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Romanian Rule of Law Reform: A Two-Dimensional Approach

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The rule of law entails the implementation of predictable, efficient, and fair legal decisions and rules that constrain government actors. Creation of the rule of law within a county is a complex process, often involving fierce battles between reform advocates acting as change agents and reform opponents with incentives to maintain the status quo of a biased, non-transparent, and corrupt legal and judicial system serving their particularistic interests. The judicial reform efforts in Romania between 2000 and 2009 can be understood as an attack on the existing mode of judicial and political organization, which was characterized by clientelism and bias more than by the impartial rule of law. The main weapon of reform employed by the transnational coalition of reformers, including both international and domestic actors, was EU conditionality that tended to take a formal and technocratic approach emphasizing the improvement of judicial capacity and efficiency.

How successful were recent judicial reforms in Romania? Did these reforms lead to the creation of rule of law? Recent reports consider Romania to have had a mixed outcome of success and failure (European Commission 2006a and 2010; Gallagher 2009, 7; Alegre, Ivanova, and Denis-Smith 2009). The World Bank composite governance indicator for the Rule of Law does not show a statistically significant aggregate change for Romania over the period 2000-2008, ranking it near to the middle of the distribution of post-communist countries (World Bank 2010).

My approach towards the assessment of rule of law is more differentiated. It is based on an understanding of the rule of law as a two-dimensional concept, consisting of a judicial capacity dimension and a judicial impartiality dimension, both of which are individually necessary but jointly sufficient for real progress. In the empirical analysis, I will show that these two dimensions have developed differently in Romania. While judicial capacity mostly has improved, judicial impartiality has remained relatively unchanged. I argue that this differentiation can be explained in terms of the agenda and achievements of the transnational reform coalition and the resistance of domestic, anti-reform actors. Unfortunately, the top-down approach of the reformers, with its focus on formal judicial

capacity, failed to transform existing power structures and judicial culture. In effect, limited transformative change on the judicial impartiality dimension has undermined the progress made on the judicial capacity dimension. The result was a series of reforms to Romania's legal structure that did not result in the creation of rule of law (i.e., an impartial, predictable, uncorrupt, and accountable judiciary).

The main explanation for the failure of external conditionality and the limited transformative power of the reformist coalition can be found in an inappropriate reform strategy and the resistance of powerful clientelistic veto players. This study thus confirms the failure of a non-complementary, apolitical, and technocratic approach to rule of law reform (Hammergen 2007; Jensen and Heller 2003). It also accords with recent scholarly work arguing that weak state capacity, corruption, and clientelistic veto players undermine the effectiveness of EU conditionality (Magen and Morlino 2008; Mendelski 2009; Vachudova 2009; Ristei 2010; Elbasani forthcoming).

Conceptual Framework for Rule of Law Development in Romania

Creation of the rule of law is a long-term process that reflects different facilitating and inhibiting conditions. The democratization and transition literature presents a number of proposed explanatory variables that generally can be compressed into two main perspectives. The first stresses economic and social development as a driver of modernization and democracy (Lipset 1959; Huntington 1991; Boix and Stokes 2003). The perspective is relatively technocratic in its implications for reform. Given an appropriate level of development, a society can produce the institutional forms necessary to establish the effective rule of law. Advocates of this perspective thus emphasize formal legal changes, judicial education and training, and institutional capacity-building on the assumption that these should lead to the creation of a capable and efficient judiciary that enforces universal legal norms and standards. The second perspective instead emphasizes political development and the distribution of power. It is actor and agency-oriented and gives precedence to domestic elites, civil society organizations, and international pressures (Higley and Lengyel 2000; Vachudova 2005; Orenstein, Bloom, and Lindstrom 2008). The practical implication is that the establishment of the rule of law depends not only on formal and efficiency-related strategies, but on a genuine transformation of power structures necessary to insure judicial independence and impartiality (Bideleux 2007; Acemoglu and Robinson 2006; Rothstein and Teorell 2008).

I argue that both approaches are relevant when explaining post-communist establishment of and variations in judicial reform. Rule of law is thus understood two-dimensionally as including simultaneously judicial capacity and judicial impartiality. The judicial capacity dimension is associated with efficiency-related institutional reforms, reflecting the quality and quantity of financial, technical, and human resources available. It is indicated, for example, by the number of judges, the legal training they receive, and the support services provided. It should vary across transitional societies largely in relation to the level

of socio-economic development and the accompanying development of social infrastructure and human capital. It is the approach most emphasized by international donors (e.g., the World Bank, European Union) intervening with rewards and penalties intended to advance the rule of law through institution-building (Anderson, Bernstein, and Gray 2005; Open Society Institute 2002; Kleinfeld Belton 2005).

The judicial impartiality dimension is associated with reform in the distribution of political power and privilege, breaking the dominance of clientele networks to insure magistrate independence and deter corruption. It is measured by a series of perception indicators, by the ability of prosecutors to win convictions in controversial cases, and by the degree of media and NGO oversight. Judicial impartiality should vary across societies largely in relation to the relative power of the transnational coalition for change. This dimension should be related to associated measures of civic culture, social trust and efficacy, and institutional separation of powers, and it should be negatively related to measures of state capture and organized crime (Samuels 2006; Haggard, MacIntyre, and Tiede 2008; Hellman and Kaufmann 2001; Holmes 2006; 2007).

