainder of power to interfere in their hands; or in other words "the process of making effective certain rights that protect both the individuals and social groups from arbitrary or illegal acts committed by the state or third parties."[7]
(ii) *Democratization.* A process representing the initiation of the democratic institutions "whereby the rules and procedures of citizenship are either applied to political institutions […] or extended to include persons not previously enjoying such rights and obligations."[8]
(iii) *Consolidation.* A process of democracies that involves the assumption that the rules initiated in the second phase are

[6] Offe 1994.
[7] O'Donnell/Schmitter/Whitehead 1986: 6.
[8] Idem.

accepted by all political actors and the democracy becomes "the only game in town".[9]

The reform of the justice system should take into consideration the patterns of change from the first phase of liberalization to the consolidation phase. The structural changes brought along new perspectives both for the old political elites as well as for persons who were previously excluded from the political arena during the communist regime. Therefore it does not seem surprising that this context also represented a decisive struggle between the new and old elites over decisional power.

I argue that in the post-communist context the competition took place over two important areas: the economy and the judiciary. Both areas were crucial for the political elites especially regarding the perspective of joining the EU. At the beginning of the 1990s, decisional power in economy was equal with the chance to explore new business ideas within a poor legislative framework, which granted the liberty of playing by one's own rules.

On this account, judicial decisional power became very attractive on the grounds of an 'economic freedom' of certain political elites and corporative groups who were not defending the idea of legal restrictions. Secondly, bearing in mind the remnants of the communist past, it could be declared no official lustration process took place neither in Romania nor in Hungary; therefore a elite change did not occur practically. At the same time there was an obvious perspective present, that of the EU membership. To achieve accession the elites had to prove a need for legitimacy towards the EU and towards the elites' own electorates which should have been convinced that after 50 years of state-party reigning, a real regime change guarantees to force the old elites to redefine themselves. For the 'new old' political elites a dilemma arose from the challenge they faced in establishing functional justice systems.

On the one hand the protection of certain interest groups should have had remained guaranteed, on the other hand democracy was supposed to "become the only game in town" as it was asserted before. Latter requirement constituted a condition which obliged political elites not only to create rules for the game but to simultaneously respect them

[9] Przeworski 1986: 26.

at all times. Therefore any attempt to build a consolidated democracy must rely on the rule of law.

Definitions of rule of law may vary on a wide range, but almost all definitions agree upon the idea of the importance of law as a governing system in limiting the exercise of both private and state power.[10] The principle of rule of law comprises written laws that are "prospective, clear, and openly accessible, [and] non-contradictory, […] independent and impartial judiciary and […] honest and apolitical law enforcement."[11] The definition presented tries to give a comprehensive outlook of the content of the rule of law, i.e. legal order. Though, distinction must be made in connection with formal and material aspects of rule of law.

Contradictory to the totalitarian state, in democracy, the power of the state is bound by law to provide Rechtssicherheit ('legal security', a concept similar in scope to the Anglo-Saxon rule of law; a major requirement of CEE constitutional states) and all state measures could be subject to judicial review before independent courts (formal rule of law).[12] The judicial bond of the state assumes the existence of a concord between the constitution and the legislation because in order to provide the citizen a solid opportunity to the access to justice and to defend his/her rights granted by the paramount law of his/her country, the judicial system shall be independent, transparent and stable (material rule of law).

Assessing these requirements I conclude that the concept of rule of law shall include first of all the primacy of the (primarily statutory, codified) law, protection of fundamental rights, separation (and/or distribution) of powers, constitutionality and legitimacy and in addition the independence and efficiency of the Judiciary. The concept of rule of law is anchored and promoted in every Eastern European constitution; however the norm implementation remains a challenge in many states. The configuration of authentic and constitutional principles was even more difficult to achieve when a confrontation with the communist past did not occur as the 'new old' political elites even remained in power after the regimes have 'changed' on paper. In this context, lustration laws which did not find political support

[10] Altman 1990.
[11] Krygier 1990: 646.
[12] Denninger 1993: 8-15.

neither in Romania nor in Hungary would have meant a clean slate, a fresh start for these new-born democracies.

In my point of view, a democratically consolidated country must fulfil the following rule of law criteria:

(i) The justice system must be independent
(ii) The legal procedure must represent the central fundament of all conflicts and must be perceived by all the actors as such
(iii) All political institutions must be subscribed to the principles of the rule of law.[13] Especially in new-born democracies where the justice system is not constantly efficient, evidencing the fulfilment of the minimum rule of law criteria is indeed a challenge. This refers particularly to the situation when the political power tries to protect its interests by politically pressuring the justice system.[14]
(iv) The separation of powers as stated by Montesquieu is not an implicit feature of the new-born democracies, especially if we consider that the law is made by the Legislative, which also defines the rules of settlement of constitutional courts and the terms of the legal status of judges.

