

Kálmán Mizsei

## **Reform reversal and the state of the rule-of-law in the former socialist countries of Europe**

28 years since the Soviet socialist doctrine so spectacularly collapsed, increasingly rule-of-law (RoL) is seen as a critical element of the endeavor to transform former “socialist” countries. At the same time, it is strongly identified as one of the most – perhaps the most – important component of long term developmental success<sup>1</sup>. Yet, there has been much less of a transformation theory around the necessary ingredients of a rule-of-law transition from the socialist economies, politics and societies than in some other areas of this transition. In fact many politicians and social scientists declared at different times that transition was over before even understanding of how this core aspect of it was to be accomplished.

This paper investigates whether current reform reversals in the European post-communist countries have expanded to the area of RoL, if so in what way, to what extent and in which countries and with what significance. In order to do that, it briefly also looks into the RoL component of the initial reform efforts. It also looks into the linkages between RoL and other areas of critical systemic characteristics such as economic freedom, democracy, centralization of public administration and human rights in order to establish if we see mutually reinforcing processes or dimensions with (relatively) autonomous dynamics. In this endeavor it uses a combination of country case analyses and deeper investigations of particular sectors, such as judiciary and prosecution. A central theme of the study is “fight against corruption” that usually is misunderstood in the broadly conceived international assistance community around the countries of the region.

11 post-socialist countries of the region have joined the European Union in three steps, between 2004 and 2013. Those 11 countries had to undergo a rigorous reform and monitoring process in order to gain eligibility to be members of the club that is seen by most as a community of countries respecting and adhering to the principles of RoL. Another group determined more by geography than substantive criteria is the Western Balkan countries which, according to the Thessaloniki Declaration<sup>2</sup> are eligible to join the EU in case they fulfill all the criteria. These countries both undergo more rigorous monitoring and have the perspective of joining the EU in case they fulfill those criteria. Even though lately EU member states’ reluctance seems to have slowed down this process, the pull effect of the perspective of EU membership is still stronger than in the case of the third category of the countries that once

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<sup>1</sup> Acemoglu, ...

<sup>2</sup> ...

belonged to the Soviet Union, outside the Baltic states. While by some criteria these countries are also eligible to EU membership, that promise is more vague and distant, thus the strength of the EU's ability to influence is apparently weaker. In addition, the systemic pull effect towards the alternative that Russia is offering is relatively the largest in the case of this group. On a scale between the ideal liberal state and the type of the patronal state as defined by Hale<sup>3</sup>, the states of the FSU are clearly closer to the Hale model state.

Overall, the move towards the RoL, a key characteristic of the liberal state, has clearly been the most resolute in the group of EU member states, despite initial concerns about the accession of Bulgaria and Romania in 2007 in this regard, as indicated by the CVM process<sup>4</sup>. Quite unexpectedly and totally unpredicted though, the most widely discussed reform reversals have lately happened in Hungary and in Poland. In both cases, institutional changes have been significant and attentively followed, partially exactly because the RoL is such a core pillar of the community of European countries that has grown into the European Union that what has been happening in those two countries is thus very unusual and affects a core EU value. The paper will examine the nature, extent and perhaps expected scope of these changes. The criteria will be the state of judicial independence; centralization of judicial power vs freedom of judges to consider cases; quality of financial allocation to courts; role of the court presidents. Finally, we will examine the independence of the higher instances of courts such as appellate courts, Supreme Court and constitutional court. The question will be raised how deep these reform reversals are and how likely it is that the countries themselves and the EU will be able to successfully address and remedy them. While judicial independence is the ultimate institutional guarantor of unbiased exercise of the rule-of-law, guarantees for unbiased investigative and prosecutorial actions are also vitally important, particularly because the institutional tradition of the post-communist region renders the organization of prosecution stronger than the judiciary. Only deliberate, systematic and long term action can change this inherited characteristic. Moreover, given the difficulty of implanting the culture of the rule-of-law in any society, a reformed judiciary without the reform of the prosecution and police will likely not withstand the pressure of vested interests and old habits over the long haul.

The paper will also focus on two important incidents of anti-corruption drives in Romania and Georgia. The key question in the case of Romania is how much such concentrated, essentially repressive drive can achieve durable systemic change in a society with very weak liberal state tradition. This aspect leads to the need to examine the highly important Georgian experiment as well. Prior to this experiment, Georgia had been much more of a patronal state than Romania. Nevertheless, Saakashvili's (and the less well known Bendukidze's) package of reforms have achieved sustained improvement of governance, reduction of crime and of corruption and superior economic performance relative to all its neighbors. The paper will

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<sup>3</sup> Hale, Henry, Patronal Politics ...

<sup>4</sup> Cooperation and verification process for Bulgaria and Romania. For its definition see [https://ec.europa.eu/info/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania\\_en](https://ec.europa.eu/info/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en).

examine the main ways reforms were executed, how a critical mass of reforms were achieved, what secures sustainability and what remains the gap between the current state of affairs and a genuine rule-of-law situation in Georgia. Romania and Georgia thus represent potentially significant reform advancements that may have the potential to lead the countries away from the risk of patrimonial state towards a sustained liberal state model. The paper will discuss the chances of such positive development as well as risks of reform reversal. The countries that have lately moved in sync with Hungary and Poland in reform reversal in the EU's Eastern Partnership area are Ukraine and Moldova. In Ukraine from 2010 the situation of the rule-of-law deteriorated markedly as President Yanukovich was aiming to gain highly centralized power. In spite of the Revolution of Dignity at the end of 2013, no breakthrough reform has happened in this area in Ukraine since then.

Constitutional changes, the state of the system of prosecution and of the judiciary in Ukraine will be examined in some detail. Subsequently, the promises of the Euromaidan revolution as well as again their neutralization will be examined. One of the key issues here is the low propensity of the international actors to understand the essence of the system in Ukraine and thus to formulate their expectations/conditionalities with the appropriate precision. Here the relationship of IMF conditionality and the EU (as well as US) efforts will be shown alongside the demands of the main international actors. Poroshenko's (and to an extent former Prime Minister Yatseniuk's) ability to find always the way out of binding obligations will be presented as an important case study. Consequently reforms have been very modest and highly fragmented and may be reversed.

### Initial reforms in the vanguard

Kornai in his in Hungary widely resonated paper in 1989<sup>5</sup> argued that privatization after the collapse of communism should be orderly and prudent. However, exactly because his advice was neither widely followed, nor even particularly supported in the community of reform economists in Hungary and elsewhere, we had an initial stage that was not particularly attentive of the requirements of the rule-of-law. We widely believed that will have to come next. Privatization everywhere had a "wild element" to it – in order to do the transition fast. In Hungary various forms of "spontaneous" privatizations (even the name ...) and accelerated sales normally to various types of incumbents indeed resulted in a fast process but not in a consensus of social justice. Elsewhere various forms of "mass privatizations" almost all proved to result in situations where cheaters of the system got rich.<sup>6</sup> While saying this I am not

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<sup>5</sup> Kornai, János, *Indulatos röpirat a gazdasági átmenet ügyében*. Budapest, HVG Rt. 1990:

<sup>6</sup> Soós Károly Attila: *Rendszerváltás és privatizáció. Elsődleges és másodlagos privatizáció Közép-Európában és a volt Szovjetunióban*. Corvina Kiadó, Budapest, 2009., still before the big reform reversals, looked optimistically into cases of radical privatizations and paid less attention to the harmful effects of neglecting the RoL aspects of privatizations and, as he rightly calls it, secondary privatizations.

necessarily condemning this process but pointing simply to its effects from the perspective of the RoL.