Practitioners of judicial reform have tended to neglect the power-related dimension and focus more on modernization and the efficiency-related dimension. Those who have emphasized aspects of impartiality, including the creation of judicial independence and the fight against corruption, have been technical in their approach, often recommending Western methods not effective in practice when applied in post-communist societies (Krastev 2005). Rule of law reformers have failed to create incentives that would change the underlying vertical structure of power in society or alter the behavior of magistrates. Formal institutional strengthening has little impact when not proceeded by a broad consensus on the direction of reform and when not linked to *de facto* improvements in court performance.

I argue that, for a nation seeking successful transition from authoritarian or communist rule, progress must be made along both dimensions in order to achieve high quality rule of law. It is important to note, empirically, that the two dimensions need not automatically advance at the same rate. Significant disjuncture between them can produce, for example, efficient but not necessarily impartial judicial enforcement. Appropriate reform strategies must avoid reliance upon those changes easy to implement and relatively non-controversial, and must establish standards based on actual performance.

This chapter will show considerable divergence in achievements across the two dimensions in post-revolutionary Romania. Explanation will focus on the political dynamic between the transnational coalition of reformers and the opposing efforts of reform opponents defending entrenched interests, with both sides embedded in existing institutions. Actors, however, were not always fixed in their positions. Their demands and the power of their coalitions varied depending on the issue dimension addressed. It was easier for change agents to unite regarding matters of technical capacity than on matters protecting judicial impartiality. It was more important for potential veto players to oppose *de facto*

implementation that would have endangered their privileges than on any formal legal or institutional changes that gave the *de jure* appearance of improvement.

The chapter also pays considerable attention to the role of external and international actors, especially the potential transformative role of the EU in promoting domestic change, during the pre-accession period and beyond (Vachudova 2005; Grabbe 2006; Alegre, Ivanova, and Denis-Smith 2009). Some scholars have viewed EU conditionality as the most effective weapon to induce change (Schimmelfennig and Sedelmeier 2004; Moravcsik and Vachudova 2003). The EU indeed has leverage through its diverse instruments of guidance, monitoring, technical and financial assistance to promote the development of judicial capacity, empower reform supporters, and thus influence the redistribution of power (Risse, Cowles, and Caporaso 2001). This account is less optimistic. EU engagement regarding the rule of law in Romania has not produced vertical transformative change, resulting in superficial reforms that have left existing power structures unaltered (Bideleux 2007). The result is that formally well-elaborated new rules were adopted but not implemented in practice and that judicial-capacity reform measures advanced more rapidly than judicial-impartiality reforms.

Regarding the progress of judicial reform in Romania, I distinguish three separate time periods. The first period, from 2000 to 2005, saw externally the opening of EU accession negotiations and the start of EU leverage, and domestically the initial efforts at formal reform for the Romanian judiciary. The second period, from 2005 to 2007, saw externally the introduction of EU safeguard clauses and domestically efforts at accelerated judicial reform under President Basescu and Justice Minister Monica Macovei. The third period, from 2007 to 2009, saw externally the introduction of the EU Cooperation and Verification Mechanism (CVM) but domestically a degree of reform backsliding after Romania's successful accession.

The following two sections examine the changes by period for the dimension of judicial capacity and then the dimension of judicial impartiality, reflecting the engagement of domestic and international actors as they affected rule of law reform in Romania, albeit differently for the two dimensions.

Creating Judicial Capacity: Relative Success

The first EU-driven judicial reform attempts were launched in late 1999. The accession partnership required Romania to undertake several measures to "improve the functioning of the judiciary including (i) adoption of a new penal code; (ii) adoption of the law on penal procedure." It was also required to "reinforce the independence of the judiciary, introduce objective criteria for recruitment and career development," reinforce administrative and judicial capacity (e.g. training of judges and prosecutors, adequate equipment etc.), "adopt a law on prevention of and fight against corruption and establishment of an independent anti-corruption department," and "upgrade law enforcement bodies and the judiciary to continue the fight against organised crime, drug trafficking and corruption" (Official Journal of the European Communities 1999). These reform requirements prompted the amendment of old and the creation of new formal

legislation (e.g., the Law on the Organization of the Judiciary, the Civil Procedure Code).

It is reported that Romania ratified forty-five conventions for harmonization with EU regulations (Schumer 2000). Additionally, Romania signed several international treaties on anti-corruption (e.g. Council of Europe Criminal Law Convention on Corruption in January 1999, United Nations Convention on Corruption in October 2003) and on organized crime (e.g. UN Convention Against Transnational Organized Crime in December 2000). New agencies were created to foster administration and implementation (e.g. a Training Centre for clerks, the position of a court administrator) and to fight judicial corruption (e.g. the National Anti-Corruption Prosecutor's Office in 2002). These new bodies, as well as previously created ones (e.g. the National Institute of Magistrates and the Superior Council of Magistrates) had initially few resources and staff, and thus, proved neither independent nor capable enough to improve *de facto* the rule of law. Because of the continuing, powerful role of the Ministry of Justice, the judicial system in Romania was described as hierarchical and centralized, leaving the courts "both unable to function effectively and unable to take any initiative to address their problem themselves" (Open Society Institute 2002, 181).