Different types of judicial independence can be derived from the research conducted, such as: collective and individual; structural and personal; or decision-making (substantive) independence etc. I agree with Bobek[15] by arguing that it is important to consider the personal (internal) independence of the judges a decisive factor of an independent Judiciary.[16] Moreover, a connection between the structural, institutional and personal independence might help obtaining a sharper image on the rule of law in Romania and Hungary. It is indispensable for a consolidated democratic state to have a solid structural independence of the Judiciary.

[13] Hofmann 1996: 37.
[14] Ahrens/Nolte 1999.
[15] Bobek 2008.
[16] It shall be clarified that personal independence shall mean the independence and inviolability of the internal conviction of the judge. Judges shall only be subject of their own moral convictions within the legal framework (statutory acts) of the State and shall not be subject to any other influence.

The structural independence requires:

(i) Independence in administrative matters: administrative matters shall be dealt with exclusively within the Judiciary, both in terms of central judicial administration and also on the lower level (county, municipal) judicial administration. Also the principal responsibility for the court administration including appointment, supervision and disciplinary control of administrative personnel and support staff must be vested in the Judiciary, or in its independent and autonomous representative body.

(ii) Independence in financial matters: the Executive and Legislative shall have control over the budget that is why it is compulsory to have a judicial council controlling decision-making regarding the financial background of the Judiciary.

(iii) Independence of the decision-making and the authority of the judiciary: the governments as well as other state institutions are under obligation to respect the independence of the Judiciary. Political arguments on the quality of judicial decisions have a negative impact on the legitimacy of the system. Respect of the Judiciary also relates to the bar of interference from political role-players.

The formal aspect of rule of law is embodied in the process of reform implementation carried out by the judges therefore personal independence represents an important variable in the evaluation of the reform process of the Judiciary. Bobek distinguishes four types of personal independence: courage, morality, knowledge and accountability.[17] Critics argue that values such as courage, morality and knowledge were especially inhibited through a highly bureaucratic and hierarchic Judiciary. The accountability represents the bond between the structural and personal independence and the intern and extern accountability dimension of a judicial system could also be determined according to its type. The main question is, based on a belief or assertion that it is a 'less dangerous branch', if the Judiciary should be completely autonomous and completely insulated from external pressures. The tensions between independence and accountability of the Judiciary stem from the argument that "the privilege

[17] Bobek 2008: 108.

of judicial irresponsibility cannot be the price which the collective is asked to pay for judicial independence".[18]

Where are the limits of accountability and which risks are related to the judicial self-purging capacity? According to Mauro Cappelletti, the absence of such capacity leads to two kinds of degeneration of the disciplinary liability of judges: (i) they become an easy target for the political pressure from the Executive and (ii) the liability becomes controlled solely by the Judiciary as "a pure instrument of corporate control".[19] Problems of legitimacy of the Judiciary arise mostly from the lack of balancing the external and internal judicial accountability. Further it shall be discussed through which mechanisms the EU can influence the independence of the judiciary and contribute to the consolidation of the Judiciary.

The concept of Europeanization

As a theoretical concept, 'Europeanization' was formed by political scientists in the mid-1990s, when the evidence of a clear commitment by the post-communist elites to follow the EU's political conditionality could not be ignored anymore. The influence of external actors in promoting democracy was therefore recognized and the main task was not anymore to analyse "whether Europe matters but how it matters, to what degree, in what direction, at what pace and at what point.''[20] More and more researchers were interested in explaining what kind of impact the European Union had on the domestic politics and policies of Eastern Europe. Methodologically the study of the EU impact on national structures increased and split among scholars who emphasize interest-based rationality, institutional path-dependencies, social constructions as well as ideas and discourse.[21]

Europeanization refers to the transfer of national sovereignty to the EU level, it is a process which causes a stronger interdependence and bindings of the national politics to the politics at an EU level. Olsen distinguishes between four possible scopes of Europeanization such as:

[18] Cappelletti 1983: 15.
[19] Idem: 48.
[20] Börzel/Risse 2000: 4.
[21] Schmidt/ Radaelli 2004.

(i) Basis for changes in external territorial boundaries,
(ii) Basis for the development of governing institutions at the European level,
(iii) Basis for the central penetration of national and sub-national systems of governance, as exporting forms of political organization and governance that are typical and distinct for Europe beyond the European territory;
(iv) Basis for a political project aimed to create a unified and politically stronger Europe.[22]

Radaelli provides a more comprehensive definition of Europeanization. According to him, Europeanization consists of processes of (i) construction, (ii) diffusion and (iii) institutionalization of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things' and shared beliefs and norms which are first defined and consolidated in the EU policy process and then incorporated in the logic of domestic (national and subnational) discourse, political structures and public policies.[23] This definition stresses the complex process of change especially regarding the political behaviour of the elites and the importance of the soft transfer as 'ways of doing things'.[24]

It is noteworthy that the interests of elites matter enormously since the policy changes depend on how sincere the actors are in assuming their role towards reform. Scholars chose to use in this context a rational choice model, which focuses on the individual's utility maximization.[25] A rational actor accepts change only as long as his interests are also satisfied. The actor's benefits in this case must be higher than his/her costs of adaptation to the pressures and processes of learning. An example for the change of attitude of political elites could be easily detected in their speeches. At the beginning of the accession process in the 1990s many stump-speeches were very pro-European, while after joining the EU it could be argued from a rational choice point of view that the interests of the actors were not satisfied anymore as their attitude swiftly turned to nationalistic and EU critical.