Privatizing banks was even more of a complex task since the view prevailed that a) it is not appropriate to sell banks to foreign strategic owners since they will lend less to local companies<sup>7</sup> and b) they could not be put out to “mass privatization” – except in a few cases. The result was on one hand slow privatization, on the other a window of opportunity for mass corruption. State banks lent to large traditional companies that were either already privatized or the managers had their ways to extract illegal cash-flows from the companies they managed. Bad loan creation in this transition period (or rather period of “window of opportunity”) was massive, resulting in the need of frequent bank bailouts.

The reformers were hoping that as soon as the bulk of privatizations will be over, RoL can be established and those anomalies will be dealt with. However, it was not well articulated how this should happen – there was no strategy how to implant the culture of the rule-of-law. On one side stood the “purists” who would be ready to slow down market reforms if those reforms were not executed perfectly, on the other were the reform enthusiasts with their hope but, critically, lack of deeply thought over strategy. It is important to emphasize, for both, fairness to the reformers and for presenting here enough of a complexity that there was no easy solution to the problem since as soon as the expectations were such that shift to private property from the Leninist philosophy is imminent, actors of the economy, enterprise managers and to-be-investors, focused their attention on a rash acquisition of property. This had notable – often dire – consequences to the perception of the rule-of-law in the society and narrower in the emerging business community. True, there was no trivial way out: a prudent alternative to orderly but excessively slow privatization was simply not there. For one, the above mentioned expectations would not be broken unless one reestablished the bankrupt economic system – impossible – or could create an orderly and very competent state administration overnight. This was equally impossible because of the chaos the collapse of the system meant. The only country with continuity in this regard was Slovenia who had gotten out of Yugoslavia so fast and easily that there was not much disruption, it inherited an imperfect market economy system where establishing minimal macroeconomic prudence as opposed to the hyperinflationary Yugoslav economy was also quite feasible, and thus it did not feel the pressure to privatize as much as the others. Also, Slovenia had a population quite disciplined with relatively less regard to the systemic incentives. Still, Slovenia paid quite a high price for this too much continuity much later – during and after its deep economic crisis in and after 2012.

Overall, one can say that the early reform enthusiasts paid minimal if at all attention to the highly complex task of evolution towards the rule-of-law. All the more so that in the early reform design economists were highly represented. I would not be critical of this since they had

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<sup>7</sup> For an early discussion of those prevailing views see in John P. Bonin, Kálmán Mizsei, István P. Székely, Paul Wachtel, Banking in Transition Economies. Developing Market Oriented Banking Sectors in Eastern Europe. Institute for EastWest Studies, New York, 1998., particularly pp 66-8.

the strongest professional inclination of radical departure from socialism. Nevertheless one of the unintended consequences was lack of design for rule-of-law transition, particularly that this is also not at all an only-lawyers task: it requires the kind of deep attitude changes in the whole society that needs much professional input beyond law experts who typically would focus more on the written formal legal solutions, much less on its marriage with local context.

While the initial reforms paid – by today’s perspective – much too little attention to creating a rule-of-law system from the most extreme form of non-rule-based system that modernity has known, a very important stimulus for further rule-of-law development proved to be the path of the candidate countries to membership in the European Union – a community of countries at the core of its existence was exactly rule-of-law. Countries in the region that had an early entry to the Union were expected to conform to the rule-of-law regime of the Union. It meant in practice particularly two major things: adopting the body of law of the Union (the *acquis communautaire*) and judicial independence. Since the European Union did not have a deep understanding of the inherited cultural characteristics of the legal systems of the post-communist countries (the “context” above), it established, and expected to fulfill, less substantive, more formal, legal criteria that the applicant countries needed to comply with.<sup>8</sup> Then what mattered in the implementation was how much the written law in different EU candidate countries played a decisive role and how much informal rules. As the EU was learning about the state of the rule-of-law in the new member states, it applied new practices such as the so called Cooperation and Verification Mechanism towards Bulgaria and Romania<sup>9</sup> after their accession to the EU.

This tension between formal and informal has remained a very important characteristic of developments in the area of the RoL. Bank regulation and supervision carries somewhat different features in two ways: first, supervising banking is to some extent like supervising air traffic: one mistake can have fatal consequences that even corrupt politicians have to try to respect. It does not mean bank supervision has become perfectly rules-driven but perhaps it means more genuine attention than to judicial independence. Second, in many countries a dominant part of the banking markets has become controlled by international strongly capitalized players. This also saved the day in the new EU member states during the 2008 crisis.

Rule-of law improvements happened in most of the countries anchored to the EU in a gradual manner: institutional guarantees of judicial independence were followed by gradual improvement of justice provision and the quality of the processes. Gradualism is natural in this area but it was also facilitated by the fact that there was less blueprint for it other than designing new, “West-conform” laws.

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<sup>8</sup> A somewhat similar distinction is developed by Mendelski, Martin, THE EU’S RULE OF LAW PROMOTION IN CENTRAL AND EASTERN EUROPE: WHERE AND WHY DOES IT FAIL, AND WHAT CAN BE DONE ABOUT IT? Bingham Centre for the Rule of Law. Global Rule of Law Exchange Papers. February 2016.

[https://binghamcentre.bicl.org/ruleoflawexchange/documents/190\\_180216\\_mendelski.pdf?showdocument=1](https://binghamcentre.bicl.org/ruleoflawexchange/documents/190_180216_mendelski.pdf?showdocument=1)

<sup>9</sup> [https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania\\_en](https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en).

### Criminally organized states in the FSU

However, in the rest of the region, the provision of justice went in a different direction. In the former Soviet Union outside the Baltics (FSU)<sup>10</sup> a different political and judicial model set in after disintegration of the Soviet Union. While in Central Europe and the Baltics judicial and prosecutorial corruption was widespread right after the early stages of transition, the system gradually cleaned up. In the FSU it happened differently.

Quite soon after the transition started, a kind of presidential model set in, providing a high degree of institutional continuity with the communist times, but largely cleared of any ideology, certainly any coherent, expressly propagated one. Wide-ranging cynicism and nihil set in. Even where parliaments for a long time played an important political role, this did not provide room for the evolution of independent judiciary. While prosecution had been a vitally important pillar of the Soviet system and it had overpowered in the courtrooms, this prevailed but adjusted to the new circumstances of political competition. Politicians in this new world used prosecution to gain competitive advantage over their rivals. Also, in the FSU a kind of “the-more-conflict-of-interest-the-merrier” system emerged from the beginning where political and business power went hand-in-hand, politicians became large business owners and vice versa – a kind of extreme “social Darwinism” came to vogue, quite a distorted interpretation of what “capitalism” really meant. In the emergence of this system too, prosecutors played a critical role as they again became vital supporters of such endeavors by clamping down on those that for political or business reasons stood in the way of the powerful. As oligarchic power emerged, oligarchs “owned” policemen, prosecutors, taxmen, customs structures and judges to advance their interests. In more competitive situations such as the pre-Putin Russia, Ukraine throughout and Moldova except in the Communist period and now, there was a certain degree of pluralism in the way of oligarchic strength relative to the supposed strongman – almost always the president but sometimes, such as in post-2009 Moldova, the Prime Minister. Ukraine is the most interesting example both, for academic purposes as well as in practical terms because of its political importance. Here a fair amount of pluralism prevailed with periodic attempts to close down on it and create a Putinesque situation first by the Kuchma and then by the Yanukovich presidencies. However, those attempts ultimately proved unsuccessful because of oligarchic counter-interests and civil society dynamism. But even in the more pluralistic situations regional monopolies or near-monopolies prevailed. Of those the most prominent is the history of the Donetsk-clan that at some point raised so high that threatened with a full takeover of the country<sup>11</sup>. This ultimately failed with the Revolution of Dignity.

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<sup>10</sup> Further we will use this category as the countries in the former Soviet Union but outside the Baltic states bear strong similarities for the purpose of this paper – albeit further East in Central Asia and Azerbaijan additional features add to the picture that are less important for the discussion here.