The formal adoption of law was appreciated by EU representatives. Yet the transplantation of foreign law without a thorough evaluation of its impact created unintended negative consequences for the Romanian judiciary. For instance, according to the 2003 changes to the Civil Procedure Code, the High Court of Cassation and Justice was given responsibility for ruling on all appeals, creating an extraordinary backlog of cases (up from 3,175 in 2002 to 35,800 in April 2004). This situation was rectified only in May 2004 when responsibility for second appeals was given back to tribunals and courts of appeal (Parvulescu and Vetrici-Soimu 2005, 7).

Even when the new rules were appropriate, weak administrative and judicial capacity hindered practical implementation. Court-level administration was substandard due to a lack of resources and management skill. Judicial training was insufficient due to low funding for the National Institute of Magistrates. There was a lack of competent clerical staff. Judicial organization was chaotic and prone to political intervention. According to a report by the Open Society Institute (2002, 183):

> The shortage of judges and supporting staff and their insufficient training has led to inefficient case management. Clerks are crowded into small offices and lack necessary professional equipment; . . . clerks do not benefit sufficiently from the available legal training and therefore their ability to offer assistance is very limited. This in turn contributes to extremely slow and lengthy court proceedings. Significant case backlogs affect the quality of judgments, encourages parties to seek extra-judicial remedies or to turn to corrupt practices, and generally affect public trust in courts.

Judicial capacity was further constrained by the poor judicial infrastructure and a lack of equipment (e.g. computers), as well as an antiquated and ineffi-

cient case filing management system based on an "archaic series of manually maintained and overlapping case registers" (Open Society Institute 2002, 184).

The overall poor situation of the Romanian judiciary was criticized by the EU, which urged Romanian elites to overcome the lack of judicial capacity and independence with a new and comprehensive judicial reform strategy. This, however, was badly drafted and poorly implemented during the mandate of Justice Minister Rodica Stanoiu, who served from 2000-04 during the period of Social Democratic Party dominance (Gallagher 2009, 149). Nevertheless, the period did see somewhat higher judicial salaries, more judicial personnel, and enhanced computerization.

The change in government, starting in 2005, led to an acceleration of judicial reforms. Romania's reputation within the EU began to improve, not because of new rhetoric (Pridham 2006) but from a greater elite reform commitment (author's interview with anonymous EU Commission official, March 2006), led by Justice Minister Macovei and President Basescu. They were encouraged by EU pressures threatening postponement of accession through the safeguard clause (Demsorean, Parvulescu, and Vetrici-Soimu 2008, 96). All the main judicial reform strategies and action plans designed by Romanian authorities during this period were either developed jointly with the EU Commission or referred to EU membership requirements, addressing the critiques and suggestions made in EU evaluation reports. In addition, the EU provided financial and technical assistance, for example by raising PHARE allocations and establishing twinning programs that brought EU experts and practitioners to Romania (European Communities 2005, 21). The new leadership prepared a revised and well-elaborated *Strategy for the Reform of the Judiciary 2005-2007*, aimed at strengthening judicial capacity through technical and efficiency-related measures including computer technology. Indeed, a Transparency International survey of magistrates indicated that these measures increased the "rate of using a computer daily for judicial tasks" from 51.7 percent to 78.8 percent between 2005 and 2007 (Transparency International 2007, 17). The annual judicial budget almost doubled between 2004 and 2006. Judicial salaries increased as did the number of magistrates. Court administration and management was improved. This relative success in strengthening overall judicial capacity was recognized by the EU in its May 2006 monitoring report (European Commission 2006a, 7).

The contrast with earlier efforts can be seen in the strengthening of the Supreme Council of Magistrates (CSM) as the guarantor of judicial independence. The EU had criticized the CSM for insufficient capacity and weak accountability (European Commission 2006b, 10) and subjected the matter to one of the benchmarks of the safeguard clause. Backed by the EU, the new government enhanced CSM capacity. Its annual budget increased, from 2005 to 2008, from nearly 3 million EUR to 20.1 million EUR and the number of administrative posts was augmented from 151 to 240 filled positions (European Commission 2006a; 2008). In July 2007, the EU Commission report noted that the administrative capacity of the CSM has been fully achieved (EU Commission 2007, 11).

EU accession in 2007 did not end international efforts to strengthen Romanian's judicial capacity. Under the Cooperation and Verification Mechanism

(CVM), Romania's judiciary was subject to benchmark-based monitoring. Capacity-building reforms included the unification of the jurisprudence of courts and prosecutor offices, strengthening the public ministry's institutional capacity, improving the system of Romanian judicial statistics, strengthening the probation system, and improving management and media training for magistrates. Post-accession evaluations by the European Commission were mixed. Although a new Human Resource Strategy for the judiciary was adopted in November 2008, the Commission remarked that "the situation remains a challenge for Romania in terms of the budgetary costs and in providing qualified personnel and support infrastructure" (EU Commission 2009b, 4). The number of magistrates declined, resulting in a heavy case workload. The Commission recently identified declining quality for judicial personnel, produced through the application of an extraordinary direct entry examination for legal professionals that permits recruitment of non-experienced magistrates as opposed to better trained graduates from the National Institute of Magistracy (European Commission 2010, 5).