[22] Olsen 2002.
[23] Radaelli 2004: 29.
[24] Grabbe 2002: 7.
[25] Elster 1986.

The Europeanization literature refers to the 'goodness of fit' between the international demands and the long-standing national policy legacies.[26] The idea of this concept is: the better the national policies fit with the EU requirements the more likely changes will be accepted and the necessary laws be implemented. In this context the political elite will have fewer problems in complying with the political conditionality.

The process of joining the EU involves processes that have an impact on the national structures. Grabbe divided the strategies and mechanisms the EU used to promote transformation in CEE in five categories:

(i) Models-provision of legislative and institutional templates: every candidate country is obliged to adopt EU laws and norms included in the acquis. The critical aspects of this procedure refer to the fact that the acceding countries do not have a consolidated institutional structure and that through the accession process their institutional system was rather jeopardized. Another critical aspect is that a process of reflection for the adjustment to the EU policies did not exist in Romania and Hungary as both countries tended to adopt each proposal coming from the EU without a strong critical evaluation.

(ii) Money – aid and technical assistance: the EU is the largest external source of aid for CEE providing funds and also bilateral programs from individual member states.

(iii) Benchmarking and monitoring: the EU can influence the institutional development through ranking the applicants, benchmarking in particular policy areas and providing examples of good practice. Monitoring is also seen as one of the strongest EU weapons and a key instrument of the political conditionality. Each candidate country is monitored in its efforts to reform by the European Commission, which published its first Regular Report in 1998. (The monitoring report sets the priorities and steps the candidate country needs to fulfil for the following year.)

(iv) Advisory system and twinning: the twinning programs have their focus on the implementation of the reforms and

[26] Héritier 2001.

provide, through expert teams from member states, advice and expertise in areas of difficulty. An evaluation of the twinning programs shows that it could be essential which member state wins the competition in providing the acceding country with its expertise.

(v) Gate-keeping – the control of access to negotiations: this is considered to be one of the EU's most powerful conditionality weapon and it has been already successfully used in Romania in 2006 when the reform of the justice system was being threatened.[27]

As the EU did not have a specific strategy how to reform the countries after the Fall of the communism, in time it became evident that EU was facing the same 'learning by doing' process as the candidate states were. The first strategy developed by the EU came about only in 1993 by setting out the so-called "Copenhagen Criteria", which stated the conditions a candidate country needed to comply with in order to become a member-state. These are[28]:

(i) stable institutions that guarantee democracy, the rule of law, human rights and respect for and protection of minorities;

(ii) a functioning market economy, as well as the ability to cope with the pressure of competition and the market forces at work inside the Union;

(iii) ability to assume the obligations of membership, in particular adherence to the objectives of political, economic and monetary union

The Copenhagen Criteria set out the principles of a consolidated democracy as compulsory for the EU accession. The EU improved its mechanisms and strategies with each accession; factors such as the context of the enlargement also played an important role in the development of these principles. The euphoria, which characterized the first eastern accession, was completely missing during Romania's accession process as the member-states claimed 'enlargement tiredness'.

[27] Grabbe 2002: 7-11.

[28] http://ec.europa.eu/enlargement/the-policy/conditions-for-enlargement/index_en.htm (17.10.2008).

Evaluation of the National and International Contexts of the Regime Changes

The nature of communism has a very important role in analyzing the first attempts to reform the system in Hungary and Romania. While Romania was facing the most aggressive form of communism, Hungary was one of the most liberal communist countries from Eastern Europe.

Nicolae Ceausescu had his own vision about the independence of the country from external factors, aspects which led to a very strict economical policy based on the idea that the country should not have any debts, which could affect its independence. Ceausescu abused the Judiciary as an instrument of punishment therefore the political opponents had no chance of a fair trial. The judges were considered servants of the system. The so-called 'phone justice' was a special feature of the communist period and still functions in Romania. This aggressive form of communism was expressed in December 1989, during the Romanian Revolution. The communist party resisted despite the international feeling of change in the neighbour countries until the very end. Romania was to country with the "bloodiest revolution" in Eastern Europe, which ended in capturing the dictator and executing him, along with his family.