<sup>11</sup> Kuzio, Taras, Ukraine. Democratization, Corruption, and the New Russian Imperialism. Praeger Security International. Santa Barbara, California, Denver, Colorado. 2015

The systemic evolution thus did not go in the direction of the liberal state in these countries and no external pressure was, in the absence of the “European perspective” and a good knowledge by the donors of the systemic nature of the region, able to gear it towards the critical feature of judicial prudence. In the political framework best described by Hale’s seminal work of Patronal Politics, a kind of criminal state emerged to which Bálint Magyar’s mafia state concept seems to be a useful complementary theory.<sup>12</sup>

An indispensable component of this system was keeping the official remuneration of the critical hierarchies of this predatory state low in order to keep them dependent of the political structures they serve. Low salaries also serve to maintain internal cohesion of the criminal state hierarchies. At the same time these different hierarchies need to be kept isolated of, and fighting among, each other so that they all depend on the godfather, most frequently the president of the state that emerged almost everywhere in the FSU after the collapse of the Soviet Union.

Thus when thinking about reform reversals, one needs to keep in mind that the politico-economic systems of the FSU did not ever go in the direction of the liberal state any time since the collapse of the Soviet Union. This has been a very dynamic period in systemic change but such that, except for perhaps Russia, could hardly be characterized in the way of move towards the liberal state and then reform reversal. When it comes to Russia, it is the perceived failure of the liberal project and systemic crisis in the form of the 1998 banking crisis and the success of the Chechen secessionist movement that triggered changes that culminated in clear reform reversal in some areas and essentially stagnation in others from 2003. Choosing the date remains arbitrary as, for instance, reducing the media pluralism started almost immediately after Putin’s coming to power but in general the narrowing of political competition started to be visible with the arrest of the oligarch and major financial sponsor of pluralistic politics, Khodorkovsky.

I am offering rather the following characterization: countries in the FSU moved in the direction of the patronal state with the speed that was not dissimilar from that of the other post-communist countries’ move in the liberal direction. In this period Russia’s model role is less obvious. One may argue that Russia was the only country in the FSU that moved in the liberal direction until at least 1998 whereas from 2003 the alteration of the path towards the stabilizing patronal model is clearly discernable.

However, in some countries of the FSU various factors continue to challenge the stability of the patronal model. The most important among them seems to be civil society activism that time to time fosters revolutionary or near revolutionary changes in elites. While these changes have not derailed the evolution towards the patronal model, they have offered political openings that at least articulated demands to turn towards the liberal state model. These countries are

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<sup>12</sup> Magyar, The Mafia State

mainly Ukraine, Moldova and Georgia whose systemic evolution is also a focus of attention of this paper.

One can detect a broad international trend, although with large variations. In this Russia's major step towards illiberalism around 2003 is particularly noteworthy as later it had a strong demonstration effect on other countries as well as state sponsored corruption also had a capacity to corrupt elites in countries particularly that were dependent on purchases of Russian commodities and armament. At the same time, countries that wanted to avoid strongest Russian tutelage likely turned towards the European Union and the United States which exposed them to expectations of systemic reforms. Popular expectations also pointed in this direction. In the year that Russia turned more autocratic, Georgia accomplished its Rose Revolution that opened the way to the most sweeping systemic transformation in the FSU area and in a long time also in the whole region. So, Georgia witnessed an opposite systemic move.

#### Sharp and unanticipated reform reversals in Hungary and Poland

The dramatic reform reversal seems to having been driven by politics. The first period of transition before the dramatic Hungarian elections of 2010 were characterized by ruling parties mostly losing elections in the area that we above characterized as the one moving in the "liberal" direction. Already then it was visible that each election was fought, certainly in Hungary but much everywhere, as if it was the last. The political culture had not yet settled in the way that loss of election was not seen as losing everything. Still, there was a big difference between this region and the "patronal" East. In the East losing the election indeed meant potentially losing "everything", including often one's personal freedom. The Central European area and, particularly, the Baltics, were very different but also different from Western Europe – a kind of in-between. And leading politicians were seeking ways to stabilize their power once they gained it. In Hungary 2006 was the very first election when the incumbent won again – that time the socialists.<sup>13</sup>

After that election FIDESZ largely relied on extra-parliamentary means to keep the socialists, whom they widely depicted as illegitimate holders of power, in check. Gyurcsány was boycotted in the parliament and street action was organized to keep government under constant pressure. When then FIDESZ won the next elections sweepingly and gained a constitutional majority, it quickly started to decompose the checks-and-balances in the liberal order that until then prevailed. That was the first such attempt among the new members of the European Union at a time when the Union itself was shaken by the post-crisis tremors inside

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<sup>13</sup> A very prominent socialist politician told me recently that we should not have illusion if Gyurcsány wouldn't have done the same that Orbán did should he have been able to do it – but his party was much less governable, docile than Orbán's FIDESZ.



the Union, particularly the ill-managed Greek debt crisis. The international factor was not only important in this but also by the sharp U-turn of Orbán in the fall of 2009, already before the elections, in his relationship towards Russia. The reasons of this U-turn are still poorly understood but the two together, a weakening EU and a positive change towards an assertive, at the same time deeply “patronal” Russia were important ramifications of Orbán’ sharp political innovation that up to today is shaking Europe and that is an important subject of this paper as he was the one among the new member states who had the political courage, and foresight to undertake such sharply negative, at the same time visionary step. He immediately changed the constitution itself, put in place mechanisms by which many of his protégés had much longer mandates at the helm of important institutions than the electoral cycle, sometimes absurdly so. He started to attack large sectors of foreign investment, particularly banks and utilities. The government turned the media market upside down and, noteworthy for our discussion, tried to limit judicial independence starting in 2010. He didn’t need to do much with the prosecution as the Prosecutor General was already a very close associate of Orbán whom the previous government, considerate of its constitutional limitations, could not remove from office.<sup>14</sup>

Hungary’s following Russia’s illiberal turn happened 7 years after what we identified as Russia’s turn of course. In 2010 Viktor Orbán’s FIDESZ party gained a constitutional majority. Such majorities happened before in the region and (for a coalition in 1994) even in Hungary. But this time the combination of the constitutional majority with a nationalist ideology that, as a reaction to the long communist period, claimed “natural entitlement” to power started to dismantle the liberal checks and balances on power that had been established right after the collapse of communism in Hungary. The Hungarian government started a sweeping attack on the independence of the courts and on foreign-owned companies, particularly utilities and banks right after coming to power. In the perspective of the almost 8 years of FIDESZ continuously in power, undoubtedly the room for democracy and the rule-of-law shrunk. However, the success of FIDESZ to restore an illiberal order can be judged as to be partial. Foreign ownership in the economy is still dominant, including critically in the export sector. Moreover, judicial independence so far largely holds. And while the Prosecutor General is a political nominee with strong connections to the Prime Minister, the prosecutorial service largely does a professional job. Its bias is visible largely in politically sensitive cases.<sup>15</sup> It is not yet clear how far the illiberal turn of Hungary will go. It will be determined by three factors. First, the tolerance of the society to this will be important. The regime’s main effort here is to create a narrative whereby Hungarian sovereignty is under attack from “Brussels” in order to

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<sup>14</sup> Hungary’s U-turn is coined by János Kornai whose paper is at the same time the best inventory of the measures of the Orbán government János Kornai, Hungary’s U-turn. Expanded version of study published in *Capitalism and Society* Volume I. Issue 10. March 2015. [http://www.kornai-janos.hu/Kornai\\_Hungary%27s%20U-Turn%20-%20full.pdf](http://www.kornai-janos.hu/Kornai_Hungary%27s%20U-Turn%20-%20full.pdf)