The main focus of the post-accession period, however, was the fight against judicial and high-level corruption, which brought considerable revision to the formal legislation of the Civil and Criminal Procedure Code. Implemented through amendments to existing law and through emergency ordinances, the consequence was often incoherent and conflicting legal provisions. According to the EU Commission (2009b, 6):

> the jurisprudence of the Romanian judiciary is contradictory, generating undue delays which, in turn, are addressed in a legislative patch work of emergency ordinances, implementing rules and practices. The ensuing complexity is the result of a politicized process and the broad based political consensus behind reform and the unequivocal commitment across political parties to ensuring real progress in the interest of the Romanian people is not yet there. There is a risk that an ever growing web of legislation, implementing rules and practices resulting from permanent political party in-fighting may cause all concerned to lose sight of the main objective, i.e. to establish an independent, stable judiciary which is able to detect and sanction conflicts of interests, and combat corruption effectively.

There is a danger to overall efficiency from the non-coherent, non-transparent patch-work transplantation of legislation from abroad and the recruitment of new judicial staff without paying attention to their quality and preparedness.

In sum, EU and domestic actors were able to bring about progress, although certainly less than complete, through legal, technical, and administrative improvements within a relatively short period of time. The positive trend in the domain of Romanian judicial capacity began under the PSD administration of Minister Stanoiu and accelerated considerably under Minister Macovei, although there has been backsliding in some areas since EU accession. This can be seen clearly in the indicators of judicial capacity reported in Table 7-1.

Table 7-1: Selected Indicators of Judicial Capacity

	2002	2004	2006	2008	Net Change
Number of professional judges per 100,000 inhabitants	17.0	18.6	20.7	19.2	+ 29.9%
Number of full time court staff per 100,000 inhabitants	40.7	41.4	43.0	40.2	- 1.2%
Number of public prosecutors per 100,000 inhabitants	9.5	12.8	12.7	11.1	+ 16.8%
Annual budget for courts and prosecution per inhabitant, in Euros	7.8	9.0	17.0	25.0	+221.8%
Annual salary, judge in the highest court, in Euros	13,017	18,894	34,082	36,802	+182.7%
Annual salary, public prosecutor at the beginning of career, in Euros	-	4,056	7,936	15,667	+286.3%
Direct Assistant to the Judge, on scale from 1-4	-	2.6	3.4	4.0	+ 53.8%
Administration and Management, on scale from 1-4	-	1.0	3.7	3.0	+200.0%

Sources: Council of Europe 2006; 2008; 2010

From 2002 through 2006, the number of judges, court staff, and public prosecutors per Romanian inhabitant grew substantially. In the case of judges and prosecutors, the growth exceeded the cutbacks between 2006 and 2008, resulting in a considerable net increase. The budget allocation for courts and prosecution per inhabitant tripled, especially after 2004. The same is true for the salaries paid to High Court judges and to prosecutors. The indicator for direct assistance to judges, including electronic files and databases, word processing, e-mail and internet connections, rose from 2.6 to 4.0 on a 4-point scale. The indicator for judicial administration and management, including the case registration system, management information, and financial information, rose from 1.0 to 3.0. The conclusion is that efforts to improve Romanian judicial capacity show signs of relative success. Unfortunately, the same cannot be said for the second dimension of rule of law, Romanian judicial impartiality.

Creating Judicial Impartiality: Relative Failure

Prior to 2005, Romania was notable for the absence of judicial impartiality. First, there was a general lack of judicial independence, which resulted from the interference from the Ministry of Justice and by court officials in judicial selection and appointments. Political and personal connections were more important than merit and the quality of judges (American Bar Association 2002). Judicial independence experienced almost no progress under the mandate of Justice

Minister Stanoiu, which was characterized by two Romanian judges as "the darkest period for the Romanian legal system from the standpoint of the independence of post-communist justice" (Dumbrava and Calin 2009, 8; European Commission 2003). Stanoiu chose a reform strategy that did not include the participation of civil society and judicial associations, provoking both domestic and international criticism. The response was the formation of the "Alliance of a European Justice in Romania," an ad-hoc coalition of young reformist judges supported by Romanian think tanks and NGOs committed to the establishment of judicial independence (Coman 2006, 1021; Coman 2007, 182).

Given pressure from media revelations and European Commission reports, judicial reformers increasingly focused on the issue of judicial independence, which "was about to become the 'miracle drug' for all the transition problems that the Romanian judicial institutions were still facing" (Coman 2007,164). The Constitution was revised in 2003, guaranteeing appointment for life for High Court judges. Three new laws intended to improve judicial independence were adopted in June 2004, regarding the Superior Council of Magistracy, magistrate status, and judicial organization. Nevertheless, the three-law package was not effectively implemented, as the formal change in statute was not matched by a revision of the Judicial System Reform Strategy or the related Action Plan (European Commission 2004, 18).