Until today the origins of the revolt which began in Timisoara are not completely elucidated, but political analysts argue that this "fake revolution" was actually organized by the second line of the party against the first one. The 'new old' elite which emerged in 1989 and won the elections in the 1990s, was led by Ion Iliescu, a former communist which was supported by the army and the secret service. The national context is deemed – as stated in the introduction of the methodology – as a contextual variable, which can explain why Romania has experienced the "slowest political swing towards democracy in the region".[29]

While Romania was practically isolated both in economic and geographic terms, Hungary profited from a very good geographic position next to the Western countries and from a very liberal economy. The Hungarian economy was led by a totally different policy, which unlike the 'Romanian way' indebted the country, but at the same

[29] http://www.freedomhouse.org/template.cfm?page=47&nit=341&year=2004 (12.11.2008).

time helped Hungary in building a high economical standard. In this context the national context has been determined by a liberal political regime, led by János Kádár**,** who tolerated demonstrations and criticism against the state-party. In the late 1980s, three contextual variables assured the regime change in Hungary:

(i) the activists within the communist party supported by the intelligentsia in Budapest began to pressure Kádár to surrender the power;
(ii) the decreasing economic standards made the population supporting a regime change;
(iii) Kádár's illness made him resign in 1988 his leading position of the Hungarian Communist Party.

The opposition won the elections and cried for, unlike in Romania, a change of elite. Among the most prominent opposition groups – as the members of a body referred to as the '(National) Opposition Roundtable' – were the FIDESZ (Association of Young Democrats) student movement, the Hungarian Democratic Forum, and the Liberal Alliance of Free Democrats. This national context is one of the intervening variables explaining why Hungary's transition from the communist dictatorship to democracy was one of the most successful among the former Soviet-bloc countries.

The Reform of the Judiciary and the Impact of the EU in Romania and Hungary

With the collapse of the communist regime in Eastern Europe, right at the beginning of the 1990s the opportunity presented itself for the first reforms on the constitutional level. In Romania, after FSN (National Salvation Front) took power, the first reform plans began to be drawn up and coordinated. A symbolic schism with the old leadership could be seen in the abolishment of the communist symbols on the national flag and national coat of arms as well as the change of the 'Social Republic of Romania' into Romania. The new government worked on a so-called 10 Point Program which focused on the separation of powers and the establishment of a pluralistic party system, yet this program could not be materialized in that form.[30] Neverthe-

[30] Gabanyi 1994: 137-138.

less the parliament adopted a new constitution in November 1991 which stated the importance of the rule of law and democratic principles. The constitution has been strongly inspired by the French and Belgian constitutional models. The Romanian Constitution was amended in 2003.

Hungary represents a very special case in Eastern Europe as it is the only country which did not adopt a new constitution after the regime change. Thus before 1990 during the round table negotiations it became evident that the Hungarian opposition was fighting in adopting a completely new constitution. The Constitution Hungary adopted on 20 August 1949 was based on the 1936 Soviet fundamental law and was the country's first permanent written constitution. The main fear of the new elite was that the communist elite could win the elections and for this reasons they tried to abolish every element of the constitution, which might have been helpful in gaining power in the favour of the old elite. The old constitution was accepted – as heavily amended – by the National Assembly on 23 October 1989. The constitutional reform (Act XXXI of 1989) had a pioneer character as it was the first one of this kind in Eastern Europe and according to Ágh the Hungarian constitution "has the long lasting impact of the negotiated transition."[31] In 1990 several acts[32] amended the constitution again and formed the framework for a democratic Hungary with pluralistic principles. The constitutional amendments represented one of the most important legislative changes in Hungary which safeguarded the rule of law.

There has been a lot of criticism regarding the fact that the constitution remained the same, old one from 1949, though only in its reference by number. Our effective Constitution is still the Act XX of 1949; however, apart from "The capital of Hungary is Budapest"[33] everything was changed or abolished based on the reasons presented above.

Especially by looking at the process how the constitutions of these two new-born democracies emerged as foreigner experts consulted both countries in drafting their constitution we can observe the soft side of 'ways of doing things' (expression used by Radaelli). Romania

[31] Ágh 2008: 312.
[32] Act XVI, Act XXIX, Act XL Act XLIV, Act LIV of 1990
[33] www.servat.unibe.ch/icl/hu__indx.html (7.11.2008).

relied on its traditional amicable relationship to France and Hungary relied on its historic symbiosis with Austria suggesting that way that structural accommodation to the EU constitutionally was politically driven and represented a sort of "anticipative Europeanization."[34]

First Steps Towards Judiciary Consolidation

The presence of EU conditionality in Romania and Hungary gradually began with the appearance of advisory and aid programs. The most important instruments were the financial aid through PHARE, SAPARD and ISPA and the twinning mechanism which gave Hungary and Romania foreign expertise. The PHARE program, which was initially created as an "accession-driven" program for Hungary and Poland, allocated 1.030 € million to Hungary for institution building programs during the period 1990-1999.[35] In its first regular report on the progress made by Hungary the Commission concluded that "developments in Hungary confirm that Hungary fulfils the political Copenhagen Criteria. Hungary's institutions continue to function smoothly."