<sup>15</sup> Bálint Magyar’s terminology for the complex system of power shaped by Orbán’s reigning is the “mafia state”. Magyar, Bálint, *Post-Communist Mafia State - The Case of Hungary*. Noran Libro Kiadó, Budapest, 2016. He expresses a somewhat more pessimistic portrayal than this author on the basis of systemic coherence.

drive attention away from burning social issues at home. Second, the economy will pose a limit to the current drive on the long haul. Hungary's economic performance has been lagging behind its peers over the last years<sup>16</sup> that again government PR is trying to overwrite with its propaganda of success and its monopoly of main media, particularly in the countryside. Since now there is a strong overall European economic growth environment, for the 2018 elections this will most likely play at the government's hands. However, its extraordinary centralization drive will eventually sharply limit the economy's potential for growth. Third, the country is at the moment, paradoxically, awash of EU funds, amounting to 4 per cent of GDP. It is not clear how this source of funds will shrink in the future thanks to the Hungarian government's many anti-EU positions. Finally, as international conditions were important for the emergence of this authoritarian exercise of power, it will also remain an important factor looking ahead for its dismantling. Orbán is playing very skillfully Brussels and its rules but it is not clear how far this will go. However, it is also likely that on the short run, should he win as it is likely the parliamentary elections, he will very likely make informal measures to make courts more pliable. Informality anyway plays an important role in his system of ruling.<sup>17</sup>

In order to protect its highly clientelist practices and social order, the government has also so far refused, or balked on, to joining two crucial mechanisms of the EU: the European Union Public Prosecutor's office<sup>18</sup> and the euro. However, in the future the pressure may mount on the government to integrate deeper in the European structures in exchange for continued generous support. Overall, Hungary's liberal order has suffered a serious setback but it is unclear now, how far the pendulum has swung back and how far it still will. Its social system is still a far cry not only from what it was in socialism and what characterizes countries further East, the "model" Russia, let alone Ukraine.

The next such episode came 5 years after Orbán's *blitzkrieg* over the political checks and balances and – partially – the rule-of-law. After Prawo i Sprawiedliwosc (PiS, its name's English translation, ironically, Law and Justice) Party won the election in 2015 in Poland, a very similar political process started to narrow the scope of the rule-of-law there. Before this turnabout, Poland's justice system evolved very promisingly. The centralized character of the prosecution steadily loosened up and from 2010 prosecution was not any more subordinated to the government. The relationship between prosecutor and judge also evolved steadily towards more judicial authority. This, as well as the stellar economic performance of Poland raised the hope that Poland would soon narrow the developmental gap with Western Europe. This trend broke very suddenly and as unexpectedly as in Hungary at the end of 2015, immediately after PiS won the elections. This process is deservedly referred often to as a constitutional coup.

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<sup>16</sup> See for the Orbán period Zsiday, Viktor, A Magyar modell sikere. September 11, 2017. <http://alapblog.hu/a-magyar-modell-sikere/>. Hungary's economic performance since about 2005 has been lagging systematically behind its peers in the region.

<sup>17</sup> See Magyar, Post Communist ... 2016.

<sup>18</sup> 20 member states agree on details on creating the European Public Prosecutor's office (EPPO). <http://www.consilium.europa.eu/en/press/press-releases/2017/06/08-eppo/>

PiS' advance in Poland has been somewhat slower than that of FIDESZ in Hungary as it has not enjoyed constitutional majority. For that it has compensated with harsher and more visibly or provocatively unconstitutional measures in its *blitzkrieg* that gained the ire of the European Commission more strongly than Orbán's actions a few years earlier had. First, immediately after taking power, PiS paralyzed the Constitutional Court and finally, in violation of the constitution, filled it up with its own people. It also changed the rules of the Constitutional Court so that it maximizes political interference in its proceedings.<sup>19</sup> In 2017 it resorted to an extraordinary concentration of power in the justice system by enormous subordination of both, the judiciary and the prosecutors to the Minister of Justice. Already before the move in 2017, the Polish practice rendered the Minister of Justice to be the Prosecutor General at the same time. It reversed a decade old effort to make prosecution independent and depoliticized. Now the new laws gave the Minister of Justice strong new powers in nomination and advancement of the judges directly and indirectly through the appointment of court presidents (with large authorizations) and vice-presidents on all levels.<sup>20</sup> Internal rivalries and procedural obstacles have slowed down the enacting of the laws insofar President Duda, himself the protégée of the PiS strongman Jaroslaw Kaczynski, did not sign two of the three interrelated laws in the judicial package. Judicial self-government has been very seriously curtailed either way. However, the President's proposed amendments to the law are also such that do not fundamentally change the politicization of the judiciary – it does change some of the arithmetic and it takes away some of the powers from the Minister of Justice and gives them to the President or to the Parliament but does not change the fact that judges get subordinated to politicians. By unconstitutionally changing their retirement to 65 years of age, the law leaves room for the kind of blood change that allows to put dependent people in the highest judicial self-management organ of the judges. The law further allows to nominate from the Ministry of Justice. It means that practically the highest organ of judges will be filled by people subordinated to the Prosecutor General. With this an enormous re-politicization of the justice system and its centralization has already been accomplished by the new government. The European Union has started an infringement procedure against Poland for systematically curtailing the rule-of-law – an absolutely unprecedented move, underlining the importance of the matter for the EU as a whole.<sup>21</sup>

Kaczynski has taken far-reachingly his script from Hungary even if the parliamentary base for his power does not match that of Orbán. Kaczynski is running (from the back seat as he is not

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<sup>19</sup> "Poland's senate votes to curb power of top court". [The Guardian](#). 24 December 2015. Sobczyk, Martin. "Battle Between Polish Government and Top Court Escalates". [Wall Street Journal](#). 14 December 2015, <https://www.politico.eu/article/poland-rebuked-for-crippling-constitutional-court-pis-kaczynski/>

<sup>20</sup> <http://www.independent.co.uk/news/world/europe/poland-president-eu-veto-judicial-independence-bill-supreme-court-judges-parliament-guy-verhofstadt-a7851551.html?cmpid=facebook-post> , <https://www.theguardian.com/world/2017/dec/20/eu-process-poland-voting-rights> , <https://oko.press/ziobro-obsadza-sady-corka-polityka-pis-zostala-wiceprezesem-mimo-negatywnej-opinii-sedziow/>

<sup>21</sup> <http://www.independent.co.uk/news/uk/politics/poland-rule-of-law-article-7-authoritarianism-independence-of-judiciary-a8120196.html>

Prime Minister neither President of the country) a coalition government not like Orbán who enjoyed constitutional majority for 5 years and near constitutional majority ever since. Thus Kaczynski could not change the constitution as he wanted and his grip on media is more limited. Yet he has compensated so far with a combination of aggressive ambition to paralyze the existing checks on his party's power and a generous social policy that oddly his hated predecessor's successful conduct of the economy has laid the fundamentals for. Also, Kaczynski has not turned against the private, including international, investors – in this way his policies were less anti-growth than in Hungary at the beginning of his fellow-populist's reign. While his social policy is not sustainable on the long run even so, it is essential since potentially it buys time to assist his effort to cement in his control of the vital institutions to the nature of the state.

Kaczynski's media policy is also similar to that of Orbán: to create a near monopoly on media for those who do not regularly access internet sources for news. Public media has been transformed into governmental propaganda tool<sup>22</sup> and efforts are made to reign in and buy independent media sources.