The second critical issue concerned judicial corruption. A World Bank study in 2001 identified the level of judicial corruption as the second highest within Romania, after that by customs authorities. It identified excessive and poorly implemented regulations as the main cause of corruption and noted that "salary levels . . . do not appear to be statistically important for explaining variations in corruption across Romanian institutions. Transparency in salary levels and structures is apparently more important than the levels and structures themselves" (World Bank 2001, xiii). Nevertheless, the European Commission advocated for increased judicial salaries as a positive measure against corruption (European Commission 2003, 19). In fact, salaries increased but corruption levels did not decline, prompting the Commission to make the fight against corruption a top priority during accession negotiations.

Nor did the creation of the National Anti-Corruption Prosecutor's Office (NAPO) in 2002 have a dramatic effect. The agency was initially under-staffed, under-funded and dependent on the Ministry of Justice and the General Prosecutor. The struggle over NAPO competences, between the transnational coalition of reformers who supported a strong and independent agency and entrenched reform opponents from the Romanian Parliament who supported the status quo, resulted in frequent legislative changes based on emergency ordinances. NAPO legislation was changed "more than a dozen times, making it one of the most amended and changed pieces of legislation in post-communist Romania" (Ristei 2010, 351). Politicians opposed to NAPO empowerment were helped by a verdict of the Constitutional Court in May 2005 restricting the capacity of NAPO to investigate and prosecute members of the parliament and the government. Similarly ineffective was the anti-corruption legislative package of April 2003. Romania demonstrated some political will and adopted EU-demanded legislation

on conflict-of-interest and the public disclosure of assets. However, this new legislation was incomplete, unclear, and only weakly implemented in practice (Ristei 2010, 352).

Starting in 2005, under the right-center government of the Truth-and-Justice Alliance, reform commitments strengthened considerably. Justice Minister Macovei, a former civil society activist, expanded participation from interest groups and professional associations and she refused to interfere with the process of judicial selection and appointment (Dumbrava and Calin 2009, 9; Papadimitriou and Phinnemore 2008, 136). The Minister, supported by President Basescu, introduced several provisions for improved accountability, merit-based selection, independent court management, and budgetary responsibility. The new *Strategy for the Reform of the Judiciary 2005-2007* was accompanied by measures to fight judicial corruption, including the adoption of the updated Deontological Code for magistrates, the random distribution of cases by the courts, wealth and interest declarations, and increased transparency.

Macovei's reform commitment prompted resistance from many politicians and judges. For instance, the PSD-influenced Constitutional Court declared unconstitutional some of the government's proposed actions in order to assure the survival of loyal senior members of the judiciary (*Romanian Digest* 2005). Reform-opposing elites from the previous Nastase government continued to influence the judiciary by means of party networks (Pridham 2006, 21). The incomplete post-communist transformation of the judicial and political leadership had left the old guard in important government positions (Pridham 2007, 250). Senior judges continued to occupy the most important positions in the Constitutional Court and the CSM or function as court presidents, while reform-minded younger magistrates were confined to lower and middle-level courts. Macovei attempted to challenge clientelistic structures as a major element in the fight against high-level corruption, yet most politicians and powerful magistrates had a vested interest in preserving the status quo. Seniority in many situations can entail that experienced judges have the greatest responsibilities. In Romania, however, it considerably hindered the advancement of judicial reform.

Political opposition is not the only reason why reform attempts failed to insure judicial impartiality. The method of conducting reform also mattered. Minister Macovei chose strategically to combat corruption with autonomous institutions independent from the normal judicial system, using the Anti-Corruption Directorate (DNA, the successor to NAPO) and the Directorate for Organised Crime and Terrorism (DIICOT). These two agencies worked independently and without the benefit of an encompassing, national consensus on anti-corruption reform. While the EU praised these agencies for increasing the number in investigations and indictments (European Commission 2007), the newly established and autonomous bodies intensified the political struggle, undermining overall efficiency. They also suffered from a lack of transparent appointment criteria, allowing for the selection of politicized and not always fully competent prosecutors (Author's interview with anonymous Romanian judge, November 2010).

The post-accession period since January 2007 is characterized by a general lack of progress regarding judicial impartiality. This is ostensibly puzzling, as

the EU continued to exert conditionality through the introduction of more tailored instruments of monitoring (e.g. the safeguard clause and the CVM) after Romania's accession.

Regarding judicial independence, legal standards continued to be undermined in practice. High-ranking national level judges in the constitutional courts were still appointed on a political basis and "seniority and networking still matter more than the performance or qualification" (Global Integrity 2008, 56). Perceived political party pressures remain, as do those exerted by influential judicial actors (Transparency International 2007). The media, rather than behaving as a critical free press, is often in the hands of powerful oligarchs with judicial interests of their own (Freedom House 2009). The CSM, the guarantor of judicial independence, is viewed as "politically biased in its functioning" (Global Integrity 2008, 57).

Some recent reports and surveys reveal increased judicial politicization in the years after Romania's accession (Transparency International 2007, 17; Initiative for a Clean Justice 2007; 2008). Part of the responsibility falls on President Basescu, whose notion of an activist role includes intruding into the work of independent bodies such as the CSM and the DNA, either by issuing critical statements or by exerting influence through the back door (Ghiciusca 2007). For instance, in February 2007, the President publicly declared which corruption cases should be prosecuted by the DNA and he rejected the nomination of judges to the High Court of Cassation (Stoica 2010, 179). Regardless of the substance of Basescu's interventions, his personal leadership style, as a change agent who imposes his will and plays by his own rules, unfortunately does not foster respect for the rule of law and for legal institutions (Teodorescu and Sultanescu 2005). Rather, this dominant and not always impartial mode of governing created tensions within the political and judicial system (author's interview with anonymous Romanian judge, November 2010), leading finally to the dismissal Macovei and an impeachment attempt against Basescu.