Hungary was one of the few countries in CEE that started to reform the judicial system with no constraints from the EU. This means that political will to reform came from inside of the ruling elite and not as a result of the conditionality instruments used by the EU. Mezei argues that before 1997 there have already been two attempts that have failed to strengthen the independence of the Judiciary.[36] The first attempt was initiated by Justice Minister Kulcsár (during 1989-1990), who considered that the judicial administration should be in the hands of a "National Temporary Judicial Committee"[37], yet his proposal did not find the support of the political parties of the Transition. The second attempt failed after the enactment of the Act LXVIII of 1991 as a result of which the Supreme Court remained independent while the Ministry of Justice remained the body responsible for the overview of the court system. The third attempt in building an independent judicial council, in charge of the administration of the

[34] Ágh 2008: 313.
[35] Hungary- Regular Report- 13/10/99.
[36] Mezei 2007: 127.
[37] Idem: 128-129.

Judiciary was eventually successful through the so-called "Judicial Reform Act", the Act LXVI of 1997 on the Organisation and Administration of the Courts.

The main incentive of the justice reform was to

(i) achieve the independence of the judicial system;
(ii) increase the prestige of judicial career,
(iii) create a new remuneration system for judges and
(iv) reduce the overwhelming workload of the local courts.[38]

Ad (i) Creating the pivotal judicial independence in a constitutional state (in a system of rule of law) happened through establishing safeguards that guarantee the separation from the Executive. An independent self-governing body was set up: the National Council of Justice (OIT). During communism the justice system was controlled by the Executive. Apart from the president of the Supreme Court, who was elected by the Parliament, any other rights regarding the justice field – as to the control and administration of the county and local courts – belonged to the Ministry of Justice.[39] The external control of the executive over the Judiciary was ended with the establishment of a National Council of Judiciary (OIT), being a self- governing body consisting of 15 members: nine judges, the minister in charge of the judicial system, the President of the Hungarian Bar Association, one Member of Parliament appointed by the Constitutional and Justice Committee, and one by the Budget and Finance Committee. The Ministry of Justice had to transfer all its administrative rights over the courts to the OIT, which was assigned with "enforcing the impartiality of judges, functioning as the central administrative body of the courts and supervising the administrative activities of the president judges of the high courts of appeal and the county courts."[40] The independence of the judges is also guaranteed as "their primary responsibility is the application of law in line with their conviction".[41]

Ad (ii)-(iii) Especially during communism, a career within the judiciary was not considered attractive by the law students because of the

[38] I want to thank Prof. Zoltán Fleck, Eötvös Loránd University and Szonja Navratil, Eötvös Károly Institute Budapest for valuable insights over the reform of the Judiciary.
[39] www.lbu.hu (15.11.2008).
[40] Act LXVI of 1997 on Organisation and Administration of the Courts, Chapter IV.
[41] Act LXVI of 1997 on Organisation and Administration of the Courts, Chapter I. see the arguments presented in the explication of personal independence.

low wages. The status the Judiciary enjoyed during the communism could be easily detected just by looking at the offices of the Ministry of Justice, which were placed in common office buildings. According to Fleck the "revolution of the judiciary" started due to an initiative of a group of young, reform orientated judges, who were unsatisfied with the working conditions and low wages. The aim of an increased prestige of the judiciary was accomplished through stricter requirements to be fulfilled in order to become a judge and higher wages.

Ad (iv) In order to soften the workload, a fourth level of courts was established, a system of high courts of justice inserted between the regional courts and the Supreme Court, which hears appeals in cases against decisions of the local (municipal) or regional courts.

The reform of the judiciary continued and prescribed in 2001 the requirement of asset declarations for judges and in 2002 through an Act on the Budget of Courts and Judges, which entitles the OIT to submit its budget proposal directly to the Parliament.

The reform of the judicial system was carried out totally in conformity with the European standards, which leads to the conclusion that the EU served as a model of legislation. Due to the high commitment of the political elite to transform the system we can observe a rather weak EU political conditionality. The reform steps began even before 1990s and were the result of inner politics. According to Hack, fear represented the heart of the reform. The Roundtable negotiations[42] revealed certain insecurity about the communist past of the new and old elite. None of the two groups trusted each other on "honest methods" of dealing with lustration as no group wanted to take the risk of having its past revealed, in case their opposition got to govern, there has been a tacit agreement and support of an independent justice system not instrumentalised by the ruling elite.

The first EU monitoring report on Hungary's progress towards accession was submitted in October 1998. Besides monitoring, other instruments such as twinning have been activated. Considerable investments in the field of the Court Information System in form of financial aid also encouraged the reform process. The accession negotiations with Hungary were successfully concluded on 13 December 2002. Hungary was presented by the EU Commission as an example of

[42] (National) Opposition Roundtable.

successful transformation as the formal and structural prerequisites for a consolidated judicial system have been accomplished through the early reform steps. Yet the emphasis of this success by the EU officials and Hungarian ruling elite focused mostly on the structural independence of the system, not taking into account personal independence.