Since we are in the middle of what seems to be a gathering momentum, its future geographical expansion is as difficult to judge as its deepening. Its spread requires a demagogue strongman who wins overwhelmingly in the elections to then undertake the decomposition of the checks and balances. No other post-communist EU-member country has so far done this and the deeper a country is institutionally integrated in the European Union the greater the weight of the EU's resistance to dismantling the rule-of-law regime. In the case of Poland the European Commission has initiated the "Article 7 procedure" in July 2017, answering to the package of laws curtailing the independence of the judiciary<sup>23</sup> and justifying the radicalism of its action by recalling that the core principle of the EU has been violated thus threatening the whole Union. The stronger the move of the European institutions to "punish" countries with a growing and large rule-of-law deficit, the more likely is that the cost-benefit analysis will deter the new "candidate". The problem is though that the Article 7 procedure is a slow one and in case of two sinners one may – and likely will – veto the measures against the other. In the meantime the decomposition of the rule-of-law can continue. Its demonstration effect is also not to be underestimated: other countries' to-be-authoritarians may well take courage from the successes of the effort in Hungary and Poland.

So the trend towards rolling back the advances in the rule-of-law in the new EU member states is tentative and it is not full even in the most extreme cases. In Hungary the judiciary holds and the government is anti-European mainly in rhetoric and less in actual deeds. In Poland many factors limit the drive of Mr. Kaczynski's and his PiS party's to eliminate judicial independence.

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<sup>22</sup> <http://www.telegraph.co.uk/news/worldnews/europe/poland/12088295/Polands-president-signs-controversial-new-media-law.html>

<sup>23</sup> [http://europa.eu/rapid/press-release\\_IP-17-2161\\_en.htm](http://europa.eu/rapid/press-release_IP-17-2161_en.htm) and [http://europa.eu/rapid/press-release\\_IP-17-2205\\_en.htm](http://europa.eu/rapid/press-release_IP-17-2205_en.htm)

Public opinion is far from monolithic. While the public media has been transformed into the government's propaganda mouthpiece, media pluralism still exists – although in the time of writing this piece new ideas are underway to eliminate media friendly to the opposition. Public protests against the anti-constitutional usurpation of power are wide-spread but it is doubtful if they will be strong enough to force limiting the effort to eliminate political competition.

The risk of consolidating authoritarian power is thus real. PiS has used social dissatisfaction skillfully and paid for its popularity by reducing the pension age and paying monthly extra outlays for kids after the first two. Particularly the first measure will over time deteriorate balances in public finances

### The not-so-clear-cut case of the Anti-Corruption Prosecution in Romania

In its original governance characteristics Romania has belonged closer to the FSU group than to the Central Europeans and the Baltics, however with two crucial exceptions: first, Romania's pro-European consensus has been as strong as for the other small post-socialist countries in the region – if not stronger in some cases and sub-periods. Second, Romania's elections have always been truly contested, free elections. No party so far has been able to manipulate it as in many countries in the FSU and now only in Hungary. When Romania joined the European Union, it did it (together with Bulgaria) with an enormous rule-of-law deficit, unprecedented in the history of the expansion of the EU. The essence of the problem for the two countries is that in spite of adopting the body of the EU legal provisions, the *acquis communautaire*, the practice of the country did not follow the law but the logic of informality, close to the logic of the patronal state. As mentioned before, the EU applied a new tool to monitor progress here, the Cooperation and Verification Mechanism (CVM). While it was a very elaborate mechanism, and the European Commission looked at a wide variety of indicators, at the end of the day the main preoccupation of the international community was to focus on producing hard evidence that the Romanian (and the Bulgarian) government clamps down on corruption. The story of the Direcția Națională Anticorupție (National Anti-corruption Directorate, DNA) that has often been hailed as a kind of best practice model, has by now led to a great domestic political controversy that is difficult to imagine how to solve without violating one or another vital European principle. Notably, the current standoff and international interference in it may be conducive to advancing the case for cutting (perhaps temporarily) corruption but quite possibly at the price of violating important principles of the rule-of-law and of democracy on one hand and completely paralyzing public administration on the other. Thus this case is of very high importance for learning lessons for other countries as well, illustrating how little there is in the way of easy solutions to the task of implanting the rule-of-law culture in countries that earlier did not have it.

The man who understood the political wind best in Romania was Basescu who put it in the front of his presidential election campaign in 2004 where he surprisingly won by claiming the mantle of the underdog in spite of his strongly communist nomenclatura background. From the start his, as well as the international supporters, focus was mainly on spectacularly clamping down on corruption. A few months after he took over the presidency, his rival in the election, former Prime Minister Adrian Nastase, was already in jail on corruption charges. This selective justice has been an important, albeit not exclusive, trademark of the whole anti-corruption campaign, hailed by the international community. Also, Romania's prosecution, and in particular DNA got such powers that critics say it has an uncontrolled mandate.

Through the CVM the European Union tried to monitor improvement of the rule-of-law via a wide set of considerations and indicators. However, Romania's other main partner, the United States had a much more single-minded approach here. Over time, this approach got strengthened by an important geopolitical consideration. Romania as a military partner has grown in importance for the United States and – via the United States – for NATO. During Basescu's presidency a coalition emerged and strengthened in which the Americans increasingly supported the "deep state" of Romania for military security reasons, while Basescu tried to strengthen the ties between the Romanian Intelligence Service (the feared Securitate's direct successor organization, SRI<sup>24</sup>) and DNA for his own political purposes. A secret protocol is alleged between the two organizations to show the nature, extent and depth of this cooperation that only recently has been acknowledged. In addition, this situation has catalyzed a large asymmetry in Romanian politics. The Americans see the best organized Romanian party, PSD as less reliably pro-Western than its right-leaning rivals, Basescu's PD (Democratic Party) earlier and PNL (National Liberal Party) and ALDE (Alliance of Liberals and Democrats) currently. Thus, the US has been taking sides in disputes around the rule-of-law in a quite partisan manner<sup>25</sup>. This asymmetry is accompanied by another one: a tremendous gap in value and party preferences between the modern young technocracy of the emerging "new Romania" and the PSD's traditional, older, more rural political base.

The numerical results of DNA's work has been very impressive, i.e. resulting in very large number of investigations and convictions. By the end of 2013 the EU could report 4,700 cases<sup>26</sup> with a conviction rate of over 90 per cent<sup>27</sup>. Among those many high level politicians were also

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<sup>24</sup> Serviciul Român de Informații

<sup>25</sup> <http://stirileprotv.ro/stiri/actualitate/hans-klemm-slabirea-legislatiei-poate-expune-romania-la-amenintari-venite-de-peste-hotare.html> on the American Ambassadors blunt statement about the planned amendments of the ...

and <https://sg.news.yahoo.com/us-sternly-criticizes-romanian-justice-plans-200523712.html>

<sup>26</sup> REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT. EU ANTI-CORRUPTION REPORT. PDF). European Commission. 3 February 2014.

<sup>27</sup> [Bringing in the scalps: the woman leading Romania's war on corruption", Theguardian.com,](#)

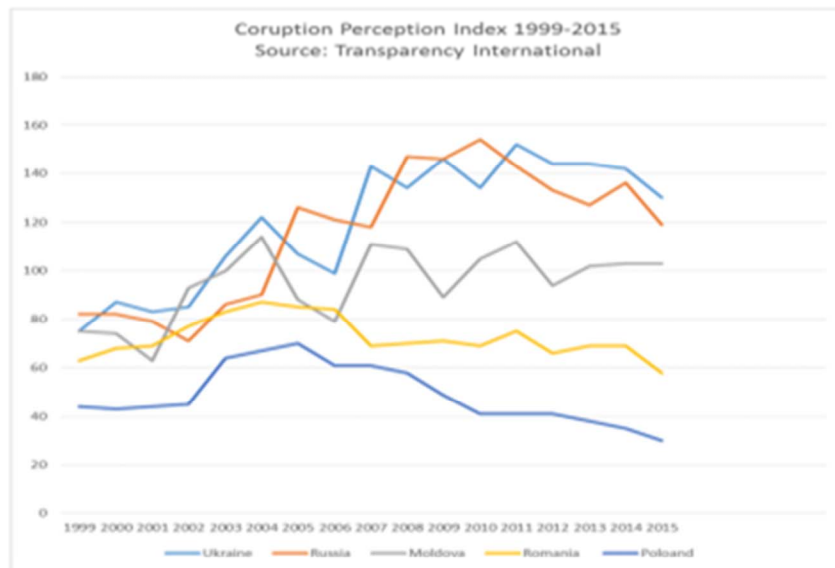
detained and investigated as well as convicted. Since then the process continued and currently the leader of the PSD, Liviu Dragnea is also investigated and his assets frozen.