Similarly regarding judicial corruption, several recent reports indicate that the pace of the reform effort after accession was not maintained (De Pauw 2007; Freedom House 2009; Initiative for a Clean Justice 2007; 2008). Most importantly, there were attempts to modify previously adopted anti-corruption legislation or diminish the power of anti-corruption agencies, including a decision by the Constitutional Court declaring unconstitutional the first version of the law on the National Integrity Agency (ANI). According the European Commission, the revised and less strict version of this law "seriously undermines the process for effective verification, sanctioning and forfeiture of unjustified assets" and in general "represents a significant step back in the fight against corruption" (European Commission 2010, 3 and 5). In addition, the EU Commission observed that "exceptions of unconstitutionality continue to delay high-level corruption cases" and that corruption-related "trials remain lengthy with only a few against prominent politicians having yet reached a first instance decision" (European Commission 2010, 6).

From interviews with Romanian judges, part of the problem stems from the anti-corruption agencies, themselves. Staff recruitment to the DNA, DIICOT,

and the ANI has been done in a non-equitable manner. The recruitment procedure allows for positions to be filled with persons selected through interviews (rather than written exams), leaving room for preferential treatment of politically connected persons who might be young and reform-minded but not always the most competent. The ANI and similar bodies were created through emergency ordinances and amendments that allegedly were not compatible with the existing constitution. For instance, two emergency ordinances enacted without debate in Parliament allowed prosecutors from the DIICOT to intercept e-mail correspondence and tap telephones for 48 hours without a warrant (*Ziua* 2007). Ironically, the rule of law was promoted by agencies that might be viewed as outside the rule of law. Differing legal interpretations between Basescu administration supporters and constitutional veto players helped politicize the anti-corruption effort, producing institutional tensions and delays in the implementation of judicial reform.

The conflict became especially bitter during the period of political cohabitation after the collapse of the PNL-PD alliance. Monica Macovei was accused by former prosecutor Alexandru Chiciu of interfering with prosecutors dealing with the penal cases of former PSD ministers Rodica Stanoiu and Serban Bradisteanu (*Jurnalul National* 2007). Macovei's replacement as Justice Minister, Tudor Chiuariu of the PNL, attempted to purge the DNA leadership upon his appointment, claiming inefficiency in management and partisan bias in operations. The opposition press reported that prosecutors of the DNA began to intimidate and threaten judges in order to influence their decisions (Boariu 2007). In contrast, the EU Commission repeated positive evaluations of DNA activities, attributing to it "a good track record of non-partisan investigations into high level corruption" and a "high level of professionalism," while blaming the courts and entrenched politicians for the overall lack of progress (European Commission 2007, 16). Minister Chiuariu in response demanded that the EC remove this evaluation from the Commission's progress report on Romania (Petrisor 2007). From the President's side, as endorsed by the EU, senior judges and old-style politicians with a stake in the status quo were resisting necessary anti-corruption prosecutions. From the government's side, the President and his allies had imposed defective and illegitimate methods, undermining anti-corruption reform. Given the battle, progress in enhancing the rule of law and establishing judicial impartiality slowed after January 2007.

In recent years, reform legislation increasingly has been adopted by means of emergency ordinances, enacted without detailed input from Parliament, specialists, and associations of civil society. Emergency ordinances have strengthened the Executive and thus reshaped the institutional balance of power. Members of the judiciary believe that their influence has been reduced and that checks-and-balances has been eliminated, making them suspicious of all proposed reforms and somewhat reluctant to implement them (Bertelsmann Stiftung 2009, 9). The constant, day-by-day changes in legislation have led to less legal stability and predictability. Absent a thorough discussion of proposed legislation in the Parliament and in society, accountability for the new laws declined. In the interviews I conducted, magistrates expressed considerable dissatisfaction with

legislation through ordinances, arguing that the "judicial system was destroyed from inside" by the political reformers and that they need "no reforms, just normality" (author's interviews with anonymous Romanian judges, November 2010). Additionally, the aggravating economic crisis has increased pressure on magistrates, who now have less certainty regarding their salaries and employment.

Table 7-2 reports a number of summary indicators of judicial impartiality taken from a variety of international rankings. The relative absence of change over time should be noted, contrasting dramatically with the considerable improvement observed previously regarding judicial capacity. Measures of formal judicial independence and legal efficiency increased moderately between 2002 and 2008. Institutions of oversight – the media, civil society, institutional separation of powers – were judged to be not improved in significant ways. Trust in the Romanian justice system fell and the perception of corruption rose. Overall, law and order was unchanged.