According to Fleck and other legal scholars the Hungarian judicial system is far from being perfect. Fleck is arguing that the judicial system received too early too much independence which encouraged rather corporative interests and a lack of accountability. It seems that the Hungarian judicial system grew so strong that few dare to criticise the system, fearing that they will be accused of interference in administrative matters of the system.

The notion of independence became so efficiently assimilated by the judges, that according to the President of the Constitutional Court, Péter Paczolay[43], it became an act of provocation to justify even the lack of internal communication with judicial independence. Hungary has no tradition of self-restraint therefore Fleck considers that the lack of strong institutional checks and balance encourages deficiencies such as low efficiency and no transparency. The former court presidents, who had close relations with the county Communist Party Committee remained in power despite the reforms. They remained in key positions during the transition and fought continuously for the independence of the system, in their interest.

The material aspect of the rule of law, which reveals how the process of reform implementation takes place, reveals vague criteria of selecting and promoting judges. The lack of transparency and the broad discretion left to officials involved in the process encourage arbitrariness. The reform orientated young judges have disappeared as the system does not allow critical voices from within. Critical points of view scrutinize the OIT's activity sceptically. The OIT should be independent, but conflicts of interests could arise due to the Council's membership, since the county presidents, most of them also members of the OIT, have the task to "reform" themselves. Due to the different conflicts of the counties, a struggle for influence and alliances are paralyzing the system. The lack of any objective meas-

[43] Interview with Dr. Péter Paczolay (5.11.2008).

urement of the judicial activity reveals the weakness of the system where, according to Fleck, there are no consequences of inefficiency. He considers changing the OIT's membership rules as the only solution for a truly consolidated judicial system.

These problems reveal the fact that a complete evaluation of the system has to take into account both the external and internal independence of the system. The European Union had at that time no instrument and solid mechanism to influence a reform profoundly and after the accession of Hungary to the EU in May 2004, the EU's influence became much weaker. The changing paradigm of the international context, which substituted the initial euphoria of the EU's Eastern Enlargement in 2004 and the 'learning by doing' process the EU experienced through the accession process of the ten CEE countries led to an 'improved' mechanisms and strategies.

After the 'Big Bang' enlargement it became clear that the EU does not have the total support for other Eastern enlargements. However, the literature tends to neglect the fact that Romania and Bulgaria do not represent a new Eastern European Enlargement but rather the second phase of the first Eastern Enlargement as the Helsinki European Council decided on the accession of twelve new countries, including Romania and Bulgaria.

Romania was the first CEE country to establish official relations with the European Community in 1974. The European Agreement has been signed in 1990, yet the official start of the negotiations began only in February 2000. It was clear that Romania's road map to accession would be a difficult one; therefore the accession date has been seen as more realistic if set on the 1st of January 2007. The negotiations started with the so-called "easy chapters" leaving the difficult chapter 'Justice' for the end of the negotiations. This 'strategy' of the Romanian elite proved to be similar to "building a house with no fundament'[44] and at the same time meant a wrong start in consolidating democracy. Romania, even more than Hungary has been confronted with the so called "Dilemma der Gleichzeitigkeit", which stipulated that all the economical and political reforms had to be passed and implemented at the same time. The Romanian ruling elite was committed to fulfil the Copenhagen Criteria and

[44] Interview with Codru Vrabie, TI executive board, Romanian political expert (7.10.2008).

above all the independence of the justice system has been declared as a priority for the government. The government speeches were backed up by an incredible law making process. For instance the Law on the Organization of the Judiciary (Lo. 92 of 1992) has been amended twelve times since its republication in 1997. According to Tapalaga[45] these excessive reform processes as well as the national strategies to strengthen the Judiciary were not genuine, but rather a modality to convince both the electorate and the EU, that a new era of modernization was beginning.

In reality a genuine adaptation process to the EU norms and mechanisms would have meant a much higher cost for the Romanian political elite that would have not been compatible with its own intern norms and rules. The Romanian political elite was as well as the Hungarian a rational actor, however, due to different national variables the Romanian elite had to play according to different rules than the Hungarian. Nevertheless, the first EU monitoring report in 1998 concluded: "despite the positive measures, overall the Romanian judicial system remains weak."[46]

In Romania, the reform of the Judiciary began initially with the structural aspects of independence. The courts were strongly tied in the transition period both financially and regarding the appointment of judges by the Ministry of Justice and therefore exposed to political influence. The Romanian Judiciary has four levels of courts: local courts, tribunals (at the county level), courts of appeal, and the High Court of Cassation and Justice (formerly the Supreme Court of Justice). The Constitutional Court has a two-fold jurisdiction: the examination of laws before their promulgation by the President, and the examination of laws already in force when their constitutionality is challenged before ordinary courts.[47]

The 1991 Constitution has been revised in 2003 and for the first time the independence and impartiality of the justice and judges was formally stated. However, the process of law making continued to lack independence and impartiality. The government constantly committed itself to reform, yet they were just cosmetic changes.