Undoubtedly Romania has been a very corrupt country by EU standards, even within the Central and East European region. It has become an important laboratory of how far such repressive institution can transform a country towards the rule-of-law. A frequent charge of the critics of the DNA is that its work has paralyzed public administration. The comparative dataset of the World Bank seems to strengthen this suspicion insofar the government effectiveness indicator has sharply improved in the case of Poland since 2006 from already a much higher level while it further deteriorated for Romania. It is conspicuous because all the other governance indicators have improved in Romania – albeit again typically less strongly than for Poland. Transparency International's Corruption Perception Index also shows a similar pattern: after a period of deterioration, it improved for Romania since 2007 but it actually improved from a higher level for Poland even more.

This underlines the question if these repressive methods have the capacity to create a lasting change in the attitudes towards corruption.

However, the main charge against the method is that it has caused significant damage by the secret nexus between DNA and SRI undermining democracy and fighting, with the energetic help of the American government, against reigning DNA under democratic control. Even former President Basescu, who in a way had released the Gini from the bottle, weighed in since 2016 against the overpower of the SRI – DNA nexus, accusing them using networks of journalists against those daring to contradict their verdicts.

The agency “routinely breaches Chinese walls between the executive, judiciary and law enforcement represents a flagrant breach of individual rights”. Kochan accuses DNA of intimidation and removal of judges, political or personal foes, excessive pre-trial publicity, “preventive detention” improper and illegal use of plea bargain to obtain confessions against high profile targets and illegal use of intrusive counter-terrorism methods in the investigation of corruption cases. As an outside observer has said: “Conviction rates in Romanian corruption cases are astonishingly high at 92%, and a close look at the methods used by the DNA reveals why. Almost all of the most high-profile cases involve one kind of procedural violation or another.”



The agency works with an “exceptionally wide” definition of corruption. It has initiated more than 10,000 cases – it sets its net very wide. Given its right to order pre-trial detention for up to 180 days, many defendants subordinate and confess due to fear of public humiliation given that the agency routinely leaks material aimed at undermining the defendants public profile, and damage to personal lives.

The Agency is widely attributed to go after political targets. This has been helped by declaring corruption a threat to national security, this way “legalizing” the involvement of SRI who are credited to execute 20,000 telephone wiretapping per year on behalf of DNA, ten times more than what they execute for national security purposes.<sup>28</sup> The de facto subordination of the DNA to the SRI is facilitated by the fact that SRI is by far better equipped thanks to American support to its activities out of the US concern of terrorism in a country whose geopolitical importance has increased enormously thanks to the sharpening conflict with Russia and Turkey’s drifting away from the Western alliance.

The presumption of innocence, enshrined in the European Convention on Human Rights is often violated by showing defendants in handcuffs in front of the media, putting them in detention in order to stigmatize them ahead of their trials and systematically leaking evidence to the media to limit the possibility of a fair hearing in court.<sup>29</sup>

<sup>28</sup> TESTIMONY OF DAVID CLARK. In [https://www.luju.ro/static/files/2017/iunie/18/David\\_Clark\\_Testimony\\_Final.pdf](https://www.luju.ro/static/files/2017/iunie/18/David_Clark_Testimony_Final.pdf)

<sup>29</sup> ibid



SRI's active role in prosecutions as well as the admission of its own general that they treat even the courts as "tactical field", i.e. a field of secret involvement has caused such an uproar that also prompted MEDEL, the international association of judges to warn against the attack of the independence of judges, ultimately of democracy in Romania.<sup>30</sup>

The ruling coalition has recently tabled a new set of legislative proposals, after the PSD's draft amendments in February 2017 were forced to be withdrawn after large urban street protests. The current proposals have triggered so far less sharp reactions, street protests but also a sharply negative reaction by the US State Department . At the bottom of this lays a paradox. While the proposals may seem actually balanced, in the current Romanian context they are widely seen by its opponents (young urban middle classes, the US and, to some extent, the EU) as serving the interests of the current parliamentary majority, at its helm with the PSD that is widely, with justification, regarded as an oligarchic or mafia formation. The fear, again not unreasonable, is that these proposed changes would weaken the fight against corruption. Thus the situation is utterly complex because on one side stands the democratic parliamentary principle and a set of provisions aimed at strengthening the rule-of-law, on the other another set of claims in the name of the rule-of-law plus the supreme goal of wiping out corruption. To make the case even more complex is the fact that there is no ultimate evidence that DNA's fight against corruption will yield in lasting changes. On one hand the indicators, as we mentioned it above, show improvements in Romania but not convincingly stronger than in the case of other new EU member states without such measures, on the other hand they also strengthen the case of those who claim that such improvements without more complex measures actually paralyze the state apparatus that is just waiting for the more comfortable situation to return.

It would be good if both, the international community and Romania's urban communities approached this less as a partisan brawl but analytically: they could help Romania to strike a good balance between meeting all these requirements, particularly that of democracy, reduction of corruption, upholding the rule-of-law and efficient governance. In order not to waste the real value that has been produced by creating and sheltering DNA should be protected by such corrective measures. It is all the more complex task that the current main governing party, PDS, is by no means a cheerleader of those values. But in the current controversy most of the elements of the changes in the legal position of judges and prosecutors is good while many proposed changes in the criminal procedural law are serving simply the interest of those under criminal investigation or convicted for corruption – and as such should be opposed .

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<sup>30</sup> European magistrates concerned that the involvement of the secret services in the Romanian judiciary process has not been clarified yet. Uniunea Nationala a Judecatorilor din Romania. November 21, 2015. <http://www.unjr.ro/2015/11/21/european-magistrates-concerned-that-the-involvement-of-the-secret-services-in-the-romanian-judiciary-process-has-not-been-clarified-yet/the-romanian-judiciary-process-has-not-been-clarified-yet>, unjr.ro, 21 November 2015.

**Various governance data for 5 countries, 2000-2011**

Country/year	Government effectiveness	Regulatory quality	Rule of law	Control of corruption
Bulgaria 2000	56.4	60.0	48.5	53.8
2006	54.6	68.1	51.2	56.1
2011	60.2	70.6	52.1	51.7
2016	65.4	73.6	53.9	51.4
Georgia 2000	28.2	34.4	20.8	15.2
2006	47.8	51.0	40.2	58.6
2011	69.2	74.4	51.2	61.6
2016	71.1	81.3	64.0	74.0
Hungary 2000	82.1	93.1	80.7	77.7
2006	77.6	85.8	82.9	74.2
2011	72.0	80.6	72.8	68.7
2016	69.2	71.6	70.2	61.1
Poland 2000	73.9	76.4	73.3	76.1
2006	65.85	72.1	62.1	64.9
2011	71.1	78.2	73.2	72.0
2016	73.6	79.8	74.5	76.4
Romania 2000	42.6	48.7	45.1	36.0
2006	48.8	64.7	50.1	53.2
2011	44.1	73.9	57.3	52.6
2016	48.1	70.1	61.5	58.2
Ukraine 2000	26.2	29.2	14.4	8.6
2006	36.6	31.9	24.9	24.9
2011	21.3	29.8	23.9	15.6
2016	31.7	36.1	23.6	19.7

Source: World Bank, Worldwide Governance Indicators, 2017.