Table 7-2: Selected Indicators of Judicial Impartiality

	2002	2004	2006	2008	Net Change
Judicial Independence WEFEOS, Scale from 1-7	2.7	3.0	2.9	3.3	+22.2%
Efficiency of Legal Framework WEFEOS, Scale from 1-7	2.6	3.2	3.1	3.2	+23.1%
Independent Media FH, Scale from 1-7	4.5	4.25	4.0	4.25	- 5.6%
Separation of Powers BTI, Scale from 1-10	-	8.0	9.0	9.0	+12.5%
Civil Society Participation BTI, Scale from 1-10	-	6.0	7.0	6.0	0
Corruption Perceptions TI, Scale from 1-5	-	4.1	3.9	4.2	+ 2.4%
Law and Order PRSG, Scale from 1-6	4.0	4.0	4.0	4.0	0
Trust in Justice EB, in percentages	35	28	30	27	-22.9%

Sources: World Economic Forum's Executive Opinion Survey (WEFEOS); Freedom House (FH); Bertelsmann Transformation Index (BTI); Transparency International (TI); Political Risk Services Group (PRSG); Eurobarometer (EB).

Another look at the same problem is found in the Global Integrity measures contrasting *de jure* adoption of legislation with *de facto* implementation in practice (Table 7-3). Consistently, Romanian law is evaluated as virtually perfect as it concerns judicial appointments, independence, accountability, conflict of interest regulations and asset disclosure rules. Consistently, Romanian practice is evaluated as deficient in all these areas, with scores in the median range or

below. Whereas the formal legal framework has improved considerably over time, the judiciary is viewed still to be acting in an inconsistent, unsupervised, and biased manner. The Romanian government is especially vulnerable to state capture (World Bank 2005; Hellman, Jones, and Kaufman 2000), with clientelistic elite networks that "play a dominant role in politics on all levels" (Bertelsmann Stiftung 2006, 17). Romanians generally believe that politicians and the rich "are above the law" (Mungiu-Pippidi 2005, 58). Recent developments regarding judicial impartiality have done little to change these perceptions.

Table 7-3: *De Jure* and *De Facto* Judicial Scores (2008)

	De Jure	*De Facto*
Judicial Appointment	100	25.0
Judicial Independence	100	50.0
Judicial Accountability	100	42.7
Conflict of Interest	100	62.5
Asset Disclosure	100	50.0

Source: Global Integrity Index.

In sum, the judicial impartiality dimension of Romanian rule of law has improved on average less than the judicial capacity dimension, suggesting that the EU-driven reform approach was not adequate to limit politicization and corruption, to improve oversight and accountability. EU conditionality produced the most change when accompanied by reform actions of committed domestic change agents, pointing to mutually reinforcing effects from the transnational coalition of reformers. In Romania, there has been consistent shuffling among political elites but no fundamental transformation of vertical power structures, resulting in the persistence of a personalistic judicial culture (Beers 2010) and an inefficient judicial system. Citizen confidence in the judiciary remains low. Recent backsliding in judicial performance reflects an uncertain future for the reform initiative and the continued potential for the revival of old practices.

Explaining the Differences: International and Domestic Actors

Why was there little overall progress in the rule of law in Romania, despite so many changes made during the recent judicial reform campaign? Why did EU-driven reforms not create an impartial, uncorrupt, and *de facto* independent judiciary?

First, the approach taken by the EU and its domestic partners in the reform coalition was inappropriate. The Romanian case shows that, under conditions of clientelism and informalism, any technocratic, elite-centered, and non-complementary reform strategy is prone to failure. It shows that *de jure* weapons adopted on a model from more developed, Western democracies lead at best to short-term victories. A conditionality strategy focused on the level of political commitment of elected officials does not deepen mass democratic attachment to

legal reform (Stewart 2009). An emphasis on the formal, capacity-building and efficiency aspects of rule of law produces form without content, resulting in unsustainable and non-transformative change.

The preceding analysis has shown that judicial reform in Romania, with limited exception, was attempted in a top-down fashion by the Executive and its technocratic supporters following the recommendations of the European Commission. Despite good intentions, the reform coalition adopted defective strategies that often produced unintended and negative effects. The best example is the poor functioning of the Supreme Council of Magistracy (CSM), the disciplinary body initially set-up to guarantee judicial independence and accountability but whose members seem to be politicized, controversial, and subject to conflicts of interest. Florica Bejinaru, for instance, remained President of the CSM despite evidence of previous *Securitate* collaboration (Popescu 2010). The organization has been criticized harshly for its inaction. It was described by the Initiative for a Clean Justice (2007, 5) as an institution "not accountable to anyone, which takes fundamental decisions in a nontransparent and unjustified manner, and whose standards do not guarantee the impartiality in the decision making process." According to the European Commission (2008b, 7), "Despite its key role in promoting a transparent and efficient judicial process, the CSM has not yet fully taken responsibility for judicial reform and for its own accountability and integrity." The creation of new agencies of oversight will not produce transformative changes unless the actors named to the agency change their mentality. Model legal forms did not necessarily result in effective content.

The same argument applies to the EU focus on increasing judicial salaries without equal attention to the number of working judges. Nowadays, magistrates earn substantially more than before the start of reform. Yet the human resources problem remains acute, judges suffer from work overload, and the quality of judicial decisions declined in response.