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[45] Interview with Dan Tapalaga, Romanian Journalist (17.10.2008).
[46] Romania_Regular Report 1999.
[47] http://ec.europa.eu/enlargement/archives/pdf/key_documents/2004/rr_ro_2004_en.pdf (3.11.2008).

An indipendent Minister of Justice was appointed in 2004 as a fresh breeze of change. I argue that the political elite remained loyal to its rational device in designating, Monica Macovei as the new Minister of Justice (2004-2007), a legal expert, who had no political record and was supported by the Romanian NGOs and media. However, I have no doubt that Macovei was genuine in joining all the forces to transform the Judiciary. As a matter of fact, she knew how to use the political conditionality of the EU against the ruling elite, forcing the government to pass the laws on justice reform. The political conditionality increased gradually and by 2004, one year before the negotiation chapters had to be closed, other strategies such as gate-keeping and safeguard-clauses have been activated. In June 2004 the EU enacted a safeguard clause that would allow the accession process to be postponed by one year, if Romania would not take the reform of the Judiciary seriously. Macovei used the political conditionality of the EU to push the reform process. The reform of the judiciary came through in 2004 with the enactment of the Law on the Superior Council of the Magistracy (CSM); the Law on the Organization of the Judiciary; and the Law on Magistrates which passed in June 2004 and otherwise would never have gained sufficient support of the Parliament.

Similarly as in Hungary, the aim of the reform was to strengthen the independence of the CSM an independent body consisting of 19 members: 9 judges and 5 public prosecutors appointed in the general meetings of the magistrates forming the two sections of the Council, one for judges and one for prosecutors, 2 representatives of civil society, appointed by the Senate, the minister of justice, the president of the High Court of Cassation and Justice and the general prosecutor of the Prosecution Office working with the High Court of Cassation and Justice. The duration of the mandate of the members appointed by the CSM is 6 years, without the possibility to be reinvested.[48]

The new legislation stipulated that the right of courts administration and promotion or sanctioning of the judges shall be transferred from the Minister of Justice to the CSM. However, while the Ministry of Justice can no longer appoint judges directly, it still has the right

[48] Law no. 304/2004 regarding judicial organization.

to appoint judicial assistants and Court Presidents, who can influence the decision process in the administration of the CSM.

However, political pressure on the Judiciary was still an existing issue, as an official survey revealed in 2004, it was a common practice for the Executive to propose individuals for important positions within the judiciary, e.g. the appointment of a former political advisor of President Iliescu, who had no practical experience as a judge, but he was appointed President of the High Court.[49] According to Danilet, a Romanian judge, political pressure remained perceptible, as "there are magistrates who are convinced that their phone calls are listened into, that their offices are 'bugged'; [...] there are magistrates who have been threatened by the parties involved in a lawsuit, outside the court building, inside the court building or even in the court room; [...] there are magistrates who have been removed from a leading office because they dared to deliver decisions which obliged the Ministry to pay remuneration debts."[50] Danilet adds that it is still common practice that certain inspector judges on the authority of the Ministry of Justice "look into the manner of judgement" especially related to high profile cases.

The so-called "Romania Watergate" scandal provides an even clearer image of the politization of the judicial system. During a meeting of the Social-Democratic Party (PSD) transcripts of the meeting in 2003 and 2004 leaked to the press. Rodica Stanoiu, Minster of Justice under Iliescu's presidency was quoted as saying how she screened investigations of corruption in favour of the party's members. The former Minister of Finance and deputy governor of the Central Bank, Florin Georgescu, was also one of the main actors: "Mr. President, I beg you to talk to Mr. Şaguna [the head of the Audit Court] on behalf of the party, he doesn't listen to me anymore. He should stop all those files and investigations. Only God knows how many telephone calls I have to make to his subordinates... Especially, Mr. President, remember that tomorrow – tomorrow! – all these files leave the Audit Court to the ordinary courts. And if a crazy auditor writes something on paper, that file is not going to stay at the Audit Court, where we have our people at the top, I can make some tele-

[49] http://ec.europa.eu/enlargement/archives/pdf/key_documents/2004/rr_ro_2004_en.pdf (11.11.2008).

[50] www.sojust.ro (12.11.2008).

phone calls and have the case closed properly. No, it is going to reach … a territorial court among divorces or petty thefts, and it will leak to the media instantly."[51]

Monica Macovei fought hard against judges and magistrates who were supporters of parties. She succeeded in making important steps in reforming the Judiciary, even though her methods of dealing with the old elite, infiltrated in the system, were not considered democratic. Her obvious aim was to dispose of the old judges and transform the system by eliminating the hierarchical structures of the CSM but she couldn't accomplish any long-lasting results as she did not have the political support necessary. Critics underlined that Macovei was very appreciated in Brussels but not in Romania, as she was a 'constant irritation' in the eyes of the politicians.