## Struggle for the rule-of-law in the FSU

The problem of most of the post-Soviet states is different from that of Poland and Hungary: they have not left patronal politics and they have not ever started to transform the provision of justice into an arm of the state independent of the executive branch. This is the most crucial difference that divides them from the community of the European Union and also from most of the new member states. In the case of the latter, this transformation is a work in progress that has now in some cases experienced a backlash and retreat. We do not know how far judicial independence will roll back in Poland and Hungary and whether other countries will follow their path. In countries like Ukraine and Moldova, or Russia, this project has never really picked up. It has rather been a fight for control over a mafia-like hierarchically organized prosecution service and a subordinate, often corrupt sometimes simply sheepish, judiciary.

However, the case of Georgia is worth of particular scrutiny after having discussed Romania as the problems of the two are not that dissimilar and Georgia demonstrates some of the features of policy packages that contributed to lasting impact that may be missing in Romania in spite of the incomparably larger EU assistance to the latter. The reforms in Georgia in the Saakashvili period in some important aspects brought breakthrough even if neither they have established a perfect rule-of-law situation nor can we be sure that their effects will sustain for a long period after the change in power in Georgia in 2012. The 8 years of Saakashvili produced a mix of policies that certainly none of the international organizations got even close to advise. In some ways many international supporters of Georgia proved to be obstacles in parts of the 2004-12 period let alone intellectual or political drivers of radical reform. The reforms there were entirely homemade. What the policy mix in Georgia entailed is radical deregulation and privatization of assets and businesses, shrinking the state, in the most corrupt and visible branches of government replacing the entire cadre and paying well to the renewed branch of government, draconic legislation and implementation against corruption and organized crime and improving the professional level of the judicial sector, including prosecution.<sup>31</sup> These days it is customary to label Saakashvili's reforms as "clamping down on petty corruption" but this does not give justice to the far-reaching systemic changes that had occurred in Georgia. Earlier the Mecca of organized crime within the former Soviet Union, Georgia became essentially free of it. Most forms of corruption were wiped out and the economy since then has developed strongly.

What is true is that the judicial practice strongly favored the new political rulers in the name of modernization. The rule-of-law was not firmly implanted also institutionally: courts and the prosecution did not become independent. And arbitrariness on the top prevailed, resulting in paying regularly enough to the ruling party's political purposes. However, while the breakthrough cannot be characterized as one towards entirely the rule-of-law, the pervasive

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<sup>31</sup> See my detailed description in Mizsei, Kálmán, *The new East European patronal states and the rule-of-law*. In (Ed by) Magyar, Bálint, *Stubborn Structures - Reconceptualizing Post-Communist Regimes*. CEU Press, 2018 (forthcoming)

clientelist feature of the economy and the entire public life reformed in a truly radical fashion. In that sense the Saakashvili reforms can be characterized as incomplete but at the same time a real transformational breakthrough. And they held during the first cycle of the following, Ivanishvili regime from 2012. In fact, in some areas they even improved by making serious steps towards exactly judicial reform, the area of our concern.

However, after winning a constitutional majority in 2017, the Georgian Dawn (the by far richest oligarch Ivanishvili's party) became less restrained and it seems that their reformist attitude is changing towards a more traditional clientelist one. In this sense a partial reform backlash/reversal has undoubtedly been observed in Georgia as well, accompanied by a strong narrowing down of the political space. However, at this point it is too early to say if the EU's pressure will be able to hold their hands back. What one can say with certainty that without the influence of the European Union Georgia's reforms would largely be rolled back and things would return to "norm".

So far, the advancement of the economic performance and, in lieu, Georgian governance has been strong thanks to the package of reforms listed above in a far more convincing fashion than that of Romania. However, there is legitimate concern that it may not hold since Georgia is far less embedded in the EU's rule-of-law system than Romania is by not being a member, having only an associate status. Over time this difference may well be decisive in the comparative dynamics of the two countries.

Here the issue is if the EU has enough leverage to force reform on the ruling elites. The EU's impact is limited for two reasons: first, it does not possess the really powerful positive stimulus that is the membership perspective. Its allure has also weakened due to the aftermath of the 2008 crisis. The demonstration effects of Hungary and Poland should not be underestimated either. Finally an important limiting factor is that it is not easy for the EU bureaucracies to understand the context and thus elaborate effective mechanisms to transform the judicial sector in these countries. Neither is it easy for them in periods of retreat to see what they definitely need to try to protect and where are the possibilities for not too expensive compromises from the perspective of the long haul.

In Ukraine three factors have driven positive dynamics, meaning a systemic struggle away from patronal politics: an ever stronger and more articulated civil society sector, the pluralistic nature of oligarchic capitalism and the relative influence of international players. As to civil society, their evolution has been marked by two (by other counts three) revolutions. Since the initial demonstrations for independence, in 2004 and 2013-14 massive demonstrations led to new elections and regime change. None of this generated, however, follow up reforms deep enough to get Ukraine out of the patronal (mafia) system<sup>32</sup>.

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<sup>32</sup> See Hale, Henry for an illuminating description on the aftermath of the Orange revolution in Patronal Politics...

The revolt – partial reform – regress dynamics was helped by the pluralistic oligarchic nature of Ukraine. By this we mean that in the Kuchma-period many oligarchs emerged for the purpose of stabilizing Kuchma's rule in the way Yeltsin had been helped by the emerging oligarchs. However, in lack of unquestioned strong ruler, such as Putin in Russia, the effort to stabilize patronal rule has always derailed. First, Kuchma was forced to abandon changing the constitution and getting reelected the third time; then the two revolutions prevented Yanukovich to consolidate his power. The pluralistic oligarchic nature of Ukrainian business and, indeed, politics has contributed to this as some of the oligarchs, falling out with Yanukovich or simply betting on his failure, supported protests in the critical moments. Finally, the geopolitical dynamics between Russia and the West also means that Russia's desire to dominate Ukraine has pushed the latter towards the somewhat reluctant West who on the other hand have demanded structural reforms.

Since Ukraine is large outside the EU member state and candidate state realm (basically in the area in the former Soviet Union that Russia has historical claim over), its systemic dynamics will have an important consequence to the spread of the rule-of-law area and also to the economic wellbeing of the continent. Moreover, implanting successfully the rule-of-law culture would also make Ukraine less vulnerable to Russia's aggression. So far these efforts have not been particularly successful if measured by change of the fundamental attributes of the patronal state<sup>33</sup>. It is also hard to predict when more marginal reforms and civil society maturing will add up to this breakthrough. The cluster of core problems of Ukraine is in the economic policy and judicial system realm. The non-private sector in the economy is still large, allowing for rent-seeking. The eternally extended freeze of agricultural land sales adds to this problem in a country with huge agricultural potential. As the president of the country is himself a significant oligarch, judicial reform has stalled out of the fear that independent judiciary may go after oligarchic wealth. Only a strong control of the courts and the prosecution can guarantee the avoidance of this risk as well as weakening potential political or business rivals through persecution.

Ukraine's systemic dynamics are moved by three factors: the economic cycle, the degree and imminence of Ukraine's dependence on Western support and the point in the political cycle. At the moment each of these point towards reform reversal: Ukraine now is less reliant on Western help than it was in 2014 and the first half of 2015 when its war with Russia was very active and without the IMF's macroeconomic support it could also have hardly survived; its economy now, although not a success but has entered a modest growth phase and it is getting closer to the presidential elections and is vital for Poroshenko to narrow the political competition. He has been successful in staying on top of Ukrainian politics although the modest economic progress, lack of rule-of-law reforms and lack of progress in reducing corruption make him very unpopular. He has neutralized, albeit with difficulty, his potentially most troubling domestic rival, the former Georgian President Mikheil Saakashvili and he has no

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<sup>33</sup> A detailed discussion of this see in Mizsei, Kálmán, op.cit.

obvious strong challenger at the moment for the Presidential elections due in 2019. And he has successfully held off reforms that could have resulted in direct personal risks for him. Most importantly, judiciary and, particularly, the prosecution as well as the domestic secret services have remained pliant to him.