The reform coalition can also be faulted for its emphasis on the introduction of autonomous bodies outside the judiciary, such as the DNA and the DIICOT, as well as for constant changes in legislation, contributing to tensions and incoherence within the judicial system with negative consequences for overall impartiality. Legislation through emergency ordinances has resulted in a feeling among judges that their opinions are not respected, giving them less stake in the reforms advanced. The lack of legal stability and coherence has been further aggravated through frequent changes of Justice Ministers, each with new priorities, creating reform discontinuity. Similarly, the government "does not appear to welcome a broader policy dialogue with civil society organizations" (Bertelsmann Stiftung 2009, 21), limiting societal attachment to the reform process. The fight against high-level corruption was allowed to become a matter of partisan acrimony, transforming judicial reform into a battle of personalities and factions, each side distrusting the motivations of the others, prompting resistance and undermining essential consensus for the project.

Second, an important obstacle to rule of law reform in Romania has been the blocking actions of individuals with established interests who are intent on resisting prosecution and protecting advantages. Reform opponents included

clientele networks of politicians, influential businessmen, media moguls, as well as members of the judiciary and the bureaucracy (Gallagher 2009; Freedom House 2009). Opponents at times even promoted formal reforms and judicial modernization, fully confident that in practice they would be able to maintain *de facto* power, thereby blocking genuine change. Measures to enhance judicial capacity were permitted to a far greater degree than those to insure judicial impartiality, as they did not endanger the status quo (Piana 2009). By contrast, many well-elaborated reforms that look excellent in legislation failed to be implemented because they threatened to alter existing power structures.

The difference in power positions within the Romanian elite is reflected by the generational composition of court personnel. Quantitatively, most magistrates are young, open-minded, skilled, and impartial, yet they do not have the authority to challenge the politicians and conservative senior judges located in the highest Romanian courts as well as in the CSM. Through their control of essential judicial positions, well-connected old guard figures effectively block transformative change (Gallagher 2009). Although the EU and other external donors managed to empower change agents financially, they seldom succeeded to provide them with enough influence. The politics of judicial reform in Romania has been contested primarily among elites, between domestic leaders affiliated with international organizations and domestic resisters linked to networks of powerful veto players. Absent a significant attack on informal and mutually-beneficial clientele structures, the effectiveness of the transnational reform coalition will be constrained.

Finally, rule of law progress in Romania has been limited because of the fundamental incoherence of the judicial system. This is a point heavily emphasized during my interviews with Romanian judges although generally ignored by the transnational reform coalition. It is rooted structurally in repeatedly changing legislation, the introduction of new independent bodies outside the judicial system, the decentralized organization of the judiciary (e.g. there are fifteen courts of appeal in Romania), and the insufficient quality of legislation that allows considerable leeway for individual interpretation. Even when judges attempt to interpret the law in an impartial manner, legal and institutional incoherence can lead in the aggregate to significant differences in judicial decisions on similar cases, producing overall bias in the application of justice. Although the European Commission (2006a, 7) noted that a "consistent interpretation of the law at all level of courts is not fully ensured," no effective remedial measures have been introduced. Thus there are complications regarding judicial impartiality arising not from the lack of quality and integrity of the judges, but from insufficient institutional design and attention to coordination and communication between the courts.

Conclusion

The analysis of rule of law development in Romania permits two basic conclusions. First, there was considerable change in the efficiency-related dimension (judicial capacity), leading to enhanced modernization of Romania's central

judicial system. By contrast, there was persistence in the power-related dimension (judicial impartiality), undermining implementation and the achievement of *de facto* rule of law. Second, agency matters significantly. Partial success regarding judicial independence can be attributed to the reformist coalition of domestic change agents and the EU. On the other hand, powerful clientele interests have successfully undermined rule implementation in practice despite rule adoption on paper, leading in some cases to reform reversals after EU accession.

The Romanian case shows that the creation of rule of law is a complex process in which models cannot simply be transplanted from abroad. Even when similar formal rules are adopted and judicial capacity is expanded, effectiveness can be undermined by powerful political actors using methods of influence in the absence of transparency and oversight. Nor are the results necessarily better when new formal institutions are created sensitive to the Romanian context. Old habits die hard, especially when defended by entrenched interests.

Fundamental change requires a vertical transformation of power structures based on a critical mass of new actors. It is inappropriate to rely upon a short-term, elite-driven process that concentrates upon existing, powerful, and visible state actors. Instead, rule of law reform should be founded upon a broad, bottom-up social-educational movement that alters values and respects rules as well as creates them. This implies that the EU and other external donors should abandon their focus on the electoral success of sympathetic pro-Western political parties as a means of promoting effective reform. Rather, they should emphasize mass democratization and participation, promoting early socialization and national consensus-building. This surely would take more time, but it ultimately would lead to a more sustainable transformation of domestic structures.

The Romanian case tells us that any simplistic reform approach based on the quantitative addition of judicial capacity, which fails to challenge the established legal and social order, will result in superficial and unsustainable outcomes. A better formula would link in a complementary fashion changes that enhance capacity with those that encourage impartiality. It would engage a much wider range of actors and provide incentives for generational change among judges. It would build upon existing institutions while paying simultaneous attention to their performance. Form must be accompanied by content. Judicial structures must be occupied by effective judges with motivation and supported by a citizenry attached to the ideal of the rule of law. It is the path for Romania if it wishes to guarantee coherence, stability, and justice within its legal system.

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