The chapter on Justice was signed by the end of the negotiations under the condition that the EU preserves its right to activate the safeguard-clause. The accession negotiations with Romania were successfully concluded on 14 December 2004, nevertheless, the EU did not stop its conditionality. A new mechanism of verification and cooperation has been activated and a new set of benchmarks for enhancing the judicial reform. In its final monitoring report on the 26th of September 2006, the Commission approved Romania's accession in 2007, but insisted on further reforms: "Should [Romania] fail to address the benchmarks adequately, the Commission will apply the safeguard measures of the Accession Treaty. They lead to the suspension of the current Member States' obligation to recognise those judgements and execute warrants issued by either country's courts or prosecutors falling under the principle of mutual recognition."[52] Macovei proved to be useful in fulfilling the purpose of the Romanian accession to the EU; however, only one month after Romania officially became a member-state she was dismissed from the seat of the Minister of Justice.

[51] http://www.sar.org.ro/Policy%20memo12-en.pdf (09.11.2008).

[52] http://ec.europa.eu/enlargement/pdf/key_documents/2006/sept/report_bg_ro_2006_en.pdf (3.11.2008).

Conclusions

The accession process reveals the fact that neither the EU nor the acceding countries knew from the beginning how the process would evolve. The EU has learned from the first Eastern European enlargement that the strategies and mechanisms need to be further elaborated. This enlargement policy led to the assumption that Romania and Bulgaria were considered to be 'second class' candidates, as they faced, according to Romanian political experts, a far more severe conditionality than the other CEEs. The post accession developments reveal though, that also Hungary faces serious problems in its Judiciary. Critics consider that the EU has overrated Hungary's reforms, which did not develop any verifying mechanism after the accession in May 2004.

In Hungary's case the EU has played an important role by offering a model of legislation, in Radaelli's words a model of "ways of doing things", financial aid and know-how. However the implementation of the reform lies in the hands of the ruling elite. Hungary presented the EU a consolidated justice, a success story which pleased EU officials. Hungary's accession was furthermore very much supported by the euphoria of the first EU Eastern Enlargement. This international variable, otherwise as in the Romanian case, did not contributed to the creation of further control and verifying mechanisms. I argue that these mechanisms would have been indispensable also in the Hungarian case. Even though superficial problems were eliminated, and the system redefined itself 'from scratch'; the problem of personal independence remains pressing. It seems that Hungary had to pay a high price for the independence of justice, as even though the political pressure is eliminated due to a clear separation of powers. The problem of the increased internal independency from within the Judiciary reveals the other extremity of the reform.

In contrast to Hungary, Romania began the genuine reform in 2004, only one year before the accession. An aspect which reveals, that if there is no political will, in spite of a strong EU political conditionality, strategies and reforms proposed by the government, are just 'cosmetic surgical' intents to present the EU officials that at least 'something has been done'. Judge Danilet doubts that foreign experts did not know the realities of the Romanian judicial system, but I assume, they were satisfied with the results presented.

The EU impact over the Judiciary in Romania does not find homogenous recognition amongst the Romanian elite: while some argue that Romania "sold itself under its value", others argue that Romania needed more than ever a strong hand from Brussels and a call for the activation of the safeguard-clause. The latter group underlines that the EU lost its authority by allowing the dismissal of Minister of Justice Macovei in 2007 just one month after Romania officially joined the EU. The civil society and the media reacted promptly by saying that with Romania's accession to the EU the reform of the Judiciary has been completed, but only on paper. Despite all the progress Romania made, it seems that the conditions set by the EU have rather been deemed a mere 'check list.'

I argue that the EU mechanisms and strategies set a good purpose to reform Romania, however they omitted to focus on the double challenge the country had to face through the phase of liberalization and democratization. Also the mechanisms and strategies were still undeveloped and insufficiently adapted to the economic and political realities of Romania. The country received financial aid to strengthen its Judiciary; however, a model of "ways of doing things" has not been presented as it happened in the case of Hungary. It seems that the gate-keeping mechanism has played an important role in 2004 as the political elite was practically cornered into passing the laws necessary for the transformation of the Judiciary. However, the dismissal of Justice Minister Macovei in 2007 reveals the fact that Romania still 'has a house built on a precarious base.'

The political elite as a rational actor managed to reform the system according to its own rules; they have created their set of rules for democracy, as their "only game in town". The Europeanization as a model of diffusion functioned just as long as the political elite agreed on implement the laws. The total transformation of the judicial system has not yet been accomplished in Romania or in Hungary. Albeit it is a difficult process in itself it suffers from hindrances constituted by the heritage of the political past: self-purging as tradition is missing in both countries, as well as from the lack of Brussels' strong commitment to exercise conditionality even after the enlargement.

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Roma migration in Europe