If any remotely cyclical dynamics is to be observed in Ukraine it is more shorter term oscillations than those long waves that we observe in case of Hungary and Poland. In fact, it is still possible to be optimistic about Ukraine's long trend. Civil society, growing from the long shadow of the Soviet Union, can be seen as ever more organized, its think tank community ever more sophisticated in knowing what exact reforms could be feasible and make a real difference. The international environment could be more conducive insofar the US foreign policy has become under President Trump's leadership less focused and certain which way it is going. In Ukraine the US influence was much more felt in the immediate post-Maidan period of 2014-15 than it is now. In fact, this international influence seems to be the strongest conduit through which Ukraine's "reform cycle" is linked (but not strongly harmonized) to the rest of the region.

Ukraine, in spite of the reform reversal, is still a very open political space, open to ideas and political competition. At the moment each of the three frontrunner countries for EU integration in the Eastern Partnership area are ruled and quite far-reachingly controlled by an oligarch and only the Ukrainian president rules from the strongest official position. Ivanishvili and Plahotniuc are running Georgia and Moldova subsequently not by occupying the most important position but by using their wealth as well as the power institutions of the country to dominate politics.

What makes so difficult to implement independence of the judiciary first of all is the lack of trust – people in position to implement such reforms are very rarely ready to release control since they themselves could be easily persecuted. And the European Union is not able to offer attractive enough short term perspectives to the rulers to mobilize them to make personally painful and risky sacrifices in the form of judicial reforms. As we wrote above, Ukraine's situation seems more of a recurring one with still many potential openings for reform. Georgia, on the other hand, is in the phase of quite likely reform reversal but from the position of strong original reforms. As said, even the post 2012 period saw strong advancement in judicial independence. Only in 2016, after the overwhelming electoral victory at the parliamentary elections of Georgian Dream of the oligarch Ivanishvili, started the dynamic turn negative. It is at the moment impossible to say how far the pendulum will swing back if at all in this period.

Moldova's situation is the least promising out of the three. The degree to which Plahotniuc has consolidated his power is quite unique in the post-communist European scene in the way he has not so far secured any electoral legitimacy. His party was the minority coalition partner after the last parliamentary elections but particularly via his personal control over the prosecutor general, the secret services as well as the bulk of the media space over time he has been able to gradually control most of the important levers of political power through corruption and blackmail. His level of informality in the way power is practiced is truly

remarkable but becomes less unprecedented in the region, after Ivanishvili's and Kaczynski's examples. Since Moldova is a small, largely rural country, the space for plurality is markedly smaller than in Ukraine.

On the other hand, the country has steadily expressed its desire for European integration. The question is how the EU has been, and going to be, use this lever to assist the Moldovan society to become a rule-of-law society from its current strongly patronal ways.

The Balkans occupies a place closer to the East European social organization but not as extreme. For the attention of this paper the most interesting case is Macedonia. Macedonia's political system first, under Gruevski in the decade of 2007 to 2017, moved rapidly and radically in the direction of radical reduction of the scope for pluralistic politics and the rule-of-law. For several reasons this anti-liberal project could finally not be completed. As in Moldova, political pluralism was sustained partly by the multiethnic nature of the state where the minority ethnic component could not as easily be incorporated into the patronal state as the public of the titular nation. Also, Western orientation of the majority of the Macedonian public made the regime vulnerable to significant external influences. Here too, civil society activism combined with the pluralistic effects of a multiethnic society, resulted in a color revolution in Macedonia starting in 2015. As a result, Macedonia's rule-of-law reversal could be corrected politically in a way only a few expected. Now, with the political (re)opening, Macedonia's new government is intent to re-establish the democratic checks and balances that were weakened in the Gruevski-decade. Its parliament has established a Special Prosecutor who is reviewing the abuse of power during the Gruevski years. A particularly important dilemma is how to best reestablish independent judiciary. This dilemma is not that dissimilar from the one in Ukraine in 2014 but the size of the country is very different and it matters. Perhaps it is also different in that it is not as corrupt, and, importantly the criminality of the state did not reach such a degree under Gruevski in Macedonia as it did under Yanukovich in Ukraine.<sup>34</sup> But political interference was surely massive and anecdotal evidence also reports on large scale corruption of judges. The current political opening gives a chance to change. How it will happen is, however, a big question that hopefully could be informed by a careful study of the cases touched upon in this paper. One of the main contentious issues is if there should be a massive lustration or screening of the judges for past malpractices or politics should trust self-cleaning of the judiciary. It will only be decided over the next period but the European Union seems to be influencing the Macedonian government towards gradualism so that the government can concentrate on other, more technical issues of fulfilling the EU's expectations so that the country can move relatively fast towards an EU candidate status.

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<sup>34</sup> In the 2016 Corruption perception index of Transparency International Ukraine's position is noticeably lower than that of Macedonia's: 131st relative to 90th. (Poland occupies 62nd and Hungary 57th place in the same list where 1st is the best, relatively least corrupt country.)

## Conclusion

East European democracies are young and have freshly come out from a particularly corrupting system of governance, Soviet-type socialism. In their first two decades some of them, mainly the ones now in the European Union, have made remarkable improvements towards rule based societies. However, from 2010 remarkable and unanticipated reversals have been happening. Thinking about the reasons of these reversals, one is only partially aided by the analogy of backlash to globalization even though the two processes clearly interact. The reason for this limited use of the analogy is twofold. First, the losers of the rule-of-law regime are much less but concentrated: some businesses that would like to be protected from market competition and politicians who want to stabilize their grip on power. Second, the rule-of-law regime is even more of an abstract notion than market competition. Therefore it is utterly difficult (but not entirely impossible!) to mobilize people around the cause of protecting a rules-based system. Thus, I would underplay the factor that is typical in some trend reversals (again, mostly in observing the pulsations of globalization is the most instructive contrast): the tensions that the given trend has produced.

But exactly this difference leads us to the first and perhaps most important driver of the reversals: politicians desire to cement in their power. I mentioned already above that the culture of thirst for “the final victory”, inherited from half a century of socialism, has remained with us. In this the “right wing”, nationalist parties have a psychological advantage insofar they have an authentic feeling that after notional internationalism “their time has come” and they are the natural holders of power. Orbán’s infamous “the motherland cannot be in opposition” illustrates this best. It is meant also to fill the legitimacy gap that dubious elections, as in Hungary in 2014 where the playing field was the least even and the rules were tailor made for FIDESZ, have created.

While this thirst to “lock in” power has always been there, other factors that facilitated the reform reversals are specific to the current time. Of those what appears to be the most important is the change of the set of international influences and that is also responsible for the degree of “harmonization” that I have shown in this paper. Two factors stand out here: Russia’s “innovative” governance model and what it meant towards the countries of its more or less influence and the EU’s declining influence in the period of reform retreat. The EU has both, lost a bit of its self-confidence and ambition during its crises since 2008 (but perhaps since the blockage of the constitution in 2005) and has found it difficult to adjust to the new task of managing new members and new neighbors with large governance deficits.

Why Hungary? This question needs further analysis but perhaps circumstance stands out: Orbán’s constitutional majority in 2010 was a great opportunity, accompanied by the international environment that was favorable to such courageous albeit regrettable venture. Hungary’s pull effect for Poland then was an important factor. The demonstration effect of the two will be considerable for the rest of the region and, perhaps, beyond. Thus understandable is the European Commission’s harsh reaction to the Polish constitutional coup. It wants to show



that such trend is no more tolerable. Time will show how much the EU will be able to cope with such dangerous precedents and demonstration effects.